Nihal Jayawickrama

# The Judicial Application of Human Rights Law

## National, Regional and International Jurisprudence

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# THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW

## National, Regional and International Jurisprudence

Since the proclamation of the Universal Declaration of Human Rights, over 140 countries have incorporated human rights standards into their legal systems: the resulting jurisprudence from diverse cultural traditions brings new dimensions to concepts first articulated in 1948. Nihal Jayawickrama draws on all available sources to encapsulate the judicial interpretation of human rights law in one ambitious, comprehensive volume. Jayawickrama covers the case law of the superior courts of eighty countries in North America, Europe, Africa, Asia, the Caribbean and the Pacific, as well as jurisprudence of the UN Human Rights monitoring bodies, the European Court of Human Rights, and of the Inter-American system. He analyses the judicial application of human rights law to demonstrate empirically the universality of contemporary human rights norms. This definitive compendium will be essential for legal practitioners, and government and non-governmental officials, as well as academics and students of both constitutional law and the international law of human rights law.

NIHAL JAYAWICKRAMA was the Ariel F. Sallows Professor of Human Rights at the University of Saskatchewan. He taught both constitutional law and the international law of human rights at the University of Hong Kong, and published on a range of contemporary legal, constitutional and human rights issues. An advocate for a Bill of Rights in Hong Kong prior to the transfer of sovereignty in 1997, he was involved in the processes that led to its fruition. Executive Director of Transparency International from 1997 to 2000, he is currently a consultant on governance and judicial reform. A member of the Sri Lanka Bar, he held the offices of Attorney General and Permanent Secretary to the Ministry of Justice, and served as a Representative to the United Nations General Assembly.

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The birds that fly in the air and the wild animals that dwell in the jungles have the same rights as you, O great King, to live wherever they wish or to roam wherever they will. The land belongs to the people of the country and to all other beings that inhabit it, while you are only its guardian.

Arahat Mahinda, the son of Emperor Asoka of the Mauryan dynasty, to King Devanampiyatissa of Lanka, *c.* 250–210 BC, found on a rock inscription in Polonnaruwa, Sri Lanka.

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# PREFACE

From 1978, I was associated with Professor Paul Sieghart, then chairman of JUSTICE, the United Kingdom section of the International Commission of Jurists, and Professor James Fawcett, then president of the European Commission of Human Rights, in a research project on the international law of human rights. My research on the jurisprudence of the Strasbourg institutions and of national courts was incorporated in Paul Sieghart's pioneering work, *The International Law of Human Rights* which was published in 1983. The cut-off date for the law examined in that book was 31 December 1981.

In the next two decades, the international human rights regime strengthened considerably. Over 150 countries, spread over every continent, incorporated contemporary human rights standards into their legal systems. Over 100 countries ratified the Optional Protocol to the International Covenant on Civil and Political Rights, thereby enabling their inhabitants to access the Human Rights Committee. Meanwhile, nearly all the countries of South and Central America, Africa and Europe subscribed to regional human rights instruments with their own monitoring or enforcement mechanisms. The resulting jurisprudence, rich in content and varied in flavour, from diverse cultural traditions, has added a new dimension to the concepts first articulated in the Universal Declaration of Human Rights. This book seeks to incorporate that jurisprudence and, in that sense, complement the late Paul Sieghart's invaluable work.

I have not set out to produce a scholarly work on human rights or on international law. There are already several analyses of the theoretical foundations and the politics of human rights, commentaries on the different human rights instruments, academic studies of selected rights, and surveys of selected case law of the Strasbourg institutions and of the Human Rights Committee. What is lacking is a volume that assembles all the available jurisprudence on human rights from international, regional

and national sources; a book that presents the content of human rights law as interpreted by the courts. That is the need I have set out to meet.

In identifying the substantive content of the rights recognized in the International Bill of Human Rights, i.e. the Universal Declaration and the two covenants, I have drawn on the following sources:

(a) the *travaux préparatoires*, particularly in respect of the International Covenant on Civil and Political Rights;
(b) the texts of international instruments dealing with specific rights and other standard setting resolutions of the United Nations General Assembly, specialized agencies and subsidiary institutions;
(c) the general comments of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, and the conclusions of the Committee of Experts under the European Social Charter;
(d) the judgments and advisory opinions of the International Court of Justice and its predecessor, the Permanent Court of International Justice;
(e) the decisions of the Human Rights Committee on individual communications received under the Optional Protocol, and of the Committee against Torture;
(f) the judgments of the European Court of Human Rights and the reports and decisions of the European Commission of Human Rights;
(g) the decisions and advisory opinions of the Inter-American Court of Human Rights and the reports of the Inter-American Commission of Human Rights;
(h) the judgments of superior courts in national jurisdictions interpreting and applying domestic Bills of Rights, wherever the specific rights and freedoms have been formulated in terms identical or similar to those enunciated in the two international human rights convenants; and
(i) the works of jurists.

The depth of discussion of a particular right is dependent on the availability of case law. Accordingly, the chapters on economic, social and cultural rights are necessarily brief, while some on civil and political rights may appear inordinately long. Since I have been able to work only in the English language, references to national jurisprudence from the European continent are often based on published summaries. The

cut-off date for the law incorporated in this book is, to the extent practicable, 31 December 2001.

Any work of this kind involves considerable research. Much of the early work was done in the libraries of the United Nations in New York and Geneva, and of the Institute of Advanced Legal Studies in London. I am grateful to the former United Nations Centre for Human Rights in Geneva, the General Secretariat of the Organization of American States in Washington DC, and the Secretariat of the Council of Europe in Strasbourg for sending me regularly a wealth of information contained in their publications, documents and reports. Many friends, including my former colleagues in Hong Kong, have either sent me, or directed me to, material which I was unaware of or had overlooked, or provided me access to their personal collections.

Writing a book of this nature is difficult to combine with regular teaching at a university, as I soon discovered after I commenced preliminary work on it while teaching constitutional, administrative and human rights law at the University of Hong Kong. I am most grateful, therefore, for the opportunity afforded me by the University of Saskatchewan in 1992–3, to spend an academic year in Saskatoon, in the exhilarating climate of the Canadian prairies. It was during that year, when I had the privilege of occupying the Ariel F. Sallows Chair of Human Rights, that I began writing this book. I could not have found a more conducive or stimulating environment, made even more agreeable by the warmth and kindness with which Dean Peter MacKinnon, QC, and his colleagues received my family and me. After leaving both Hong Kong and academia in 1997, progress on this book was interrupted for a while as I commuted between London and Berlin (and a few other places as well) learning and exploring the new, but not entirely unrelated, area of corruption in public life and, more especially, in the judiciary.

This book would not, of course, have assumed the shape and form in which it appears today but for the help and co-operation which was always forthcoming from Professor James Crawford, Whewell Professor of International Law at the University of Cambridge, Ms Finola O'Sullivan, Commissioning Editor (Law), and Dr Jennie Rubio, Law Development Editor, at Cambridge University Press. I am grateful for their recognition of the need for a definitive text on this subject, and their belief in my capacity to produce and deliver within the time constraints that regulate most things in life. An effort spread over a decade

would not have been possible without the continuing tolerance and understanding of my family. Indeed, it was their profound interest and encouragement that enabled this work to reach fruition. My deepest debt, therefore, is owed to my wife, Sarojini, and to our two daughters, Nishana and Sharanya, all of whom, I am sure, looked forward on each new year's day to life finally returning to normal in our home, wherever it might have been located.

The language of the chapters on the substantive rights that follow is rarely mine. The real authors are the lawyers and judges, the men and women of many cultures who, individually and collectively, enhanced the value of human life and extended the frontiers of human dignity by their courageous, imaginative and innovative approach to the interpretation and application of international and regional human rights instruments and national constitutions. I have attempted to assemble in a single volume as much of the material as I have been able to gather in the hope that their endeavours will help and inspire others not only to follow but even to improve upon their achievements. Thereby, the evolving body of international human rights law will, in fact, become the universally accepted common standard by which the conduct of governments, public officials, private bodies, and individuals is measured. If I have expressed a preference for a particular view, criticized a decision, or projected a dissent, I have done so because of my own perception that in the protection of human rights, it is not possible to compromise; there can be no half-way houses, no wayside halting places. Human rights are not only fundamental; they are also inherent and inalienable.

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Basic Principles for the Treatment of Prisoners, UNGA resolution 45/111, 14 December 1990, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 368, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 263, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 110.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, Havana, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 346, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 318, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 142.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173, 9 December 1988, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 327, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 265, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 267.

Charter of the Organization of African Unity, 25 May 1963, in force 13 September 1963, Addis Ababa, 47 UNTS 39; (1963) 2 ILM 766.

Charter of the Organization of American States, 30 April 1948, in force 13 December 1951, Bogota, 119 UNTS 48, consolidated text as amended: (1994) 33 ILM 981.

1995), 202, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 607.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, UNGA resolution 2391 (XXIII), 26 November 1968, in force 11 November 1970, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 674.

Convention on the Political Rights of Women, UNGA resolution 640 (VII), 20 December 1952, in force 7 July 1954, 193 UNTS 135, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 164.

Convention on the Prevention and Punishment of the Crime of Genocide, New York, UNGA resolution 260 A (III), 9 December 1948, in force 12 January 1951, 78 UNTS 277, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993) 669.

Convention on the Reduction of Statelessness, 30 August 1961, in force 13 December 1975, New York, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 206, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 612.

Convention on the Rights of the Child, UNGA resolution 44/25, 20 November 1989, in force 2 September 1990, (1989) 28 ILM 1448, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 174, Cmd 1976.

Convention Governing Specific Aspects of Refugee Problems in Africa, OAU, 10 September 1969, in force 20 June 1974, Addis Ababa, 1001 UNTS 45, (1969) 8 ILM 1228, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 323.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, UNGA resolution 317 (IV), 2 December 1949, in force 25 July 1951, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 233.

Convention Relating to the Status of Refugees, 28 July 1951, in force 22 April 1954, Geneva, 189 UNTS 150, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 634.

freedoms in private meetings, E/RES/1503 (XLVIII), 27 May 1970, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 262.

European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, in force September 1953, Rome, 213 UNTS 221, ETS 5, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 73.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.1, adopted 20 March 1952, in force 18 May 1954, Paris, ETS 9, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 92.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.2, adopted 6 May 1963, in force 21 September 1970, Strasbourg, ETS 44, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 94.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.3, adopted 6 May 1963, in force 21 September 1970, Strasbourg, ETS 45.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.4, adopted 16 September 1963, in force 2 May 1968, Strasbourg, ETS 46, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 97.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.5, adopted 20 January 1966, in force 20 December 1971, Strasbourg, ETS 55.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.6, adopted 28 April 1983, in force 1 March 1985, Strasbourg, ETS 114, (1983) 22 ILM 539, (1985) 6 HRLJ 77, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 100.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.7, adopted 22 November 1984, in force 1 November 1988, Strasbourg, ETS 117, (1985) 24 ILM 435, (1985) 6 HRLJ 80, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 103.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.8, adopted 19 March 1985, in force 1 January 1990, ETS 118; (1986) 25 ILM 387; (1985) 6 HRLJ 88.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.9, adopted 6 November 1990, Rome, ETS 40, (1991) 30 ILM 693, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 107.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.10, adopted 25 March 1992, in force 1 October 1994, Strasbourg, ETS 146, (1992) 13 HRLJ 182, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 110.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.11, adopted 11 May 1994, Strasbourg, ETS 155, (1994) 33 ILM 960, (1994) 15 HRLJ 86, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 112.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.12, adopted 4 November 2000.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed 26 November 1987, in force 1 February 1989, Strasbourg, ETS 126, (1988) 27 ILM 1152, (1988) 9 HRLJ 359, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 265.

European Social Charter, signed 18 October 1961, in force 26 February 1965, Turin, 529 UNTS 89, ETS 35, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 142.

European Social Charter, Additional Protocol, adopted 5 May 1988, Strasbourg, ETS 128, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 163.

European Social Charter, Revised, 3 May 1996, Strasbourg, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 182.

Framework Convention for the Protection of National Minorities, Council of Europe, adopted 10 November 1994, Strasbourg, ETS 157,

(1995) 34 ILM 351, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 286.

General Principles on Freedom and Non-Discrimination in the matter of Political Rights, ECOSOC resolution 1786 (LIV).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, in force 21 October 1950, Geneva, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 681, 75 UNTS 31.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, in force 21 October 1950, Geneva, 75 UNTS 85, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 707.

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, in force 21 October 1950, Geneva, 75 UNTS 135, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 728.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, in force 21 October 1950, Geneva, 75 UNTS 287, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 799.

Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 9 September 1990, Havana, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 351, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 330, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 162.

Inter-American Convention on the Forced Disappearance of Persons, OAS, signed 9 June 1994, Belan, Brazil, (1994) 33 ILM 1529, *Human Rights: a Compilation of International Instruments*, Vol. II (New York: United Nations, 1997), 55.

*Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 948.

No.10: Minimum Age (Agriculture) Convention, 25 October 1921, in force 31 August 1923, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 715.

No.11: Right of Association (Agriculture) Convention, 25 October 1921, in force 11 May 1923, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 3.

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No.20: Night Work (Bakeries) Convention, 8 June 1925, in force 26 May 1928, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 299.

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No.38: Invalidity Insurance (Agriculture) Convention, 29 June 1933, in force 10 August 1938, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 611.

No.39: Survivors' Insurance (Industry, etc.) Convention, 29 June 1933, in force 8 November 1946, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 613.

No.40: Survivors' Insurance (Agriculture) Convention, 22 June 1935, in force 10 August 1938, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 622.

No.42: Workmen's Compensation (Occupational Diseases) Convention (Revised), 21 June 1934, in force 17 June 1936, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 662.

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No.73: Medical Examination (Seafarers) Convention, 29 June 1946, in force 17 August 1955, Seattle, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 956.

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No.79: Night Work of Young Persons (Non-Industrial Occupations) Convention, 9 October 1946, in force 29 December 1950, Montreal, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 745.

No.87: Freedom of Association and Protection of the Right to Organize Convention, 9 July 1948, in force 4 July 1950, San Francisco, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 4.

No.90: Night Work of Young Persons (Industry) Convention (Revised), 10 July 1948, in force 12 June 1951, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 752.

No. 97: Migration for Employment Convention (Revised), 1 July 1949, in force 22 January 1952, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 785.

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No.128: Invalidity, Old-Age and Survivors' Benefits Convention, 29 June 1967, in force 1 November 1969, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 628.

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No.136: Benzene Convention, 23 June 1971, in force 27 July 1973, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 377.

No.138: Minimum Age Convention, 26 June 1973, in force 19 June 1976, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 730.

No.141: Rural Workers Organizations Convention, 23 June 1974, in force 24 November 1977, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 15.

No.151: Labour Relations (Public Service) Convention, 27 June 1978, in force 25 February 1981, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 25.

No.154: Collective Bargaining Convention, 19 June 1981, in force 11 August 1983, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 218.

No.155: Occupational Safety and Health Convention, 22 June 1981, in force 1 August 1981, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 350.

No.156: Workers with Family Responsibilities Convention, 23 June 1981, in force 1 August 1981, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 52.

No.157: Maintenance of Social Security Rights Convention, 21 June 1982, Geneva.

No.158: Termination of Employment Convention, 22 June 1982, Geneva.

No.168: Employment Protection and Protection against Unemployment Convention, 21 June 1988, in force 17 October 1991, Geneva, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 456.

No.169: Indigenous and Tribal Peoples Convention, 27 June 1989, in force 5 September 1991, (1989) 28 ILM 1382, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 471.

No.171: Night Work Convention, 26 June 1990, Geneva.

ILO Recommendation:

No.115: Workers' Housing Recommendation, 28 June 1961, Geneva, *International Labour Conventions and Recommendations, 1919–1981*, (Geneva: International Labour Office, 1982), 503.

Model Treaty on the Transfer of Proceedings in Criminal Matters, UNGA resolution 45/118, 14 December 1990, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 390.

Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, UNGA resolution 45/119, 14 December 1990, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 396.

Montevideo Declaration on Democratic Culture and Governance, adopted by the International Conference on Democratic Culture and Development: Towards the Third Millennium in Latin America, organized by UNESCO and the Pax Institute, Uruguay, November 1990.

Montreal Statement of the Assembly for Human Rights, 22–7 March 1968, (1968) 9(1) *Journal of the International Commission of Jurists* 94.

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by ECOSOC, E/RES/1989/65, 24 May 1989, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 332.

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, UNGA resolution 37/194, 18 December 1982, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 308, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 265.

Procedures for the Implementation of ECOSOC resolution 1503 (XLVIII), Sub-Commission on Prevention of Discrimination and Protection of Minorities, resolution 1 (XXIV), 13 August 1971, *The United Nations*

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, in force 7 December 1978, Geneva, 1125 UNTS no. 17513, (1977) 16 ILM 1442, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 930.

Recommendations on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UNGA resolution 2018 (XX), 1 November 1965, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 491.

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC resolution 1984/50, 25 May 1984, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 293, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 310.

Slavery Convention, 25 September 1926, in force 9 March 1927, Geneva, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 201.

Standard Minimum Rules for the Treatment of Prisoners, ('Standard Minimum Rules') adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1955, and approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 187, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 243.

Statute of the Inter-American Commission on Human Rights, adopted by the Council of the Organization of American States, 25 May and 8 June 1960, *Basic Documents on International Protection of Human Rights* (Louis B. Sohn and Thomas Buergenthal ed.) (New York: Bobbs-Merrill Co. Inc., 1973), 194.

Statute of the Council of Europe, adopted 5 May 1949 in force 3 August 1949. ETS 1.

Statute of the International Tribunal for the Former Yugoslavia, Annex to Security Council document S/25704, 3 May 1993, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 418, at 434–40.

Statute of the International Tribunal for Rwanda, Security Council resolution 955, 8 November 1994, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 489.

Statute of the Office of the United Nations High Commissioner for Refugees, UNGA resolution 428 (V), 14 December 1950, *Human Rights: a Compilation of International Instruments*, Vol. I (Second Part) (New York: United Nations, 1993), 655.

Strasbourg Declaration on the Right to Leave and Return, adopted at a meeting of experts convened by the International Institute of Human Rights in Strasbourg, France, 1986.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, in force 30 April 1957, Geneva, adopted by a Conference of Plenipotentiaries convened by ECOSOC resolution 608 (XVII) of 30 April 1956, 266 UNTS 3, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 209.

United Nations Basic Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC resolution 1989/65, 24 May 1989, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 228.

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990, Havana, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 142.

United Nations Declaration on the Elimination of All Forms of Racial Discrimination, UNGA resolution 1904 (XVIII), 20 November 1963, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 61.

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UNGA resolution 45/112, 14 December

1990, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 369, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 346, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 180.

United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ('United Nations Rules'), UNGA resolution 45/113, 14 December 1990, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 374, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 275, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 192.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), UNGA resolution 40/33, 29 November 1985, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 300, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 356, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 171.

United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), UNGA resolution 45/110, 14 December 1990, *The United Nations and Human Rights, 1945–1995* (New York: United Nations, 1995), 364, *Human Rights: a Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1993), 336, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (New York: United Nations, 1992), 113.

UNGA resolution 637 A (VII), 16 December 1952: The Right of Peoples and Nations to Self-Determination, *A Comprehensive Handbook of the United Nations* (Min-Chuan Ku ed.), Vol. I (New York, Monarch Press, 1978) 767.

UNGA resolution 1514 (XV), 14 December 1960: Declaration on the Granting of Independence to Colonial Countries and Territories, *A Comprehensive Handbook of the United Nations* (Min-Chuan Ku ed.), Vol. I (New York: Monarch Press, 1978), 768.

UNGA resolution 1803 (XVII), 14 December 1962: Permanent Sovereignty over Natural Resources, *The United Nations and Human Rights,*

# PART I

## Introduction

# 1

# Historical and juridical background

## International law

There has been in existence for several centuries a body of international law regulating relations between states, particularly in regard to the conduct of war and diplomatic immunity. These are principles and rules of conduct whose existence is acknowledged by states, and compliance with which is accepted as obligatory, although there is as yet no international legislature with authority to make laws applicable to states, no international police force capable of enforcing the observance of laws by states, and no international court with compulsory jurisdiction over states.

The origin of modern international law is attributed to the rise of the secular sovereign state in Western Europe following the Treaty of Peace of Westphalia 1648 that marked the end of the Thirty Years' War. But there is evidence that some of these rules were observed elsewhere in the world several hundred years previously. For instance, ancient Greek custom recognized the inviolability of the persons of envoys, the right of asylum of persons resorting to sacred places, and the sanctity of treaties, especially those concluded after a religious ceremony. In ancient China (551–479 BC), the institution of *Li* condemned the detention, arrest or murder of envoys negotiating peace. In ancient India (1367 BC), agreements between Bahmani and Vijayanagar kings provided for the humane treatment of prisoners of war and the sparing of the lives of the enemy's unarmed subjects.[1] In his treatise,

[1] Erica-Irene A. Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels* (New York: United Nations, 1992) 15, citing Keyshiro Iriye, 'The Principles of International Law in the Light of Confucian Doctrine' (1967) 1 *Recueil des cours de l'Academie de droit international de La Haye* 8–11; Jui-Chia-Cheng, 'Ancient Chinese Political and Legal Teaching and the Modern Theory of International Law Related to the Position of the Individual in

*The Arthashastra*,[2] the Indian political scientist Kautilya (circa 150 BC) described, for instance, the nature of treaties:

> Some teachers say that an agreement made on the word of honour or by swearing an oath is an unstable peace whereas one backed by a surety or hostage is more stable. Kautilya disagrees. An agreement made on oath or on word of honour is stable in this world and the next [i.e. breaking it has consequences in life and after death]. An agreement which depends on a surety or a hostage is valid only in this world since its observance depends on the relative strength [of the parties making it]. Kings of old, who were always true to their word, made a pact by [just] verbal agreement. If there was any doubt they swore by [touching] fire, water, a ploughed furrow, a wall of the fort, the shoulder of an elephant, the back of a horse, the seat on a chariot, a weapon, a gem, seeds, a perfume, liquor, gold or money, declaring that these would destroy or desert him, if he violated the agreement. If there was any doubt about the swearer being true to his oath, the pact was made with great men, ascetics or the chiefs standing as surety [guaranteeing its observance]. In such a case, whoever obtained the guarantees of persons capable of controlling the enemy outmanoeuvred the other.

The need for more precise and clearly defined rules of conduct for regulating the relationship between states arose with the emergence of the modern state system in Europe. State practice during this period drew on the writings of Hugo Grotius and several of his contemporaries who had themselves drawn on the concept of natural law in formulating the rights, privileges, powers and immunities of national entities. In the next two centuries, not only did the body of international law expand, but its philosophical base also moved from the law of nature to the positivist school. In 1899, the Permanent Court of Arbitration was established with a bureau at The Hague for the pacific settlement of international disputes, and in 1919 the Permanent Court of International Justice was constituted. In 1946, the Charter of the United Nations established the International Court of Justice as the principal judicial organ of the United Nations.[3] Article 38 of the statute of the court requires it,

International Law', thesis (unpublished), Athens University (1970); R.C. Hingorani, *Modern International Law* (New York: Oceana Publications, 1984) 13–15; and Nagendra Singh, *India and International Law* 1969, 10.

[2] Kautilya, *The Arthashastra*, edited, rearranged and introduced by L.N. Rangarajan (New Delhi: Penguin Books India (Pvt) Ltd, 1992).

[3] Article 92.

when deciding in accordance with international law a dispute submitted to it, to apply:

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

At least three formal sources of contemporary international law are, therefore, recognized:[4]

(i) A treaty (or international convention) results from the conscious decision of two or more states to create binding obligations between them.[5] It becomes a source of international law when the states parties express their consent to be bound by the treaty, and the treaty enters into force.[6] Thereupon its terms constitute for its states parties legally binding obligations in international law which must be performed by them in good faith (*pacta sunt servanda*). A party may not invoke municipal law as a reason for failure to perform a treaty obligation.[7] While treaties may be entered into on a wide variety of subject-matter, including those in respect of which rules

[4] For a fuller discussion of the sources of international law, see Rebecca M.M. Wallace, *International Law*, 2nd edn (London: Sweet & Maxwell, 1992), 7–33; Martin Dixon, *International Law*, 2nd edn (London: Blackstone Press Ltd, 1993), 18–67.

[5] A treaty may also be entered into between a state and an international organization or between international organizations: see Vienna Convention on the Law of Treaties between States and International Organizations 1986.

[6] Consent to be bound is usually expressed by 'signature' followed by 'ratification'. For other means of expressing consent, see Vienna Convention on the Law of Treaties 1969, Articles 11–16. A treaty may take a number of forms and be given a diversity of names. A joint communiqué may constitute an international agreement to submit a dispute to arbitration or judicial settlement: *Aegean Sea Continental Shelf Case*, ICJ Reports 1978, 39. So would exchanges of letters between the heads of two states, and minutes signed by the foreign ministers of two states recording commitments accepted by their governments: *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain) (Jurisdiction – First Phase)*, ICJ Reports 1994, 112. A treaty enters into force 'in such manner and upon such date as it may provide or as the negotiating states may agree': Vienna Convention on the Law of Treaties 1969, Article 24.

[7] Vienna Convention on the Law of Treaties 1969, Articles 26 and 27.

of customary international law already exist, a treaty is void if it conflicts with 'a peremptory norm of general international law' (*jus cogens*).[8]

(ii) International custom is a general practice observed by states in the belief that it is obligatory. Before a norm of behaviour crystallizes into a rule of customary international law, two requirements must be satisfied. The first is that within the period in question, however brief it might be, state practice, including that of states whose interests are specially affected, should have been both 'extensive and virtually uniform',[9] as well as 'constant'.[10] The second is that the state practice should have been motivated, not by considerations of courtesy, convenience or tradition, but by *opinio juris*.[11]

(iii) The phrase 'general principles of law' appears to embrace principles common to many municipal legal systems, such as that one should not be a judge in one's own cause,[12] that both sides to a dispute should be fairly heard,[13] that an injured party is entitled

[8] Vienna Convention on the Law of Treaties 1969, Articles 53 and 64. For the purposes of that convention, a peremptory norm of general international law is 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Rules of customary international law which are regarded as having the character of *jus cogens* appear to be those which outlaw acts of aggression and genocide; the rules which concern the basic rights of the human person, including protection from slavery and racial discrimination: *Barcelona Traction, Light and Power Company Limited Case (Belgium* v. *Spain) (Second Phase),* ICJ Reports 1970, 3; which prohibit the use of force: *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua* v. *USA) (Merits),* ICJ Reports 1986, 14; and which recognize the equality of states and self-determination: *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua* v. *USA) (Merits),* per Judge Sette-Camara, separate opinion.

[9] *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands),* ICJ Reports 1969, 3.

[10] *Asylum Case (Colombia* v. *Peru),* ICJ Reports 1950, 266.

[11] *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands,* ICJ Reports 1969, 3: Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.

[12] *Mosul Boundary Case,* PCIJ Reports, Series B, No.12 (1925), 32.

[13] *Diplomatic and Consular Staff in Tehran Case (USA* v. *Iran),* ICJ Reports 1980, 3; *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua* v. *USA) (Merits)*, ICJ Reports 1986, 14.

to be compensated,[14] and the principles of equity.[15] It appears to have been included as a source to be resorted to when no generally accepted rule of international law exists to which the court may have recourse.[16]

## Religious and cultural tradition

Respect for human dignity and personality and a belief in justice are rooted deep in the religious and cultural traditions of the world. Hinduism, Buddhism, Judaism, Christianity and Islam all stress the inviolability of the essential attributes of humanity. Many of the moral values that underpin the contemporary international law of human rights are an integral part of these religious and philosophical orders.[17] Witness the following conversation between the Buddha and his disciple, the Venerable Upali (circa 500 BC), in which was enunciated the rule of natural justice:

> Q: Does an Order, Lord, that is complete carry out an act that should be carried out in the presence of an accused monk if he is absent? Lord, is that a legally valid act?
> A: Whatever Order, Upali, that is complete carries out an act that should be carried out in the presence of an accused monk. If he is absent, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.

[14] *Chorzow Factory Case*, PCIJ Reports, Series A, No.17 (1928), 29.

[15] For an exposition of the contribution of equity, see Individual Opinion of Judge Weeramantry, *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway),* ICJ Reports 1993, 210–79. According to him, the application of equity to a given case comprises the application of an equitable principle or principles, the adoption of an equitable procedure or procedures, the use of an equitable method, or the securing of an equitable result. For an earlier critique of the application of equity as a source of international law, see M. Akehurst, 'Equity and General Principles of International Law', (1976) 25 *International and Comparative Law Quarterly* 801.

[16] *Barcelona Traction, Light and Power Company Limited Case (Belgium* v. *Spain) (Second Phase),* ICJ Reports 1970, 3.

[17] See John M. Peek, 'Buddhism, Human Rights and the Japanese State' (1995) 17 *Human Rights Quarterly* 527; L.C. Green, 'The Judaic Contribution to Human Rights' (1990) *Canadian Year Book of International Law* 3; Bassam Tibi, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations', (1994) 16 *Human Rights Quarterly* 277; Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New York: Syracuse University Press, 1990).

> Q: Does an Order, Lord, that is complete carry out an act that should be carried out by the interrogation of an accused monk if there is no interrogation?
> A: Whatever Order, Upali, that is complete carries out an act which should be carried out on the interrogation of an accused monk. If there is no interrogation, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.[18]

Contrary to assertions made by some political leaders in Asia that contemporary human rights concepts are Eurocentric in origin and conception, and therefore inconsistent with 'Asian values', reference to Asia's spiritual heritage demonstrates that respect for human rights is an integral part of the traditions of the East. For example, in the course of a ministry of forty-five years, the Buddha expounded a philosophy of life based upon tolerance and compassion in which the human mind was the principal element:

> Mind is the forerunner of all evil states. Mind is chief; mind-made are they. If one speaks or acts with wicked mind, because of that, suffering follows one, even as the wheel follows the hoof of the draught-ox.[19]
> Mind is the forerunner of all good states. Mind is chief; mind-made are they. If one speaks or acts with pure mind, because of that, happiness follows one, even as one's shadow that never leaves.[20]

These poetic utterances of the Buddha, recorded in the first century AD from oral tradition, encompassed a wide variety of subjects. For instance, the need for an impartial tribunal:

> He is not thereby just because he hastily arbitrates cases. The wise man should investigate both right and wrong;[21]

the rejection of penalties that cause unnecessary suffering:

> All tremble at the rod. Life is dear to all. Comparing others to oneself, one should neither strike nor cause to strike;[22]

[18] I.B. Horner, trans. *The Book of the Discipline (Vinaya-Pitaka)*, volume IV: *Mahavagga or the Great Division IX* (London: Luzac & Co Ltd, 1962), 466–8.
[19] Narada Thero, trans. *The Dhammapada* (Colombo Apothecaries' Co Ltd, 1972), verse 1.
[20] Narada Thero, trans. *The Dhammapada*, verse 2.
[21] Narada Thero, trans. *The Dhammapada*, verse 256.
[22] Narada Thero, trans. *The Dhammapada*, verse 130.

the sanctity of life:

> If a person destroys life, is a hunter, besmears his hand with blood, is engaged in killing and wounding, and is not merciful towards living beings, he, as a result of his killing, when born amongst mankind, will be short-lived;[23]

the futility of victory at war:

> A man may spoil another, just so far
> As it may serve his ends, but when he's spoiled
> By others he, despoiled, spoils yet again.
> So long as evil's fruits is not matured,
> The fool doth fancy 'now's the hour, the chance !'
> But when the deed bears fruit, he fareth ill.
> The slayer gets a slayer in his turn;
> The conqueror gets one who conquers him;
> The abuser wins abuse, the annoyer, fret.
> Thus by the evolution of the deed.
> A man who spoils is spoiled in his turn;[24]

the importance of *ahimsa* or non-violence:

> Hatreds do not cease through hatred:
> through love alone they cease;[25]

the recognition of the supremacy of the human person:

> By oneself, indeed, is evil done;
> by oneself is one defiled.
> By oneself is evil left undone;
> by oneself, indeed, is one purified.
> Purity and impurity depend on oneself.
> No one purifies another;[26]

the equality of the sexes:

> A woman child, O Lord of men, may prove
> Even better offspring than a male;[27]

[23] Narada Maha Thera, *The Buddha and His Teachings* (Colombo: Associated Newspapers of Ceylon Ltd, 1972), 309.
[24] Narada Maha Thera, *The Buddha and His Teachings*, 201.
[25] Narada Thero, trans. *The Dhammapada*, verse 5.
[26] Narada Thero, trans. *The Dhammapada*, verse 165.
[27] Narada Maha Thera, *The Buddha and His Teachings*, 313.

the repudiation of slavery and the caste system:

> Birth makes no brahmin, nor non-brahmin makes,
> 'Tis life and doing that mould the brahmin true.
> Their lives mould farmers, tradesmen, merchants, serfs.
> Their lives mould robbers, soldiers, chaplains, kings;[28]

the reciprocal duties of employers and employees:

A master should minister to servants and employees by

i. assigning them work according to their strength,
ii. supplying them with food and wages,
iii. tending them in sickness,
iv. sharing with them extraordinary delicacies, and
v. relieving them at times.

The servants and employees, who are thus ministered to by their master, should:

i. rise before him,
ii. go to sleep after him,
iii. take only what is given,
iv. perform their duties satisfactorily, and
v. spread his good name and fame;[29]

and of parents and children:

> In five ways a child should minister to his parents . . .
> Once supported by them I will now be their support; I will perform duties incumbent on them; I will keep up the lineage and tradition of my family; I will make myself worthy of my heritage.
> In five ways parents thus ministered to . . . by their child, show their love for him – they restrain him from vice, they exhort him to virtue, they train him to a profession, they contract a suitable marriage for him, and in due time they hand over his inheritance.[30]

the duties of kingship:

[28] Narada Maha Thera, *The Buddha and His Teachings*, 309.
[29] Narada Maha Thera, *The Buddha and His Teachings*, 588.
[30] T.W and C.A.F. Rhys David (eds.), *The Dialogues of the Buddha* (Pali Text Society, 1977), 180–3, *Sigalovada Suttanta* (The Sigala Homily), cited in C.G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 248.

> The first of the 'Ten duties of the King' is liberality, generosity, charity (*dana*). The ruler should not have craving and attachment to wealth and property, but should give it away for the welfare of the people.
> Second: A high moral character (*sila*). He should never destroy life, cheat, steal and exploit others, commit adultery, utter falsehood, and take intoxicating drinks. That is, he must at least observe the Five Precepts of the layman.
> Third: Sacrificing everything for the good of the people (*pariccaga*), he must be prepared to give up all personal comfort, name and fame, and even his life, in the interest of the people.
> Fourth: Honesty and integrity (*ajjava*). He must be free from fear or favour in the discharge of his duties, he must be sincere in his intentions, and must not deceive the public.
> Fifth: Kindness and gentleness (*maddava*). He must possess a genial temperament.
> Sixth: Austerity in habits (*tapa*). He must lead a simple life, and should not indulge in a life of luxury. He must have self-control.
> Seventh: Freedom from hatred, ill-will, enmity (*akkodha*). He should bear no grudge against anybody.
> Eighth: Non-violence (*avihimsa*), which means not only that he should harm nobody, but also that he should try to promote peace by avoiding and preventing war, and everything which involves violence and destruction of life.
> Ninth: Patience, forbearance, tolerance, understanding (*khanti*). He must be able to bear hardships, difficulties and insults without losing his temper.
> Tenth: Non-opposition, non-obstruction (*avirodha*), that is to say that he should not oppose the will of the people, should not obstruct any measures that are conducive to the welfare of the people. In other words, he should rule in harmony with his people;[31]

the relevance of the welfare state:

> Planters of groves and fruitful trees
> And they who build causeways and dams
> And wells construct, and watering sheds
> And (to the homeless) shelter give –
> Of such as these by day and night
> For ever doth the merit grow

[31] Walpola Rahula, *What the Buddha Taught* (Bedford: The Gordon Fraser Gallery Ltd, 1959), 1967 edition, 85.

In righteousness and virtue might
Such folk from earth to Nirvana go;[32]

and the freedom of thought, belief and expression:

> Do not accept anything on mere hearsay (i.e. thinking that thus have we heard it from a long time). Do not accept anything by mere tradition (i.e. thinking that it has thus been handed down through many generations). Do not accept anything on account of rumours (i.e. by believing what others say without any investigation). Do not accept anything just because it accords with your scriptures. Do not accept anything by mere supposition. Do not accept anything by mere inference. Do not accept anything by merely considering appearances. Do not accept anything merely because it agrees with your pre-conceived notions. Do not accept anything merely because it seems acceptable (i.e. should be accepted). Do not accept anything thinking that the ascetic is respected by us (and therefore it is right to accept his word).
>
> But when you know for yourselves – these things are immoral, these things are blameworthy, these things are censured by the wise, these things when performed and undertaken conduce to ruin and sorrow – then indeed do you reject them.
>
> When you know for yourselves – these things are moral, these things are blameless, these things are praised by the wise, these things when performed and undertaken conduce to well-being and happiness – then do you live and act accordingly.[33]

Quite early in his ministry, the Buddha urged his *bhikkus* to travel 'for the welfare of the many, for the happiness of the many, through compassion for the world, for the welfare, benefit and happiness of gods and man'.[34] This obligation, imposed on his disciples for the purpose of spreading his teachings, carries with it, by implication, the freedom of movement. The *Mahaparinibbanasutta* of the *Dighanikaya* states that, firstly, people must 'assemble frequently'; secondly, they should 'assemble peacefully or in unison' (*samagga samipatanti*), 'arise peacefully' (*samagga vutthahanti*), and 'transact business peacefully' (*samagga vajjikaraniyani karonti*).[35]

[32] Mrs Rhys David, trans. *The Book of Kindred Sayings (Sanyutta Nikaya)*, (London: OUP, 1917).
[33] Narada Maha Thera, *The Buddha and His Teachings*, 284.
[34] 1 *Vinayapitaka* 21 (London, Pali Text Society), cited in Horace Perera (ed.), *Human Rights and Religions in Sri Lanka* (Colombo: Sri Lanka Foundation, 1988), 107.
[35] 2 *Dighanikaya* 73, cited in Horace Perera (ed.), *Human Rights and Religions in Sri Lanka* (Colombo: Sri Lanka Foundation, 1988), 175.

## Philosophical thought

This religious and cultural tradition that emphasized the inviolability of the human person was complemented by many strands of philosophical thought that unfolded the concept of a natural law that was equally inviolable and to which all man-made law must conform.[36] Aristotle (384–322 BC) explained that a rule of justice is natural that has the same validity everywhere, and does not depend on its acceptance. He distinguished natural law from rules of justice based on convention and expediency, which he compared to standard measures. 'Corn and wine measures are not equal in all places, but are larger in wholesale and smaller in retail markets. Similarly the rules of justice ordained not by nature but by man are not the same in all places, since forms of government are not the same, though in all places there is only one form of government that is natural, namely, the best form'.[37] Cicero (106–43 BC) also conceived of a higher law which 'is of universal appplication, unchanging and everlasting'. He described it as a law not taught or learnt from books but 'drawn from Nature herself, in which we have never been instructed . . . but which is inborn in us'.[38] 'For reason did exist, derived from the Nature of the universe, urging men to right conduct and diverting them from wrong-doing, and this reason did not first become Law when it was written down, but when it first came into existence; and it came into existence simultaneously with the divine mind.'

He compared that law 'made in agreement with that primal and most ancient of all things, Nature', to 'the many deadly, the many pestilential statutes which nations put in force. These no more deserve to be called laws than the rules a band of robbers might pass in their assembly'.[39]

Over 1,600 years later, Hugo Grotius, in his treatise *De Jure Belli Ac Pacis* (1625), drew upon human reason as the basis of natural law. 'The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature,

[36] For a discussion of the law of nature, see H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968 reprint), 73–140.

[37] Aristotle: *The Nicomachean Ethics*, Books I–X, tr. H. Rackham (London: Heinemann, 1975).

[38] C.G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 197.

[39] Marcus Tullias Cicero, *De Republica*, tr. G.H. Sabine and S.B. Smith (Indianapolis: Bobbs-Merrill, 1976).

God'.[40] John Locke, in his *Second Treatise on Government* (1689) asserted the superiority of natural law over positive law:[41]

> 222. . . . Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and, either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.[42]

And, in the eighteenth century, the 'Age of Enlightenment', a galaxy of European political thinkers, including Montesquieu, Voltaire, Beccaria and Paine, consolidated a doctrine of liberty and equality that had a profound influence on political developments on their continent and beyond. Among them, Jean-Jacques Rousseau, in *The Social Contract* (1762), affirmed that sovereignty remained throughout with the people. 'So long as a people is constrained to obey, and obeys, it does well; but as soon as it can shake off the yoke, and shakes it off, it does better; for since it regains its freedom by the same right as that which removed it, a people is either justified in taking back its freedom, or there is no justifying those who took it away'.[43]

## Transforming philosophy into law

The early municipal codifications of individual rights were compacts between the rulers and privileged sections of the community. For example, the Magna Carta of 1215, signed by King John of England at Runneymede, was exacted by the feudal barons and was intended to protect their interests. It did, however, contain certain provisions which have since been construed to be of general application. For example,

[40] Hugo Grotius, *Of the Law of War and Peace*, tr., F.W. Kelsey (Indianapolis, Bobbs Merrill, 1957).

[41] Positivists argued the supremacy of the law of a sovereign state.

[42] John Locke, *Political Writings*, David Wootton (ed.) (London: Penguin Books, 1993).

[43] Jean-Jacques Rousseau, *The Social Contract and Discourses*, J.H. Brummfitt and J.C. Hall, eds. (London: Dent, 1973).

> 39. No freeman shall be taken or imprisoned, or disseized, or outlawed, or exiled or in any way harmed – nor will we go upon him or send upon him – save by the lawful judgment of his peers or by the law of the land.
> 40. To none will we sell, to none deny or delay, right or justice . . .
> 42. Henceforth any person, saving fealty to us, may go out of our realm and return to it, safely and securely, by land and by water, except perhaps for a brief period in time of war, for the common good of the realm.

Similarly, the English Bill of Rights of 1689 was the basis upon which Parliament negotiated the accession to the throne of William and Mary, Prince and Princess of Orange. Many of its provisions were intended to protect the rights of Parliament, although at least one was more general in nature: '(10) That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.'[44]

While these concessions were obtained by feudal barons and the affluent gentry for themselves alone, the real significance of these charters lies in the fact that each constituted a limitation of the power of the then absolute monarch. As Lauterpacht has observed, 'the vindication of human liberties does not begin with their complete and triumphant assertion at the very outset; it commences with their recognition in *some* matters, to *some* extent, for *some* people, against *some* organ of the state'.[45]

Standards founded upon the doctrines of 'social contract' and 'natural law' were embodied in the first domestic Bill of Rights – the Virginia Declaration of Rights 1776. In it, the people of Virginia, through their representatives assembled at a convention, proclaimed that 'all men are by nature equally free and independent, and have certain inherent rights,

[44] The *Encyclopaedia Britannica* (Macropaedia), volume VIII, 15th edn, 1977, refers to two earlier codifications: in 1188, the Cortes, the feudal assembly of the Kingdom of Leon (on the Iberian Peninsula) received from King Alfonso IX his confirmation of a series of rights, including the right of an accused to a regular trial and the right to the inviolability of life, honour, home and property; in 1222, the Golden Bull of King Andrew II of Hungary guaranteed, *inter alia*, that no noble would be arrested or ruined without first being convicted in conformity with judicial procedure. C.G. Weeramantry, in his *Invitation to the Law* (Sydney: Butterworths, 1982), cites several edicts of Asoka, the Buddhist Emperor of India (269–232 BC), one of which was the Edict of Toleration: 'a man must not do reverence to his own sect or disparage that of another man without reason. Deprecation should be for specific reasons only, because the sects of other people all deserve reverence for one reason or another.'

[45] H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968 reprint), 131.

of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'. The Declaration proclaimed a compendium of impressive principles including: (i) that all power is vested in, and consequently derived from, the people; (ii) that when a government is found to be inadequate, a majority of the community has an indubitable, unalienable, and indefeasible right to reform, alter or abolish it; (iii) that the legislative and executive powers of the state should be separate and distinct from that of the judiciary; (iv) that the election of people's representatives ought to be free, and that all men have the right of suffrage, and cannot be taxed or deprived of their property for public purposes without their own consent; (v) that an accused person has a right to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; (vi) that no man be deprived of his liberty except by the law of the land, or the judgment of his peers; (vii) that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; (viii) that general warrants, whereby any officer may be commanded to search suspected places without evidence of a fact committed, ought not to be granted; (ix) that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained; (xi) that the military should be under strict subordination to, and governed by, the civil power; (xii) and that all men are equally entitled to the free exercise of religion, according to the dictates of conscience.[46]

On 4 July 1776, in the American Declaration of Independence, the representatives of thirteen states assembled in congress affirmed that 'all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of their happiness', and that 'to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, and that whenever any form of government becomes

[46] The Virginia Declaration of Rights 1776 was followed in quick succession by similar declarations in the Constitutions of Pennsylvania, Maryland, Delaware, New Jersey, North Carolina, South Carolina, New York, New Georgia and Massachusetts.

destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness'. The Constitution of the United States of America of 1787 provided, *inter alia*, that the writ of habeas corpus should not be suspended, and no bill of attainder or *ex post facto* law should be passed. The amendments of 1791, 1865, 1868, 1870, and 1920 added other rights to constitute a relatively comprehensive and enforceable Bill of Rights. Meanwhile, on 27 August 1789, the representatives of the French people, organized as a National Assembly, proclaimed the Declaration of the Rights of Man and of the Citizen. A product of the French Revolution, and undoubtedly inspired by the American experience and influenced by the philosophical discourse of the age, this document contained a statement of the 'natural, inalienable, and sacred rights of man'. Philosophy was being translated into law.[47]

## The doctrine of state sovereignty

The principal obstacle to the development of the international law of human rights was the rule of customary international law that recognized the doctrine of state sovereignty. According to that rule, a sovereign state had full, complete and exclusive authority to deal with its own territory and with its own nationals. It followed that international law did not permit any interference or intervention by any other state, or by the community of states, in respect of either of these matters. Accordingly, a state was free to deal with its own nationals in whatever way it chose to. In particular, it alone had the right to determine the subject-matter and content of its domestic laws. In the context of the doctrine of state sovereignty, it was inconceivable that international law could vest an individual with any rights exercisable against his own state.[48]

[47] According to Lauterpacht, in the nineteenth century the recognition of fundamental rights in the constitutions of states became 'a general principle of the constitutional law of civilized states'. He cites Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), Liberia (1847), Sardinia (1848), Denmark (1849), Prussia (1850) and Switzerland (1874). See Lauterpacht, *International Law*, 89.

[48] An alien, however, was entitled under international law to be treated in accordance with minimum standards of civilization, including the right to personal liberty and the right to equality before the law. This was an obligation which the state owed to the other state of

## Humanitarian norms as international law

The doctrine of state sovereignty, in so far as it related to the treatment by a state of its own nationals, began to be eroded, however, by the incorporation of certain humanitarian norms in international law. This was a gradual process which began in the early nineteenth century.

i. By the Treaty of Paris 1814, the British and French governments agreed to co-operate to suppress the traffic in slaves. After several such bilateral agreements, the General Act of the Berlin Conference on Central Africa 1885 declared that 'trading in slaves is forbidden in conformity with the principles of international law as recognized by the signatory powers'. Following agreement on other measures, such as the right of visit and search, and the confiscation of ships engaged in the slave trade, provided for in the General Act of the Brussels Conference 1890, an International Convention on the Abolition of Slavery and the Slave Trade was concluded in 1926. Its object was 'the complete suppression of slavery in all its forms and of the slave trade by land and sea'.
ii. A Swiss philanthropist, Henry Dunant, who had observed the suffering of sick and wounded soldiers in the Battle of Solferino fought between French and Austrian armies in northern Italy in 1859, took the initiative in establishing the International Committee for Aid to the Wounded (later renamed the International Committee for the Red Cross). Due to his efforts, a diplomatic conference was convened in Geneva in 1864 at which sixteen European states adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (the First Geneva Convention). In it they undertook to care for sick and wounded soldiers irrespective of their nationality, and to return home captured wounded soldiers if they were incapable of further military service. At the Hague Peace Conferences of 1899 and 1907, it was agreed to extend these principles to the sick and wounded in naval warfare, and to prohibit certain practices, including the bombardment of undefended towns, the use of poisonous gases and soft-nosed bullets.[49]

which the alien was a national. The irony of this situation lies in the fact that an individual was better protected under the law when he was outside the jurisdiction of his own state.

[49] Four new conventions replacing the existing ones were adopted at an international diplomatic conference held in Geneva in 1949. These covered the sick and wounded on land

iii. On the initiative of groups of social reformers, governments meeting in Berne in 1906 agreed upon two multilateral labour conventions. One prohibited night work for women employed in industrial establishments, and the other prohibited the use of the inflammable white phosphorus in the manufacture of matches. With the establishment of the International Labour Organization in 1919, a succession of other conventions designed to regulate working conditions was concluded.

iv. The map of Europe was redrawn as part of the peace settlement of 1919 following the end of the First World War. An integral part of the peace settlement was a series of treaties in which provision was made – with the League of Nations as guarantor – for the protection of the rights of minorities living within the newly carved boundaries of several European states. The rights protected included their freedom of religion, the right to use their own language, and the right to maintain their own religious and educational establishments. A complaints procedure was also instituted, enabling individuals to invoke personal rights in any international forum against the state of which they were nationals.[50]

## An international consensus on human rights

These were the only areas in which the doctrine of state sovereignty had begun to erode, and where the international community could presume to judge, or even legitimately express its concern at, a government's treatment of its own citizens. But the Second World War and the events that preceded it in Germany (and in the territories under German occupation), where unprecedented atrocities were perpetrated on millions of its own citizens by the regime then lawfully in power, demonstrated how

(First Convention); wounded, sick and shipwrecked members of the armed forces at sea (Second Convention); prisoners of war (Third Convention), and civilian victims (Fourth Convention). In 1977, at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, two Additional Protocols to the 1949 Conventions were adopted. Protocol I deals with the protection of victims of international conflicts. Protocol II concerns the victims of internal armed conflicts, including those between the armed forces of a government and dissidents or other organized groups which control part of its territory.

[50] See *Steiner and Gross* v. *The Polish State*, Upper Silesian Arbitral Tribunal, Cases Nos. 188 and 287, *Annual Digest* 1927–8; *Minority Schools in Albania*, PCIJ Reports 1935, Series A/B, No.64.

hopelessly inadequate international law was. According to the strict doctrine of state sovereignty, any foreign criticism of the domestic laws that authorized these atrocities was illegitimate; according to the theory of legal positivism, it was also meaningless.[51] Unless there was established a set of superior standards to which all national law must conform – an overriding code of international human rights law – history could well repeat itself.[52]

President Roosevelt articulated his vision of this world order in his annual message to the United States Congress on 6 January 1941. He spoke of a world founded upon four essential human freedoms: freedom of speech and expression, freedom to worship, freedom from want, and freedom from fear. It was to be a definite basis for a kind of world attainable in our own time and generation. Later that year, in the Atlantic Charter of 14 August 1941, the President of the United States of America and the Prime Minister of the United Kingdom, affirmed their commitment to 'certain common principles in the national policies of their respective countries on which they base their hopes for a better future of the world'. These included (i) no aggrandizement, territorial or other; (ii) no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; (iii) respect for the right of peoples to choose the form of government under which they live, and restoration of sovereign rights and self-government to those forcibly deprived of them; (iv) enjoyment by all states of access, on equal terms, to the trade and raw materials of the world; (v) improved labour standards, economic adjustment and social security; (vi) freedom from fear and want everywhere; (vii) a peace that would enable everyone to traverse the high seas and oceans without hindrance; and (viii) the abandonment of the use of force and the encouragement of disarmament.

These principles were reaffirmed in the Declaration of the twenty-six United Nations of 1 January 1942; in the Declaration of Moscow of

[51] Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 14.

[52] For a fascinating account of the development of international human rights law written by the person who served as Director of the Human Rights Division of the United Nations from 1946–66 and, therefore, actively participated in all the principal events of that momentous period, see John P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers Inc., 1984). For a study of the influence on the text of the Universal Declaration of Human Rights of Adolf Hitler and his policies of National Socialism, see Johannes Morsink, 'World War Two and the Universal Declaration' (1993) 15 *Human Rights Quarterly* 357.

30 October 1943 made by the Foreign Ministers of the United States, the United Kingdom, China and the Soviet Union; and in the Declaration of Teheran of 1 December 1943 made by the President of the United States, the Prime Minister of the United Kingdom, and the Premier of the Soviet Union. Proposals for the establishment of an international organization were agreed on by the representatives of the United States, the United Kingdom, China and the Soviet Union at a conference held at Dumbarton Oaks, Washington in 1944; the Dumbarton Oaks Proposals were signed on 7 October 1944. In the Yalta Agreement of 11 February 1945, President Roosevelt, Prime Minister Churchill and Premier Stalin decided to summon a United Nations Conference on the proposed world organization for 25 April 1945. The Charter was drafted at that conference, and was adopted on 25 June and signed on 26 June, with fifty-five nations participating. It became operative upon the ratification by the required number of signatory states on 24 October 1945.

## The Charter of the United Nations

The Charter of the United Nations was the standard-bearer, the first of several international treaties that helped to create an international human rights regime. Its preamble reaffirmed 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'. One of the principal purposes of the United Nations was declared to be the achievement of 'international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion'.[53] Article 55(c) states that, with a view to the creation of conditions of stability and well-being, the United Nations 'shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. This is a mandatory obligation imposed on the organization. In Article 56, 'All Members pledge themselves to take joint and separate action in co-operation with the Organization' for the achievement of the purpose set forth in Article 55(c). This is a legal obligation undertaken by the signatories to the Charter of 26 June 1945, and those other sovereign states which in later years were to contribute towards the universality of

[53] Article 1.

the United Nations. This legal duty to promote respect for human rights necessarily includes the legal duty to respect them.[54]

The effect of Article 56 is to require each member state of the United Nations to take action, both collectively with other signatory states and separately (within their domestic jurisdictions), to secure 'universal respect' for, and 'observance' of, human rights and fundamental freedoms. Since the requirement arises out of a treaty voluntarily entered into by each state, the obligation is binding. By requiring the Economic and Social Council (which was one of the organs the Charter established) to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all', including the preparation of draft conventions for submission to the General Assembly, the Charter obviously intended that the formulation of standards and of methods of enforcement would follow under the auspices of the United Nations.

The existence of a legal duty is not dependent upon the existence of a sanction for failure to perform that duty. Accordingly, Lauterpacht argued that irrespective of the question of definition or enforcement, the Charter imposed upon the member states of the United Nations the legal duty to respect fundamental rights.

> The Charter of the United Nations is a legal document; its language is the language of the law, of international law. In affirming repeatedly the 'fundamental human rights' of the individual it must necessarily be deemed to refer to legal rights – to legal rights recognized by international law and independent of the law of the State. These rights are only imperfectly enforceable, and, in so far as the availability of a remedy is the hallmark of legal rights, they are imperfect legal rights. Yet in the sphere of international law the correlation of right and remedy is not so close as within the State. Moreover, irrespective of the question

[54] Sieghart explains that, as a matter of construction, the obligation in Article 56 is an obligation to take *action* to *achieve* the purposes set forth in Article 55, and the word 'promote' in that article merely introduces those purposes, and does not itself form part of them. The purpose is 'universal respect for, and observance of, human rights and fundamental freedoms' and it is this – and not its promotion – which the states parties 'pledge' themselves to take action to achieve: Paul Sieghart, *International Law of Human Rights*, 52. See also Lauterpacht, *International Law*, 152. It must be noted, however, that this rhetoric was not matched by domestic performance at the time. For example, the United States practised racial discrimination, the United Kingdom and several other European states had colonial empires, and the Soviet Union ruthlessly punished its dissidents.

> of enforcement, there ought to be no doubt that the provisions of the Charter in the matter of fundamental rights impose upon the Members of the United Nations the legal duty to respect them. In particular, it is clear that a Member of the United Nations who is guilty of a violation of these rights commits a breach of the Charter.[55]

This view has now been confirmed by Judge Weeramantry in the International Court of Justice.

> Even in domestic law, the positivistic view that a sanction is essential to its validity has long been left behind. Modern research, both jurisprudential and sociological, has shown the inherent validity of a law to be independent of the existence of a sanction to enforce it. This is doubly so in regard to international law. Indeed, it scarcely needs mention that in international law the Austinian view that a sanction is necessary to the existence of a rule of law, or of a legal prescription, has always been particularly inappropriate . . . The question of the obligation to comply must at all times be sharply distinguished from the question of enforceability.[56]

In fact, the International Court of Justice has confirmed (though in an *obiter dictum*) that the pledge contained in Article 56 bound each member state to observe and respect human rights within its territorial jurisdictions.[57]

[55] Lauterpacht, *International Law*, 34.

[56] Individual Opinion, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzogovina* v. *Yugoslavia (Serbia and Montenegro))*, Further Requests for the Indication of Provisional Measures, ICJ Reports 1993, at 54.

[57] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16. The Court observed that 'under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.'

# 2

# The international bill of human rights

The internationalization of human rights is a relatively new phenomenon. It was not the result of a logical progression in the development and application of natural law or natural rights. Instead, it manifested itself in the mid-twentieth century with the birth of the United Nations as a response to the inadequacies of a system which relied almost exclusively on the municipal law of a sovereign state for the protection of the individual. Recoiling from the terror of Nazi Germany, the World War II victors sought to establish a new world order in which what a state did to its citizens within its territorial borders would no longer be its exclusive concern. In barely thirty years, an elaborate regime of international human rights law came into existence, seeking to protect the individual against the acts and omissions of his or her own government. Philosophical concepts were replaced by legal rules incorporated in a series of human rights treaties. These human rights treaties 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting states. In concluding these human rights treaties the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction'.[1]

When the Charter of the United Nations imposed a binding obligation on signatory states to respect the human rights and fundamental freedoms of individuals, it recognized that individuals enjoyed such rights

[1] *The Effect of Reservations on the Entry into Force of the American Convention*, Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of 24 September 1982, paragraph 29.

and freedoms under international law. It was a recognition explicitly made by the states parties to the Charter. From being solely a matter of domestic concern, a government's treatment of its own nationals became the legitimate concern of the international community. When the organs established under the Charter – the Commission on Human Rights, the Economic and Social Commission and the General Assembly – proceeded to catalogue and define these rights and freedoms, impose duties upon states to respect and ensure them, and establish mechanisms for monitoring their enforcement, the individual was transformed from being, as Lauterpacht described, 'an object of international compassion'[2] into a subject of international law, capable of seeking his or her own remedies in international fora for the protection of fundamental human rights.

The traditional doctrine of state sovereignty has undoubtedly been eroded by the emergence of a body of international human rights law. But its erosion was the result of sovereign states, in the exercise of their sovereignty, agreeing not only to respect and safeguard human rights within their own territories, but also to be accountable to, and to submit to scrutiny by, each other and the international community in respect of the performance of that obligation. A matter which was within a state's domestic jurisdiction ceased to be exclusively so to the extent to which it came to be also governed by international obligations undertaken by the state.[3]

## Universal Declaration of Human Rights (UDHR)

The Charter of the United Nations neither catalogued nor defined the rights to which it referred. Accordingly, the Economic and Social Commission (ECOSOC), which was charged with the promotion of respect for, and observance of, human rights,[4] established a Commission on Human Rights and instructed it to submit proposals, recommendations and reports regarding an International Bill of Human

[2] H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968 reprint), 4.

[3] *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports 1989, 216, per Judge Shahabudeen. The judge was, in this instance, referring to the jurisdiction of states over questions concerning the health of their citizens.

[4] Articles 61–72.

Rights.[5] The Commission met in January 1947 and elected Mrs Eleanor Roosevelt (USA) as its chairman and Professor P.C. Chang (China) as vice-chairman. On the proposal of the latter, the Commission decided that the International Bill of Human Rights would be in three parts: a Declaration, a Covenant on Human Rights, and measures of implementation. Two months later, Mrs Roosevelt appointed a drafting committee of eight, selected with due regard for geographical distribution: the representatives of Australia (Col. Hodgson), Chile (Hernan Santa Cruz), China (P.C. Chang), France (René Cassin), Lebanon (Charles Malik), United States of America (Eleanor Roosevelt), United Kingdom (Lord Dukeston), and the Union of Soviet Socialist Republics (Vladimir Koretsky). When the drafting committee commenced its work, it had before it a preliminary draft – 'the Secretariat Outline' – prepared by John P. Humphrey, the Director of the Human Rights Division of the United Nations.[6]

On 10 December 1948, from Paris, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights.[7] Its

[5] ECOSOC resolution 5(I) of 16 February 1946. In resolution 9(II) of 21 June 1946, ECOSOC requested the Commission to submit 'suggestions regarding ways and means for the effective implementation of human rights and fundamental freedoms'.

[6] For the text, see *Yearbook on Human Rights for 1947* (New York: United Nations, 1949), 484. Humphrey states that 'I was no Thomas Jefferson and, although a lawyer, I had practically no experience drafting documents. But since the Secretariat had collected a score of drafts, I had some models on which to work. One of them had been prepared by Gustavo Gutierrez and had probably inspired the draft declaration of the international duties and rights of the individual which Cuba had sponsored at the San Francisco Conference. There were also texts prepared by Irving A. Isaacs, by the Rev Wilfred Parsons, S.J., by Rollin McNitt and by a committee chaired by Viscount Sankey after a public debate conducted in Britain by the *Daily Herald*. One had been prepared by Professor Hersch Lauterpacht and another by H.G. Wells. Still others came from the American Law Institute, the American Association for the United Nations, the American Jewish Congress, the World Government Association, the *Institut de droit international*, and the editors of *Free World*. The American Bar Association had sent in an enumeration of subjects. With two exceptions, all these texts came from English-speaking sources and all of them from the democratic West. The documentation which the Secretariat brought together *ex post facto* in support of my draft included texts extracted from the constitutions of many countries. But I did not have this before me when I prepared my draft. The best of the texts from which I worked was the one prepared by the American Law Institute, and I borrowed freely from it. This was the text that had been unsuccessfully sponsored by Panama at the San Francisco Conference and later in the General Assembly. It had been drafted in the United States by a distinguished group representing many cultures, one of whom was Alfredo Alfaro, the Panamanian foreign minister.' See John P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers Inc., 1984) 32–3.

[7] UNGA resolution 217 A (III) of 10 December 1948. This resolution also contained four other parts: B: RIGHT OF PETITION (requesting ECOSOC to ask the Commission on Human

proclamation was preceded at that session by a detailed scrutiny of 'almost every word, phrase, clause and paragraph' – 1,400 votes in all at eighty-five meetings of the Third Committee.[8] Adopted without a dissenting vote, the UDHR was 'a common understanding' of those rights which the member states had pledged to respect and observe; the first comprehensive statement of human rights of universal applicability. Its preamble states that it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

The UDHR begins with the philosophical postulates upon which it is based: that the right to liberty and equality is man's birthright and cannot be alienated, and that because man is a rational and moral being he is different from other creatures on earth and is therefore entitled to certain rights and freedoms which other creatures do not enjoy.[9] It then proceeds to proclaim the human rights and fundamental freedoms:

Article 3: The right to life, liberty and security of person.
Article 4: The right to freedom from slavery or servitude.
Article 5: The right to freedom from torture or from cruel, inhuman or degrading treatment or punishment.

Rights 'to give further examination to the problem of petitions when studying the draft covenant on human rights and measures of implementation, in order to enable the General Assembly to consider what further action, if any, should be taken at its next regular session regarding the problem of petitions'); C: FATE OF MINORITIES (noting that it had been decided not to include a specific provision on minorities in the Declaration, but requesting ECOSOC to ask the Commission on Human Rights to 'make a thorough study of the problem of minorities in order that the United Nations may be able to take effective measures for the protection of racial, national, religious or linguistic minorities'); D: PUBLICITY TO BE GIVEN TO THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (recommending to governments of member states to use every means within their power to publicize the text of the Declaration and to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions; requesting the Secretary-General to have the Declaration widely disseminated by publishing and distributing texts in all languages possible; and inviting specialized agencies and non-governmental organizations to do their utmost to bring the Declaration to the attention of their members); and E: PREPARATION OF A DRAFT COVENANT ON HUMAN RIGHTS AND DRAFT MEASURES OF IMPLEMENTATION (requesting ECOSOC to ask the Commission on Human Rights to continue to give priority in its work to the preparation of a draft Covenant on Human Rights and draft measures of implementation).

[8] Centre for Human Rights, *United Nations Action in the Field of Human Rights* (New York: United Nations, 1994), paragraph 372.

[9] Centre for Human Rights, *United Nations Action*, paragraph 365. Article 1 reads: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

Article 6: The right to recognition as a person before the law.
Article 7: The right to equality before the law and equal protection before the law.
Article 8: The right to an effective remedy.
Article 9: The right to freedom from arbitrary arrest, detention or exile.
Article 10: The right to a fair and public hearing.
Article 11: The right of accused persons to be presumed innocent and to protection against the retroactive application of the criminal law.
Article 12: The right to privacy.
Article 13: The right to freedom of movement.
Article 14: The right to seek and to enjoy asylum.
Article 15: The right to a nationality.
Article 16: The right to family life.
Article 17: The right to protection against the arbitrary deprivation of one's property.
Article 18: The right to freedom of thought, conscience and religion.
Article 19: The right to freedom of opinion and expression.
Article 20: The right to freedom of peaceful assembly and association.
Article 21: The right to participate in public life.
Article 22: The right to social security.
Article 23: The right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, and the right to form and join trade unions for the protection of one's interests.
Article 24: The right to rest and leisure.
Article 25: The right to an adequate standard of living.
Article 26: The right to education and the prior right of parents to choose the kind of education to be given to their children.
Article 27: The right to participate in the cultural life of the community.
Article 28: The right to a social and international order in which the rights and freedoms recognized in the Declaration can be fully realized.

The UDHR states that everyone has duties to the community, and that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of

others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[10]

According to Humphrey, the Declaration had no father in the sense that Jefferson was the father of the American Declaration of Independence. It was 'the work of literally thousands of people who contributed to the drafting through United Nations bodies, the specialized agencies, and non-governmental organizations; and, although Western influences were undoubtedly the strongest, both Marxist–Leninist theory and communist practice were important, as were the claims of the politically and economically dependent countries'.[11] Charles Malik, a professor of philosophy in Lebanon who, as chairman of the Third Committee, presented the final text to the General Assembly, elaborates further:

> The Declaration is the composite product of all cultures and nations pooling their wisdom and insight. The Atlantic world stressed principally civil, political and personal liberties; the Soviet world advocated economic and social rights; the Latin American world concerned itself with the rule of law; the Scandinavians underlined equality between the sexes; India and China stood for nondiscrimination, especially in relation to the downtrodden, underdeveloped and underprivileged; and were also intensely interested in the right to education; others argued for the origin of these rights in the very nature of man itself; those with a dominant religious outlook wanted to safeguard religious freedoms. The study of how each nation and culture brought in the fundamental values of its cherished traditions to the common concern is a fascinating task.[12]

But the UDHR was not in itself meant to be a legally binding instrument. It was not signed by any state, nor was it intended that it should be. It sought to complement the general provisions of the Charter and serve as 'a common standard of achievement for all peoples and

[10] Article 29.

[11] John P. Humphrey, 'The World Revolution and Human Rights', in Allan E.Gottlieb (ed.), *Human Rights, Federalism and Minorities* (Toronto: Canadian Institute of International Affairs, 1970), 155.

[12] Address of Ambassador Charles H. Malik, former President, United Nations General Assembly and former Chairman, Human Rights Commission, United Nations, at the opening plenary session of the Conference of Non-Governmental Organizations in Observance of the 25th Anniversary of the Universal Declaration of Human Rights, UN Headquarters, New York, 10 December 1973.

nations'. It contained a statement of rights whose 'effective recognition and observance' both among the peoples of member states themselves and among the peoples of territories under their jurisdiction was to be secured by 'progressive measures, national and international'.[13] Time, however, appears to have transformed the character of the Declaration, and today there is a widespread belief that all governments are obliged to ensure the enjoyment of the rights it proclaims.

### *An authentic interpretation of the Charter ?*

The preamble to the UDHR recites that 'Whereas Member States have pledged themselves to achieve in co-operation with the United Nations the promotion of universal respect for and observance of human rights', and 'Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge', the UDHR is proclaimed by the General Assembly as 'a common standard of achievement'. This preambular recital suggests that the human rights which member states had pledged to respect and observe, but which were left undefined in the Charter, are those which are now set forth in the Universal Declaration. Alternatively, the UDHR may be viewed as constituting a 'subsequent agreement between the parties' to the Charter 'regarding the interpretation' of the Charter or the application of its provisions.[14] On either view, the Universal Declaration is acknowledged today as the legitimate aid to the interpretation of the expression 'human rights and fundamental freedoms' in the Charter of the United Nations.[15]

Humphrey argues that by the development of a new customary rule, the UDHR has become an authentic interpretation of the United Nations Charter.[16] In support of his contention he cites several resolutions of the General Assembly, beginning with one that was adopted four months after the proclamation of the UDHR. It concerned the refusal by the government of the Soviet Union to permit one of its citizens, who was the

[13] Preamble to the Declaration.

[14] Vienna Convention on the Law of Treaties 1969, Article 31(3)(b).

[15] See Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 54.

[16] John P. Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character', in B.G. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration* (The Hague: Martinus Nijhoff, 1979), 21–37.

wife of the Chilean ambassador's son, to leave that country with her husband. On that occasion, the General Assembly invoked UDHR 13 (right of everyone to leave any country including his own) and UDHR 16 (right to marry without any limitation due to race, nationality or religion) in a resolution which affirmed that 'measures which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or to join them abroad are not in conformity with the Charter'. The resolution accordingly recommended that the Soviet Union withdraw measures of that nature.[17] Humphrey observes that the resolution does not say in so many words that the UDHR was binding; but it did say after invoking the two articles in question that the measures adopted by the Soviet Union were not in conformity with the Charter. Since the Charter neither catalogued nor defined human rights, the logical and inescapable conclusion was that the states which voted for the resolution were using the UDHR to interpret the Charter.[18]

Humphrey's contention derives support from powerful dicta of the International Court of Justice. In the *Namibia Case*[19] the court stated in its opinion that: 'To establish . . . and to enforce distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent, or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.' Humphrey cautions that, since the Charter itself stipulates that human rights must be respected and promoted 'for all without distinction as to race, sex, language, or religion,'[20] this opinion is of 'little help'. Another commentator, Nigel Rodley, argues that this opinion 'is authority, however, for the proposition that there is under

[17] UNGA resolution 285 (III) of 25 April 1949. In UNGA resolution 265 (III) of 14 May 1949 which related to the treatment of people of Indian origin in the Union of South Africa, the General Assembly invited the Governments of India, Pakistan and South Africa to enter into discussions at a round table conference, taking into consideration the purposes and principles of the United Nations and the Universal Declaration of Human Rights. Other resolutions cited by Humphrey include UNGA resolution 1514 (XV) of 14 December 1960, UNGA resolution 1904 (XVIII) of 20 November 1963, Security Council resolution S/5471 (1963), and UNGA resolution 2145 (XXI) of 27 October 1966.

[18] Humphrey, 'The Universal Declaration of Human Rights', 34.

[19] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, paragraph 131.

[20] Article 1(3).

the United Nations Charter a clear legal obligation on governments not to commit such discrimination'.[21] The latter quotes the view of a former president of the court that this wording 'leaves no room for doubt that, in its view, the Charter does impose on the members of the United Nations legal obligations in the human rights field'.[22]

The opinion of the court cited above and the provision in the Charter to which Humphrey refers, deal with two different matters. While the Charter requires member states to ensure that human rights are enjoyed by all without distinction as to race, sex, language or religion, the court is expressing the view that 'to discriminate' on the grounds of race, colour, descent, or national or ethnic origin, is a denial of fundamental rights and is, therefore, a violation of the purposes and principles of the Charter. Nowhere in the Charter is it stated that 'to discriminate' is a denial of human rights. That statement is found in the UDHR. Therefore, the court, on this occasion, was resorting to the UDHR in order to understand, with reference to the facts of that particular case, the stipulation in the Charter that human rights be respected and promoted.

The contention receives further support from a more recent decision of the International Court of Justice. In its judgment in the *Teheran Hostages Case*,[23] the court states that: 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.' Nowhere in the Charter is the wrongful deprivation of liberty or the imposition of hardship on persons subjected to physical constraint expressly prohibited. That prohibition is contained in the right to liberty and security of person, and in the right to freedom from torture, which are articulated in the UDHR. The Charter merely enjoins member states to respect and promote human rights. Therefore, in this case, the court was stating quite explicitly that conduct contrary to the UDHR is incompatible with the principles of the Charter.

[21] Nigel S. Rodley, 'Human Rights and Humanitarian Intervention: the Case Law of the World Court', (1989) 38 *International and Comparative Law Quarterly* 321, at 324.

[22] Nagendra Singh, *Enforcement of Human Rights in Peace and War and the Future of Humanity* (Utrecht: Martinus Nijhoff Publishers, 1987), 28.

[23] *Diplomatic and Consular Staff in Teheran Case*, ICJ Reports 1980, 42.

*Customary international law, independent of the Charter?*

The UDHR is, as its very name suggests, not a treaty but a declaration. In United Nations practice, a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.[24] In view of the solemnity and significance of a declaration, 'it may be considered to impart, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon states'.[25] In the fifty years that have elapsed since its proclamation, has the UDHR, or some of its provisions at least, justified this expectation? As early as 1971 a judge of the International Court of Justice recognized that 'although the affirmations of the Declaration are not binding *qua* international convention . . . they can bind the states on the basis of custom . . . whether because they constituted a codification of customary law . . . or because they have acquired the force of custom through a general practice accepted as law . . . '.[26]

Herbert Vere Evatt, who was president of the United Nations General Assembly when the UDHR was adopted in Paris in 1948, predicted that 'millions of men, women and children all over the world, many miles

[24] This opinion was expressed by the United Nations Secretariat of the UN at the request of the Commission on Human Rights regarding the difference between a 'declaration' and a 'recommendation' as far as the legal implications were concerned: see UN document E/CN.4/L.610; 34 ESCOR, Suppl.No.8 (E/3616/Rev.1), at 15 (1962), reproduced in Louis B. Sohn and Thomas Buergenthal, *International Protection of Human Rights* (Indianapolis: Bobbs-Merrill Company Inc., 1973), 519–20.

[25] See the United Nations document referred to in the note above. Sean MacBride argues that the preamble to the Hague Convention 1907 contains what could be described as a broad convenient definition of customary international law in respect of human rights: 'The principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.' He suggests that by the application of this broad conventional definition, it is possible to treat parts, at least, of the UDHR as forming part of the law of nations and of customary international law. He argues that while not having the binding force of an international convention, the UDHR must surely represent 'the usages established among civilized peoples', 'the laws of humanity', and 'the dictates of the public conscience'. See A.H. Robertson (ed.), *Human Rights in National and International Law* (Manchester: Manchester University Press, 1968), 66.

[26] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, separate opinion of Vice-President Ammoun at 76.

from Paris and New York, will turn for help, guidance and inspiration to this document'.[27] On the twentieth anniversary of its proclamation, a distinguished non-governmental gathering in Montreal, meeting under the co-chairmanship of Sean MacBride, secretary-general of the International Commission of Jurists, claimed that: 'The Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law'.[28] On its twenty-fifth anniversary, at a commemorative conference in New York, attended by eighty-three non-governmental organizations, the UDHR was recognized as having 'indisputably become the yardstick throughout the world regarding humane treatment of human beings'.[29] On the eve of its fiftieth anniversary, the independent expert members of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities reaffirmed that the UDHR 'constitutes an international standard of paramount importance'.[30]

Despite these bold assertions by 'the people', it is only state practice that can change the character of the UDHR from a document of very high moral authority into customary law. It is not possible in this chapter to provide a comprehensive analysis of the extent to which the standards set out in the UDHR have been acknowledged in state practice as obligatory. However, at this stage, a brief, even cursory, survey of its use by the international community, its incorporation in international and regional law, its reflection in national constitutions, and its reference in judicial decisions, appears to be germane to the subject under discussion.

Before subsequent state practice is examined, it is relevant to note that no member state of the United Nations voted against the adoption of the UDHR. Eight states, however, abstained. Humphrey explains why. Saudi Arabia feared that the right to change one's religion or belief would favour the proselytizing activities of missionaries who were often the precursors of foreign intervention. The Saudi Arabian Ambassador

[27] United Nations, *The Universal Declaration of Human Rights: a Standard of Achievement* (New York: United Nations, 1963), 12.

[28] 'The Montreal Statement of the Assembly for Human Rights, 22–27 March 1968' (1968) 9(1) *Journal of the International Commission of Jurists* 94.

[29] An Appeal approved by consensus at the Conference of Non-Governmental Organizations on Human Rights, 10–12 December 1973, UN Headquarters, New York.

[30] Resolution 1997/43, 49th session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

Jamil Baroody – a Lebanese Christian – asserted that the Koran forbade Moslems to change their religion, an interpretation of the religious text that was challenged by the Pakistani Ambassador Zafrullah Khan – a Muslim. South Africa considered the Declaration to be too wide since it included rights other than fundamental rights. As for the six countries of the Soviet Bloc:

> Ambassador Andrei Vishinky of the Soviet Union said that the Declaration suffered from serious defects and omissions: the article on slavery was too abstract; the article on freedom of information failed to solve the problem because it did nothing to prevent warmongering and fascist ideas; there could be no freedom of information unless the workers had the means to voice their opinions, and that meant having at their disposal printing presses and newspapers; the right to demonstrate in the streets should have been guaranteed; there were no guarantees that scientific research would not be used for war purposes; and there were no provisions protecting the rights of minorities. Finally, he regretted there was no mention in the Declaration of the sovereign rights of states. The representative of the Ukraine rationalized his abstention in traditional Marxist terms: the Declaration proclaimed rights that could not be exercised under existing conditions and within the economic structure of many countries. Before the right to work, to rest and to education could be implemented, the economic system of free enterprise would have to be drastically altered . . . Speaking for Czechoslovakia, its representative complained that the Declaration was not imbued with revolutionary spirit; it was neither bold nor modern. It was merely a proclamation, said the representative of Byelorussia: it did not guarantee the rights proclaimed. The rights included, said the Pole, did not go beyond the rights recognized by the old liberal school . . . Compared to the Declaration of 1789 on the Rights of Man and of the Citizen, and the Communist Manifesto, and especially the principles which inspired the October Revolution, it was a step backward. The Yugoslavs found more measured language in which to explain their abstention: the traditional categories of human rights (meaning civil and political rights) needed to be widened, and a system of social rights recognized which would include the collective rights of certain communities.[31]

[31] John P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers Inc., 1984), 68–73. A less known fact is that Canada abstained from voting in the Third Committee. No explanation was offered. Seventy-two hours later, in the General Assembly, Canada voted in favour and in explanation of that vote Ambassador Lester Pearson stated that many of the articles in the Declaration were vague and

The separate votes taken on its substantive provisions reveal that the large majority of the rights and freedoms enunciated therein received unanimous approval. These were the right to life, liberty, and security of person; freedom from slavery and servitude; freedom from torture, cruel, inhuman, or degrading treatment or punishment; the right to recognition as a person; freedom from discrimination; the right to an effective remedy; freedom from arbitrary arrest, detention, or exile; the right to a fair trial; rights of accused persons; the right to privacy; the right to seek and enjoy asylum; the right to a nationality; the right to family life; the right to own property; freedom of assembly and association; the right to democracy and access to the public services; the right to social security; the right to work, to free choice of employment, to just and favourable conditions of work and remuneration, and the right to form and join trade unions; the right to leisure; the right to an adequate standard of living; and the right to participate in cultural life. Negative votes were cast only in respect of the freedom of movement[32] and the freedom of opinion and expression,[33] while abstentions were recorded in respect of the freedom of thought, conscience, and religion, and the right to education.[34] Despite the surfacing of cold war politics, there appeared to be, in 1948, substantial acceptance of the norms articulated in the UDHR. Not being a treaty, it bore no signatures or ratifications. But few instruments were 'more representative of the will and aspirations of the international community' than the UDHR.[35]

## Use by the international community

In innumerable pronouncements made at gatherings of sovereign states, the UDHR has been endorsed as an obligatory standard of achievement. The following are a few significant examples:

- In 1960, in the Declaration on the Granting of Independence to Colonial Countries and Peoples, the United Nations General Assembly

lacking in precision, and that it would have been much better if a body of jurists, such as the International Law Commission, had examined the text before it was submitted to the General Assembly. Humphrey, himself a Canadian, describes this as 'probably ex post facto rationalization'. See 71–2.

[32] The voting figures were: forty-four for, six against, two abstentions.

[33] The voting figures were: forty-three for, seven against, two abstentions.

[34] Four abstentions, and three abstentions, respectively.

[35] Humphrey, 'The World Revolution', 159.

(with the single exception of South Africa, but including all the other states that had abstained on the final vote on the UDHR) declared that 'all states shall observe faithfully and strictly the provisions' of the UDHR.[36]

- In 1963, in the Charter of the Organization of African Unity done at Addis Ababa, the Heads of African States and Governments affirmed their 'adherence' to the principles of the UDHR.[37]
- In 1968, the International Conference on Human Rights held in Teheran, attended by the official representatives of eighty-four states, while 'affirming its faith in the principles' of the UDHR, proclaimed that it is 'a common understanding of the people of the world concerning the inalienable and inviolable rights of all members of the international community'.[38]
- In 1975, the International Conference on Security and Co-operation in Europe, attended by all the sovereign states of Eastern and Western Europe (with the single exception of Albania) as well as the United States and Canada, made a commitment in its Final Act to act in conformity with the purposes and principles' of the UDHR, and to 'fulfil their obligations' as set forth in it.[39]
- In 1980, the Riobamba Charter of Conduct adopted by the states of the Andean Group (Colombia, Ecuador, Peru, Venezuela, Costa Rica, Panama, and Spain) contained a pledge to 'apply the basic principles' established in the UDHR.[40]
- In 1983, the Heads of State or Government of over ninety Non-Aligned Nations, meeting in New Delhi, reiterated 'their commitment to ensure respect for the promotion of human rights of individuals and the rights of people in accordance with' the UDHR.[41]
- In 1987, the Heads of Government of the Commonwealth, assembled at Vancouver, 'reaffirmed their commitment to the observance of human rights . . . in accordance with the principles enshrined in

[36] Resolution 1514 (XV) of 14 December 1960.

[37] For the text, see Min-Chuan Ku (ed.), *A Comprehensive Handbook of the United Nations* (New York: Monarch Press, 1979), vol. II, 680.

[38] For the text, see Centre for Human Rights, *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1993), 51–4.

[39] For relevant extracts from the text, see Sieghart, *International Law of Human Rights*, 30–1.

[40] For the text, see (1980) *International Commission of Jurists: the Review* 64.

[41] UN document A/38/132, Annex 1, part 1, paragraph 24.

Commonwealth Declarations and the main international human rights instruments'.[42]

- In 1993, the representatives of 171 states and two national liberation movements assembled in Vienna at the World Conference on Human Rights not only reaffirmed their commitment to the principles of the Declaration, but also referred to states being 'duty-bound' as 'stipulated' in, and urged the 'full implementation' of, the UDHR.[43]

The UDHR has also been incorporated in bilateral treaties and other international agreements as an obligatory code of conduct. For instance, in the 1951 peace treaty between the allied powers and Japan, the latter declared its intention to strive to realize the objectives of the UDHR. In the 1954 memorandum of understanding between the governments of Italy, the United Kingdom, the United States, and Yugoslavia, regarding the Free Territory of Trieste, the Italian and Yugoslav governments agreed that, in the administration of their respective areas, they would act in accordance with the principles of the UDHR.[44] In the 1960 treaty concerning the establishment of the Republic of Cyprus, the governments of the United Kingdom, Turkey, and Greece, agreed that 'the Republic of Cyprus shall secure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in section 1 of the European Convention' which, in turn, was based upon the UDHR.[45]

'It is out of such stuff', says Humphrey, that the customary law of nations is made. 'For custom is simply the consensus of states as to what the law is and it is proved out of their own mouths, as it were, by their official statements and practice. What could be more official than a vote cast at the United Nations? When a member state votes for a resolution that purports to say what the law is, that is evidence that, in the opinion of that state, such is the law. So while resolutions of the General Assembly are not ordinarily binding in themselves, they may be evidence of customary law'.[46]

[42] Commonwealth Heads of Government, *The Vancouver Communiqué, October 1987* (London: Commonwealth Secretariat, 1987).

[43] The Vienna Declaration and Programme of Action, 25 June 1993, UN document A/CONF.157/23.

[44] United Nations, *United Nations Action in the Field of Human Rights* (New York: United Nations, 1974), 17.

[45] Article 5. For the text, see *Cmnd.1093: Cyprus* (London: HMSO, 1960).

[46] Humphrey, *Human Rights & the United Nations*, 75–6. In his separate opinion in the *Barcelona Traction Case*, International Court of Justice Report 1970, 1 at 302–4, Judge Ammoun

## Incorporation in international treaties

In the ICCPR and in the ICESCR, the provisions of the UDHR have, with three exceptions,[47] been reaffirmed as conventional law now binding on 148 and 145 states respectively. Through the ECHR, and the ACHR, 40 European states and 25 South and Central American and Caribbean states respectively, have taken steps for the collective enforcement in their own regions of several of the principles enunciated in the UDHR. The entry into force of the African Charter on Human and Peoples' Rights in October 1985 marked a similar commitment in that continent by 48 sovereign states. In addition, several of the specific rights proclaimed in the UDHR, or aspects of them, have been defined in greater detail and provision for their separate implementation has been made, in a series of other international treaties.[48]

## Reflection in national constitutions

Several national constitutions which were enacted after the UDHR was proclaimed either expressly referred to it in their preambles or in their operative provisions, or contained detailed statements which were modelled on the text of its articles. For example, the preambles to the 1961 Constitution of Cameroon, the 1963 Constitution of Senegal, and the 1990 Constitution of Benin affirmed their 'attachment to the fundamental freedoms' embodied in the UDHR. Article 2 of the 1966 Constitution of the Republic of Malawi provided that 'the Government and People of Malawi shall continue to recognize the sanctity of the personal liberties enshrined' in the UDHR. Article 3 of the 1968 Constitution of the Republic of Equatorial Guinea provided that the state shall recognize and guarantee the human rights and freedoms set forth in the UDHR. In the recent Constitution of the Principality of Andorra, article 5 unequivocally declares that the UDHR 'is binding in Andorra'. In contrast, the 1975 Constitution of the Independent State of Papua New Guinea, which contained a very comprehensive statement of 'basic rights', provided in the limitation clause that for the purpose of determining whether or not any law, matter or thing is reasonably justified in a democratic society, a

observed that 'the positions taken up by the delegates of states in international organizations and conferences, and in particular in the United Nations, naturally forms part of state practice'.

[47] The right to seek and enjoy asylum, the right to a nationality, and the right to own property.

[48] For texts, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997).

court may have regard to the UDHR.[49] Today, no less than 146 national constitutions drawn up since 1948 contain statements of fundamental rights which, where they do not faithfully reproduce the provisions of the UDHR, are at least inspired by it.

## Reference in judicial decisions

In several instances, judges of the International Court of Justice have relied on, or cited, the UDHR in ascertaining the content of customary international law. For example, in the 1955 *Nottebohm Case*, Judge Guggenheim referred to the 'basic principle embodied in Article 15(1)' of the UDHR 'according to which everyone has the right to a nationality'.[50] In the 1966 *South West Africa Case*, Judge Tanaka referred to the UDHR which 'although not binding in itself constitutes evidence of the interpretation and application of the relevant Charter provisions', and concluded that 'the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law'.[51] In the 1971 *Namibia Case*, after explaining how the UDHR could bind states on the basis of custom, vice-president Ammoun observed that 'one right which must certainly be considered a pre-existing customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature'.[52] Similarly, in the 1980 *Teheran Hostages Case*, where the United States government invoked six articles of the UDHR in support of its submission that certain minimum standards governing the treatment of aliens exist as a matter of customary international law, the court stated categorically that 'wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'.[53]

[49] Article 39(2).

[50] *Nottebohm Case (Second Phase),* ICJ Reports 1955, dissenting Opinion of M. Guggenheim, Judge 'Ad Hoc', at 63.

[51] *South West Africa Case, Second Phase*, ICJ Reports 1966, dissenting opinion of Judge Tanaka, 293.

[52] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), ICJ Reports 1971, separate opinion of Vice-President Ammoun, at 76.

[53] *Case Concerning United States Diplomatic and Consular Staff in Teheran*, ICJ Reports 1980, 42.

More recently, in the 1987 *Yakimetz Case*, Judge Evensen referred to UDHR 13 and 15 (the right to leave any country, including one's own; and the right not to be arbitrarily deprived of one's nationality, nor denied the right to change one's nationality) as laying down 'basic principles of law'.[54] Two years later, in the *Mazilu Case*, the same judge invoked UDHR 16 (the family is the natural and fundamental group unit of society and is entitled to protection by society and the state) in support of his view that 'the integrity of a person's family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary international law, but from "general principles of law recognized by nations"'. He observed that UDHR 16 'is a concrete expression of an established principle of human rights in the modern law of nations'. Accordingly, the respect for a person's family and family life must be considered as integral parts of the 'privileges and immunities' that are necessary for 'the independent exercise of their functions' by experts on missions for the United Nations.[55]

At the national level, while there is evidence that the UDHR has been cited in numerous legal proceedings,[56] perhaps the most significant judicial decision yet is that of a United States Federal Court of Appeals in the case of *Filartiga* v. *Pena-Irala*.[57] That court held, in 1980, that 'official torture is now prohibited by the law of nations'. To reach its decision, the court noted that the Charter of the United Nations obliges all member states to take action to promote 'respect for the observance of human rights and fundamental freedoms for all', and that subsequent United Nations declarations, which 'specify with great precision the obligations of member states under the Charter', expressly prohibit any state from 'permitting the dastardly and totally inhuman act of torture'. The court further noted that the prohibition of torture is incorporated in human rights treaties and prohibited by the constitutions of over fifty-five states,

[54] *Application for Review of Judgment No.333 of the United Nations Administrative Tribunal*, ICJ Reports 1987, dissenting opinion of Judge Evensen, at 173.

[55] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports 1989, separate opinion of Judge Evensen, at 210.

[56] See United Nations, *United Nations Action in the Field of Human Rights* (New York: United Nations, 1974), 18–19.

[57] 630 F. 2nd 876 (2nd Cir. 1980), noted in (1980) *International Commission of Jurists: the Review* 62. See also 'United States: Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga* v. *Pena Irala*' (1980) *International Legal Materials* 592.

and that diplomatic sources report that no government, even those reported to use torture, asserts a *right* to torture. A few months later, in *Rodriguez-Fernandez* v. *Wilkinson,*[58] the United States District Court for the District of Kansas held that the indeterminate detention of an alien by immigration authorities pending deportation was contrary to international law. 'Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law.'[59]

It would appear, therefore, that the international community now accepts the observance of fundamental human rights and freedoms as obligatory. The document most widely cited, in political and judicial fora alike, is the UDHR. As early as 1965, Sir Humphrey Waldock expressed his opinion that 'the constant and widespread recognition of the principles of the Universal Declaration clothes it in the character of customary law'.[60] More recently, John P. Humphrey has asserted that the UDHR is 'part of the customary law of nations, and therefore is binding on all states'.[61] Alexandre Kiss now argues that the principles proclaimed in the UDHR may be considered to have become not only customary rules of international law, but also a kind of 'higher rules' which no state can ignore in any circumstances.[62] These expressions of opinion by recognized jurists are supported by resolutions of international organizations, state practice, and judicial decisions, at least to the extent

[58] 505 F. Supp.787 (D. Kan.1910).

[59] The United States Court of Appeals for the Tenth Circuit upheld the District Court's decision by construing the relevant statutes to require the alien's release. The court, however, observed that 'No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment': 654 F 2nd 1382 (19th Cir. 1981). For a discussion of this case, see Farooq Hassan, 'The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?' (1983) 5 *Human Rights Quarterly* 48.

[60] H. Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention' (1965) *International and Comparative Law Quarterly*, Supp. No. 11, 15.

[61] John P. Humphrey, 'The International Bill of Rights: Scope and Implementation' (1976) 17 *William and Mary Law Review* 529. See also Humphrey, *Human Rights & the United Nations*, 65.

[62] Alexandre Kiss, 'The Role of the Universal Declaration of Human Rights in the Development of International Law', in Centre for Human Rights, *Bulletin of Human Rights*, Special Issue (New York: United Nations, 1988), 47.

that a consensus now exists that some of its provisions have crystallized into rules of customary international law. Five that immediately spring to mind are the right to life,[63] right to liberty, freedom from slavery, freedom from torture, and the right to equality before the law. Perhaps there are more.

It does not, of course, follow that, in fact, human life is universally respected, or that torture, discrimination, and practices similar to slavery are no longer resorted to, whether furtively or more conspicuously, in many parts of the civilized world. If that were indeed so, there would be little need for the international law of human rights. But what is comfortingly new, as a new millennium begins, is a growing consensus among states on obligatory standards of conduct. Even a government accused of 'extremely serious violations of human rights' will now insist that it is complying with the provisions of the UDHR. For instance, in 1978, the President of Nicaragua, General Somoza, faced with a denunciation by neighbouring Colombia and Venezuela, wrote to the President of the United Nations General Assembly asserting that his government 'had made it a rule at all times to observe and promote human rights, which the Constitution of Nicaragua guarantees in full accord with the Universal Declaration of Human Rights adopted by the 1949 (sic) United Nations General Assembly, in which I had the honour to take part as a delegate'.

## The International Covenant on Civil and Political Rights (ICCPR)

Parallel to the drafting of the UDHR, the United Nations engaged itself in the preparation of a human rights treaty, and measures for its implementation. But the euphoria of the immediate post-war years was giving way to the chill and frigidity of the advancing cold war. The task took eighteen years. Louis Henkin attributes the tardiness to the necessity 'to accommodate, bridge, submerge, and conceal deep divisions and differences, especially between democratic-libertarian and socialist-revolutionary states – differences in fundamental conceptions about the

[63] See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 23, where the court observed that 'the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligations'.

relation of society to the individual, about his rights and duties, about priorities and preferences among them'.[64]

In 1952, the General Assembly decided that instead of a single treaty, two covenants be drafted, one to contain civil and political rights and the other economic, social and cultural rights. Two factors made it necessary to divide the human rights covenant into two separate instruments.[65] The first was the belief that it was impossible to develop a single system of implementation for both the civil and political rights and the economic, social and cultural rights. Appropriate national responses would vary with the 'nature' of the right. It was thought that protecting civil and political rights meant passing laws and revising constitutions, while guaranteeing economic, social and cultural rights meant the establishment of programmes as well. Moreover, while it seemed that an international tribunal could and should be created to deal with alleged violations of the former category of rights, it was believed that no such structure could be created at the international level to supervise such rights as the right to work or the right to health. The second was the surfacing of substantial disagreement over the desirability of a covenant which dealt with economic, social and cultural rights. Some states which were prepared to support a covenant guaranteeing civil and political rights were not willing to agree to a document that would commit them to social welfare rights and thus to specific social welfare programmes.

The Commission on Human Rights completed its preparation of the two draft covenants in 1954, but their article-by-article review by the Third Committee was to take another twelve years. Finally, on 16 December 1966, the General Assembly adopted three instruments: the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the latter.[66] The first of these came into force on 3 January 1976, while the other two became operative on 23 March of the same

[64] Louis Henkin, 'Introduction', in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 9.

[65] David M. Trubeck, 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs' in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), 205–23.

[66] UNGA resolution 2200 (XXI) of 16 December 1966. The ICCPR and ICESCR were adopted unanimously. The voting on the Optional Protocol was sixty-eight in favour, two against, and thirty-eight abstentions.

year. In December 1989, the General Assembly adopted the Second Optional Protocol to the ICCPR, and that instrument entered into force on 11 July 1991.[67]

In its substantive parts, the ICCPR defines the following rights in greater detail than the UDHR:

Article 1: The right to self-determination.
Article 2: The right to freedom from discrimination in the enjoyment of rights.
Article 6: The right to life.
Article 7: The right to freedom from torture, cruel, inhuman, or degrading treatment or punishment.
Article 8: The right to freedom from slavery, servitude, and forced or compulsory labour.
Article 9: The right to freedom from arbitrary arrest or detention.
Article 10: The right to a penitentiary system aimed at reformation and social rehabilitation.
Article 11: The right not to be imprisoned for inability to fulfil a contractual obligation.
Article 12: The right to liberty of movement and freedom to choose a residence.
Article 13: The right of aliens to freedom from arbitrary expulsion.
Article 14: The right to a fair trial.
Article 15: The right to protection against retroactive criminal legislation.
Article 16: The right to recognition as a person.
Article 17: The right to privacy.
Article 18: The right to freedom of thought, conscience, and religion.
Article 19: The right to freedom of expression.
Article 20: The right to protection against propaganda for war and incitement to discrimination.
Article 21: The right of peaceful assembly.
Article 22: The right to freedom of association.

[67] UNGA resolution 44/128 of 15 December 1989. The Second Optional Protocol was adopted with fifty-nine in favour, twenty-six against, forty-nine abstentions, twenty-five absent. As at 1 June 2001, the ICCPR had been ratified, acceded to, or succeeded to, by 148 states; the ICESCR by 145 states; the Optional Protocol by 98 states; and the Second Optional Protocol by 45 states. Forty-four states had made the declaration under Article 47 of the ICCPR.

Article 23: The right to the protection of the family unit.
Article 24: The rights of children.
Article 25: The right to take part in the conduct of public affairs.
Article 26: The right to equality before the law and equal protection of the law.
Article 27: The right of ethnic, religious or linguistic minorities to enjoy their own cultures, practise their own religions, and to use their own languages.

When a state ratifies or accedes to the ICCPR, it undertakes three domestic obligations and at least one international obligation.

### *To respect and to ensure the recognized rights*

The first obligation (which is the same as that of states parties to the ACHR) is 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights recognized in the ICCPR, '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'.[68] This provision was intended to make it obligatory for states to promote the *implementation* of the recognized rights, and to take the necessary steps, including legislation, to guarantee to everyone a real opportunity of enjoying them.[69]

A state complies with the obligation 'to respect' the recognized rights by not violating them.[70] Whenever a state organ, official or public entity violates a right, there is a failure of the duty to respect that right. An act which violates a right but which is initially not directly imputable to the state (e.g. because it is the act of a private person or because the person responsible has not been identified) may constitute a failure by the state 'to respect' the right, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to

[68] Article 2(1). At the drafting stage, it was expressly emphasized that special measures for the advancement of any socially or educationally backward sections of society should not be construed as 'distinction' within the meaning of this article. See UN document A/5655, s. 20.

[69] UN document A/2929, chapter V, s. 2. See also UNGA resolution 421(V).

[70] Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia Press, 1981), 72.

it as required by the ICCPR.[71] Therefore, the state has an obligation to ensure that violations do not result from private acts.[72]

The duty to 'ensure' imposes an affirmative duty on the state, and calls for specific activities by the state to enable individuals to enjoy the recognized rights.[73] Interpreting the corresponding provision in ACHR 1, the Inter-American Court has observed that the duty to 'ensure' requires the state to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the recognized rights.[74] The obligation to ensure also implies a duty to organize the governmental apparatus and, generally, all the structures through which state power is exercised so that they are capable of ensuring the free and full enjoyment of these rights. Consequently, there must be mechanisms through which the state is able to prevent, investigate and punish any violation of a right and, if possible, restore the violated right and provide such compensation as may be warranted for any damage resulting from the violation. The state also has a legal duty to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation.[75]

The phrase 'within its territory and subject to its jurisdiction' should be read as a disjunctive conjunction, indicating that a state party must be deemed to have assumed the obligation to respect and to ensure the rights recognized in the ICCPR 'to all individuals within its territory' *and* 'to all individuals subject to its jurisdiction'.[76] If it is not so read, a person who, for example, exercises his right to freedom of movement and travels out of his country will not enjoy 'the right to enter his own

[71] See *Velasquez Rodriguez* v. *Honduras*, Inter-American Court, 29 July 1988.

[72] *Compulsory Membership of Journalists Association*, Inter-American Court, Advisory Opinion OC-5/85, 13 November 1985. See also *Svenska Lokmannaforbundet* v. *Sweden*, European Commission, (1974) 1 EHRR 617; *National Union of Belgian Police* v. *Belgium*, European Commission, (1975) 1 EHRR 578 ; *Young, James and Webster* v. *United Kingdom*, European Commission, (1979) 3 EHRR 20; *Marckx* v. *Belgium*, European Court, (1979) 2 EHRR 330; *Costello-Roberts* v. *United Kingdom*, European Court, (1993) 19 EHRR 12; *Gunaratne* v. *People's Bank*, Supreme Court of Sri Lanka, [1987] LRC (Const) 383.

[73] Human Rights Committee, General Comment 3 (1981).

[74] *Exceptions to the Exhaustion of Domestic Remedies*, Inter-American Court, Advisory Opinion OC-11/90, 10 August 1990.

[75] *Velasquez Rodriguez* v. *Honduras*, Inter-American Court, 29 July 1988.

[76] Buergenthal, 'To Respect and to Ensure', 72.

country', since he will no longer be within the territory of his own state. Similarly, this obligation is not limited to the national territory of the state, but extends to all persons under its actual authority and responsibility, whether such authority is exercised on its own territory or abroad. Nationals of a state are partly within its jurisdiction wherever they may be, and authorized agents of a state not only remain subject to its jurisdiction when abroad, but bring any other person within the jurisdiction of that state to the extent that they exercise authority over such person.[77] In conformity with the relevant principles of international law governing state responsibility, the responsibility of a state can also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.[78] A state will, therefore, be accountable for the violation of a right committed by one of its agents upon the territory of another state, whether with the acquiescence of the government of that state or in opposition to it.[79]

### *To give effect to the recognized rights*

The second obligation is for the state to take the necessary steps, in accordance with its constitutional processes and with the provisions of the ICCPR, to adopt such legislative or other measures as may be necessary to give effect to these rights and freedoms.[80] What is contemplated is a diversity of constitutional arrangements by which effect may be given to the recognized rights.[81] It has been suggested that measures such as educational and information activities, administrative controls of official conduct, opening opportunities to disadvantaged groups (for example, affirmative action), and removing any impediments that exist to the realization of the rights, may also help to fulfil this obligation.[82]

[77] *Stocke* v. *Germany,* European Commission, (1991) 13 EHRR 839. In this case there was collusion between French and German authorities to abduct a German from France to German territory in order to effect his arrest. See also *Cyprus* v. *Turkey*, European Commission, (1975) 2 *Decisions & Reports* 125, (1975) 18 *Yearbook* 82.

[78] *Loizidou* v. *Turkey*, European Court, (1996) 23 EHRR 513.

[79] *Lopez* v. *Uruguay*, Human Rights Committee, Communication No.52/1979, HRC 1981 Report, Annex XIX.

[80] Article 2(2).

[81] *Matadeen* v. *Pointu*, Privy Council on appeal from the Supreme Court of Mauritius, [1998] 3 LRC 542.

[82] Oscar Schachter, 'The Obligation to Implement the Covenant in Domestic Law', in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 317–18.

The establishment of a national commission on human rights and the appointment of an ombudsman are two ways in which the violation of rights may be avoided or at least rectified speedily and inexpensively. The obligation to adopt legislative or other measures to give effect to the recognized rights implies the commitment not to adopt measures that conflict with the rights or which will result in their violation.[83]

### *To provide an effective remedy*

The third obligation is to ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by the legal system, and to develop the possibilities of judicial review; and to ensure that the competent authorities shall enforce such remedies when granted.[84] Similar obligations are undertaken by the states parties to the ECHR (Article 2) and ACHR (Article 25).

When the ICCPR was being drafted, it was accepted that 'the proper enforcement of the provisions of the covenant depended on guarantees of the individual's rights against abuse, which comprised the following elements: the possession of a legal remedy, the granting of this remedy by national authorities, and the enforcement of the remedy by competent authorities'.[85] While a judicial remedy was considered to be preferable, it was thought unreasonable to impose upon all states an immediate obligation to provide such a remedy. It was, therefore, provided that each state should undertake 'to develop the possibilities of a judicial remedy', while not excluding the possibility of a remedy being granted by the executive, or by parliamentary commissions, or, indeed, through ad hoc legislation designed to remedy a specific wrong.[86] Interpreting ECHR 13, which requires that everyone whose rights are violated 'shall have an effective remedy before a national authority', the European Court has observed that the authority referred to may not necessarily be a judicial

[83] *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights),* Inter-American Court, Advisory Opinion OC-14/94, 9 December 1994.

[84] Article 2(3).

[85] UN document A/2929, chap.V, s. 14.

[86] UN document A/2929, chap.V, s. 16; A/5655, s. 27.

authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.[87] Since rights may be violated not only by executive or administrative action, the remedy ought to encompass offending legislative acts. It is interesting to note that, according to ICCPR 2(3)(a), the beneficiary is a person whose rights 'as herein recognized' are violated. If the yardstick to be used by the competent authority are the rights 'as herein recognized', the rights recognized in the ICCPR may need to form, and continue to be, part of the domestic law that regulates the activities of all branches of the state machinery: an argument in favour of the constitutional entrenchment of the substantive provisions of the ICCPR as a whole.[88]

For a remedy to be 'effective', it is not sufficient that it be provided for by the constitution or by law or that it be formally recognized; it must be truly effective in establishing whether there has been a violation of a right and in providing redress. For example, where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by agents of the state, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.[89] A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the judiciary lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.[90]

[87] *Silver* v. *United Kingdom*, European Court, (1983) 5 EHRR 347.

[88] See Inter-American Commission on Human Rights, Report No.1/95, Case 11.006, Peru, 7 February 1995, where it was held that to protect the rights of individuals against possible arbitrary actions of the state, it is essential that one of the branches of government have the independence that permits it to judge both the actions of the executive branch and the constitutionality of the laws enacted and even the judgments handed down by its own members. The independence of the judiciary is, therefore, an essential requisite for the practical observance of human rights.

[89] *Tekin* v. *Turkey*, European Court, (1998) 31 EHRR 95.

[90] *Judicial Guarantees in States of Emergency*, Inter-American Court, Advisory Opinion OC-9/87, 6 October 1987. See J. Raymond, 'A Contribution to the Interpretation of Article 13

The practice of some states of granting amnesty in respect of unlawful acts such as torture is incompatible with the duty of states to investigate such acts, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future. A state may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[91] Indeed, a state is obliged to investigate violations of rights committed by a prior regime, especially when these include crimes as serious as torture.[92]

### *To report periodically to the Human Rights Committee*

While the promotion and protection of human rights is essentially within the province of a national government, an international supervisory mechanism to which the government is regularly accountable has also been established in accord with the principle that a government's treatment of its own nationals is the legitimate concern of the international community. In addition to its domestic obligations, a state party to the ICCPR is required to submit to the Secretary-General of the United Nations periodic reports on the measures it has adopted to give effect to the recognized rights and on the progress made in the

of the European Convention on Human Rights' (1980) *5 Human Rights Review* 161, where it has been suggested that, as a rule, a remedy will be 'effective' if: (a) it is *accessible*, i.e. the individual is in a position to start a procedure which will result in a decision from the relevant authority; (b) it is *sufficient*, i.e. the relevant authority has the power to redress the alleged violation if it is in fact established; (c) it has some *likelihood of being accepted*, i.e. there are no established precedents against its availability; and (d) it is not the mere *repetition* of a remedy which has already been used. See also Draft Basic Principles and Guidelines on Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, prepared by Theo van Boven, special rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN document E/CN.4/Sub.2/1993/8: An 'effective' remedy is one that is capable of producing the result for which it was designed. It suggests both injunctive and compensatory relief. Compensation must, therefore, be provided for any economically assessable damage resulting from a human rights violation. This would include physical or mental harm; pain, suffering and emotional distress; lost opportunities, including education; loss of earnings and earning capacity; reasonable medical and other expenses of rehabilitation; harm to property or business, including lost profits; harm to reputation or dignity; and reasonable costs and fees of legal or expert assistance to obtain a remedy.

[91] General Comment 20 (1992).

[92] *Rodriguez* v. *Uruguay*, Human Rights Committee, Communication No.322/1988, HRC 1994 Report, Annex IX.B

enjoyment of those rights. These reports are examined by the Human Rights Committee (HRC), an eighteen-member expert body established under the ICCPR[93] with dual functions: to consider and comment on reports submitted by states parties on the measures adopted by them to comply with their obligations,[94] and to deal with 'communications' from states parties alleging failure by other states parties to fulfil their obligations.[95]

The HRC requires the first report to be submitted within one year of the entry into force of the ICCPR for the state concerned, and thereafter every five years unless it requires an earlier report.[96] If the human rights situation in a particular state deteriorates rapidly, the HRC has adopted the practice of requiring that state to submit an urgent report on the situation, usually within three months.[97] The consideration of a report takes place in public meetings and in the presence of representatives of the state concerned. A working group meets ahead of the session and prepares and transmits to the state concerned a list of issues arising from its report. The members of the HRC have the opportunity to seek additional clarification under each issue and to ask supplementary questions. At the end of the session, the HRC adopts comments reflecting its views as a whole on the state party's report. The comments are sent to the state concerned, published in a separate document, and included in the annual report submitted by the HRC to the General Assembly. These comments provide a general evaluation of a state's report and of the dialogue with its representatives, and take note of factors and difficulties that affect the implementation of the ICCPR, of positive developments that may have occurred during the period under review and of specific issues of concern relating to the application of the provisions of the ICCPR. They include suggestions and recommendations to the state. In the following periodic report, the state is requested, on a systematic basis,

[93] Article 40. The measures adopted to give effect to the Second Optional Protocol must also be included in such a report if the state party has ratified or acceded to that instrument.

[94] Article 40. [95] Article 41.

[96] For guidelines on the form and content of reports to be submitted by states parties, see UN document HRI/GEN/2/Rev.1 of 9 May 2001.

[97] For example, the HRC has required urgent reports from Iraq (11 April 1991), the Federal Republic of Yugoslavia (4 November 1991), Peru (10 April 1992), Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (6 October 1992), Angola and Burundi (29 October 1993).

to inform the HRC of the measures it has adopted to follow up on the comments.[98]

## The Optional Protocol

The Optional Protocol to the ICCPR enables a state to recognize the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that state of any of the rights set forth in the ICCPR or in the Second Optional Protocol. A communication may be submitted only after all available domestic remedies have been exhausted. Under the committee's rules, an application from an individual is accepted if it is submitted by him or through a duly appointed representative. Such representative could be a lawyer, or a close relative, particularly if the individual concerned is not in a position to submit the application himself.[99] But a member of a non-governmental organization who had taken an interest in the alleged victim's situation, and claimed the authority to submit a communication because he believed that 'every prisoner treated unjustly would appreciate further investigation of his case by the Human Rights Committee' was held to lack standing.[100] Nor has the HRC been willing to consider a communication submitted by an organization.[101]

[98] For an analysis of the impact of the reporting system on the policies of a government, see Nihal Jayawickrama, 'Hong Kong and the International Protection of Human Rights' in R. Wacks (ed.), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), 120 at 134–9.

[99] The Committee has insisted on proof of authorization such as a power of attorney, and has declined to proceed where such documentation was not tendered. See *Dr A.B.* v. *Italy*, Human Rights Committee, Communication No.565/1993, 8 April 1994, HRC 1994 Report, Annex X.AA. (a friend, on behalf of a family said to have fled the country to avoid sanctions following refusal to submit to mandatory vaccination); *Pereira* v. *Panama*, Human Rights Committee, Communication No.436/1990, HRC 1994 Report, Annex X.E (a lawyer and personal friend on behalf of a former President of the Republic of Panama who had fled the country and obtained political asylum elsewhere).

[100] *L.A.* v. *Uruguay*, Human Rights Committee, Communication No.128/1982, HRC 1983 Report, Annex XXVI. The author was a member of the Swedish branch of Amnesty International.

[101] *A Group of Associations for the Defence of the Rights of Disabled and Handicapped Persons in Italy* v. *Italy*, Human Rights Committee, Communication No.163/1984, HRC 1984 Report, Annex XV; J.R.T. and the W.G. Party v. Canada, Communication No.104/1981, HRC 1983 Report, Annex XXIV. Cf. observations of the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney General* [1993] 2 LRC 279 at 288

All communications are upon receipt initially processed by a member of the HRC who is periodically designated as the 'special rapporteur'. A five-member working group will, if it can reach unanimity, declare communications admissible. The admissibility or otherwise of all other communications is determined by the HRC. Upon being declared admissible, the communication is sent to the government concerned, which is required to submit in writing, within six months, 'explanations or statements clarifying the matter and the remedy, if any, which may have been taken by it'.[102] There is no provision for any further exchange, but the HRC has developed a practice of giving the author an opportunity to comment on the government's response. The working group then proceeds to consider the merits of the communication, and prepares draft 'views' for consideration in plenary. Before the adoption of final views, further information may be sought from the government or the author by means of an interim decision. Final 'views' are then adopted by the HRC as a whole, stating whether the acts or omissions complained of reveal a breach of the ICCPR or not. Any member is free to append an individual opinion if he or she so desires. The HRC forwards its 'views' to the government concerned and to the individual. They are then published by the HRC and reproduced in its annual report to the General Assembly.

Contrary to the principles enunciated in the ICCPR itself, all proceedings before the HRC are closed to the public, and there is no provision for the complainant or his representative to be present or to be heard, or to lead evidence.[103] However, with respect to the burden of proof,

per Gubbay CJ: 'The applicant is a human rights organization whose avowed objects are to uphold basic human rights, including the most fundamental right of all, the right to life. It is intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution . . . It would be wrong, therefore, for this court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this court.' (The relief sought in this case was a declaration that the delay in carrying out sentences of death on four prisoners constituted inhuman or degrading treatment, in contravention of the constitution, and for an order that such sentences be permanently stayed.)

[102] Under the committee's rules of procedure, it may inform the government whether interim measures of protection are desirable to avoid irreparable damage to the victims of the alleged violation. Such measures may include a medical examination, the non-expulsion of an alien, or the not carrying out of a death sentence.

[103] The communication procedure was accepted by states with considerable reluctance. When the ICCPR was being drafted, there was very strong opposition to the inclusion of any such

particularly in respect of alleged violations of ICCPR 6 (right to life), 7 (prohibition of torture), and 9 (freedom from arbitrary arrest), the HRC's view is that it does not rest solely on the author of the communication, particularly since the author and the state party do not always have equal access to the evidence. 'It is implicit in article 4(2) of the Optional Protocol that the state party has the duty to investigate in good faith all allegations of violation of the covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the committee the information available to it'. Where further clarification of the case depends upon information exclusively in the hands of the state party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary from the state party.[104]

Between the commencement of its work under the Optional Protocol in 1977 and the conclusion of its 72nd session on 27 July 2001, 1,004 communications concerning alleged violations in 69 states had been registered for consideration by the HRC. Of that number, 368 had been concluded by the expression of views; 300 had been declared inadmissible; 142 had been discontinued or withdrawn; and 194 were pending. In the 368 views on communications received and considered, the HRC found violations in 282 of them. In July 1990, the HRC devised a mechanism to enable it to evaluate state compliance with its views. A special rapporteur is periodically designated for the purpose of ascertaining the measures taken by states to give effect to the committee's views. A state is usually required to inform the committee within ninety days what measures have in fact been taken. This requirement has been justified on the basis that by becoming a party to the Optional Protocol a state

provision. It was argued that international law governed relations between states, and that an individual's interests were protected by the state of which he was a national. The response to that argument was that the classic doctrine of international law did not work in the context of the protection of human rights. An individual's rights would, in the majority of cases, be violated by organs or agencies of the state of which he was a national. It was eventually agreed that provision would be made for individual complaints in a separate treaty, thereby enabling those states opposed to the concept to nevertheless become parties to the ICCPR.

[104] *Bleier* v. *Uruguay*, Human Rights Committee, Communication No.30/1978, HRC 1982 Report, Annex X. See also *Motta* v. *Uruguay*, Human Rights Committee, Communication No.11/1977, HRC 1980 Report, Annex X (a refutation of the allegation in general terms is not sufficient).

has recognized the competence of the HRC to determine whether there has been a violation of the ICCPR or not; and that pursuant to ICCPR 2 the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in it and to provide an effective and enforceable remedy in case a violation has been established.[105]

## The Second Optional Protocol

The Second Optional Protocol prohibits the execution of any person and requires states to take all necessary measures to abolish the death penalty. No reservations are permitted to this instrument, except a reservation entered at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for 'a most serious crime of a military nature' committed during wartime.

## The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The following rights are recognized in the ICESCR:

Article 1: The right of self-determination.

Article 6: The right to work, including the right to the opportunity to gain one's living by work freely chosen or accepted.

Article 7: The right to the enjoyment of just and favourable conditions of work; particularly, fair wages and equal remuneration for work of equal value; safe and healthy working conditions; equal opportunity for promotion, subject to no considerations other than those of seniority and competence; rest, leisure, and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8: The right to form trade unions and to join the trade union of one's choice, for the promotion and protection of one's economic and social interests, including the right to strike.

Article 9: The right to social security, including social insurance.

[105] *Wright and Harvey* v. *Jamaica*, Human Rights Committee, Communication No.459/1991, HRC 1996 Report, Annex VIII.F.

Article 10: The right of the family to protection and assistance, including the right of mothers to special protection before and after childbirth, and the right of children and young persons to protection from economic and social exploitation.

Article 11: The right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Article 12: The right to the enjoyment of the highest attainable standard of physical and mental health.

Article 13: The right to education, including the right of parents to choose for their children schools other than those established by public authorities, and to ensure the religious and moral education of their children in conformity with their own convictions.

Article 14: The right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author, including the right to respect for the freedom indispensable for scientific research and creative activity.

ICESCR 2, which describes the nature of the general legal obligations undertaken by a state when it ratifies or accedes to that covenant, contains both 'obligations of conduct' and 'obligations of result'.[106]

### *Obligations of conduct*

Of the obligations of conduct, two are of immediate effect:

(a) The state undertakes to guarantee that the rights recognized in the ICESCR 'will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[107]

[106] Committee on Economic, Social and Cultural Rights, General Comment 3 (1990). See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (1986) 37 *International Commission of Jurists: the Review* 43.

[107] Article 2(2).

(b) The state undertakes 'to take steps . . . by all appropriate means, including particularly the adoption of legislative measures'.[108] While the full realization of the rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the ICESCR's entry into force for the state concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the ICESCR. The means which should be used in order to satisfy the obligation 'to take steps' are stated to be 'all appropriate means' including the adoption of legislative measures. In many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the right to work and to the enjoyment of just and favourable conditions of work, the right to form and join trade unions, and the right to social security, legislation may also be an indispensable element for many purposes.[109]

However, the adoption of legislative measures is not exhaustive of this obligation. The term 'by all appropriate means' must be given its full and natural meaning. Each state must decide for itself which means are the most appropriate under the circumstances with respect to each right. Among the additional measures which may be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to those rights which may, in accordance with the national legal system, be considered justiciable. For example, the enjoyment of the recognized rights without discrimination will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. In addition, the equal right of men and women to the enjoyment of these rights, the right to fair wages and equal remuneration for work of equal value, the rights in respect of trade union activity, the right of children to protection from economic and social exploitation, the right to free primary education, the rights of parents in respect of the education of their children, the right of individuals and bodies to establish and direct educational institutions, and the right to academic freedom, seem to be

[108] Article 2(2).
[109] Committee on Economic, Social and Cultural Rights, General Comment 3 (1990).

capable of immediate application by judicial and other organs in many national legal systems.[110] Other measures which may also be considered 'appropriate' include, but are not limited to, administrative, financial, educational and social measures.[111]

### *Obligations of result*

The principal obligation of result is to take steps 'with a view to achieving progressively the full realization of the rights recognized' in the ICESCR. The term 'progressive realization' is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense, the obligation differs significantly from that contained in ICESCR 2 which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the ICESCR should not be misinterpreted as depriving the obligation of all meaningful content. It is, on the one hand, a necessary flexibility device reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the ICESCR which is to establish clear obligations for the state in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards

[110] See also Michael K Addo, 'The Justiciability of Economic, Social and Cultural Rights' (1988) *Commonwealth Law Bulletin* 1425–32.

[111] Committee on Economic, Social and Cultural Rights, General Comment 3 (1990). The committee stressed that the 'appropriate means' referred to above neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. In terms of political and economic systems the ICESCR is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of, a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. The rights recognized in the ICESCR are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed, *inter alia*, in the preamble to the ICESCR, are recognized and reflected in the system in question.

that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.[112]

A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon the state. Thus, for example, a state in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the ICESCR. If the ICESCR were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, any assessment as to whether a state had discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. ICESCR 2(1) obliges a state to take the necessary steps 'to the maximum of its available resources'. In order for a state to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all the resources at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. Even where the available resources are demonstrably inadequate, the obligation remains for the state to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.[113]

The undertaking given by the state is 'to take steps, individually and through international assistance and co-operation, especially economic and technical'. The phrase 'to the maximum of its available resources' was intended by the drafters of the ICESCR to refer both to the resources existing within a state and those available from the international

[112] Committee on Economic, Social and Cultural Rights, General Comment 3 (1990).
[113] Committee on Economic, Social and Cultural Rights, General Comment 3 (1990).

community through international co-operation and assistance.[114] Moreover, the essential role of such co-operation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in ICESCR 11, 15, 22 and 23. In accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the ICESCR itself, international co-operation for development and thus for the realization of economic, social and cultural rights is an obligation on all states. It is particularly incumbent upon those states which are in a position to assist others in this regard. The Committee on Economic, Social and Cultural Rights has noted in particular the importance of the Declaration on the Right to Development,[115] and the need for states to take full account of all of the principles recognized therein. In the absence of an active programme of international assistance and co-operation on the part of all those states that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.[116]

### *The reporting obligation*

Progress in the implementation of domestic obligations is monitored by ECOSOC through a reporting procedure[117]. A state party to the ICESCR undertakes to submit reports on the measures it has adopted and the progress made in achieving the observance of the rights recognized in that covenant. At first ECOSOC sought to perform this task through a working group of governmental experts. The ineffectiveness of that mechanism led ECOSOC to establish, in 1985, a Committee on Economic, Social, and Cultural Rights. Composed of eighteen experts, this body, which is now charged with the implementation of this covenant, adopts a procedure similar to that of the HRC.

[114] For a discussion of this concept, see Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 693.

[115] UNGA resolution 41/128 of 4 December 1986. The Declaration states, *inter alia*, that 'All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.'

[116] Committee on Economic, Social and Cultural Rights, General Comment 3 (1990).

[117] Article 16.

## Other international instruments

Both before and after the adoption of the ICCPR and ICESCR, the United Nations and its specialized agencies helped to formulate a number of other multilateral treaties which sought to implement specific rights or groups of related rights. These supplement the protection afforded by the covenants and several of them contain implementation procedures of their own.[118] Among the human rights treaties elaborated by, or under the auspices of, the United Nations are:

(a) The Convention on the Prevention and Punishment of the Crime of Genocide[119]
(b) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[120]
(c) Convention relating to the Status of Refugees,[121] as amended by the Protocol of 1966[122]
(d) Convention on the Political Rights of Women[123]

[118] For texts, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997).

[119] UNGA resolution 260 (III) of 9 December 1948 (12 January 1951). Genocide means 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group'. All persons, whether they be constitutionally responsible rulers, public officials or private individuals are required to be tried and punished for committing, or for conspiring, inciting or attempting to commit, or for complicity in, genocide.

[120] UNGA resolution 317 (IV) of 2 December 1949 (25 July 1951). Any person who, 'to gratify the passions of another: (a) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (b) exploits the prostitution of another person, even with the consent of that person; (c) keeps or manages, or knowingly finances or takes part in the financing of a brothel; or (d) knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others', is required to be punished.

[121] Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened by UNGA resolution 429 (V) of 14 December 1950 (22 April 1954).

[122] Protocol Relating to the Status of Refugees, UNGA resolution 2198 (XXI) of 16 December 1966. (4 October 1967).

[123] UNGA resolution 640 (VII) of 20 December 1952 (7 July 1954). Women are entitled, on equal terms with men, and without any discrimination, to vote in all elections, to be elected to all publicly elected bodies established by national law, to hold public office, and to exercise all public functions established by national law.

(e) Convention relating to the Status of Stateless Persons[124]
(f) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[125]
(g) Convention on the Nationality of Married Women[126]
(h) Convention on the Reduction of Statelessness[127]
(i) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[128]
(j) International Convention on the Elimination of All Forms of Racial Discrimination[129]

[124] Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by ECOSOC resolution 526A (XVII) of 26 April 1954 (6 June 1960). This convention which seeks to regulate and improve the status of stateless persons (other than 'refugees') defines such a person as 'a person who is not considered as a national by any state under the operation of its law'.

[125] Adopted in 1956 by a Conference of Plenipotentiaries convened by ECOSOC resolution 608 (XVII) of 30 April 1956 (30 April 1957). The Slavery Convention of 1926, required contracting parties to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms. The Supplementary Convention redefined the term 'slavery' and required the complete abolition or abandonment of certain other institutions and practices, including debt bondage and serfdom, and their designation as criminal offences, whether or not they were covered by the definition of slavery.

[126] UNGA resolution 1040 (XI) of 29 January 1957 (11 August 1958). It is provided that: (a) neither the celebration nor the dissolution of a marriage between a national and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife; (b) neither the voluntary acquisition of the nationality of another state nor the renunciation of nationality by the husband shall prevent the retention of her nationality by the wife; (c) the alien wife of a national may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures.

[127] Adopted on 30 August 1961 by a Conference of Plenipotentiaries which met in 1959 and in 1961 in pursuance of UNGA resolution 896 (IX) of 4 December 1954 (13 December 1975). A state is required to grant its nationality to a person born in its territory who would otherwise be stateless; and to a person born outside its territory who would otherwise be stateless, if the nationality of one of his parents at the time of such person's birth was that of that state. Every treaty providing for the transfer of territory is required to include provisions designed to secure that no person shall become stateless as a result of the transfer.

[128] UNGA resolution 1763A (XVII) of 7 November 1962 (9 December 1964). This convention provides that: (a) no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law; (b) legislative action shall be taken to specify a minimum age for marriage; and (c) all marriages shall be registered in an appropriate official register by the competent authority.

[129] UNGA resolution 2106A (XX) of 21 December 1965 (4 January 1969). States parties undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.

(k) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[130]
(l) International Convention on the Suppression and Punishment of the Crime of Apartheid[131]
(m) Convention on the Elimination of All Forms of Discrimination against Women[132]
(n) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[133]
(o) International Convention against Apartheid in Sports[134]
(p) Convention on the Rights of the Child[135]
(q) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[136]

[130] UNGA resolution 2391 (XXIII) of 26 November 1968 (11 November 1970). No statutory limitation shall apply to certain war crimes and crimes against humanity, including genocide, irrespective of the date of their commission, and whether or not they constitute a violation of the domestic law of the country in which they were committed.

[131] UNGA resolution 3068 (XXVIII) of 30 November 1973 (18 July 1976). The states parties declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination are crimes violating the principles of international law and constituting a serious threat to international peace and security.

[132] UNGA resolution 34/180 of 18 December 1979 (3 September 1981). States parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

[133] UNGA resolution 39/46 of 10 December 1984 (26 June 1987). Each state party agrees to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction; and, *inter alia*, to ensure that all acts of torture are offences under its criminal law, and to take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction.

[134] UNGA resolution 40/64 of 10 December 1985 (3 April 1988). It is agreed, *inter alia*, not to permit sports contact with a country practising apartheid and to take appropriate action to ensure that sports bodies, teams and individual persons do not have such contact.

[135] UNGA resolution 44/25 of 20 November 1989 (2 September 1990). States parties agree to respect and ensure the rights set forth in this convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. A child is defined as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

[136] UNGA resolution 45/158 of 18 December 1990 (not entered into force yet). This convention establishes, in certain areas, the principle of equality of treatment with nationals for all migrant workers and members of their families, irrespective of whether they are in regular or irregular situation or of the particular group they belong to. A migrant worker is 'a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a national'.

## *ILO*

Of the specialized agencies, the International Labour Organization (ILO) is concerned with economic and social rights, such as the right to work, the right to just and favourable conditions of work, the right to form and join trade unions, the right to social security, and the right to an adequate standard of living. It is also concerned with civil and political rights such as the freedom of expression, the freedom of association, and the freedom of peaceful assembly. The ILO seeks to lay down standards in respect of these rights. Among the human rights conventions adopted by the General Conference of the ILO are the following:

(a) Convention Concerning Freedom of Association and Protection of the Right to Organize[137]
(b) Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively[138]
(c) Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value[139]
(d) Convention on the Abolition of Forced Labour[140]
(e) Convention Concerning Discrimination in Respect of Employment and Occupation[141]

[137] ILO Convention No.87, adopted on 9 July 1948 (4 July 1950). The right of workers and employers to establish and to join organizations of their own choosing without previous authorization is recognized, and states are required to take all appropriate measures to ensure that workers and employers freely exercise this right.

[138] ILO Convention No.98, adopted on 1 July 1949 (18 July 1951). States are required to provide protection for workers against acts of anti-union discrimination, and for workers' and employers' organizations against mutual acts of interference in their establishment, functioning, and administration. Appropriate machinery must be established to ensure respect for the right to organize, and measures must be taken to encourage and promote voluntary collective negotiation between employers or employers' organizations and workers' organizations.

[139] ILO Convention No.100, adopted on 29 June 1951 (23 May 1953). States undertake to ensure the application of the principle of equal remuneration for men and women for work of equal value.

[140] ILO Convention No.105, adopted on 25 June 1957 (17 January 1959). This convention outlaws the use of any form of forced or compulsory labour for the following purposes: (a) as a measure of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilizing and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.

[141] ILO Convention No.111, adopted on 25 June 1958 (15 June 1960). States undertake to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation.

(f) Convention Concerning Employment Policy[142]
(g) Convention Concerning Protection and Facilities to Be Afforded to Workers' Representatives in the Undertaking[143]
(h) Convention Concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service[144]
(i) Convention Concerning the Promotion of Collective Bargaining[145]
(j) Convention Concerning Employment Promotion and Protection against Unemployment[146]
(k) Convention Concerning Indigenous and Tribal Peoples in Independent Countries[147]

The ILO supervises the application of the standards it has laid down through tripartite – composed of representatives of governments, workers and employers – bodies. Among them is the twenty-member

[142] ILO Convention No.122, adopted on 9 July 1964 (15 July 1966). States undertake to declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.

[143] ILO Convention No.135, adopted on 23 June 1971 (30 June 1973). Workers' representatives in the undertaking will enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

[144] ILO Convention No.151, adopted on 27 June 1978 (25 February 1981). Public employees are guaranteed adequate protection against acts of anti-union discrimination in respect of their employment.

[145] ILO Convention No.154, adopted on 19 June 1981 (11 August 1983). States are required to make collective bargaining possible for all employers and all groups of workers in all branches of economic activity. The term 'collective bargaining' extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for (a) determining working conditions and terms of employment, and/or (b) regulating relations between employers and workers, and/or (c) regulating relations between employers or their organizations and a workers' organization or organizations.

[146] ILO Convention No.168, adopted on 21 June 1988 (17 October 1991). Each state is required to take appropriate steps to co-ordinate its system of protection against unemployment and its employment policy. In particular, it is required to ensure that its methods of providing unemployment benefits contribute to the promotion of full, productive and freely chosen employment, and are not such as to discourage employers from offering and workers from seeking productive employment.

[147] ILO Convention No.169, adopted on 27 June 1989 (5 September 1991). States are required to develop, with the participation of indigenous and tribal peoples, co-ordinated and systematic action to protect their rights and to guarantee respect for their integrity.

Committee of Experts on the Application of Conventions and Recommendations which meets annually in March to examine periodic reports submitted by each member state on measures it has taken to give effect to the conventions it has ratified. The nine-member Committee on Freedom of Association of the ILO Governing Board examines complaints against member states of infringement of the right to freedom of association.

## *UNESCO*

The United Nations Educational, Scientific and Cultural Organization (UNESCO) is required by its constitution to contribute to peace and security by promoting collaboration among nations through education, science and culture, with a view to furthering universal respect for justice, for the rule of law, and for human rights and fundamental freedoms, without distinction as to race, sex, language or religion. To achieve these aims, the General Conference of UNESCO has established standards through numerous recommendations, conventions and declarations in its areas of principal concern, namely, the right to education, freedom of opinion and expression, and the rights relating to culture, arts and science, as well as the teaching of human rights. Among them is the Convention against Discrimination in Education.[148]

In 1978, UNESCO established a procedure for considering individual communications from any source and directed against any state concerning 'violations of human rights falling within the competence of UNESCO in the fields of education, science, culture and information'. These communications are examined by UNESCO's Committee on Conventions and Recommendations which meets in private session once every six months. A confidential report containing appropriate information arising from this examination, together with recommendations which the Committee may wish to make is then transmitted to the Executive Board which considers, also in private session, what action ought to be taken.[149]

[148] Adopted on 14 December 1960 (22 May 1962).

[149] UNESCO 104 EX/decision 3.3. For the text, see UN document A/CONF.157/PC/61/Add.1 of 31 March 1993, pages 9–13. See also David Weissbrodt and Rose Farley, 'The UNESCO Human Rights Procedure: an Evaluation' (1994) 16 *Human Rights Quarterly* 391.

### *Geneva Conventions*

An important group of international human rights instruments concluded outside the United Nations system are the Geneva Conventions. Adopted by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, convened by the Swiss Federal Council in Geneva in 1949, they deal with the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war. At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened by the International Committee of the Red Cross and hosted by the Government of Switzerland in Geneva in 1977, two protocols were added. The first relates to the protection of victims of international armed conflicts, and the second relates to the protection of victims of non-international armed conflicts.

## Regional human rights instruments

Parallel to international developments, there also grew up a body of regional human rights law.

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

In May 1948, 800 prominent members of the various sectors of the European Community drawn from nineteen European states, including politicians, lawyers and those active in wartime resistance movements, met in The Hague, under the auspices of the International Committee of Movements for European Unity, to demonstrate their support for the cause of European unity.[150] The immediate consequence of the Hague Congress was the creation one year later of the Council of Europe comprising two principal organs: a Committee of Ministers (which meets

[150] See Christiane Duparc, *The European Community and Human Rights* (Brussels: Commission of the European Communities, 1993); A.H. Robertson, 'The Political Background and Historical Development of the European Convention on Human Rights' (1965) *International and Comparative Law Quarterly*, Supp. No.11, 24.

at least twice a year at ministerial level and throughout the year at the level of their deputies, and provides an opportunity for a continuing dialogue on the development of European co-operation) and a Parliamentary Assembly (which is a consultative body with no legislative powers elected by the parliaments of member states or according to a procedure determined by them). The objectives of the Council, and therefore the obligations incumbent on its members, were described as the consolidation of pluralist democracy, respect for human rights, and the assertion of the rule of law.[151] A common history and shared cultural traditions, coupled with what was perceived as a growing threat to their accustomed way of life from an alien transplanted ideology, enabled its member states, barely two years after the proclamation of the UDHR, to agree upon a European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[152]

The following rights are recognized in the ECHR:

Article 2: The right to life.
Article 3: The right not to be subjected to torture or inhuman or degrading treatment or punishment.
Article 4: The right to freedom from slavery, servitude, and forced or compulsory labour.
Article 5: The right to liberty and security of person.
Article 6: The right to a fair trial.
Article 7: The right to protection against retroactive criminal legislation.
Article 8: The right to privacy.
Article 9: The right to freedom of thought, conscience and religion.
Article 10: The right to freedom of expression.
Article 11: The right to freedom of assembly and association.

[151] The Statute creating the Council of Europe was signed in London on 5 May 1949. For the text of the Convention and the subsequent Protocols, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997).

[152] *European Treaty Series*, No.5; 213 *United Nations Treaty Series* 221. Twelve states signed the ECHR in Rome on 4 November 1950. It entered into force in September 1953, and has now been ratified by the following states members of the Council of Europe: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, TFYR Macedonia, Turkey, Ukraine and the United Kingdom.

Article 12: The right to marry and to found a family.
Article 13: The right to a remedy.

By subsequent protocols, the following additional rights and freedoms have also been secured:

*First Protocol*[153]

Article 1: The right to the peaceful enjoyment of one's possessions.
Article 2: The right to education.
Article 3: The right to free elections.

*Protocol No.4*[154]

Article 1: The right not to be deprived of liberty merely on the ground of inability to fulfil a contractual obligation.
Article 2: The right to liberty of movement and freedom to choose a residence.
Article 3: The right to freedom from expulsion.
Article 4: The right of aliens to protection against collective expulsion.

*Protocol No.6*[155]

Article 1: The right to protection against the imposition of the death penalty.

*Protocol No.7*[156]

Article 1: The right of aliens to freedom from arbitrary expulsion.
Article 2: The right to review of a criminal conviction or sentence.
Article 3: The right to compensation for a miscarriage of justice.
Article 4: The right to freedom from double jeopardy.
Article 5: The right of spouses to equality of rights and responsiblities.

[153] Paris, 20 March 1952, *European Treaty Series*, No.9.
[154] Strasbourg, 16 November 1963, *European Treaty Series*, No.46.
[155] Strasbourg, 28 April 1983, *European Treaty Series*, No.114.
[156] Strasbourg, 22 November 1984, *European Treaty Series*, No.117.

*Protocol No.12*[157]

Article 1: The right to freedom from discrimination.

Each state party to the ECHR undertakes to secure to everyone within its jurisdiction these rights and freedoms.[158] The ECHR originally established an enforcement machinery in the form of the European Commission of Human Rights, the European Court of Human Rights (each institution consisting of members or judges, as the case may be, equal to the number of member states of the Council of Europe), and the Council of Ministers.[159] Protocol No.11, which came into force on 1 November 1998, restructured the enforcement machinery by abolishing the two-tiered system of the European Commission and the European Court which had resulted in a wasteful duplication of procedures and given rise to substantial delays, and establishing a new permanent European Court of Human Rights. The new court, which consists of a number of judges equal to that of the states parties to the ECHR, sits in Committees of three, Chambers of seven, and in a Grand Chamber of seventeen judges. The Court has jurisdiction in respect of all matters concerning the interpretation and application of the ECHR and the Protocols thereto. The judgments are transmitted to the Committee of Ministers which supervises their execution.

[157] Rome, 4 November 2000. [158] Article 1.

[159] The commission was responsible for examining all alleged violations of the ECHR following complaints received from a state party, any person (whether natural or legal), a non-governmental organization, or a group of individuals claiming to be the victim of a violation. The first stage of the commission's procedure involved an examination of the admissibility of the application. If an application was declared admissible, the second stage of procedure required the commission to place itself at the disposal of the parties with a view to securing a friendly settlement on the basis of respect for human rights. If no settlement could be secured, the commission prepared a report in which it established the facts and stated its opinion as to whether those facts disclosed a violation of the ECHR. This report was transmitted to the committee of ministers. Within three months of the commission's report being sent to the committee of ministers, either the commission or any state concerned could refer the case to the court. The court examined the case in the light of the report of the commission, together with any further written evidence or legal argument. The judgment of the court was final, but in the absence of any enforcement powers of its own, the committee of ministers supervised the implementation of the judgment. In an appropriate case, the Court might afford the victim of a violation 'just satisfaction' if the consequences of the violation could not fully be repaired according to the domestic law of the state concerned. If a case was not referred to the court, the committee of ministers decided by a two-thirds majority, whether there had been a breach of the ECHR. If it found a violation, it might then decide that a state must afford the victim 'just satisfaction'.

Since its establishment in 1955, the European Commission registered and dealt with nearly 35,000 applications from aggrieved individuals and associations and occasionally from concerned states parties. Since its creation in 1959, the European Court has delivered more than 600 judgments. According to one commentator, the ECHR is 'the most sophisticated of all contemporary instruments for the international protection of human rights'.[160]

### *The European Social Charter*

The European Social Charter (ESC) was signed in Turin on 18 October 1961 by the member states of the Council of Europe, and came into force on 26 February 1965.[161] The ESC, which seeks to complement the ECHR, contains a statement of the following rights and principles:

1 The right of everyone to the opportunity to earn their living in an occupation freely entered into.
2 The right of all workers to just conditions of work.
3 The right of all workers to safe and healthy working conditions.
4 The right of all workers to a fair remuneration sufficient for a decent standard of living for themselves and their families.
5 The right of all workers and employers to freedom of association in national or international organizations for the protection of their economic and social interests.
6 The right of all workers and employers to bargain collectively.
7 The right of children and young persons to a special protection against the physical and moral hazards to which they are exposed.
8 The right of employed women, in case of maternity, and other employed women as appropriate, to a special protection in their work.
9 The right of everyone to appropriate facilities for vocational guidance.
10 The right of everyone to appropriate facilities for vocational training.

[160] John P. Humphrey, 'The International Law of Human Rights in the Middle Twentieth Century', in Maarten Bos (ed.), *The Present State of International Law and Other Essays* (Deventer: Kluwer, 1973).

[161] For the text, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997). Twenty states have so far ratified the Social Charter: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and the United Kingdom.

11 The right of everyone to benefit from any measures enabling them to enjoy the highest standard of health attainable.
12 The right of all workers and their dependents to social security.
13 The right of anyone without adequate resources to social and medical assistance.
14 The right of everyone to benefit from social welfare services.
15 The right of disabled persons to vocational training, rehabilitation and social resettlement.
16 The right of the family to appropriate social, legal and economic protection to ensure its full development.
17 The right of mothers and children, irrespective of marital status and family relations, to appropriate social and economic protection.
18 The right of nationals of any contracting state to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons.
19 The right of migrant workers who are nationals of a contracting state, and their families, to protection and assistance in the territory of any other contracting state.

In 1988, an additional Protocol was added to the ESC, containing four new rights:

20 The right of workers to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the ground of sex.
21 The right of workers to be informed and to be consulted within the undertaking.
22 The right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking.
23 The right of elderly persons to social protection.

This Protocol entered into force on 4 September 1992.[162]

In 1996, a Revised ESC was adopted, adapting the substantive contents of the original ESC and the additional Protocol,[163] and updating by the inclusion of the following new rights and principles:

[162] For the text, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997), vol. II, 163.
[163] For the text, see *Human Rights: a Compilation of International Instruments*, 182.

24 The right of workers to protection in cases of termination of employment.
25 The right of workers to protection of their claims in the event of insolvency of their employer.
26 The right of workers to dignity at work.
27 The right of all persons with family responsibilities to engage in employment.
28 The right of workers' representatives to protection against acts prejudicial to them.
29 The right of workers to be informed and consulted in collective redundancy procedures.
30 The right of everyone to protection against poverty and social exclusion.
31 The right of everyone to housing.

A state party to the ESC undertakes three obligations. The first is to consider as the aim of its policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which these rights may be effectively realized. The second is to consider itself bound by at least six of the following rights: the right to work, the right to organize, the right to bargain collectively, the right of children and young persons to protection, the right to social security, the right to social and medical assistance, the right of the family to social, legal and economic protection, and the right of migrant workers and their families to protection and assistance, and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the ground of sex. The third is to consider itself bound by such number of other articles of the ESC as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs.

The application of the ESC is monitored on the basis of periodic reports submitted by governments. These reports are first analysed by a nine-member Committee of Independent Experts who decide whether or not a national situation is in conformity with the provisions of the ESC as interpreted by it.[164] These decisions are published as 'conclusions', and

[164] The Committee of Experts consists of not more than seven members appointed by the Committee of Ministers of the Council of Europe from a list of independent experts of the

are then examined by a Governmental Committee (a sub-committee of the Governmental Social Committee of the Council of Europe) which advises the Committee of Ministers as to the cases in which a recommendation should be made to the relevant contracting state.

### *American Convention on Human Rights*

The Charter of the Organization of American States (OAS) was signed on 30 April 1948 at the Ninth International Conference of American States convened in Bogota.[165] Its preamble stated that 'the historic mission of America is to offer to man a land of liberty, and a favourable environment for the development of his personality and the realization of his just aspirations', and that 'the true significance of American solidarity and good neighbourliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man'. In its substantive provisions, the Charter reaffirmed and proclaimed as a principle of the OAS 'the fundamental rights of the individual without distinction as to race, nationality, creed or sex'.[166] At the same conference, the American Declaration of the Rights and Duties of Man was adopted in the form of a resolution.[167]

In 1959, in Santiago, the Fifth Meeting of Consultation of Ministers of Foreign Affairs adopted a resolution creating the Inter-American Commission on Human Rights, and in the following year the OAS Council adopted the Statute of the Commission and elected its seven members. The statute described the commission as an 'autonomous entity of the Organization of American States, the function of which is to promote respect for human rights'.[168] It added that for the purpose of the statute,

highest integrity and of recognized competence in international social questions proposed by contracting states. They are appointed for six years.

[165] For the text, see (1952) 119 *United Nations Treaty Series* 48–92. The Charter entered into force on 13 December 1951. The original states parties were Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay and the United States of America. See also the Protocol of Buenos Aires, signed on 27 February 1967, which amended the Charter.

[166] Article 5(j).

[167] Resolution XXX, Final Act of the Ninth International Conference of American States, 30 March–2 May 1948. See Thomas Buergenthal, 'The Inter-American System for the Protection of Human Rights', in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) 439–90.

[168] Article 1.

'human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man' (ADRD).[169] The ADRD thus became the basic normative instrument of the commission.[170] However, the powers of the commission were limited by its statute to gathering information, preparing studies, and making recommendations to governments for the adoption of 'progressive measures in favour of human rights within the framework of their domestic legislation'.[171] In 1965, the commission was authorized to examine and report on communications submitted to it, thereby initiating an individual petition system. In 1970, the Protocol of Buenos Aires which amended the Charter changed the status of the commission from an 'autonomous entity' into one of the principal organs of the OAS. Its functions were re-defined to be 'to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters'. An inter-American convention on human rights would determine the structure, competence, and procedure of this commission, as well as those of other organs responsible for these matters.

The American Convention on Human Rights (ACHR), drafted by the Inter-American Council of Jurists, was adopted in 1969 at an intergovernmental conference convened by the OAS in San José, Costa Rica. It entered into force in July 1978.[172] Drawing not only on the UDHR and the ADRD but also on the ECHR and the draft ICCPR, the ACHR recognizes the following rights:

Article 3: The right to juridical personality.
Article 4: The right to life.
Article 5: The right to humane treatment.
Article 6: The right to freedom from slavery.

[169] Article 2. [170] Buergenthal, 'The Inter-American System', 439, at 472.

[171] The Statute of the Inter-American Commission on Human Rights 1960, article 9.

[172] For the text, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997) vol. I, 14. Twenty-five states have so far ratified the ACHR: *Argentina, Barbados, *Bolivia, *Brazil, *Chile, *Colombia, *Costa Rica, Dominica, *Dominican Republic, *Ecuador, *El Salvador, Grenada, *Guatemala, *Haiti, *Honduras, Jamaica, *Mexico, *Nicaragua, *Panama, *Paraguay, *Peru, *Suriname, *Trinidad and Tobago, *Uruguay and *Venezuela. States which have not yet acceded to it are Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, and the United States of America. Of the states ratifying the ACHR, twenty-one (marked with an asterisk) have accepted the court's jurisdiction. Trinidad and Tobago withdrew from the ACHR on 26 May 1998 and the withdrawal became effective on 26 May 1999.

Article 7: The right to personal liberty.
Article 8: The right to a fair trial.
Article 9: The right to freedom from ex post facto criminal laws.
Article 10: The right to compensation for a miscarriage of justice.
Article 11: The right to privacy.
Article 12: The right to freedom of conscience and religion.
Article 13: The right to freedom of thought and expression.
Article 14: The right of reply.
Article 15: The right of assembly.
Article 16: The right to freedom of association.
Article 17: The right to family life.
Article 18: The right to a name.
Article 19: The rights of the child.
Article 20: The right to nationality.
Article 21: The right to property.
Article 22: The right to freedom of movement and residence.
Article 23: The right to participate in government.
Article 24: The right to equal protection.
Article 25: The right to judicial protection.

The states parties to the ACHR undertake 'to respect' and 'to ensure' the 'free and full exercise' of these rights 'to all persons subject to their jurisdiction'.[173] These obligations are monitored by two bodies, each composed of seven experts: the Inter-American Commission on Human Rights established in 1959, and the Inter-American Court of Human Rights. The members of the former are elected by the OAS General Assembly, while the judges of the latter are elected by the states parties to the ACHR from among nationals of any OAS member state. The commission, which has its headquarters in Washington DC, exercises its functions by dealing with individual complaints of alleged violations of human rights and, where appropriate, submitting cases to the court; by a general consideration of human rights in specific countries, usually by a fact-finding mission, on its own initiative, at the request of one of the OAS organs, or in response to a request by the state concerned; and by the formulation of proposals to enhance the protection of human rights.[174]

[173] Article 1(1).

[174] The mandate of the commission is complicated by the fact that it has to deal with two regimes: that which is established under the ACHR and that established under the ADRD.

The court, which sits in San José, Costa Rica, has both a contentious and an advisory jurisdiction: the adjudication of disputes relating to charges that a state party has violated the ACHR, and the interpretation of the ACHR in proceedings that do not involve the adjudiciation of specific disputes.[175]

### *Additional Protocol to the ACHR*

On 17 November 1988, at the eighteenth regular session of the OAS General Assembly held in San Salvador, the states parties to the ACHR approved the Additional Protocol – the Protocol of San Salvador – containing the following economic, social and cultural rights:

Article 6: The right to work.
Article 7: The right to just, equitable and satisfactory conditions of work.
Article 8: The right to form and join trade unions.
Article 9: The right to social security.
Article 10: The right to health.
Article 11: The right to a healthy environment.
Article 12: The right to food.
Article 13: The right to education.
Article 14: The right to the benefits of culture.
Article 15: The right of formation and protection of the family.
Article 16: The right of children to protection by the state, society, and their family.
Article 17: The right of the elderly to special protection.
Article 18: The right of the handicapped to special protection.

This complication is compounded by the fact that two countries within whose territories a very substantial proportion of the total population of the continent lives, Brazil and the United States, have not yet ratified the ACHR. By 1999, the commission had processed more than 12,000 cases.

[175] The court, which began its activities in 1979, has heard thirty-five contentious cases, in which sixty-seven decisions have been handed down on preliminary objections, jurisdiction, merits, reparation and interpretation of decisions; issued sixteen advisory opinions; and settled twenty-five requests for provisional measures. Its judgments so far, however, concern principally the right of recognition of legal personality, the right to life, the right to integrity of person, the right to personal freedom, judicial guarantees, the principle of legality and retroactivity, the rights of the child, equality before the law, and judicial protection.

The Additional Protocol came into force on 16 November 1999.[176] The first state obligation is the guarantee of non-discrimination in the exercise of these rights.[177] The second is the adoption of necessary measures, especially economic and technical, to the extent allowed by its available resources and taking into account its degree of development, for the purpose of achieving progressively the full observance of these rights.[178]

### *African Charter on Human and Peoples' Rights*

The initiative for an African human rights charter was taken at a meeting of African jurists – the African Conference on the Rule of Law – convened by the International Commission of Jurists (ICJ) in Lagos in 1961. The idea was developed at a number of UN seminars and ICJ conferences held in the following years.[179] At the 1978 Dakar Symposium organized by the ICJ and the Senegalese Association for Legal Studies and Research, a follow-up group was formed to 'sell' the idea to African Heads of State. In the following year, on the initiative of President Senghor of Senegal, the Assembly of Heads of State and Government of the Organization of African Unity (OAU) meeting in Monrovia decided to convene a meeting of 'highly qualified experts' to prepare a preliminary draft of a convention that would provide for the promotion and protection of human rights in Africa.[180] A few months later, at a UN seminar in Monrovia which was attended by the representatives of thirty African states, several specific proposals relating to the establishment of a regional commission in Africa were adopted.[181] The draft prepared by African experts was considered at two sessions of the Conference of OAU Ministers of Justice

[176] The Additional Protocol has been ratified by eleven countries: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Panama, Paraguay, Peru, Suriname and Uruguay. Countries which have signed but not yet ratified are Argentina, Bolivia, Dominican Republic, Guatemala, Haiti, Nicaragua and Venezuela.

[177] Article 3. [178] Article 1.

[179] UN seminars were held in Cairo in 1969 and in Dar-es-Salaam in 1973. See UN documents ST/TAO/HR/38 and ST/TAO/HR/48. See also UNGA resolution 2200 (XXI) of 19 December 1966.

[180] The OAU was established under the Charter of the Organization of African Unity, which was concluded in Addis Ababa on 25 May 1963 and came into force on 13 September 1963. For the text, see (1963) 480 *United Nations Treaty Series*, 70–88.

[181] The Monrovia Proposal for the Setting up of an African Commission on Human Rights, which was adopted at the conclusion of this seminar, contained a model for the establishment of such a body. See UN document ST/HR/SER.A/4.

held in The Gambia in 1980 and 1981. In June 1981, the African Charter on Human and Peoples' Rights (AfCHPR) was unanimously adopted at the Nairobi Assembly of Heads of State and Government of the OAU. It became operative in October 1986, and an African Commission began functioning in that continent on 2 November 1987.[182]

The states parties to the AfCHPR recognize the following rights and undertake to adopt legislative or other measures to give effect to them:[183]

Article 3: The right to equality and the equal protection of the law.
Article 4: The right to life.
Article 5: The right to protection from exploitation and degradation, particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment or punishment.
Article 6: The right to liberty and the security of the person.
Article 7: The right to have one's cause heard, including the rights of accused persons.
Article 8: The right to freedom of conscience and religion.
Article 9: The right to express and disseminate opinions and to receive information.
Article 10: The right to free association.
Article 11: The right to assemble freely with others.
Article 12: The right to freedom of movement and residence, including the right to seek and obtain asylum in other countries, and the right of non-nationals to protection against arbitrary expulsion and mass expulsion.
Article 13: The right to freely participate in government, including the right of equal access to public property and services.
Article 14: The right to property.
Article 15: The right to work under equitable and satisfactory conditions and the right to equal pay for equal work.

[182] For the text, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997), vol. II, 330. It has been ratified by Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahraoui Arab Democratic Republic, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Togo, Tunisia, Uganda, United Republic of Tanzania, Zaire, Zambia and Zimbabwe. Yet to accede are Eritrea, Ethiopia, South Africa and Swaziland.

[183] Article 1.

Article 16: The right to health.
Article 17: The right to education.
Article 18: The right to the protection of the family unit, including the rights of the aged and the disabled to special measures of protection and the prohibition of discrimination against women.
Article 19: The right of all peoples to equality.
Article 20: The right of all peoples to self-determination.
Article 21: The right of all peoples to freely dispose of their wealth and natural resources.
Article 22: The right of all peoples to economic, social and cultural development.
Article 23: The right of all peoples to national and international peace and security.
Article 24: The right of all peoples to a general satisfactory environment.

An eleven-member Commission has the task of promoting the rights, ensuring their protection, and interpreting the AfCHPR.[184] Its promotional activities include making recommendations to governments and formulating principles and rules aimed at solving legal problems relating to the enjoyment of the recognized rights upon which governments may base their legislation. Its protective mission is fulfilled through the consideration of periodic reports from governments[185] and the examination of communications submitted by states parties or other sources.[186] In respect of the latter, since the commission has no judicial authority of its own, it submits to the OAU Assembly of Heads of State and Government, for its final decision, a report setting forth the facts and the conclusions it has reached, together with its recommendations.[187] If a communication reveals the existence of a series of serious or massive violations of human rights, the commission draws this to the attention of the assembly which may thereupon request the commission to undertake an in-depth study of the situation and make a factual report accompanied by its findings and recommendations.[188]

In 1998, the thirty-fourth Summit of Heads of State and Government of the OAU adopted a protocol to the AfCHPR for the establishment of an African Court on Human and Peoples' Rights.

[184] Article 45. [185] Article 62. [186] Article 47. [187] Article 52. [188] Article 58.

### *An Asian Convention on Human Rights?*

There is as yet no regional human rights mechanism in Asia. The idea of drafting an Asian convention has been raised on several occasions at gatherings of non-governmental organizations and at meetings convened by the United Nations. However, Asian governments remain quite oblivious to the need to co-operate to better protect the human rights of the people of their region. This is hardly surprising, considering that of the forty-nine states in the region, only twenty-one have so far ratified both covenants, and of them only seven have ratified the Optional Protocol: Australia, Mongolia, Nepal, New Zealand, the Republic of Korea, the Philippines and Sri Lanka.

One major drawback in Asia is the lack of an existing regional intergovernmental organization, similar to the OAU, the OAS or the Council of Europe, that brings together all the countries of the region for political or socio-economic co-operation. There seems to be no such tradition of regional co-operation in Asia. Indeed, there is no discernible common identity among Asian countries. Within the existing sub-regional alliances such as the League of Arab States, Association of South-East Asian Nations (ASEAN) and South Asian Association for Regional Co-operation (SAARC), a common understanding on human rights does not appear to be even remotely possible, having regard to current human rights records of some of the participating governments.

Another drawback is the fact that Asia encompasses a widely heterogeneous community that extends from Syria and Iraq in the west to the Philippines, Japan and the islands of the Pacific in the east, from China and Korea in the north to India and Sri Lanka in the south. It is quite unrealistic to think of the region as a single unit with a common identity. As one commentator has observed, 'Asia is a conglomeration of countries with radically different social structures, and diverse religious, philosophical and cultural traditions; their political ideologies, legal systems, and degrees of economic development vary greatly; and above all, there is no shared, historical past even from the times of colonialism'.[189]

On the other hand, there are in Asia threads that can be gathered, foundations of freedom upon which it may be possible to build. The first is a tradition of legalism that stretches from the Indian sub-continent, through Sri Lanka and Malaysia, to the Philippines. Long experience

[189] Hiroko Yamana, 'Asia and Human Rights'.

with colonial legal systems has given these countries a strong legal profession, a relatively independent judiciary, and an ability to utilize the judicial process to assert and vindicate individual freedom. The second is the existing constitutional framework of several countries in the region, such as Hong Kong, India, Kiribati, Nauru, Nepal, Papua New Guinea, Philippines, the Republic of Korea, Solomon Islands, Sri Lanka, Tonga, Tuvalu and Vanuatu. A justiciable Bill of Rights is an integral part of the national constitution in each of these countries. The third is the fact that within Asia there are sub-regional clusters of states that have already ratified both the ICCPR and the ICESCR and thereby demonstrated a willingness to submit to the international human rights regime and its monitoring procedures. These include Afghanistan, Iran, Iraq, Israel, Jordan, Lebanon, Syrian Arab Republic and Yemen in the west; India, Nepal and Sri Lanka in the south; Cambodia, the Democratic Peoples' Republic of Korea, Japan, Mongolia, Philippines, the Republic of Korea and Vietnam in the east; and Australia and New Zealand on the fringes of the Pacific. The fourth is an abiding spiritual heritage based upon the tenets of the four principal religions of the world which sprang forth from the soil of Asia – Hinduism, Buddhism, Christianity and Islam.

The purpose of an Asian convention being to better secure to all persons subject to the jurisdiction of the participating states the rights and freedoms recognized in the International Bill of Human Rights, the initiative for the conclusion of such an instrument and for the establishment of an Asian Commission and an Asian Court of Human Rights ought to be taken by those states that have already accepted the standards contained in the two international covenants. Indeed, as the World Conference on Human Rights declared, regional arrangements are intended to 'reinforce universal human rights standards, as contained in international human rights instruments, and their protection'.[190] The experience of the other continents ought to convince these states that not only do regional mechanisms facilitate more effective scrutiny of their own performance, but also that within such regional institutions it is possible for each of them to play a relatively more significant role than they possibly could on the world stage.

[190] Vienna Declaration and Programme of Action, paragraph 37. For the text, see Report of the World Conference on Human Rights: Report of the Secretary-General, UN document A/CONF.157/24 (Part I) of 13 October 1993.

### *Helsinki Final Act*

On 1 August 1975, in Helsinki, Finland, at the conclusion of a unique inter-governmental Conference on Security and Co-operation in Europe, the thirty-five participating nations which included all of Eastern and Western Europe, the United States and Canada, signed a Final Act containing, *inter alia*, ten 'Principles guiding relations between participating States'. Principle VII was entitled 'Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief', and included a commitment by the participating states to 'act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights' and to 'fulfil their obligations as set forth in the international declarations and agreements in this field, including, *inter alia*, the International Covenants on Human Rights, by which they may be bound'.[191] The Final Act did not impose any binding obligations under international law. Indeed, it expressly declared that it is not eligible for registration as a treaty under Article 102 of the United Nations Charter. But its particular significance lies in the fact that it was a reaffirmation by states with widely differing political, social, and economic systems of their commitment to the international law of human rights.

## Human rights treaties as international law

Human rights treaties are an important element of contemporary international law. When a state ratifies or accedes to such a treaty, it not only binds itself to perform the obligations arising from the treaty, but also submits its performance to the scrutiny of the other states parties. The absence of any regular sanctions for the non-performance or violation of an obligation under a human rights treaty, or the failure of other states parties to report such non-performance or violation where provision does exist for reporting, does not detract from their binding nature. The immediate beneficiaries under them are not states but individuals. Moreover, the existence of a legal duty is not dependent upon the existence of a sanction for failure to perform that duty. As Judge Weeramantry has observed in the International Court of Justice,

[191] For relevant extracts from the text, see *Human Rights: a Compilation of International Instruments* (New York: United Nations, 1997), vol. II, 369.

'the question of the obligation to comply must at all times be sharply distinguished from the question of enforceability'.[192]

## Reservations to human rights treaties

Unless it is expressly forbidden or restricted by the treaty itself, it is not uncommon for a state upon signature, ratification or accession to a treaty to express 'reservations' concerning some of its provisions. Thereby, a state withholds or limits its consent to being bound by particular provisions in that treaty. On the one hand, the possibility of entering reservations may encourage a state which has difficulty in guaranteeing all the rights recognized in a treaty to accept the generality of the obligations under that treaty. On the other hand, the number of reservations, their content and their scope, may undermine the effective implementation of the treaty and tend to weaken respect for the obligations of states parties. In this connection, it must be noted that human rights norms are the legal expression of the essential rights that every person is entitled to as a human being,[193] the 'irreducible human element' or 'the quintessential values through which we affirm together that we are a single human community'.[194]

### *Views of the Inter-American Court of Human Rights*

The regime of reservations to treaties is governed by Articles 19–23 of the Vienna Convention on the Law of Treaties. But the Inter-American Court of Human Rights held in 1982 that these articles are not applicable in their entirety to the ACHR. In particular, (i) a state party may ratify or adhere to the ACHR with whatever reservations it wishes to make, provided only that such reservations are not 'incompatible with the object and purpose' (Article 19(c) of the Vienna Convention) of the ACHR; and (ii) it would be manifestly unreasonable to apply the legal regime established by Article 20(4) of the Vienna Convention, which makes the entry

[192] Individual Opinion, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzogovina* v. *Yugoslavia (Serbia and Montenegro))*, Further Requests for the Indication of Provisional Measures, ICJ Reports 1993, at 54.

[193] Human Rights Committee, General Comment 24 (1994).

[194] Boutros Boutros Ghali, former Secretary-General of the United Nations, in his address at the Opening of the World Conference on Human Rights, Vienna, 14 June 1993, UN document A/CONF.157/22 of 12 July 1993.

into force of a ratification with a reservation dependent upon its acceptance by another state. The court explained that Article 20(4) reflects the needs of traditional multilateral international agreements which have as their object the reciprocal exchange, for the mutual benefit of the states parties, of bargained-for rights and obligations. Contemporary human rights treaties are not multilateral treaties of the traditional type concluded to the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the state of their nationality and all other contracting states. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.[195]

### *Views of the Human Rights Committee*

In a General Comment made in 1994, the Human Rights Committee addressed the issue of reservations to the ICCPR, considering it necessary for the performance of its duties that it should know whether a state was bound by a particular obligation or to what extent.[196] The object and

[195] *The Effect of Reservation on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, 24 September 1982. See also *Austria* v. *Italy*, European Commission, Application 788/1960, 4 *Yearbook* 116: The obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.

[196] Human Rights Committee, General Comment 24 (1994). A 'reservation' must be distinguished from a 'declaration' as to a state's understanding of the interpretation of a provision, and from a 'statement of policy'. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the state, it constitutes a reservation. A reservation should indicate in precise terms the national legislation or practices which the state believes to be incompatible with the covenant obligation reserved, and explain the time period required to render such laws and practices compatible with the covenant, or why it is unable to do so. While stressing that the necessity for maintaining reservations should be periodically reviewed, and reservations should be withdrawn at the earliest possible moment, the committee was of the view that interpretative declarations should not seek to remove an autonomous meaning to covenant obligations, by pronouncing covenant obligations to be identical, or to be accepted only in so far as they were identical, with existing provisions of national law. See also *Temeltasch*

purpose of the ICCPR is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding on those states which ratify, and to provide an efficacious supervisory machinery for the obligations undertaken.

A reservation that offends a peremptory norm is not compatible with the object and purpose of the ICCPR. Although treaties that are mere exchanges of obligations between states allow them to reserve *inter se* application of rules of general international law, the position is different in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the ICCPR that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a state may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. In respect of the right to a fair trial, while reservations to particular elements of that right may be acceptable, a general reservation to that right would not be.[197]

Applying more generally the object and purpose test, the committee noted that, for example, a reservation that denied peoples the right to determine their own political status and to pursue their economic, social and cultural development, was incompatible with the object and purpose of the ICCPR. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis, was not acceptable. Nor may a state reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights recognized in the ICCPR.[198]

v. *Switzerland*, European Commission, (1982) 5 EHRR 407, where an interpretative declaration was deemed to have the legal effect of a reservation.

[197] Human Rights Committee, General Comment 24 (1994).

[198] Human Rights Committee, General Comment 24 (1994).

Examining reservations to the non-derogable provisions of the ICCPR, the committee observed that while there was no hierarchy of importance of rights, the operation of certain rights may not be suspended even in times of national emergency. This underlines the importance of non-derogable rights. But not all rights of profound importance, such as ICCPR 9 (freedom from arbitrary arrest or detention) and ICCPR 27 (rights of minorities) have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (e.g. ICCPR 7 which prohibits imprisonment for debt). Another reason is that derogation may indeed be impossible (e.g. freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there will be no rule of law. A reservation to the provisions of ICCPR 4 itself, which precisely stipulates the balance to be struck between the interests of the state and the rights of the individual in times of emergency, will fall into this category. Some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms (e.g. the prohibition of torture and arbitrary deprivation of life), are also of this category. While there is no automatic correlation between reservations to non-derogable provisions and reservations which offend the object and purpose of the ICCPR, a state has a heavy onus to justify such a reservation.[199]

The ICCPR also consists of important supportive guarantees. These provide the necessary framework for securing the rights recognized in the ICCPR and are thus essential to its object and purpose. Some operate at the national level and others at the international level. Reservations designed to remove these guarantees are thus not acceptable. For example, a state may not make a reservation to ICCPR 2(3) indicating that it intended to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the covenant and underpin its efficacy. The ICCPR also envisages, for the better attainment of its stated objectives, a monitoring role for the Human Rights Committee. Reservations that purport to evade that essential element in the design of the ICCPR, which is also directed to securing the enjoyment of the rights, are not compatible with its object and purpose. A state

[199] Human Rights Committee, General Comment 24 (1994).

may not reserve the right not to present a report and have it considered by the committee. The committee's role, whether under ICCPR 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the ICCPR and the development of a jurisprudence. Accordingly, a reservation that rejects the committee's competence to interpret the requirements of any provisions of the ICCPR will also be contrary to the object and purpose of that treaty.[200]

The intention of the ICCPR is that the rights recognized therein should be ensured to all individuals under a state party's jurisdiction. To this end certain attendant requirements are likely to be necessary. National laws may need to be altered properly to reflect the requirements of the ICCPR, and mechanisms at the domestic level may be needed to allow the recognized rights to be enforceable. The committee has observed that reservations often reveal a tendency of states not to want to change a particular law. Sometimes that tendency is elevated to a general policy. The committee has expressed its concern at widely formulated reservations which essentially render ineffective those recognized rights which would require any change in national law to ensure compliance with ICCPR obligations. No real international rights or obligations have thus been accepted. Indeed, when there is an absence of provisions to ensure that the recognized rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the committee under the Optional Protocol, all the essential elements of the ICCPR guarantees have been removed.[201]

With reference to the Optional Protocol, the committee noted that its object and purpose is to recognize the competence of the HRC to receive and consider communications from individuals who claim to be victims of a violation by a state party of any of the rights in the ICCPR. States accept the substantive rights of individuals by reference to the ICCPR, and not the Optional Protocol. The function of the latter is to allow claims in respect of those rights to be tested before the committee. Accordingly, a reservation to an obligation of a state to respect and ensure a right recognized in the ICCPR, made under the Optional Protocol when it has not previously been made in respect of the same right under

[200] Human Rights Committee, General Comment 24 (1994).
[201] Human Rights Committee, General Comment 24 (1994).

the ICCPR, did not affect the state's duty to comply with its substantive obligation. A reservation cannot be made to the ICCPR through the vehicle of the Optional Protocol, but such a reservation would operate to ensure that the state's compliance with that obligation may not be tested by the committee under the Optional Protocol. And because the object and purpose of the Optional Protocol is to allow the rights obligatory for a state under the ICCPR to be tested before the committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the Optional Protocol, even if not of the ICCPR.[202]

Reservations relating to the required procedures under the Optional Protocol are not compatible with its object and purpose. But a reservation that purports to limit the competence of the committee to acts and events occurring after entry into force for the state concerned of the Optional Protocol is not a reservation but a statement consistent with its normal competence *ratione temporis*. However, the committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. A reservation which effectively adds an additional ground of inadmissibility under Optional Protocol 5(2) by precluding examination of a communication when the same matter had already been examined by another comparable procedure has been viewed by the committee as not violating the object and purpose of the Optional Protocol in so far as the most basic obligation is to secure independent third party review of the human rights of individuals.[203]

The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the ICCPR in so far as they relate to the right to life by prohibiting execution and abolishing the death penalty. It has its own provision concerning reservations, which is determinative of what is permitted. Second Optional Protocol 2(1) provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a

[202] Human Rights Committee, General Comment 24 (1994).
[203] Human Rights Committee, General Comment 24 (1994).

military nature committed during wartime. Two procedural obligations are incumbent upon states parties wishing to avail themselves of such a reservation. Second Optional Protocol 2(1) obliges such a state to inform the secretary-general, at the time of ratification or accession, of the relevant provisions of its national legislation during warfare. This is clearly directed towards the objectives of specificity and transparency and in the view of the committee a purported reservation unaccompanied by such information is without legal effect. Second Optional Protocol 2(3) requires a state making such a reservation to notify the secretary-general of the beginning or ending of a state of war applicable to its territory. In the view of the committee, no state may seek to avail itself of its reservation (i.e. have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of the Second Optional Protocol 2(3).[204]

In making these observations on the subject of reservations, the committee stressed that it is the committee alone which has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the ICCPR. Although in respect of international treaties in general, a reservation precludes the operation, as between the reserving state and other states, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting states only to the extent that it has not been objected to, such provisions will be inappropriate to address the problem of reservations to human rights treaties. The latter are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place here, except perhaps in the limited context of reservations to declarations on the committee's competence under ICCPR 41. The absence of protest by states cannot imply that a reservation is either compatible or incompatible with the object and purpose of the ICCPR. States may often see no legal interest in or need to object to reservations by another state in respect of the human rights of its own citizens. The committee, on the other hand, has necessarily to take a view on the compatibility of a reservation with the object and purpose of the ICCPR and with general international law before

[204] Human Rights Committee, General Comment 24 (1994).

it can know the scope of its duty to examine a state's compliance under ICCPR 40 or a communication under the Optional Protocol. The normal consequence of an unacceptable reservation is not that the ICCPR will not be in effect at all for a reserving state. Rather, such a reservation will generally be severable, in the sense that the ICCPR will be operative for the reserving state without the benefit of the reservation.[205]

### *Views of the International Law Commission*

In the International Law Commission (ILC) in 1997, the special rapporteur on 'The law and practice relating to reservations to treaties' objected to 'the excessive pretensions' of the Human Rights Committee in seeking to 'act as the sole judge of the permissibility of reservations'. In preliminary conclusions on the subject, the ILC reiterated its view that the general rules enumerated in Articles 19–23 of the Vienna Convention governed the regime of reservations to all treaties, including treaties in the area of human rights. The ILC accepted that where human rights treaties were silent on the subject of reservations, the monitoring bodies were competent to comment upon and express recommendations with regard to the admissibility of reservations by states, but stressed that this competence did not exclude or otherwise affect the traditional modalities of control by the contracting parties in accordance with the provisions of the Vienna Convention and, where appropriate, by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties.[206]

### *Views of chairpersons of human rights treaty bodies*

The chairpersons of human rights treaty bodies, at their eighth annual meeting in 1998, examined the preliminary conclusions of the ILC and considered them to be 'unduly restrictive' and that they did not pay sufficient attention to the fact that human rights treaties, by virtue of their subject-matter and the role they recognized to individuals, could not be placed on the same footing as other treaties with different

[205] Human Rights Committee, General Comment 24 (1994).

[206] International Law Commission, 1997 Report, Chapter V: Reservations to Treaties, paragraphs 44–157.

characteristics. They expressed their support for the approach followed by the Human Rights Committee in General Comment No.24.[207]

## Continuity of obligations under human rights treaties

Where a treaty does not contain any provision regarding its termination, and does not provide for denunciation or withdrawal, the possibility of termination, denunciation or withdrawal has to be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. Accordingly, a treaty is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal, or a right to do so is implied from the nature of the treaty. In a General Comment on the subject, the Human Rights Committee has observed that the parties to the ICCPR did not admit of any such possibility. That it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that ICCPR 41(2) does permit a state party to withdraw its acceptance of the competence of the HRC to examine inter-state communications by filing an appropriate notice to that effect, while there is no such provision for denunciation of or withdrawal from the ICCPR itself. Moreover, the Optional Protocol to the ICCPR, negotiated and adopted contemporaneously with the ICCPR, permits states parties to denounce it. The same conclusion applies to the Second Protocol in the drafting of which a denunciation clause was deliberately omitted.[208]

The HRC also observed that the ICCPR is not the type of treaty which, by its nature, implies a right of denunciation. Together with the ICESCR, it codifies in treaty form the universal human rights enshrined in the UDHR, the three instruments often being referred to as the 'International Bill of Human Rights'. As such the ICCPR does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect. The rights enshrined in the ICCPR belong to the people living in the territory of the state party. The HRC has consistently taken the view, as evidenced by its longstanding practice, that once the

[207] Meeting of the Chairpersons, *Human Rights Monitor* No.41–2, 1998, pp. 3–4.
[208] Human Rights Committee, General Comment 26 (1997).

people are accorded the protection of the rights under the ICCPR, such protection devolves with the territory and continues to belong to them, notwithstanding any change in government of the state party, including dismemberment in more than one state or state succession or any subsequent action of the state party designed to divest them of the rights guaranteed by the ICCPR. The HRC emphasized that international law does not permit a state which has ratified or acceded to the ICCPR to denounce it or withdraw from it.[209]

[209] Human Rights Committee, General Comment 26 (1997).

# 3

# The domestic protection of human rights

In 1958, Mrs Eleanor Roosevelt, chairperson of the committee that produced the first draft of the Universal Declaration of Human Rights (UDHR) asked where universal human rights begin. She answered:

> In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: The neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[1]

Mrs Roosevelt was underscoring the fact that human rights need to be protected, in the first instance, at home. Since human rights principally involve the relationship between the individual and the state, and sometimes also between individuals, the task of protecting and promoting human rights is primarily a national one. It is at the national level that the first line of defence must exist or be established. The international instruments which prescribe contemporary standards and the international monitoring bodies which scrutinize national performance are essentially complementary in nature. They are not a substitute for domestic initiatives.

## The application of international law

The status of international law within a municipal legal system is generally determined by municipal law. Consequently, different rules apply

[1] *Teaching Human Rights* (New York: United Nations, 1963), 1.

in different jurisdictions. Where the monist theory is followed, international law and municipal law on the same subject operate concurrently and, in the event of a conflict, the former prevails. Where the dualist theory is favoured, international law and municipal law are regarded as two separate systems of law, regulating different subject-matter. They are mutually exclusive, and the former has no effect on the latter unless and until incorporation takes place through domestic legislation. One reason for this negative view is because 'the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action'.[2] To take any other view would be to recognize that the executive possesses law-making power. The strict adherent to the dualist theory will, when sitting in a domestic court, refuse to pay heed to a rule of international law which has not been incorporated in domestic law. He will refuse to recognize any interaction between the two branches of the law. However, this 'old culture of resistance, or indifference, to international law is now gradually changing'; there is a 'growing rapprochement which can be detected', and the influence of international human rights law has manifested in several ways, though not always without some misgiving.

The international law of human rights is substantially different from traditional international law. For instance, when a state party ratifies, or accedes to, a human rights treaty, it neither acquires rights nor incurs obligations in relation to other states parties. What it does is to make a solemn and binding commitment to respect and to ensure the rights recognized in that treaty to all individuals within its territory and subject to its jurisdiction. These individuals are the sole beneficiaries under that treaty. The obligation that is undertaken by the state is one which has to be performed, in accordance with its own constitutional processes, within its own territory and in relation to its own people. Performance or non-performance does not affect the other states parties. Not receiving any benefit whatsoever under the treaty, they remain in a position analogous to that of trustees.

The fact that it is the executive branch of government that represents the state in accepting obligations under the treaty, does not exempt the

[2] *Attorney-General for Canada* v. *Attorney-General for Ontario* Privy Council on appeal from the Supreme Court of Canada, [1937] AC 326, at 347, per Lord Atkin. See also *The Parliament Belge* (1879) 4 PD 129 at 154; *Saloman* v. *Customs and Excise Commissioners* Court of Appeal, [1966] 3 All ER 871; *R* v. *Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* Court of Appeal, [1976] 3 All ER 843.

legislative and judicial branches from performing those obligations. It can hardly be argued that the legislature and the judiciary of a state party to a human rights treaty are free to ignore or decide not to give effect to, its provisions. The commitment is made by 'the state' which, in this context, must mean all three branches of government. It is made in relation to the governed who, as sole beneficiaries under the treaty, will be entitled to demand immediate compliance with it.

In an international court, a state may not invoke its municipal law as justification for its failure to perform a treaty obligation.[3] Still less may a state which has bound itself, for example, 'to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect' to the recognized rights, argue in a domestic court that the operation of municipal law makes the fulfilment of that obligation impossible. That a state which has contracted valid international obligations is bound to make in its legislation such modifications as are necessary to ensure the fulfilment of those obligations is 'a principle that is self-evident'.[4] The obligation, being one made in relation to its own people, must be fulfilled immediately. This may be done by either transforming the rights recognized in the treaty into municipal law through a constitutionally entrenched, justiciable statement of rights or by regarding the treaty as self-executing.[5]

[3] Vienna Convention on the Law of Treaties 1969, Art. 27. See also *Alabama Claims Arbitration* (1872) Moore 1 Int. Arb. 495; *Greco-Bulgarian Communities*, Permanent Court of International Justice, Advisory Opinion, PCIJ Reports 1930, Series B, No.17, p. 32; *Polish Nationals in Danzig*, Permanent Court of International Justice, Advisory Opinion, PCIJ Reports 1931, Series A/B, No.44, p. 24. The Inter-American Court of Human Rights has observed that, in relation to the ACHR, a state may violate an international treaty and, specifically, the ACHR, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by ACHR 2. Likewise, it may adopt provisions which do not conform to its obligations under the ACHR. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes. See *Certain Attributes of the Inter-American Commission on Human Rights*, Advisory Opinion OC-13/93, 16 July 1993.

[4] *Exchange of Greek and Turkish Populations*, Permanent Court of International Justice, Advisory Opinion, PCIJ Reports 1925, Series B, No.10, p. 20.

[5] See, for example, Constitution of France 1958, art. 55; Constitution of Bahrain 1973, art. 37; Constitution of Spain 1978, art. 96; Constitution of Benin 1990, art. 147; Constitution of Madagascar 1992, preamble; and Constitution of the Republic of Congo 1992, preamble. Art. 11 of the Constitution of the Slovak Republic 1992 states that 'The international agreements on human rights and basic freedoms which were ratified by the Slovak Republic and which have been declared legal, take precedence over its laws whenever they guarantee a wider scope of constitutional rights and freedoms.'

## A Bill of Rights

### *The Original Models*

The purpose of a Bill of Rights is to introduce contemporary norms and standards into the governance of the country.[6] In the development of every legal system there has been an endeavour to devise a standard of values against which the performance of the government can be measured; a higher standard to which it must conform. At first it was the divine law. Indeed, even today, in certain parts of the world, legislation is measured by reference to the revelations in the Koran. Later, standards founded upon theories of 'social contract' and 'natural law' began to be applied. The 1776 Virginia Declaration of Rights,[7] the 1789 French Declaration of the Rights of Man and of the Citizen, and the 1791 amendments to the Constitution of the United States were the earliest attempts to formulate a comprehensive national statement of natural rights. Each was the work of a political assembly, the product of the tumultuous events that preceded it, and was designed to respond to the particular grievances, and the needs and aspirations, of those revolutionary years. In the nineteenth and early twentieth centuries, other countries in Europe, Asia and Africa provided themselves with constitutional declarations of rights modelled on these pioneering efforts.[8]

[6] See *West Virginia State Board of Education* v. *Barnette*, United States Supreme Court, 319 US 624 (1943) at 638, per Jackson J: 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no election'; *The State* v. *Makwanyane*, Constitutional Court of South Africa, [1995] 1 LRC 269, per O'Regan J: 'It must be emphasized that the establishment of a Bill of Rights, enforceable by a judiciary, is designed, in part, to protect those who are the marginalized, the dispossessed and the outcasts of our society. They are the test of our commitment to a common humanity and cannot be excluded from it.'

[7] For the text, see F.E. Dowrick (ed.), *Human Rights: Problems, Perspectives and Texts* (England: Saxon House, 1979), 155. Several states in the United States thereafter incorporated statements of rights into their own constitutions.

[8] Lauterpacht mentions the constitutions of Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), Liberia (1847), Sardinia (1848), Denmark (1849), Prussia (1850), Switzerland (1874), Germany (1918), Russia (1918), Turkey (1928), China (1931), Afghanistan (1931), Siam (1932) and Japan (1946). See H. Lauterpacht, *International Law and Human Rights* (London: Archon Books, 1968 reprint), 89–90.

### *Reliance on the common law*

The traditional English attitude towards constitutional entrenchment of rights was one of scepticism.[9] In the wake of the proclamation in 1789 of the Declaration of the Rights of Man and of the Citizen, France was the scene of one of the most gruesome episodes of European history. Despite the enactment in 1791 of the American Bill of Rights, slavery continued to be a lawful and respectable institution in that country for over a hundred years after it had been declared illegal by an English court. On the other hand, in England during this same period, notwithstanding the absence of any constitutional limitations on Parliament's powers, the individual enjoyed a relatively higher degree of political and personal freedom. This was attributed primarily to the strength of the English common law. Under the common law, rights and freedoms are residual. According to Halsbury, the concept of liberty is expressed in two separate principles: (a) the subject may say or do what he pleases, provided he does not transgress the substantive law or infringe the legal rights of others; and (b) public authorities (including the Crown) may do nothing but what they are authorized to do by some rule of common law (including the royal prerogative) or statute.[10] In other words, as far as an individual is concerned, whatever is not prohibited by law is permitted, and his right to do that which is permitted is secured through specific remedies. Sir Ivor Jennings expressed his belief in the vitality of the common law very succinctly when, in 1958, he wrote: 'in Britain we have no Bill of Rights; we merely have liberty according to law; and we think – truly, I believe – that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man'.[11] Notwithstanding such rhetoric, there are many inadequacies in the common law.

Firstly, common law rights are determined, almost fortuitously, on a case-by-case basis. The rights which are already recognized under the common law have been so recognized as a result of actions brought

[9] See, for example, the views of Bentham, Dicey, etc., quoted in S.A. de Smith, 'Fundamental Rights in the New Commonwealth' (1961) 10 *International and Comparative Law Quarterly* 83, at 84–5.

[10] *Halsbury's Laws of England*, 4th edition (London: Butterworths, 1974), volume VIII, para 828.

[11] W.I. Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1958), 20.

to remedy specific wrongs. Whether the scope of such rights may be widened, or new rights established, would depend entirely upon the outcome of actions that may be instituted to remedy specific wrongs in the future. Sometimes, the converse may result. For instance, the concept of freedom of expression is already circumscribed by judicial decisions which prohibit statements which are in contempt of court, blasphemous, seditious, defamatory, in breach of confidence, or are likely to provoke a breach of the peace. Indeed, following a decision of the House of Lords which had the effect of further restricting the scope of this freedom, one of the judges felt constrained to say that his confidence in the capacity of the common law to safeguard freedoms essential in a free society had been 'seriously undermined'.[12]

Secondly, while the common law recognizes rights such as the freedom of expression and freedom of peaceful assembly, some which are enunciated in the UDHR and affirmed in successive treaties, such as freedom from slavery, servitude and forced labour, are unknown to the common law. Others, such as the right to privacy, are indirectly and, therefore, inadequately, articulated. While the common law recognizes no general right of privacy, some elements of that right may be enforced through torts such as trespass, nuisance and defamation, and by the law relating to breach of confidence. But modern methods of surveillance by sophisticated technical devices, and the misuse of computerized data banks, which now constitute serious intrusions of privacy, are all beyond the reach of the common law. As an English judge once observed, even telephone tapping 'is a subject which cries out for legislation'.[13]

Thirdly, the rights which have emerged through the common law are generally negative rights, in the sense that they afford protection from interference by others, rather than positive rights which require a particular form of conduct. For example, the right of access to information, which is an essential attribute of the freedom of expression, has not so far been, and is unlikely ever to be, afforded by the application of the common law. Similarly, one would probably wait in vain for the common law to afford protection against racial or sexual discrimination, however socially divisive or derogatory to human dignity such conduct

[12] *Attorney General* v. *The Observer Ltd*, House of Lords [1987] 1 WLR 1248, per Lord Bridge.

[13] *Malone* v. *Metropolitan Police Commissioner (No. 2)*, Chancery Division [1979] 2 WLR 700, per Sir Robert Megarry VC.

may be. The common law 'was that people could discriminate against others on the grounds of colour, etc., to their hearts' content.'[14]

Fourthly, Dicey's proud boast that habeas corpus is 'for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'[15] may now be seriously questioned. In proceedings for habeas corpus, a respondent will usually discharge his burden by proof of conformity with the provisions of the empowering statute. But in the case of preventive detention, which is now increasingly resorted to by governments, ostensibly in the interests of national security, the empowering statute often grants the executive a discretion. The exercise of that discretion can rarely be successfully challenged by habeas corpus, since the court cannot in such proceedings inquire into the reasonableness or fairness of the suspicion claimed to be held by the executive officer ordering the arrest or detention.[16] Moreover, the grant of such discretion to the executive is often accompanied by a suspension of the writ of habeas corpus. Even in respect of the confinement of mental patients, the judicial review offered by habeas corpus is quite inadequate. As the European Court has noted, 'when the terms of a statute afford the executive a discretion, whether wide or narrow, the review exercisable by the courts in habeas corpus proceedings will bear solely upon the conformity of the exercise of that discretion with the empowering statute'.[17] But a person compulsorily confined on the ground of unsoundness of mind should have the right to a judicial determination of both the substantive and the formal lawfulness of his detention.

Finally, the reason for supposing that the legislature will not unduly or arbitrarily encroach on that sphere of individual freedom secured by the common law is that the legislature is a democratically elected body. In the United Kingdom, Parliament is a representative body elected at periodic intervals. It conducts its affairs 'in the full light of day and is exposed continuously to the full weight of public criticism and discussion through the Press and broadcasting media as well as by way of public meeting and writings'.[18] The need to seek re-election is also expected to deter members from imposing oppressive legislation on the

[14] *Applin* v. *Race Relations Board*, House of Lords [1975] AC 259, per Lord Simon.
[15] A. V. Dicey, *An Introduction to the Study of the Constitution* (London: Macmillan, 10th edition, 1959), 199.
[16] *Ireland* v. *United Kingdom*, European Court, (1978) 2 EHRR 25, paras 81–4.
[17] *X* v. *United Kingdom*, European Court, (1981) 4 EHRR 188, paras 55–9.
[18] Lord Lloyd, 'Do We Need a Bill of Rights?' (1976) *Modern Law Review* 121, at 125.

electorate. But many countries do not possess a democratically elected legislature or one that is subject to such scrutiny or pressure. In reality, even a democratically elected legislature is hardly a free agent. It is invariably 'manipulated' by the executive through the majority which it commands, and 'whipped' into making hundreds of new laws each year to promote more effective government in accordance with party policies, regardless of whether such laws curtail individual freedom.[19] The tyranny of the majority, rather than individual freedom, becomes the characteristic feature of such a system. The strongest argument for dependence on the common law thus loses its validity.

Early Commonwealth constitutions reflected the traditional English attitude. The constitutions of the original dominions, Canada, Australia, South Africa, and Ireland, did not contain any comprehensive statement of fundamental rights, although they did accord some measure of protection in respect of matters such as use of language, religious worship, and parental rights over children's education.[20] The philosophy underlying these constitutions is reflected in Wheare's assertion that the ideal constitution 'would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights'. He thought that rights could not be declared in a constitution except in absolute and unqualified terms, unless indeed they were so qualified as to be meaningless.[21]

The single exception was the declaration of rights in the 1875 Constitution of Tonga: a unique phenomenon within the British Empire. It has been attributed either to the influence of 'visiting Methodist ministers',[22] or to that of the Hawaiian consul-general for Australia and the Pacific on then King George Tupou I of Tonga who was persuaded that the inclusion in the constitution of this British protected state of a

[19] For example, in the United Kingdom itself, the common law freedom of expression is restricted by a succession of statutes including the Official Secrets Act (protection of government information); the Public Order Act and the Race Relations Act (prevention of disorder); the Obscene Publications Act, the Indecent Advertisement Act, the Children and Young Persons (Harmful Publications) Act, the Theatres Act, the Customs (Consolidation) Act, and the Judicial Proceedings (Regulation of Reports) Act (protection of morals); the Independent Broadcasting Authority Act (protection of national security); and the Rehabilitation of Offenders Act (protection of rights and reputations).

[20] See British North America Act 1867, ss. 93, 133; Commonwealth of Australia Constitution Act 1900, ss. 51, 80, 116, 117; South Africa Act 1909, ss. 35, 137; Government of Ireland Act 1920, s. 5.

[21] K.C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966), 49.

[22] Sir William Dale, *The Modern Commonwealth* (London: Butterworths, 1983), 167.

Bill of Rights based on that of Hawaii would ensure recognition of his kingdom as an international power.[23] Sir Kenneth Roberts-Wray, former legal adviser in the British Foreign Office, describes the century-old Tongan code as one that has 'few empty spaces available for fresh material to be taken' from contemporary human rights instruments. He admits, however, that had that law come to his notice during his period of service, he would have been impressed, but would not have reacted further. He explains that 'In those days there was little recognition of the international relevance of basic human rights. Peoples who enjoyed them took them for granted and did not concern themselves overmuch with those to whom they were denied, except when notorious injustice hit the headlines.' It required the gross excesses attendant upon the second of two world wars to 'shake us out of our complacency'.[24]

In India, in the first quarter of the twentieth century, there was considerable nationalist agitation for a constitutional guarantee of fundamental rights. In a country which was larger than the United States, and which had a population more varied than that of the whole of Europe, there was a widespread perception that the English common law was not sufficiently malleable in contending with the growing aspirations of a restless, volatile and stratified community of 500 million men and women who spoke many different languages and whose faiths and beliefs straddled the religious spectrum. But in 1930, the Simon Commission on the Constitution responded quite negatively, though characteristically:

> Many of those who came before us have urged that the Indian constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European states formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective.[25]

Although the Simon Commission failed to discern it, a 'will' to make a Bill of Rights work probably existed among the emerging Indian political leadership who would soon be called upon to face the challenge

[23] James S. Read, 'Bills of Rights in the Third World: Some Commonwealth Experiences' (1973) *Verfassung und Recht in Übersee* 21.

[24] Sir Kenneth Roberts-Wray, 'Human Rights in the Commonwealth' (1968) 17 *International and Comparative Law Quarterly* 908.

[25] Cmd 3569 (1930), 22–3.

of uniting the numerous disparate forces into a single state. Such a will did not appear to exist among British parliamentarians who, when the demand was renewed a few years later, perfunctorily dismissed it. According to them, 'the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional document'.[26]

As Ceylon approached independence in the mid-1940s, the British government sought constitutionally to safeguard the interests of ethnic, religious and linguistic minorities who would soon become subject to Sinhalese–Buddhist majority rule. The ministers were invited to submit for consideration by a constitutional commission a draft constitution which was acceptable to the minorities. Some of the ministers believed that comprehensive constitutional guarantees of human rights would allay the fears of minority communities in regard to their position in the new political order. A justiciable Bill of Rights with procedural remedies for their enforcement was accordingly prepared. The majority of the ministers were, however, persuaded by their constitutional adviser, Sir Ivor Jennings, then principal of the Ceylon University College, not to include such a Bill of Rights. With no demand by the minorities themselves, no proposal by the ministers, no insistence by the colonial office, and no recommendation by the constitutional commission that was appointed, Ceylon emerged into independence with no Bill of Rights. Instead, the Ceylon (Constitution) Order in Council 1946 contained two limitations on Parliament's powers: the prohibition of legislative action seeking to (a) interfere with the free exercise of religion, or (b) discriminate against a community or religious group.[27] Fifteen years later, in a BBC radio talk, Sir Ivor Jennings conceded that a chapter on fundamental rights was very desirable in Ceylon's Constitution. He admitted that had he known then as much about the problems of Ceylon's heterogeneous society as he now did, 'some of the provisions would have been different'.[28]

Ten years later, as the British West African colony of the Gold Coast prepared for independence, the then Gold Coast government prepared a draft constitution which included seven articles for the protection

[26] *Report of the Joint Parliamentary Committee on Indian Constitutional Reform*, H.L.6 and H.L.5 of 1933–4.

[27] Section 29. See also *Ceylon: Report of the Commission on Constitutional Reform, 1945*: Cmd 6677.

[28] Noted in J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Colombo: Hansa Publishers Ltd, 1973), 509.

of fundamental rights. The draft was rejected as a whole by the British government, and Ghana at independence had no Bill of Rights.[29] Instead, the 1957 Constitution included provisions similar to those found in the 1946 Constitution of Ceylon relating to racial discrimination, freedom of conscience and the practice of religion. But making its appearance for the first time (in this instance, in a country which supplied half the world's cocoa and enjoyed one of the strongest economies in Africa) was a recognition of the right to property: a detailed provision requiring the payment of adequate compensation, to be determined by the Supreme Court, upon the compulsory acquisition of property.[30]

### *From common law to constitutional entrenchment*

Despite its stance at home, the British attitude to constitutional Bills of Rights in its colonial and dependent territories underwent a dramatic change with the dawn of the 1960s. This manifested itself in Kenya where the continuing Mau Mau insurrection had made it quite plain that the transfer of political power to the African majority could not be delayed any longer. But in that East African colony, not only was the predominantly African population still excluded from government, but extensive tracts of agricultural land were also effectively in the hands of European settlers. At the January 1960 constitutional conference that preceded Kenyan independence, the British government actually insisted that legal provision for the judicial protection of human rights be included in the independence constitution.[31] It is not improbable that the British government hoped that a constitutional guarantee of fundamental rights, including the prohibition of discrimination, and very detailed provisions designed to prevent the compulsory acquisition of property except in specified circumstances and on prompt payment of full compensation, would provide the white minority with sufficient security to enable them to continue enjoying a substantial measure of economic power under black majority rule.[32]

Apart from local considerations, other factors probably contributed to the British government's rejection of the notion that constitutionally

[29] James S. Read, 'Bills of Rights in the Third World: Some Commonwealth Experiences' (1973) *Verfassung und Recht in Übersee* 21, at 28, quoting the then Attorney General, Geoffrey Bing: Geoffrey Bing, *Reap the Whirlwind* (London: Macgibbon & Kee, 1968).

[30] S.I. 1957, No. 277. [31] Cmnd 960 (1960).

[32] For the 1960 Constitution of Kenya, see S.I. 1960, No. 2201.

entrenched human rights are 'rhetorical nonsense – nonsense upon stilts'.[33] Firstly, events at the United Nations and in Western Europe must have had a catalytic influence on both Westminster and Whitehall. The 1945 Charter of the United Nations; the 1948 UDHR; the 1951 ratification of the European Convention on Human Rights and Fundamental Freedoms (ECHR) (and its application in 1953 to forty-two overseas dependent territories), and the drafting of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (an exercise in which Britain was an active participant), were all events that charted a new course and opened a new chapter in the history of political thought.[34]

Secondly, the 1949 Indian initiative to give herself, through a constituent assembly, a new constitution which contained a carefully formulated statement of fundamental rights[35] was beginning to prove infectious in South Asia. The Constituent Assembly of Pakistan also opted for constitutional guarantees in its 1956 Constitution. Sir Ivor Jennings was amused by 'a tendency to carry these constitutional provisions too far and to include in the constitutions too many detailed provisions'. He recorded two subcontinental jokes: an Indian judge cannot blow his nose without express constitutional authority, and in Pakistan all judges' chairs have cushions in order that they might sit fairly and freely, without favour and without fear.[36] Notwithstanding such derision, on Merdeka Day, 31 August 1957, the Federation of Malaya became an independent, sovereign state within the Commonwealth under a constitution which entrenched a number of 'fundamental liberties' based on the Indian model.[37] In the same year, in Ceylon, a joint select committee of the Senate and the House of Representatives was appointed to consider the revision of the constitution with reference, *inter alia*, to the guaranteeing of fundamental rights. In 1959 the select committee

[33] Jeremy Bentham's much quoted comments on the French Declaration of the Rights of Man and of the Citizen.

[34] In 1966, Britain recognized the right of individual petition to the European Commission of Human Rights, and subscribed to the compulsory jurisdiction of the European Court of Human Rights. In 1967, Britain extended both these facilities to its dependent territories. In 1966, Britain also voted for, and then signed, the two United Nations Covenants.

[35] The Constitution of India 1949.

[36] W.I. Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1958), 107.

[37] Constitution of Malaya 1957, *Gazette* of 11 December 1957, Notification No. (New Series) 885.

resolved unanimously to amend the constitution to include an enforceable chapter on fundamental rights similar to that in the Indian Constitution. Unfortunately, further proceedings were aborted by the dissolution of Parliament which followed the assassination of the reformist Prime Minister who had been the motivating force behind the proposed revision.

Thirdly, there was the Nigerian precedent. As Britain began to dismantle its enormous colony on the west coast of the African continent, one of the issues that remained unresolved was how best to deal with the fears of several minority groups who insisted on safeguards before they consented to independence. A Minorities Commission under the chairmanship of Sir Henry Willink was appointed 'to ascertain the facts about the fears of minorities in any part of Nigeria and to propose means of allaying those fears, whether well or ill founded'. The commission reported that two options were available: fragment the country by dividing the existing three regions into new regions in such a way as to satisfy the claims of minorities for autonomy; or include provisions guaranteeing fundamental rights in the constitution. The commission found little enthusiasm for the entrenchment of human rights; almost all the different groups competing for a share of real political power were insistent that nothing but separate states could meet their problems. In fact, active support for a Bill of Rights came only from a few Christian groups. Nevertheless, the commission recommended that a Bill of Rights based upon the provisions of the ECHR be written into the constitution.[38] The commissioners were not so starry-eyed as to believe that they had discovered the answer to all of Nigeria's seemingly intractable problems. But, as they observed:

> Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights.

[38] Minorities Commission Report, Cmnd 505 (1958).

The arguments hitherto employed by Britain to reject requests for the entrenchment of human rights were no longer relevant. Not only had it already ratified the ECHR, but it had actually extended its provisions to Nigeria. How then could it decline to incorporate in Nigerian domestic law provisions which Britain had already applied to that territory through its executive treaty-making power? Britain would surely not have ratified the ECHR on behalf of Nigeria if it was not ready and willing to fulfil, in respect of Nigerian society, the obligations arising from that treaty.

In December 1959 Nigeria became the first British colony to be provided with a constitutional Bill of Rights.[39] It was to have a profound effect throughout the Commonwealth. In quick succession, Bills of Rights, usually based on the Nigerian model, were included in the independence constitutions of Sierra Leone (1961), Cyprus (1961),[40] Jamaica (1962), Uganda (1962), Trinidad and Tobago (1962),[41] Kenya (1963), Malawi (1964), Malta (1964), Zambia (1964), The Gambia (1965), Singapore (1965),[42] Guyana (1966), Botswana (1966), Lesotho (1966), Barbados (1966), Nauru (1968), Mauritius (1968), Swaziland (1968), Fiji (1970), Western Samoa (1970), Bangladesh (1972), Bahamas (1973), Grenada (1974), Papua New Guinea (1975), Seychelles (1976), Tuvalu (1978), Dominica (1978), Solomon Islands (1978), Saint Lucia (1979), Kiribati (1979), Saint Vincent and Grenadines (1979), Zimbabwe (1979), Vanuatu (1980), Belize (1981), Antigua and Barbuda (1981), Saint Christopher and Nevis (1983) and Namibia (1990). A standard paragraph in nearly

[39] Nigeria (Constitution)(Amendment No. 3) Order in Council 1959, S.I. 1959, No. 1772. It was retained upon independence in the Nigeria (Constitution) Order in Council 1960, S.I.1960, No. 1652.

[40] In the 1960 Treaty Concerning the Establishment of the Republic of Cyprus, entered into between Britain, Greece and Turkey, and the Republic of Cyprus, it was agreed that 'the Republic of Cyprus shall secure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in Section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on the 4th of November 1950, and the Protocol to that Convention signed at Paris on the 20th of March 1952'. (Cmnd 1093 (1964 reprint)) Accordingly, the chapter on fundamental rights in the Constitution of Cyprus was based on the then existing European model.

[41] The draft independence constitution of Trinidad and Tobago was prepared by the Government of Trinidad and Tobago, examined by a joint select committee of the Senate and the House of Representatives, and approved by the House of Representatives. By the time the constitutional conference convened in London in 1962, it had already been decided by the local legislature that the fundamental rights provisions should follow the 1960 Canadian Bill of Rights.

[42] The fundamental rights in the Singapore Constitution were similar to those in the Constitution of Malaya, and were based on the Indian model.

every report of a constitutional conference held in London to formulate an independence settlement would read thus:

> The Constitution will provide for safeguarding the fundamental rights and freedoms of the individual, irrespective of race, place of origin, political opinion, colour, creed or sex, subject to respect for the rights and freedoms of others and for the public interest. These fundamental rights and freedoms will include the right to life, liberty, security of the person and protection of the law; freedom of conscience, of expression and of assembly and association and of movement; protection for the privacy of a person's home and other property and from deprivation of property without compensation. Provision will also be included affording protection against discriminatory treatment on grounds of race, place of origin, political opinions, colour or creed. Subject to safeguards, derogation from certain of these fundamental rights and freedoms will be permitted in time of war, public emergency, or when democratic institutions are threatened by subversion. The period during which a proclamation declaring a state of emergency remains in force without being extended by resolution of the House of Assembly will be limited to one month, and any person detained under emergency measures will be entitled to have his case reviewed by an independent and impartial tribunal.
>
> Provision will be made in the Constitution for the enforcement by the Courts of the fundamental rights and freedoms. In particular, any person who alleges that any of the protective provisions is being or is likely to be contravened in relation to him will have a right to apply to the High Court for redress, and there will be provision for rights of appeal in such cases.[43]

Imminent independence was not considered to be an essential prerequisite for a Bill of Rights. Chapters on fundamental rights based on the Nigerian model and modified to suit varying local circumstances soon found their way into the constitutions of the dependent territories as well. Today, such judicial protection of human rights exists in Anguilla, Bermuda, Falkland Islands, Gibraltar, Montserrat, and Turks and Caicos Islands.

### *The impact of regional instruments*

The ECHR, which came into force in 1953, was the first treaty designed to secure the protection of human rights on a collective basis. While

[43] Report of the Barbados Constitutional Conference 1966, Cmnd 3058.

it became directly applicable in the domestic legal systems of several states, with legislative or even supralegislative status being accorded to it,[44] these and other states parties also resorted to the technique of incorporating its provisions in their national constitutions. Accordingly, a Bill of Rights based on the ECHR became a standard feature of many western European constitutions.[45] With the democratization of eastern Europe, and with the newly 'liberated' states wishing to enter the mainstream of European political, economic and social activity by securing membership in the Council of Europe, the constitutional protection of human rights in that region was significantly enhanced. A comprehensive Bill of Rights is now an integral part of the constitutions of each of those states.[46] Through all these developments, Britain remained a significant exception, until 1998 when, after decades of debate in academic and political circles, a formula was agreed upon to incorporate into the domestic law of a country with no written constitution the substantive provisions of the ECHR.[47]

The entry into force in 1978 of the American Convention on Human Rights (ACHR) also influenced constitution-making in south and central America. Many of the constitutions drafted and enacted following that event in states parties to that Convention contain a statement of fundamental rights.[48] On the African continent, the catalyst arrived in the form of the 1981 African Charter on Human and Peoples' Rights (AfCHPR). The decade that followed saw the restoration of democracy in several states and the adoption of new constitutions containing justiciable Bills of Rights.[49] Many of them made specific reference to the

[44] As, for example, in Austria where the Convention enjoys constitutional status. See Federal Constitution (Amendment) Act, 4 March 1964.

[45] A statement of fundamental rights was included in the Constitutions of Austria, Belgium, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Portugal, San Marino, Spain, Switzerland and Turkey.

[46] They include the Constitutions of Belarus 1994, Bulgaria 1991, Czech Republic 1992, Estonia 1992, Hungary 1949 (as amended), Latvia 1922 (as amended), Lithuania 1992, Macedonia 1991, Poland 1992, Romania 1990, Russian Federation 1993, Slovak Republic 1992, Slovenia 1991, Tajikistan 1993, Turkmenistan 1992, Uzbekistan 1992, Yugoslavia (Serbia and Montenegro) 1992, and Kyrghyz Republic 1993.

[47] Human Rights Act 1998.

[48] See the Constitutions of Chile 1980, Colombia 1991, Ecuador 1984, El Salvador 1983, Guatemala 1985, Haiti 1987, Honduras 1982, Nicaragua 1987, Paraguay 1992, Peru 1979 and Suriname 1987.

[49] New constitutions containing entrenched Bills of Rights were adopted in Angola 1980, Benin 1990, Burkina Faso 1991, Burundi 1992, Chad 1991, Comoros 1992, Congo 1992,

regional instrument. For example, the preamble to the 1990 Constitution of Benin reaffirmed 'our attachment to the principles of democracy and human rights as defined in the African Charter on Human and People's Rights, whose provisions make up an integral part of this Constitution and have a value superior to the internal law'.[50]

### *The impact of the Covenants*

The growing human rights consciousness generated by the drafting and adoption of the two human rights covenants and their entry into force in 1976 led many states parties to endeavour to incorporate statements of fundamental rights in their national constitutions. Among them were the member states of the old Commonwealth whose early attempts to graft a Bill of Rights into existing constitutional structures had either been aborted or had met with limited success. In 1960, the Canadian legislature, unable to amend its own constitution which was contained in an Act of the United Kingdom Parliament, had enacted a Bill of Rights in the form of an ordinary statute. It declared that certain rights and freedoms had existed and would continue to exist in Canada, and required that every law (that is, any existing or future federal statute) be construed and applied so as not to abrogate, abridge, or infringe any of those rights or freedoms. It also required the minister of justice to examine proposed legislation in order to ascertain whether any provision was inconsistent with the Bill of Rights and to report any such inconsistencies to Parliament. For most of the twenty-two years that it remained in force, the Canadian Bill of Rights was nothing more than an aid to the interpretation of statutes.[51] In 1982, the Canadian Charter of Rights and Freedoms, enacted in London at the request of Canada, offered that country a Bill of Rights that was, in some respects, ahead of contemporary international developments.

Djibouti 1992, Equatorial Guinea 1991, Ethiopia 1991, Gabon 1991, Ghana 1990, Guinea 1990, Guinea-Bissau 1984, Madagascar 1992, Malawi 1994, Mali 1992, Mauritania 1991, Morocco 1992, Namibia 1991, Niger 1992, Rwanda 1991, São Tomé and Príncipe 1990, Seychelles 1992, Sierra Leone 1991, South Africa 1993, Sudan 1985, Togo 1992, United Republic of Tanzania 1985, Zaire 1990, Zambia 1991 and Zimbabwe 1979.

[50] See similar provisions in the preambles to the Constitutions of Burundi 1991, Burkina Faso 1991, Comoros 1991, Congo 1992, Gabon 1991, Madagascar 1992, Niger 1992 and Togo 1992.

[51] It took ten years for the Supreme Court to determine that it had the authority to declare a law to be inoperative if it was found to be inconsistent with the Bill of Rights.

On the other hand, several attempts in Australia to incorporate the ICCPR into domestic law failed. In November 1973, the Human Rights Bill introduced in the Australian Senate lapsed with the prorogation of Parliament in the following year. The Australian Bill of Rights Bill 1985 was the subject of a long debate in the Senate before being withdrawn by the Government in 1986. In 1988, an attempt by referendum to include certain fundamental rights in the Australian Constitution was overwhelmingly defeated.[52] The Sri Lankan parliament had control over its constitution, but an attempt in 1970 to entrench a constitutional Bill of Rights was hamstrung by an ideological debate on the relative supremacy of a Bill of Rights and parliament. The efforts of a Marxist minister of constitutional affairs to reconcile the judicial protection of human rights with a legislature which was to be the 'supreme instrument of state power' produced a caricature of a Bill of Rights which hardly had any impact on Sri Lankan life in the six years that that constitution remained in force. The rights considered relevant were sandwiched into one paragraph of one article; the second paragraph contained a wide exclusion clause which authorized the legislature to restrict the exercise and operation of the rights to protect a variety of interests; and the third paragraph provided that inconsistent existing law would nevertheless continue in force. There was no special enforcement procedure either.[53] In 1978, the Sri Lankan Parliament enacted a new constitution which contained a more comprehensive (though not entirely satisfactory) statement of fundamental rights with limited enforcement procedures.

[52] The ICCPR, however, is contained in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986.

[53] Its federal political structure and the fact that it had no direct control over the amendment of its constitution prevented Canada from enacting in 1960 an effective entrenched Bill of Rights. But why did Sri Lanka, which suffered from neither of these impediments, fail to provide herself with proper machinery for the protection of fundamental rights? The answer is not difficult to find. An effective Bill of Rights is necessarily a limitation on both legislative and executive power, and is usually adopted at a critical stage in a country's evolution, such as emergence into statehood or in the wake of a revolution. But when a government in office and a parliament in session set out to draft a Bill of Rights, they are in effect being called upon to determine what limitations ought to be placed on the exercise by them of power which they already possess. S. Nadesan QC drew the following analogy at the time: 'It is as if at Runnymede, in 1215, the Barons of England had invited King John to draft the Magna Carta' (*Some Comments on the Constituent Assembly and the Draft Basic Resolutions*, Colombo: Nadaraja Press, 1971). Unless there are very strong motivating factors, neither a government nor a parliament is likely to lightly surrender its power through a Bill of Rights.

Tanganyika, unlike Canada and Sri Lanka, had decided against the adoption of a Bill of Rights. A presidential commission which examined the question recommended in 1965 that any attempt to protect individual freedom by a Bill of Rights would, in the circumstances of Tanganyika, 'be neither prudent nor effective'.[54] It proposed instead the establishment of a permanent commission of inquiry into allegations of abuse of power. Three reasons were urged against a Bill of Rights: (a) a Bill of Rights would limit in advance of events the measures which the government may take to protect the nation from the threat of subversion and disorder; (b) a Bill of Rights would invite conflict between the judiciary and the executive and legislature; and (c) Tanganyika had dynamic plans for economic development which could not be implemented without revolutionary changes in the social structure. Despite these protestations, the Fifth Constitutional Amendment Act 1984, which became operative on 1 March 1985, introduced a Bill of Rights into the Constitution of the United Republic of Tanzania. As Tanzania's Attorney General explained to a new generation of law students, the fact that it took Tanzania well over twenty years to have the Bill of Rights incorporated in the constitution was indicative of the fact that 'the acceptance or otherwise of the Bill of Rights is an intrinsic involvement and consequential result of the national moral growth'.[55]

Nearly all post-ICCPR constitutions now contain a statement of fundamental rights inspired by, though not necessarily in the same terms as, the covenant. It was in a British colony, however, that the first attempt was made to incorporate in a domestic law the rights as defined in the ICCPR. The Hong Kong Bill of Rights Ordinance 1991 was a mirror image of that covenant.[56] Although the People's Republic of China was not then a party to either covenant, a law enacted in 1990 by China's legislature, which was intended to serve as the constitution

[54] *The United Republic of Tanzania – a Report of the Presidential Commission on the Establishment of a Democratic One Party State* (Dar Es Salaam: Government Printer, 1965), 30–3.

[55] Address by the Hon. D.Z. Lubuva, Attorney General and Minister for Justice, to the Faculty of Law, University of Dar-es-Salaam on 16 October 1987 (1988) 14 *Commonwealth Law Bulletin* 853.

[56] The right to self-determination was omitted, probably because that colony was being denied the exercise of that right in consequence of a 1984 agreement between Britain and China whereby the former undertook to 'restore' to the latter the territory and its inhabitants on 1 July 1997. The views of the inhabitants were not sought before this agreement was signed or ratified.

of Hong Kong when it became a special administrative region of China on 1 July 1997, also incorporated the provisions of the two covenants in the domestic law of Hong Kong. Article 39(1) of the Basic Law of the Hong Kong SAR declares that the provisions of the two covenants 'shall remain in force and shall be implemented through the laws of the Hong Kong SAR'. Paragraph 2 of that article adds that 'The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article'. The Court of Final Appeal of Hong Kong has held that the effect of Article 39 was to give the provisions of the ICCPR and ICESCR constitutional force in the Hong Kong SAR.[57]

### *The drafting of a Bill of Rights*

There is no prescribed formula for a Bill of Rights. Its provisions may be as diverse and as numerous as one's imagination allows. Or they may be as narrow and as restricted as the need for power and control dictate. The strength of a Bill of Rights will, therefore, range from one end of the spectrum to another, depending on the depth of commitment of those in power to the concept of human rights. In several countries, the scope and content of the rights and freedoms as defined in the international and regional instruments, have been expanded. In others, their applicability has been restricted.

#### Comprehensiveness

Although the ICCPR and ICESCR sought to express in precise legal language the general principles first articulated in the UDHR, they also reflected a political compromise between the liberal democracies and the socialist states during the period of the cold war. For example, the right to private ownership of property was dropped. The right to seek asylum in other countries was also omitted. The civil law concept of *'ordre public'*, which is unintelligible in common law jurisdictions, was introduced. Some rights were restrictively defined; an example being the right to life, which took account of the fact that several countries had not yet abolished the death penalty. These compromises were inevitable in

[57] *HKSAR* v. *Ng Kung Siu*, Court of Final Appeal of the Hong Kong SAR, [2000] 1 HKC 117; *Chan Kam Nga (an infant)* v. *Director of Public Prosecutions*, Court of Final Appeal of the Hong Kong SAR, [1999] 1 HKLRD 304 at 310; [1999] 1 HKC 347, at 355, per Bokhary PJ.

the bargaining process that precedes the adoption of any international treaty; and the covenants are treaties.

The omission of the right to property, however, has not prevented the inclusion of an extensive definition of that right in nearly a hundred constitutions. For example, article 8 of the Constitution of Saint Christopher and Nevis 1983, the text of which extended over three pages, prohibited the compulsory acquisition of any interest or right over property of any description, except for a public purpose under the provisions of a law which provided for prompt payment of compensation to be determined judicially, and which may be remitted, free of any deduction of any tax, to any other country.[58] Nor did the ambivalence regarding the death penalty prevent the Constitution of Namibia 1990 from expressly providing that: 'No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia'.[59] Similarly, the Constitution of Germany 1949 stated that 'anybody persecuted on political grounds has the right of asylum'.[60] In none of the Commonwealth Bills of Rights is there any mention whatsoever of *ordre public*; for obvious reasons, the more familiar common law concept of 'public order' was preferred.[61]

The requirement that anyone who is arrested on a criminal charge shall be brought 'promptly' before a judge was translated into domestic law by substituting therefor a specified period such as twenty-four hours (in Greece,[62] Kenya,[63] Western Samoa,[64] Nauru,[65] Bangladesh,[66]

[58] Cf. the even more detailed provision in article 16 of the Constitution of Zimbabwe 1979. Other constitutions that recognize the right to property include those of Greece 1975, art. 17; Germany 1949, art. 14; Ireland 1937, art. 43; Switzerland, art. 22(3); South Africa 1993, art. 28; Burkina Faso 1991, art. 15; Zambia 1991, art. 16; Japan 1946, art. 29; Thailand 1991, arts. 35 and 36; Philippines 1986, art. III, s. 9; Thailand 1991, arts. 24 and 49; Slovak Republic 1992, art. 20; Bulgaria 1991, art. 17; Russian Federation 1993, art. 35; Argentina 1853, art. 17; Mexico 1917, art. 27; Paraguay 1992, art. 109; Iran 1979, art. 47; Iraq 1970, arts. 15–17; Syrian Arab Republic 1973, arts. 15–17; Solomon Islands 1978, art. 8; Nauru 1968, art. 8; and Western Samoa 1960, art. 14.

[59] For a similar provision, see Constitution of Colombia 1991, art. 11.

[60] Art. 16a. See also Constitutions of Slovenia 1991, art. 48; Burundi 1992, art. 24; Cape Verde, art. 36; Somali Democratic Republic, art. 35; Colombia 1991, art. 36; and Iraq 1970, art. 34.

[61] See, for example, the Constitution of Monserrat 1990, articles 58, 59, 60, 61, 62, and 64.

[62] Constitution of Greece 1975, art. 6(2).

[63] Constitution of Kenya 1969, art. 72(3).

[64] Constitution of Western Samoa 1960, art. 6(4).

[65] Constitution of Nauru 1968, art. 5(3).

[66] Constitution of the People's Republic of Bangladesh 1972, art. 33(3).

Ghana,[67] Cape Verde,[68] and Lesotho),[69] forty-eight hours (in Antigua and Barbuda,[70] South Africa,[71] and Malta),[72] or seventy-two hours (in Belize,[73] Dominica,[74] and Saint Christopher and Nevis).[75] Article 51 of the Constitution of Papua New Guinea 1975 gave substance to the 'freedom to seek information' (an attribute of the freedom of expression) by providing specifically that every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society in respect of certain specified areas of activity.[76] The Constitution of Saint Lucia 1978 extended the application of the prohibition of discrimination into the private sector by requiring that 'No person shall be treated in a discriminatory manner by any person or authority',[77] while the Canadian Charter of Rights and Freedoms 1982 added 'age' and 'mental or physical disability' to the conventional grounds upon which the law may not discriminate against any person.[78]

In early constitutions, economic, social and cultural rights were treated as 'directive principles of state policy', and therefore non-justiciable.[79]

[67] Constitution of the Republic of Ghana 1979, art. 21(3).
[68] Constitution of Cape Verde, art. 29.
[69] Constitution of Lesotho 1966, art. 6(2).
[70] Constitution of Antigua and Barbuda 1981, art. 5(5).
[71] Constitution of South Africa 1993, art. 25(2)(b).
[72] Constitution of the Republic of Malta (June 1975 ed.), art. 35(2).
[73] Constitution of Belize 1981, art. 5(2).
[74] Constitution of the Commonwealth of Dominica 1978, art. 3(3).
[75] Constitution of Saint Christopher and Nevis 1983, art. 5(3).
[76] The right of access to official information is being increasingly recognized in national constitutions. See, for example, Constitutions of Nepal 1990, art. 16; Seychelles 1992, art. 28; Cape Verde, art. 43; South Africa 1993, art. 23; Belarus 1994, art. 34; Bulgaria 1991, art. 41; and Malawi 1994, art. 37.
[77] Art. 13(2).
[78] Art. 15. See also the Constitution of Seychelles 1992, art. 36 which recognizes the rights of the aged and the disabled.
[79] For example, the 1937 Constitution of Ireland contained a statement of such 'principles of social policy' which were 'intended for the general guidance of the Oireachtas [Parliament]'. The application of those principles in the making of law was to be 'the care of the Oireachtas exclusively' and were 'not to be cognizable by any court' (art. 45). Part IV of the 1949 Constitution of India is entitled 'Directive Principles of State Policy', and contains provisions that recognize several economic, social and cultural rights. These rights, however, are subject to the qualification that they 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'. See also Constitutions of Malta, article 22; Sri Lanka 1972, article 16; Bangladesh 1972, chapter II; Spain 1978, articles 39–52; Ghana 1979, article 6(1); Nigeria 1979, article 13; Guyana 1980, article 39; Nepal 1990, part 4; Thailand 1991, chapter V; Namibia 1991, articles 95–101; and Sierra Leone 1991, chapter 3.

But many recent constitutions expressly recognize most of the economic, social and cultural rights,[80] while others include selected rights such as the rights to education,[81] academic freedom,[82] health,[83] shelter,[84] work,[85] a safe and healthy environment,[86] culture,[87] and social security.[88]

[80] See, for example, the Constitutions of Belarus 1994, arts. 41–55; Bulgaria 1991, arts. 47–55; Estonia 1992, arts. 28–9, 32, 37–9; Hungary 1949 (as amended), arts. 70/B-70/K; Macedonia 1991, arts. 30–49; Poland 1992, arts. 67–81; Slovak Republic 1992, arts. 35–45; Slovenia 1991, arts. 49–62, 65–76; Turkmenistan 1992, arts. 31–6; Uzbekistan 1992, arts. 36–42; Yugoslavia (Serbia and Montenegro) 1992, arts. 45–62; Kyrghyz Republic 1993, arts. 21–37; Netherlands 1987, arts. 19–23; Portugal 1989, arts. 58–79; Turkey 1987, arts. 41–64; Colombia 1991, arts. 42–82; Costa Rica 1949, arts. 50–89; Ecuador 1984, arts. 26–31; El Salvador 1983, arts. 32–70; Guatemala 1985, arts. 47–117; Haiti 1987, arts. 32–9; Honduras 1982, arts. 111–181; Nicaragua 1987, arts. 57–88; Peru 1979, arts. 12–57; Suriname 1987, arts. 24–51; Venezuela 1961, arts. 72–109; Mongolia 1992, art. 16; Burkina Faso 1991, arts. 14–30; Cape Verde, arts. 58–79; Congo 1992, arts. 30–55; Madagascar 1992, arts. 17–40; and São Tomé and Princípe 1990, arts. 41–55.

[81] See Constitutions of Algeria, art. 50; Burundi 1992, art. 32; Cape Verde, art. 49; Ghana 1990, art. 25; Guinea-Bissau 1984, art. 41; Malawi 1994, art. 25; Namibia 1991, art. 20; Rwanda 1991, arts. 26–7; Senegal 1963, arts. 16–18; Seychelles 1993, art. 33; South Africa 1993, art. 32; Belgium 1994, art. 24; Cyprus 1960, art. 20; Denmark 1953, art. 76; Germany 1949, art. 7; Greece 1975, art. 16; Ireland 1937, art. 42; Luxembourg 1868, art. 23; Bulgaria 1991, art. 53; Lithuania 1992, art. 41; Russian Federation 1993, art. 43; Slovak Republic 1992, art. 42; Slovenia 1991, art. 57; Tajikistan 1993, art. 23; Iran 1979, art. 30; Iraq 1970, art. 27; Kuwait 1962, art. 40; Syrian Arab Republic 1973, art. 37; Republic of Yemen 1994, art. 53; Afghanistan 1990, art. 56; China 1982, art. 46; Indonesia 1945, art. 31; Japan 1946, art. 26; Lao Peoples Democratic Republic 1991, art. 25; Malaysia 1957, art. 12; Republic of Korea 1988, art. 31; and Vietnam 1992, art. 59.

[82] See Constitutions of Slovenia 1991, art. 60; Japan 1946, art. 23.

[83] See the Constitutions of Algeria, art. 51; Gabon 1991, art. 8; Ghana 1990, arts. 29–30; Guinea 1990, art. 15; Seychelles 1992, art. 29; Russian Federation 1993, art. 41; Slovenia 1991, art. 51; Tajikistan 1992, art. 25; Iraq 1970, art. 33; Syrian Arab Republic 1973, art. 47; Republic of Yemen 1994, art. 54; Paraguay 1992, art. 68; Panama 1972, arts. 105–13; and Afghanistan 1990, art. 57.

[84] See Constitution of Seychelles 1992, art. 34.

[85] See the Constitutions of Algeria, art. 52; Benin 1990, art. 30; Burundi 1992, arts. 33–4; Gabon 1991, art. 7; Ghana 1990, art. 24; Guinea 1990, art. 36; Guinea-Bissau 1984, art. 36; Mali 1992, art. 17; Niger 1992, art. 26; Senegal 1963, art. 20; Seychelles 1992, art. 35; Somali Democratic Republic, art. 21; South Africa 1993, art. 26; United Republic of Tanzania 1985, art. 22; Greece 1975, art. 22; Bulgaria 1991, art. 48; Russian Federation 1993, art. 37; Slovenia 1991, art. 35; Iraq 1970, art. 32; Kuwait 1962, art. 41; Syrian Arab Republic 1973, art. 36; Panama 1972, arts. 60–75; Paraguay 1992, arts. 86–94; Afghanistan 1990, art. 52; China 1982, art. 42; Indonesia 1945, art. 27; Lao People's Democratic Republic 1991, art. 26; Republic of Korea 1988, art. 32; and Thailand 1991, art. 48.

[86] See Constitutions of Benin 1990, arts. 27–9; Mali 1992, art. 15; Niger 1992, art. 28; South Africa 1993, art. 29; Greece 1975, art. 24; Russian Federation 1993, art. 42; Slovak Republic 1992, art. 44; Slovenia 1991, art. 72; Panama 1972, arts. 114–17; Paraguay 1992, art. 8; and Republic of Korea 1988, art. 35.

[87] See Constitutions of Burundi 1992, art. 36; Ghana 1990, art. 26; Malawi 1994, art. 26; Namibia 1991, art. 19; Seychelles 1992, art. 39; South Africa 1993, art. 31; Bulgaria 1991,

## Applicability

Since the primary purpose of a Bill of Rights is to introduce contemporary norms and standards into the governance of a country, its provisions must apply to all three organs of government. In other words, the law-making process, the administrative process, and the judicial process, must be subjected to the Bill of Rights.[89] This requirement is well expressed in the recent Constitution of the Republic of Namibia in the following terms: 'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'[90] As explicit is the provision in the Indian Constitution that, '13 (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. (2) The State[91] shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.'

art. 54; Russian Federation 1993, art. 44; Syrian Arab Republic 1973, art. 47; Panama 1972, arts. 76–86; Afghanistan 1990, art. 58; China 1982, art. 47; and Vietnam 1992, art. 60.

[88] See Constitutions of Seychelles 1992, art. 37; Bulgaria 1991, arts. 51–2; Russian Federation 1993, art. 39; Slovak Republic 1992, arts. 39–40; Slovenia 1991, art. 50; Tajikistan 1993, art. 25; Iran 1979, art. 29; Syrian Arab Republic 1973, art. 46; Republic of Yemen 1994, art. 55; Argentina 1853, art. 14; Panama 1972, arts. 105–113; Afghanistan 1990, art. 57; China 1982, art. 45; Indonesia 1945, art. 34; and Republic of Korea 1988, art. 34.

[89] *Hinds* v. *R*, Privy Council on appeal from the Court of Appeal of Jamaica [1976] 1 All ER 353 at 360. Referring to the chapter on fundamental rights in the Constitution of Jamaica, Lord Diplock explained that its provisions formed part of the substantive law of the state and, until amended by whatever special procedure was laid down in the constitution for that purpose, 'impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers'.

[90] Another formulation to like effect, but confined to governmental action, is contained in article 179(2) of the Constitution of the Republic of Cyprus 1960: 'No law or decision of the House of Representatives or of any of the Communal Chambers, and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution [including those relating to fundamental rights and liberties].' See also the Constitution of the Solomon Islands 1978, article 2; the Constitution of Saint Vincent and the Grenadines 1979, article 101.

[91] The State is defined to include the Government and Parliament of India and the Government and Legislatures of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

The effect of a declaration by a court that a law is inconsistent with a protected right and is, therefore, void would be to render such law inoperative from the date of the judgment of the court. In Namibia, however, a court has the power and the discretion in an appropriate case, instead of declaring any law or action to be invalid, to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action, within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the court, whichever be the shorter, such impugned law or action is deemed to be valid.[92]

To exempt one or other branch of government, even partially, from the application of the fundamental rights provisions is to negate the purpose for which the Bill of Rights is enacted. But that is precisely what was done in the Caribbean state of Jamaica whose 1962 Constitution provided that: '26(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter [that is, Chapter III: Fundamental Rights and Freedoms], and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions'.[93] The Constitution of the Republic of Sri Lanka 1972 also stated quite explicitly that 'all existing law shall operate notwithstanding any inconsistency with' the fundamental rights and freedoms guaranteed therein.[94] In Belize, existing law was deemed to be valid, notwithstanding inconsistency with the Bill of Rights, for a period of five years,[95] while in Malta, the period of validity of such existing law was limited to three years.[96] In Tuvalu, only existing law in conflict with the prohibition of discrimination continued in force,[97] while in Singapore, existing laws which authorized arrest and detention 'in the interests of public safety, peace and good order', and laws which related to the misuse of drugs,

[92] Constitution of the Republic of Namibia 1990, art. 25(1)(a).

[93] For similar provisions, see the Constitution of Trinidad and Tobago 1962, art. 3; Constitution of Barbados 1966, art. 26; Constitution of Bahamas 1973, art. 30.

[94] Art. 18(3). This provision was re-enacted in the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 16(1).

[95] Constitution of Belize 1981, art. 21.

[96] Constitution of the Republic of Malta 1964, art. 48(7).

[97] Constitution of Tuvalu 1978, art. 15(9).

continued in force notwithstanding the constitutional provision guaranteeing the right to liberty of the person.[98]

## Limitations

While proper boundaries need to be placed on the exercise of certain individual rights, it is necessary to ensure that the opportunity for placing such restrictions and limitations is not utilized for the purpose of eroding the core of the right itself, or indeed, for destroying the right altogether. For example, ICCPR 9 which states that 'No one shall be deprived of his liberty except on such grounds . . . as are established by law' appears to have been understood and applied in Malaysia, Singapore and Sri Lanka to mean that the legislature may establish any grounds it chooses. For example, the Constitution of Malaysia provides in article 5(1) that 'No person shall be deprived of his life or liberty save in accordance with law'. A Malaysian court upheld the Internal Security Act of that country, which permitted arrest and indefinite detention by order of a minister of the government, as being a valid law passed by Parliament in terms of article 5(1). Consequently, any deprivation of personal liberty effected under that law is 'in accordance with law'.[99] It was also held in Malaysia, again on the authority of article 5(1), that, if Parliament deems it necessary that the death penalty should be mandatory for a person convicted of a specified criminal offence, that would be a valid exercise of legislative power.[100] On the other hand, Article 3 of the Constitution of Anguilla 1982 precisely defined the grounds on which the legislature may authorize the deprivation of personal liberty, and those grounds did not include executive detention.

Where such grounds are not precisely defined, a Bill of Rights could insist that any limitations upon the exercise of protected rights be conditional upon an objective determination of a court that such limitation is necessary. For example, article 11(2) of the Constitution of Anguilla 1982 subjected the freedom of expression to restrictions imposed by law which are 'reasonably necessary' to protect certain interests (such as public order, public morality or public health) and are 'reasonably justifiable in a democratic society'. Whether a restriction satisfies these two

[98] Constitution of Singapore, art. 9(6).
[99] *Public Prosecutor* v. *Yee Kim Seng* [1983] 1 *Malayan Law Journal* 252.
[100] *Attorney General* v. *Chiow Thiam Guan* [1983] 1 *Malayan Law Journal* 51.

tests will be determined by a court. A similar determination would take place in applying article 1 of the Canadian Charter of Rights and Freedoms which states that the rights and freedoms guaranteed are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. On the other hand, the Constitution of Malaysia stated in article 10(2) that the freedom of speech and expression may be subject to 'such restrictions as it [Parliament] deems necessary or expedient in the interests of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence'.[101] The Malaysian Parliament was, therefore, the sole judge of the question whether it was necessary to impose a restriction to protect or promote any of the specified interests. The question was non-justiciable.

Sometimes, the Covenant has been modified to meet the special needs of the country concerned. For instance, ethnicity and multiculturalism were recognized by permitting the continued application of personal and customary laws in Fiji,[102] Lesotho,[103] and Zimbabwe,[104] notwithstanding the rule prohibiting discriminatory legislation. In Papua New Guinea, extrajudicial means of dispute settlement in respect of the ownership of customary land were preserved.[105] In Guyana, provision was made for acquiring the property of Amerindians 'for the purpose of its care, protection and management', notwithstanding the prohibition against the compulsory acquisition of property,[106] and in Malaysia, the right to equality did not invalidate or prohibit any provision 'for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service'.[107] The freedom of movement was modified in Botswana by placing restrictions within defined areas of territory on persons who were not Bushmen 'to the extent that such restrictions are reasonably

[101] For a similar provision, see Constitution of Singapore, art. 14(2).
[102] Constitution of Fiji 1970, art. 15(3).
[103] Constitution of Lesotho 1966, arts. 17(4)(b) and (c).
[104] Constitution of Zimbabwe 1979, arts. 23(3)(a) and (b).
[105] Constitution of Papua New Guinea 1975, art. 54(b).
[106] Constitution of the Co-operative Republic of Guyana 1980, art. 142(2)(b)i.
[107] Constitution of Malaysia, art. 8(5)(c).

required for the protection and well-being of Bushmen';[108] in Kiribati, by restricting the movement of persons other than Banabans into Banaba;[109] and in Zimbabwe, by imposing restrictions on the residence within Tribal Trust Land of persons who were not tribespeople 'to the extent that such restrictions are reasonably required for the protection of the interests of tribespeople or their well-being'.[110]

## Derogation

Human rights law recognizes that there may be periods of public emergency threatening the very existence of the democratic structure of society, when it may be necessary, in the larger interests of the community, for the exercise of certain human rights to be temporarily suspended. This is to enable extraordinary measures to be taken by the government within the framework of the law to deal effectively with the critical situation that has arisen. Most Commonwealth Bills of Rights contain a provision relating to the protection of persons detained under emergency regulations. Such a provision requires the detainee to be informed, with reasonable promptitude and in sufficient detail, of the grounds upon which he is detained, and to be afforded reasonable facilities for consulting a legal practitioner of his choice. It also requires notification of such detention to be published in the government gazette, and review of the detention order by an independent and impartial tribunal before which the detainee will be permitted to appear in person or by counsel.[111] Recommendations made by such a tribunal are usually not binding on the government. However, the Constitution of the Republic of Namibia 1990 now provides for the appointment by the president, on the recommendation of the judicial service commission, of an advisory board consisting of five persons, of whom at least three should be judges of superior courts or qualified to be such, with power to order the release from detention 'if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such person'.[112] In Vanuatu, any citizen aggrieved by reason of any regulation made during a state of emergency may complain to the

[108] Constitution of Botswana 1966, art. 14(3)(c).
[109] Constitution of Kiribati 1979, art. 120.
[110] Constitution of Zimbabwe 1979, art. 223(f).
[111] See, for example, the Constitution of Belize 1981, arts. 18 and 19.
[112] Arts. 24(2)c), 26(5)(c).

Supreme Court, which has jurisdiction to determine the validity of such regulation.[113]

## Entrenchment

It is the legislature, through its unfettered law-making power, which has the capacity to pose the greatest threat to individual liberties. Therefore, the ultimate effectiveness of a Bill of Rights will depend upon its ability to achieve at least three objectives: (a) to override existing inconsistent legislation; (b) to invalidate future inconsistent legislation; and (c) to withstand attempts at repeal or amendment, expressly or by implication, by subsequent legislation. All these objectives are usually accomplished by incorporating the Bill of Rights in the national constitution. The constitution of a country is its supreme law, and prevails over all other legislation. It is usually unamendable, except with a special majority or through special procedure.

Different methods have been employed to secure entrenchment. For example, in Jamaica, a bill which seeks to alter any provision of the Bill of Rights requires the affirmative votes of not less than two-thirds of all the members in each House of Parliament at the final vote thereon.[114] In Nauru, such a bill requires to be approved by not less than two-thirds of the total number of members of Parliament as well as by two-thirds of all the votes validly cast at a referendum.[115] In the Bahamas, approval at a referendum must be preceded by the affirmative votes of not less than three-quarters of all the members of each House of Parliament.[116] But it is the Constitution of the Republic of Namibia – a country whose people had for several decades been subjected to brutal oppression – that now contains the most rigidly entrenched Bill of Rights in the world: 'No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter,

[113] Constitution of Vanuatu, art. 70.

[114] Constitution of Jamaica 1962, art. 49. For a similar provision, see Constitution of Botswana 1966, art. 90.

[115] Constitution of Nauru 1968, art. 84. For similar provisions, see Constitution of Kiribati 1979, art. 69; Constitution of Zambia 1964, art. 72 (a majority of all the persons entitled to vote in the referendum); Constitution of the Republic of Ghana 1979, art. 209 (affirmative votes of at least 48 per cent of those entitled to vote at a referendum, at least 50 per cent of those entitled to vote having voted).

[116] Constitution of Bahamas 1973, art. 54.

shall be permissible under the Constitution, and no such purported repeal or amendment shall be valid or have force or effect' (article 131).

## Justiciability

A declaration of human rights, however impressive it may seem and sound, will have very little impact on the community for which it is intended if it is not justiciable. To be justiciable the legal system must contain a review mechanism capable of determining whether or not there has been compliance with the obligations imposed by the Bill of Rights. For example, the preamble to the 1974 Constitution of the Republic of Seychelles declared the intention of the people of that former British colony to secure the enjoyment of a wide variety of fundamental rights and freedoms. These were then enumerated in some detail, and there was even a provision at the end which served as a limitation clause on the exercise of these rights and freedoms. However, in the body of the constitution, in an interpretation clause, it was stated that the preamble to the constitution expressed general principles 'and although it may be used as an aid to the interpretation of this constitution it shall be read subject to the other provisions of this constitution'. As if that were not sufficiently debilitating, the clause proceeded to add that the preamble 'shall not be treated as part of the Constitution . . . but where any law is reasonably capable of being understood or given effect to in such a way as not to be inconsistent with the preamble it shall be so understood or given effect to'.[117]

Equally valueless as a protective measure was the requirement in the Constitution of the Republic of Ghana 1960 that the president shall, immediately after his assumption of office, solemnly declare before the people his adherence to certain fundamental principles, including that human rights and freedoms would be respected. The text of this declaration was entrenched, in the sense that the power to alter its provisions otherwise than by the addition of further paragraphs was 'reserved to the people'.[118] But there was no provision anywhere for impeaching the conduct of the president for failure to abide by this solemn declaration or, indeed, for his removal except on the ground of physical or mental infirmity.

[117] Schedule 3, clause 3. Such non-justiciable preambular Bills of Rights are now found only in the Constitutions of Cameroon and the Central African Republic.

[118] Art. 13.

The window-dressing provisions referred to above appeared in the constitutions of two former British colonies which had abandoned democratic principles for one-party government. But in the independence constitutions, as well as in those prepared by the British government for its dependent territories, and in force from the Pacific to the Caribbean, there has always been a provision which enabled an individual to enforce his fundamental rights and freedoms in a court of law. Originally drafted for inclusion in the 1959 Nigerian Bill of Rights, and probably inspired by the enforcement mechanism in the Indian Constitution,[119] this provision remained basically unchanged for thirty years. Its most recent version, which appears in the 1990 Constitution of the dependent territory of Montserrat, provides thus:

> 66.(1) If any person alleges that any of the foregoing provisions of this Part has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction –
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Part to the protection of which the person concerned is entitled:
>
> Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.
>
> (3) If, in any proceedings in any court established in Montserrat other than the High Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions

[119] Art. 32 of the Constitution of the Republic of India 1949 empowered the Supreme Court to issue directions, orders or writs, whichever may be appropriate, for the enforcement of the guaranteed rights.

> of this Part, the court in which the question has arisen shall refer the question to the High Court, unless, in its opinion, the raising of the question is merely frivolous or vexatious.
>
> (4) An appeal shall lie as of right to the Court of Appeal from any final determination of any application or question by the High Court under this section, and an appeal shall lie as of right to Her Majesty in Council from the final determination by the Court of Appeal of the appeal in any such case;
>
> Provided that no appeal shall lie from a determination by the High Court under this section dismissing an application on the ground that it is frivolous or vexatious.

Although this standard remedy was sufficiently flexible to enable not only executive acts but also legislative action to be challenged, supplementary provision was made in certain constitutions for a bill to be examined for repugnance before it was enacted. For example, the Constitution of the Republic of Zambia 1964 enabled the Chief Justice to appoint a tribunal consisting of two present or former High Court judges, whenever a request was made by seven members of the National Assembly, within three days of the final reading of a bill, for a report on whether any provision in that bill would be inconsistent with any of the protected fundamental rights or freedoms. If the tribunal reported in the affirmative, the President was entitled to withhold his assent to such bill.[120]

In respect of fundamental rights and freedoms, a court should be cautious before accepting the view that some particular disregard of them is of minimal account.[121] For, as was pointed out by the United States Supreme Court: 'If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty'.[122]

[120] Arts. 27, 71. See also Constitution of Cyprus 1960, art. 140 (Supreme Constitutional Court); Constitution of Singapore, part VII (Presidential Council for Minority Rights); Constitution of the Republic of Sri Lanka 1972, art. 54 (Constitutional Court); Constitution of Zimbabwe 1979, art. 36 (Senate Legal Committee); and Constitution of Ghana 1979, art. 105 (Council of State).

[121] *Olivier* v. *Buttigieg*, Privy Council on appeal from the Supreme Court of Malta, [1966] 2 All ER 459.

[122] *Thomas* v. *Collins* 323 US 516 (1944).

## Conclusion

The content, form, and scope of every Bill of Rights, whether international, regional or domestic, has been determined largely by circumstances attendant upon its birth. The existence of two international human rights covenants, and the omission in one of them of certain rights freely accepted eighteen years earlier in the UDHR, reflects the collision of interests which resulted in their final form. Similarly, the ECHR and its progressive expansion by subsequent protocols reflects the changing priorities of contemporary European societies. Many of the comprehensive statements of fundamental rights in Commonwealth constitutions were virtually imposed upon the about-to-be-independent territories by the British government in constitutional settlements agreed upon for the protection of minority communities and for other equally relevant considerations. A few resulted from the recommendations of post-independence constitutional commissions; from a combination of idealism and hard bargaining within a constituent assembly; or as a reaction to colonial repression in the euphoria of newly won independence. Some were determined by reference to a particular political ideology, or were drafted and adopted reluctantly by the very persons whose powers and authority they were supposed to delimit. At which end of the spectrum each fell, and consequently its effectiveness, was often determined by these circumstances. But, as the Tanzanian Attorney General has suggested, the voluntary adoption of a proper Bill of Rights is always indicative of, and results from, national moral growth.

A Bill of Rights cannot function in isolation. It needs soil that will nourish it. All but one of the independence constitutions of the former British colonies in Africa contained enforceable Bills of Rights, but was that continent ready to meet the challenge? Read notes that:

> The new States emerged often hurriedly from authoritarian colonialism with dominant nationalist movements but essentially weak political systems, with vulnerable opposition parties and institutions like the judiciary, the press and the professions too weak to exert effective pressures on government, with poor and poorly-educated populations and struggling economies – rocky soil for the nurture of human rights.[123]

[123] James S. Read, 'The Protection of Human Rights in Municipal Law', C.F. Forsyth and J.E. Schiller (ed.), *Human Rights: the Cape Town Conference* (Cape Town: Juta & Co. Ltd., 1979), 156.

Nor can a Bill of Rights function on its own. Its interpretation and enforcement is the function of the judiciary. An independent and impartial judiciary is essential for the effective protection of human rights. This cannot be achieved by merely including safeguards in a constitution which superficially offer the judges security of tenure. There must be a desire on the part of the executive and the legislature to respect that independence, and a manifestation of that desire in appropriate form. There must be an effort on the part of the judiciary to assert and maintain that independence, as well as a consciousness of its responsibilities. And there must be a genuine belief in the community that such independence actually exists, a confidence in the ability and integrity of the institution.

The outlawing of murder has not eradicated killing. So too, a Bill of Rights will not prevent the violation of human rights. But if the criminal code has succeeded in establishing norms which most people of good sense and conscience now strive to observe, a Bill of Rights must surely, in due course, create a consciousness among men and women, whether their role in society be that of making, applying or enforcing the law, or of simply living their own lives, that there are higher standards and more exalted values to which all people, be they meek or mighty, must eventually conform. That consciousness will follow when it is realized that rights are always accompanied by duties, and that it is only the concern of the individual for the rights of others that will ensure the continued observance of, and respect for, his or her own inalienable rights.

## A Human Rights Commission

In 1946 the Economic and Social Council invited states members of the United Nations to consider the desirability of establishing local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights.[124] That was primarily in connection with the drafting of the International Bill of Rights. But in 1960, with much of the drafting completed, ECOSOC recognized that such institutions, representing as they did informed opinion on questions relating to human rights, could

[124] ECOSOC resolution 9 (II) of 21 June 1946.

make a significant contribution to the promotion and implementation of international human rights standards in each country. Accordingly, ECOSOC invited governments to establish such institutions and, where they already existed, to encourage their development.[125]

In 1991, at an international workshop convened in Paris by the United Nations and attended, *inter alia*, by representatives of national human rights institutions, a comprehensive body of principles relating to the role, composition, status and functions of national institutions was drawn up.[126] Endorsed by the General Assembly,[127] and known as the 'Paris Principles', they require that a national institution be given a broad mandate which is clearly set forth in a constitutional or legislative text. The responsibilities of such an institution should include the following:

(a) to submit to government, parliament or any other competent body, on an advisory basis, opinions, recommendations, proposals and reports on any matter concerning the promotion and protection of human rights;
(b) to promote and ensure the harmonization of national legislation, regulations and practices with international human rights instruments, and their effective implementation;
(c) to encourage ratification or accession to international human rights instruments, and their effective implementation;
(d) to contribute to reports which the state is required to submit to treaty monitoring bodies;
(e) to co-operate with the United Nations and other agencies and institutions in the areas of promotion and protection of human rights;
(f) to assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
(g) to contribute to increasing public awareness of human rights.

[125] ECOSOC resolution 772B (XXX) of 25 July 1960. See also ECOSOC resolution 888F (XXXIV) of 24 July 1962, UNGA resolution 1961 (XVIII) of 12 December 1963, UNGA resolution 2200C (XXI) of 16 December 1966, Commission resolution 23 (XXXIV) of 8 March 1978.

[126] See, Centre for Human Rights, *National Human Rights Institutions* (New York: United Nations, 1995), 37.

[127] UNGA resolution 48/134 of 20 December 1993.

# 4

# The international protection of human rights

It is at the national level that human rights can be best protected. But when the state fails in that task, the issue of international action arises.[1] The implementation mechanism, however, is still the weakest link in the international human rights regime. In the early exhilarating years of the United Nations, when there was still something left of the lofty idealism that was to make possible the Universal Declaration of Human Rights (UDHR) a number of innovative proposals were made. The original working group on implementation, while recognizing that primary responsibility for enforcement lay in domestic remedies achieved through the incorporation of the recognized rights in national law, recommended that the Economic and Social Council (ECOSOC) appoint a standing committee for the mediation and conciliation of disputes arising out of alleged violations of the proposed human rights convention and, if possible, provide a remedy. Disputes not settled by the ECOSOC committee would proceed to the Human Rights Commission which would decide whether they should be referred to an international human rights tribunal, the creation of which was also recommended. The decisions of the tribunal would bind the parties, and would be implemented by the General Assembly. None of

[1] Former United Nations Secretary-General Boutros Boutros Ghali explained that in such circumstances, the international community, i.e. international organizations, whether universal or regional – must take over from the states that fail to fulfil their obligations. 'This is a legal and institutional construction that does not harm our contemporary notion of sovereignty.' He argued that a state does not have the right to put that concept to a use that is rejected by the conscience of the world and by the law. 'When sovereignty becomes the ultimate argument put forward by authoritarian regimes to support their undermining of the rights and freedoms of men, women and children, such sovereignty – and I state this as a sober truth – is already condemned by history': Address by the Secretary-General of the United Nations at the opening of the World Conference on Human Rights, Vienna, 14 June 1993, UN document A/CONF.157/22 of 12 July 1993.

these recommendations were seriously considered by the Human Rights Commission.[2]

Equally ambitious proposals were made by some governments. Australia suggested an international court of human rights. India thought the Security Council should be seized of all alleged violations of human rights, investigate them and enforce redress. Uruguay sought the appointment of a United Nations Attorney General for Human Rights who would receive complaints from individuals and groups and then act on their behalf in proceedings before a standing committee.[3] France proposed an International Investigation Commission, and Israel suggested the creation of a new specialized agency for the implementation of the covenants.[4] None of these proposals received any support, and when in 1954 the Commission on Human Rights transmitted the draft treaties to the General Assembly, it had barely managed to recommend, by seven votes to six with one abstention, the establishment of a Human Rights Committee.

## Treaty mechanisms

### *Reporting procedures*

The reporting procedure is designed principally to facilitate the monitoring of a state's performance of its obligations under a human rights instrument. At present, reporting is required under seven treaties: the ICCPR (the Human Rights Committee), the ICESCR (the Committee on Economic, Social and Cultural Rights), the International Convention on the Elimination of All Forms of Racial Discrimination (the Committee on the Elimination of Racial Discrimination), the Convention on the Elimination of All Forms of Discrimination against Women (the Committee on the Elimination of Discrimination against Women), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Committee against Torture), the Convention on the Rights of the Child (the Committee on the Rights of

[2] John P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers Inc., 1984), 49.

[3] John P. Humphrey, *Human Rights and the United Nations*, 26–7, 130.

[4] A.H. Robertson, *Human Rights in the World* (Manchester: Manchester University Press, 1982), 29.

the Child), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (the Group of Three).[5] The treaty monitoring bodies perform a special role in the international human rights regime. They not only supervise the performance of obligations freely accepted by states parties to the treaties, but also, through their findings, comments and views, contribute to the interpretation of the human rights norms and the growing body of human rights jurisprudence.

## Purpose of reporting

In a General Comment, the Committee on Economic, Social and Cultural Rights has pointed out that it would be incorrect to assume that reporting is essentially only a procedural matter designed solely to satisfy each state party's formal obligation to report to the appropriate monitoring body. On the contrary, the process of preparing and submitting a report can, and should, serve to achieve a variety of objectives: (a) to ensure that a comprehensive review is undertaken by the state with respect to national legislation, administrative rules and procedures, and practices; (b) to ensure that the state monitors the actual situation with respect to each of the rights on a regular basis; (c) to provide the basis for the elaboration of clearly stated and carefully targeted policies; (d) to facilitate public scrutiny of government policies and encourage the involvement of the various sectors of society in the formulation, implementation and review of the relevant policies; (e) to provide a basis on which both the state and the committee can effectively evaluate the extent to which progress has been made towards the realization of the treaty obligations; (f) to enable the state to develop a better understanding of the problems and shortcomings encountered in efforts to realize the full range of rights; and (g) to facilitate the exchange of information among states and to develop a better understanding of the common problems faced by states and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the ICESCR.[6]

[5] In view of the significant and very positive developments that had occurred in South Africa, the Group of Three recommended to the Commission on Human Rights in January 1995 to suspend any further meetings of the Group, without prejudice to any subsequent reactivation of the monitoring mechanism.

[6] Committee on Economic, Social and Cultural Rights, General Comment 1 (1989).

## Weaknesses in the reporting system

While reporting can be an effective mechanism for monitoring the performance of states parties to an international human rights treaty, there are certain institutional weaknesses in the system established by the United Nations. While governments 'undertake' to submit reports whenever the monitoring body so requests, there is no mechanism for ensuring that such reports are in fact submitted, whether on the due date or at all. Apart from sending reminders and, in some instances, repeated reminders, the monitoring bodies do not appear to have the authority to compel the performance of the reporting obligation. In December 1992, the Committee on Economic, Social and Cultural Rights, recognizing that it should not be possible for a state to escape scrutiny simply by its own failure to provide the necessary reports, decided to proceed to consider the state of implementation of the ICESCR in a number of states which, despite many requests to do so, had not fulfilled their reporting obligations.[7]

Since the reports which are submitted are compiled by governments, they are likely to be self-laudatory. Even if they are not, it is unlikely that a government will report to the international monitoring body instances when it has actually violated recognized rights, or failed to meet the standards of performance required by the relevant treaty. Therefore, the effectiveness of the reporting system will depend on the extent to which the monitoring body is able to inform itself of the real situation in the reporting state. Non-governmental organizations (NGOs), which are usually the most prolific and reliable source of information relating to the

[7] On 17 and 18 May 1994, the committee considered the state of implementation by Kenya and The Gambia respectively of the ICESCR on the basis of 'reliable information' available to it. In its concluding observations the committee noted that: 'In situations in which a government has not supplied the committee with any information as to how it evaluates its own compliance with its obligations under the covenant, the committee has to base its observations on a variety of materials stemming from both intergovernmental and non-governmental sources. While the former provide mainly statistical information and apply important economic and social indicators, the information gathered from the relevant academic literature, from non-governmental organizations and from the press tends by its very nature, to be more critical of the political, economic and social conditions in the countries concerned. Under normal circumstances, the constructive dialogue between a state party reporting and the committee will provide an opportunity for the government concerned to voice its own view, and to seek to refute such criticism and convince the committee of the conformity of its policies with what is required by the covenant. Non-submission of reports and non-appearance before the committee deprives a government of this possibility to set the record straight.' See UN documents E/C.12/1993/6 of 3 June 1993 and E/C.12/1994/9 of 31 May 1994.

human rights situation in a country, do not have an effective right of access, recognized in the relevant instruments, to any of the monitoring bodies. While the Committee on Economic, Social and Cultural Rights has, in its rules of procedure, provided for the receipt of written statements from non-governmental organizations and has set aside the first afternoon at each of its sessions to enable it to receive oral information from NGOs, the Human Rights Committee does not have a corresponding provision in its own rules. While the absence of such a provision has not prevented NGOs from supplying information to members of the committee in their individual capacity, nor prevented the members from meeting informally with NGO representatives,[8] that is not the same as a formal right of access.[9]

If each state party to an international human rights treaty were to diligently fulfil its reporting obligation, and each member of a monitoring body were to equip himself or herself adequately to examine such report and the state representative who presents it, the reporting system would probably collapse. The Human Rights Committee, for example, meets only three times a year, for a total of nine weeks. It has no secretariat of its own as such, no office space and no regular researchers. The members are left to their own devices to prepare their interventions as best as they can, perhaps in their hotel rooms. Apart from periodic country reports from 148 states parties, they are also required to inquire into individual communications under the Optional Protocol. Back in their own countries, where they probably spend the remaining forty-three weeks between sessions, they are likely to be equally stressed in their regular employment, whether as judges, law professors or civil servants. There is clearly a need now to treat membership of at least the Human Rights Committee and the Committee on Economic, Social and Cultural Rights as a full-time occupation.

[8] In April 1991, the members of the Human Rights Committee agreed to meet collectively, at an informal lunch, representatives of NGOs from Hong Kong who wished to present oral submissions to them prior to the consideration of the United Kingdom report in respect of Hong Kong. In November 1996, the committee members assembled in the committee chamber during the lunch break to hear NGO representatives from Hong Kong in a more orderly manner. In its concluding observations, the committee acknowledged the 'great assistance' which it had received from NGO representatives.

[9] The Committee against Torture receives written submissions from non-governmental organizations, while the Committee on the Rights of the Child regards non-governmental organizations as 'other competent bodies' (article 45) and accordingly invites them to furnish both written and oral submissions.

### *Inquiry procedure*

One of the human rights instruments, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, provides for an inquiry procedure. Article 20 empowers the Committee against Torture to receive information concerning allegations of torture. If it appears to the committee that the information received is reliable and contains well-founded indications that torture is being systematically practised in the territory of a state party, the committee will invite that state to co-operate in its examination of the information and, to that end, submit observations with regard to that information. Having considered such information and any other relevant material available to it, the committee may decide to designate one or more of its members to make an urgent confidential inquiry. If it does so, the committee will invite the state concerned to co-operate with it in the conduct of the inquiry. The inquiry may include, with the agreement of the state, a visit to the territory by the designated members. The findings of the designated members, together with its own comments or suggestions, will be transmitted by the committee to the state. All the proceedings relating to the inquiry will be confidential, but a summary of the results will be included in the committee's annual report to the General Assembly.

### *Inter-State Complaints*

Three of the international human rights instruments provide a procedure by which states parties recognize the competence of the monitoring bodies to receive and consider communications from a state party claiming that another state party is not fulfilling its obligations under the instrument concerned: the ICCPR (Article 41); the International Convention on the Elimination of All Forms of Racial Discrimination (Articles 11, 12 and 13) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treament or Punishment (Article 21). This method of supervision presupposes that an individual, who is already a human rights victim in his own country, is able to persuade a foreign state to take up his complaint on his behalf. It assumes that a government will gratuitously come to the aid of foreigners at the risk of compromising its relations with other governments. There is the additional greater danger that a government that does so will be exposing

itself to a retaliatory attack in the same forum. This is, therefore, a very weak mechanism. It is unlikely that a state will intervene on behalf of an individual living in another country whose rights have allegedly been violated by the government of that country unless there is some strong political motivation for doing so.[10]

### *Individual complaints*

Under four international human rights instruments, provision is made for dealing with individual complaints alleging violations of the provisions of the instruments concerned: the Optional Protocol to the ICCPR; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 22); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 14); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 77).

## Non-treaty mechanisms

### *International Court of Justice*

The International Court of Justice is the principal judicial organ of the United Nations.[11] Its statute is an integral part of the Charter of the United Nations and, consequently, all member states of the United

[10] In more closely knit Europe, under the ECHR procedures, inter-state complaints have been lodged. Analysing about eighteen such complaints, Leo Zwaak has divided them into three groups: (1) complaints relating to situations in which the applicant state had a particular relation with citizens of the respondent state, who, however, were not nationals of the applicant state (e.g. a complaint by Greece about the conduct of the United Kingdom in Cyprus); (2) complaints relating to situations in which the respondent state had allegedly violated the rights of nationals of the applicant state (e.g. a complaint by Cyprus against Turkey following the Turkish invasion of Cyprus); (3) complaints by a state or a group of states acting on behalf of all the contracting states and alleging a breach of the Convention by one contracting party (e.g. the complaint by the Scandinavian countries and the Netherlands against Greece following the 1969 coup d'état of the colonels). See Leo Zwaak, 'The Protection of Human Rights and Fundamental Freedoms within the Council of Europe' (1988)(2) *SIM Newsletter* 43–68. See also Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 *Human Rights Quarterly* 249–301.

[11] The court consists of fifteen judges, no two of whom may be nationals of the same state. Judges are elected by the General Assembly and the Security Council, hold office for nine years, and may be re-elected. A regular election of five judges is held every three years.

Nations are *ipso facto* parties to the statute of the court.[12] Only states may be parties in cases before the court, and the jurisdiction of the court will comprise all cases which the parties refer to it. In addition, states parties to the statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation. Some of the contentious issues relating to human rights which have been referred to the court include the question of the seizure and holding as hostages of members of the United States diplomatic and consular staff in Iran, and the question of the continued existence of the mandate for South West Africa.

The General Assembly or the Security Council may request the court to give an advisory opinion on any legal question. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the court on legal questions arising within the scope of their activities.[13] Advisory opinions have been requested and obtained on issues such as the international status of Western Sahara and of South West Africa, the legal consequences of the continued presence of South Africa in Namibia, and reservations concerning the Genocide Convention. A number of human rights instruments contain provisions whereby any dispute between the contracting states relating to the interpretation, application or fulfilment of the instrument may be submitted to the court at the request of any of the parties to the dispute.[14] However, neither the ICCPR nor the ICESCR specifically provides for adjudication by the court.

[12] In addition, Switzerland, Liechtenstein and San Marino, who are not members of the United Nations, have become parties to the statute.

[13] Charter of the United Nations, Art. 94. See also Statute of the International Court of Justice, Arts. 65–8.

[14] See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Art. 30; Convention on the Elimination of All Forms of Discrimination against Women 1979, Art. 29; International Convention on the Suppression and Punishment of the Crime of Apartheid 1973, Art. XII; International Convention on the Elimination of All Forms of Racial Discrimination 1965, Art. 22.

### *Security Council*

Under the Charter of the United Nations, member states have conferred on the Security Council primary responsibility for the maintenance of international peace and security and have agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf.[15] The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.[16] Any member of the United Nations may bring such dispute to the attention of the Security Council.[17] When the Security Council determines the existence of any threat to the peace, breach of the peace, or act of aggression, it may make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.[18] Measures which the Security Council may initially take include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[19] If such measures would be, or prove to be, inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of member states of the United Nations.[20]

The Security Council has dealt with several human rights problems, including massive and repeated violations in South Africa, Somalia, Haiti, Yugoslavia and Rwanda; the situation in the occupied Arab territories; and instances of hostage-taking and abduction. But the full weight of its authority was brought to bear only in response to the 1990 invasion and occupation of Kuwait by Iraq, which had more to do with the violation of traditional norms of international law than with human rights.

[15] Art. 24. The Security Council is composed of fifteen members, including five permanent members: China, France, the Russian Federation, the United Kingdom and the United States of America. The ten non-permanent members are elected by the General Assembly for two-year terms and are not eligible for immediate re-election. Decisions of the Council on all but procedural matters are made on an affirmative vote of nine members, including the concurring votes of the permanent members.

[16] Art. 34. [17] Art. 35. [18] Art. 39. [19] Art. 41. [20] Art. 42.

### *United Nations General Assembly*

One of the functions of the United Nations General Assembly is to initiate studies and make recommendations for the purpose of 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[21] Such matters are usually referred by the General Assembly to its Third Committee which deals with social, humanitarian and cultural matters.

The General Assembly has established a number of subsidiary organs which are concerned with human rights. They include:

(a) The International Law Commission, whose object is the promotion of the progressive development of international law and its codification.[22] Among the international human rights instruments it has prepared are the Genocide Convention, the Refugees Convention, the Conventions relating to the Status of Stateless Persons and the Reduction of Statelessness, the Declaration on Territorial Asylum, and the Statute of the Office of the United Nations High Commissioner for Refugees.
(b) The Office of the United Nations High Commissioner for Refugees, which provides protection and assistance for refugees and other displaced persons.[23]
(c) The Special Committee on Decolonization, or the 'Committee of 24', whose principal function is to monitor the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[24]
(d) The Special Committee against Apartheid, whose original mandate was 'to keep the racial policies of the Government of South Africa under review when the Assembly is not in session', and was later requested to 'constantly review all aspects of the policies of Apartheid in South Africa and their international repercussions'.[25]

[21] Art. 13. The General Assembly consists of all the member states of the United Nations, and meets in New York in regular sessions from September to December each year, and in such special sessions as occasion may require.

[22] UNGA resolution 174 (II) of 21 November 1947. The commission now consists of thirty-four members elected by the General Assembly on a geographical basis for a five-year term.

[23] UNGA resolution 319 (IV) of 3 December 1949. See also UNGA resolution 428 (V) of 14 December 1950; and UNGA resolution 3274 (XXIX) of 10 December 1974.

[24] UNGA resolution 1654 (XVI) of 27 November 1961.

[25] UNGA resolution 1761 (XVII) of 6 November 1962. The Special Committee consists of eighteen member states of the United Nations.

(e) The United Nations Council for Namibia, which was established to administer the Territory of South West Africa until independence.[26]
(f) The Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories.[27]
(g) Committee on the Exercise of the Inalienable Rights of the Palestinian People, which was required to consider and recommend to the General Assembly a programme of implementation designed to enable the Palestinian people to exercise 'its inalienable rights in Palestine', including the right to self-determination and the right to return to their homes and property from which they had been displaced and uprooted.[28]

### *Economic and Social Council*

The Economic and Social Council is authorized by the Charter of the United Nations to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'.[29] In connection with this function, it is also authorized to prepare draft conventions for submission to the General Assembly,[30] to call international conferences,[31] and to obtain reports from member states on the steps taken to give effect to its recommendations and to those of the General Assembly, and to communicate its observations on these reports to the General Assembly.[32] ECOSOC may also furnish information to the Security Council.[33] Acting on the authority of the Charter, one of the first decisions of ECOSOC was to establish the Commission on Human Rights and the Commission on the Status of Women. ECOSOC is a political body which originally comprised eighteen members but now consists of fifty-four members of the United Nations elected by the General Assembly.[34] It normally holds an organizational session and two regular sessions each year. Human rights items are usually referred to the first session of its Social Committee on which all fifty-four members are represented.

[26] UNGA resolution 2248 (S-V) of 19 May 1967.
[27] UNGA resolution 2443 (XXIII) of 19 December 1968. This committee consists of three member states: Senegal, Sri Lanka and Yugoslavia, appointed by the President of the United Nations General Assembly.
[28] UNGA resolution 3376 (XXX) of 10 November 1975. The committee consists of twenty member states, with the Palestine Liberation Organization participating as an observer.
[29] Art. 62(2). [30] Art. 62(3). [31] Art. 62(4).
[32] Art. 64. [33] Art. 65. [34] Art. 61.

### *Commission on Human Rights*

The Commission on Human Rights is the principal functional organ of the United Nations concerned with human rights.[35] It meets for six weeks every year in February/March. It consists of fifty-three members – all states – who are elected from time to time by the ECOSOC. These fifty-three states are elected on a geographical basis and represent a cross-section of the world in many respects. The commission is essentially a political body, and its states members include those whose human rights records range from the good to the dismal. In fact, there are states that have sought and secured election to the commission, and have thereafter served on it, without ratifying or acceding to either of the two principal human rights covenants. Yet, it is this body that drafted the UDHR, the ICCPR and ICESCR, and all the principal human rights instruments. Meron attributes its success in this respect to the practice of many governments of designating as their representatives on the commission persons possessing special competence in human rights.[36]

In addition to representatives of its states members, sessions of the commission may be attended by representatives of any member state of the United Nations which is not represented on the commission but is invited to participate in its deliberations, and by observers from states members and non-members of the United Nations not represented on the commission, and from United Nations bodies, specialized agencies, other inter-governmental organizations concerned with human rights, national liberation movements, and non-governmental organizations in consultative status with ECOSOC in categories A or B, all of whom may make written and oral statements concerning issues on the agenda.

[35] The initial terms of reference under which ECOSOC established the commission in 1946 were as follows: 'To submit proposals, recommendations and reports regarding: (a) an international bill of human rights; (b) international declarations or conventions on civil liberties, the status of women, freedom of information, and similar matters; (c) the protection of minorities; (d) the prevention of discrimination on grounds of race, sex, language or religion; and (e) any other matter concerning human rights not covered by items (a), (b), (c) and (d).' The commission was also authorized 'to call in ad hoc working groups of non-governmental experts in specialized fields or individual experts, without further reference to the Council, but with the approval of the President [of ECOSOC] and the Secretary-General.' See ECOSOC resolutions 6(1) of 16 February 1946 and 9(11) of 21 June 1946. Later, the commission was authorized to assist ECOSOC in the co-ordination of activities concerning human rights in the United Nations system. See ECOSOC resolution 1979/36 of 10 May 1979.

[36] Theodor Meron, *Human Rights Law-Making in the United Nations* (Oxford: Clarendon Press, 1986), 276.

### *Sub-Commission on Prevention of Discrimination and Protection of Minorities*

The sub-commission is the main subsidiary body of the Commission on Human Rights.[37] Established at its first session in 1947, the sub-commission's original mandate was:

(a) to undertake studies, particularly in the light of the UDHR, and to make recommendations to the commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities; and
(b) to perform any other functions which may be entrusted to it by the ECOSOC or the commission.

However, much of its work today is related neither to discrimination nor to the protection of minorities. Indeed, it has been suggested that its name be changed to 'Committee of Experts on Human Rights".[38]

The sub-commission now consists of twenty-six experts elected by the commission for a four-year term from nominations made by member states of the United Nations on the following basis: twelve from the Afro-Asian group of states, six from Western European and other states, five from Latin-American states, and three from Eastern European states. The sub-commission meets annually in Geneva in August for a period of four weeks. In addition to its members, its sessions are attended by observers from states members and non-members of the United Nations, and from United Nations bodies, specialized agencies, other inter-governmental organizations, national liberation movements, and non-governmental organizations which have consultative status with ECOSOC, all of whom may make written and oral statements concerning issues on its agenda.

## Reporting Procedure

In 1956, on the recommendation of the Commission on Human Rights, the ECOSOC established a system of periodic reports on human rights.[39]

[37] A Sub-Commission on Freedom of Information and of the Press which was also constituted at the same time was discontinued in 1952.
[38] Meron, *Human Rights Law-Making*, 275.
[39] ECOSOC resolution 624 B (XXII) of 1 August 1956.

States members of the United Nations and members of specialized agencies were requested to transmit to the secretary-general, every three years reports describing developments and the progress achieved during the preceding three years in the field of human rights, and measures taken to safeguard human liberty in their metropolitan areas and in non-self-governing and trust territories, if any. The reports were to deal with the rights enumerated in the UDHR and with the right of peoples to self-determination. In 1965, ECOSOC revised the system of reporting and called for the submission of information within a continuing three-year cycle scheduled as follows: (a) in the first year, on civil and political rights; (b) in the second year, on economic, social and cultural rights; and (c) in the third year, on freedom of information. From 1957 to 1977, the periodic reports were initially studied by the sub-commission and then examined by the commission. No reports were examined thereafter, and in 1980 the General Assembly decided to terminate this system of periodic reporting as being an activity that was 'obsolete, ineffective or of marginal usefulness'.[40]

## Communications concerning human rights

One of the earliest decisions that the commission was called upon to take related to the thousands of complaints which the United Nations began to receive both before and after the proclamation of the UDHR. It was to be expected that people throughout the world to whom the UDHR reached out would respond by measuring the treatment accorded to them by their governments by reference to the standards set out in that document. At one of its earliest sessions, when it was actually engaged in drafting the UDHR, the commission decided that it had 'no power to take any action in regard to any complaints concerning human rights'.[41] According to Sir Hersch Lauterpacht, there was no legal justification for that statement. In his view, the commission was not only entitled to take such action; it was bound by the Charter to take cognizance of violations of human rights and to initiate such actions upon them as is not expressly excluded by the Charter. 'They are under a duty to receive petitions alleging violations of human rights, to examine them, and,

[40] UNGA resolution 35/209 of 17 December 1980. See also Commission resolution 10 (XXXVII) of 13 March 1981.

[41] UN document E/CN.4/14/Rev.2 of 6 February 1946.

on the basis of such examination, to take all requisite action short of intervention'.[42]

Yet, that decision was approved by the ECOSOC which also approved a complicated procedure for disposing of these complaints without serious consideration.[43] The secretary-general would compile a confidential list of such communications with a brief indication of the substance of each, and furnish that confidential list to the commission, in private meeting, without divulging the identity of the authors. Similarly, if a communication concerned a state not represented on the commission, similar information relating to such communication would be provided to that state. The author of each communication would be informed that it had been 'duly noted for consideration in accordance with the procedure laid down by the United Nations', but that the commission had no power to take any action in regard to the complaint concerning human rights. According to Humphrey, 'it was probably the most elaborate wastepaper basket ever invented'. At every session, the commission 'went through the farce of clearing the conference room for a secret meeting which lasted only a few minutes, time enough for the commission to adopt a resolution taking note of the list'.[44]

The public response to this confession of impotence was summed up by the secretary-general in a report he made to the commission in 1949 in which he urged that the policy be reconsidered: 'This statement, though technically correct . . . creates the impression that the United Nations *as an organization* . . . has no power to take any action. This irritates the general public and brings disappointment and disillusionment to thousands of people all over the world who, through the publicity activities of other organs of the United Nations . . . have been led to believe that one of the purposes of the United Nations is the achievement of co-operation in promoting and encouraging of universal respect for human rights and fundamental freedoms.'[45]

[42] H. Lauterpacht, *International Law and Human Rights* (London, Archon Books, 1968 reprint), 230.

[43] Resolution 75(V) of the Economic and Social Council, 5 August 1947.

[44] Humphrey, *Human Rights and the United Nations*, 28.

[45] Report by the Secretary-General on the Present Situation with Regard to Communications Concerning Human Rights, UN document E/CN.4/165 of 2 May 1949.

## 728F Procedure

Despite this and other attempts made to alter the 'self-denying rule', none was successful. When, ten years later, ECOSOC reviewed its policy, it merely consolidated a number of minor modifications that had been made through the years. In resolution 728F (XXVIII) of 30 July 1959 it reaffirmed its approval of the statement that 'the Commission on Human Rights recognizes it has no power to take any action in regard to any complaints concerning human rights', and requested the secretary-general (a) to compile and distribute to members of the commission a non-confidential list containing a brief indication of the substance of each communication; (b) to inform the writers that their communications will be handled in accordance with this resolution, indicating that the commission has no power to take any action in regard to any complaint concerning human rights; (c) to furnish each member state concerned with a copy of any communication which refers explicitly to that state, without divulging the identity of the author; and (d) to ask governments sending replies whether they wish their replies to be presented to the commission in summary form or in full. ECOSOC also provided that members of the sub-commission should have, with respect to communications dealing with discrimination and minorities, the same facilities as were enjoyed by members of the commission. The purpose of this very tortuous exercise appeared to be merely to acquaint the members of the commission and of the sub-commission of current problem areas.

## 1235 Procedure

The first breakthrough occurred in 1967 following concern repeatedly expressed by the representatives of newly admitted African and Asian states over policies of racial discrimination, segregation and apartheid, as well as the violation of the right to self-determination in several colonial territories. In that year, the commission sought and obtained from the ECOSOC wider powers in respect of communications. By resolution 1235 (XLII) of 6 June 1967, ECOSOC approved the decision of the commission to give annual consideration to an item entitled 'Question of violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent

countries and territories',[46] and granted the commission and the sub-commission the authority

(a) to examine information relevant to gross violations of human rights and fundamental freedoms contained in communications listed by the secretary-general; and
(b) in appropriate cases, and after careful consideration of the information made available to it, to make a thorough study of situations which reveal a consistent pattern of violations of human rights, and to report on the results of that study.

This procedure now enables participants at sub-commission and commission sessions, particularly non-governmental organizations, to publicly refer to violations of human rights and to submit evidence of such violations with a view to activating perhaps a resolution and then 'a thorough study'. The conduct of a state will be measured by reference to the standards prescribed in the UDHR.

### 1503 Procedure

Three years later, following the preparation by the sub-commission of new procedures for the handling of human rights communications, the ECOSOC adopted resolution 1503 on 27 May 1970. In that resolution the ECOSOC:

(1) authorized the sub-commission to appoint a working group of not more than five of its members, with due regard to geographical distribution, to meet once a year in private meetings for a period not exceeding ten days immediately before the sessions of the sub-commission to consider all communications, including replies of governments thereon, received by the secretary-general under ECOSOC resolution 728F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the sub-Commission those communications, together with replies of governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the sub-commission;

[46] Commission resolution 8 (XXIII).

(2) requested the sub-commission to consider in private meetings the communications brought before it in accordance with the decision of a majority of the members of the working group and any replies of governments relating thereto and other relevant information, with a view to determining whether to refer to the commission particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the commission;
(3) requested the commission, after it had examined any situation referred to it by the sub-commission, to determine:
    (a) whether it requires a thorough study by the commission and a report and recommendations thereon to ECOSOC; or
    (b) whether it may be a subject of an investigation by an ad hoc committee to be appointed by the commission which shall be undertaken only with the express consent of the state concerned and shall be conducted in constant co-operation with that state and under conditions determined by agreement with it. In any event, the investigation may be undertaken only if:
        (i) all available means at the national level have been resorted to and exhausted;
        (ii) the situation does not relate to a matter which is being dealt with under other procedures prescribed in the constituent instruments of, or conventions adopted by, the United Nations and the specialized agencies, or in regional conventions, or which the state concerned wishes to submit to other procedures in accordance with general or special international agreements to which it is a party.

ECOSOC also decided that all actions envisaged in the implementation of this resolution by the sub-commission or the commission should remain confidential until such time as the commission may decide to make recommendations to it.[47]

By resolution 2 (XXIV) of 16 August 1971, the sub-commission established the Working Group on Communications as envisaged in ECOSOC resolution 1503 (XLVIII). In 1974, the commission established the

[47] For procedures for dealing with the admissibility of communications, see Sub-Commission resolution 1 (XXIV) of 13 August 1971.

Working Group on Situations. What is now popularly described as the '1503 procedure' comprises the following four stages:

(1) The Working Group on Communications screens the communications which have been processed by the secretariat during a twelve-month period ending twelve weeks prior to its meeting. Any responses received from governments are also taken into account. A communication may be referred to the sub-commission only if at least three of the five members of the working group so decide.
(2) The sub-commission considers the communications and government replies brought to its attention by the working group and determines which particular situations to refer to the commission for consideration. In so doing, the sub-commission may also take into account 'other relevant information'. The sub-commission usually takes its decisions by secret ballot. If it is decided to refer a situation to the commission, the government concerned is informed and invited to submit written observations to be taken into account when the commission examines the situation.
(3) The Working Group on Situations examines the material and recommends to the commission what course of action to take in respect of each particular situation. The governments concerned are informed of the recommendations in order to facilitate their subsequent participation in the commission.
(4) In the light of the recommendations placed before it by the Working Group on Situations, the commission considers the particular situations referred to it by the sub-commission. At this stage, the governments concerned are invited to attend the respective closed meetings of the commission, to address the commission, and to reply to any oral questions put by its members. The government representatives have the right to attend and to participate in the entire discussion concerning their country situation and to be present when the commission decides what course of action to take.

While ECOSOC resolution 1503 (XLVIII) envisaged that the commission would determine either (a) whether a thorough study is warranted in respect of a particular situation, or (b) whether a particular situation should be investigated by an ad hoc committee, the latter procedure has never been resorted to and a thorough study has been embarked upon only once: in 1978 the commission appointed a special envoy to carry out

that task in respect of the human rights situation in Uganda four years after it began receiving communications, but the exercise was abandoned immediately thereafter with the fall of the regime of President Idi Amin. Instead, the commission has devised the following four alternatives in the application of the 1503 procedure:

(a) to discontinue consideration of the matter, when further consideration or action is not warranted;
(b) to keep the situation under review, in the light of any further information received from the government concerned and any further information which may reach the commission under the 1503 procedure;
(c) to keep the situation under review and to appoint an independent expert to enter into direct contacts with the government and the people of the country concerned and to report back to the commission at its following session. Alternatively, the commission has requested the secretary-general to appoint a special representative for the same purpose;
(d) to discontinue consideration of the matter under the confidential 1503 procedure, in order to take up consideration of the same matter under the public 1235 procedure.

All meetings of bodies involved in the 1503 procedure are closed. No publicity is given to the decisions taken by the two working groups. However, after the commission has concluded its work under the 1503 item each year, the chairman makes a public statement, indicating which countries have been the subject of discussion. He also indicates which countries, if any, are no longer under consideration within the procedure.[48]

Although there is now a forum in which, irrespective of treaty obligations, the United Nations may examine, report on, and make recommendations on the human rights situation in a country, such scrutiny may commence only if the information available reveals 'a gross violation of human rights', and may thereafter proceed to 'a thorough study' only if the information reveals 'a consistent pattern of violations of human rights'. Perhaps even more inhibiting is the fact that states that are clearly

[48] For advice on the use of the '1503 procedure', see Amnesty International, *A Practical Guide to the United Nations '1503 Procedure': a Confidential Procedure for Complaints about Alleged Human Rights Violations* (AI Index IOR 30/02/89).

serious offenders are often able to 'purchase' protection by techniques such as mutual support within the commission, economic or other material assistance to fellow member states of the commission, and the intervention of powerful friends, usually in the form of one or more of the permanent members of the Security Council. Although the only real sanction available to the commission is publicity, no country, however insignificant or powerful, pretends that it does not mind being classified as a serious violator of human rights. For, within the international human rights regime, a country so classified is, in many respects, regarded as an international outlaw.[49]

## Special Procedures

Adding a new dimension to the role of the Commission on Human Rights is the issue-oriented approach to the examination of human rights violations. Referred to as special procedures, they fall into two categories: those working groups or individuals mandated to examine and report on human rights issues on a global basis by theme, i.e. on major phenomena of human rights violations worldwide; and those required to focus on human rights situations in specific countries. These procedures, which owe their origin principally to the authorization contained in paragraph 3 of Commission resolution 9 (II) of 21 June 1946 'to call in aid ad hoc working groups of non-governmental experts in specialized fields or individual experts', are not a part of the established international institutional framework for the protection of human rights, but have developed on an ad hoc basis over the years. For instance, the first of the thematic mechanisms, the Working Group on Enforced and Involuntary Disappearances, was set up in 1980 in response to the international outcry at the escalating numbers of missing persons under military dictatorships, particularly in Chile and Argentina. Similarly, the country-specific inquiries began with the appointment in 1967 of the Ad Hoc Working Group of Experts on Southern Africa to address the multiple problems of apartheid.[50]

[49] For an account of the obstacles placed in the way of adopting a resolution in the Sub-Commission relating to the human rights situation in a country, see Nihal Jayawickrama, 'Human Rights Exception No Longer', in George Hicks (ed.), *The Broken Mirror: China after Tienanmen* (Essex: Longman Press, 1990).

[50] Commission resolution 2 (XXIII) of 6 March 1967. The original mandate of the working group was to investigate charges of torture and ill-treatment of prisoners, detainees and persons in police custody in South Africa.

Thematic mandates have been issued to working groups or to individual rapporteurs in respect of subjects such as arbitrary detention; enforced or involuntary disappearances; extrajudicial, summary or arbitrary executions; freedom of opinion and expression; independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers; internally displaced persons; racism, racial discrimination and xenophobia; religious intolerance; sale of children, child prostitution and child pornography; torture and other cruel, inhuman or degrading treatment; use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination; and violence against women.

Country-oriented mandates have similarly been issued (sometimes in consequence of resolutions adopted under the 1235 Procedure) in respect of Afghanistan; Bosnia-Herzegovina and the Federal Republic of Yugoslavia; Burundi; Republic of Chechnya of the Russian Federation; Chile; Cuba; Cyprus; Democratic Republic of Congo; East Timor; El Salvador; Equatorial Guinea; Haiti; Iraq; Islamic Republic of Iran; Myanmar; Palestinian territories occupied by Israel; Sierra Leone; Southern Africa (Ad Hoc Working Group of Experts); and Sudan (Working Group).

A working group or rapporteur usually investigates information received from whatever source by communicating with the relevant governments. A visit to a country may be undertaken, but only with the consent of the government concerned. Alternatively, neighbouring countries may be visited for meetings with exiles, dissidents and activists. Perhaps the most far-reaching of the techniques adopted is the 'urgent-action procedure', whereby immediate action is resorted to in respect of reported disappearances, impending executions, and allegations of continuing torture.[51] However, the special procedures too suffer from the disability that a political decision is a prerequisite for the commencement of an investigation, and that obstacle has often proved

[51] On Special Procedures, see Helena M. Cook, 'International Human Rights Mechanisms' (1993) 50 *International Commission of Jurists: the Review* 31–55; Nigel S. Rodley, 'Towards a More Effective and Integrated System of Human Rights Protection by the United Nations', UN document A/CONF.157/PC/60/Add.6 of 1 April 1993; Kurt Hendl, 'Recent Developments Concerning United Nations Fact-Finding in the Field of Human Rights' in Novak, Steurer and Tretter (eds.), *Felix Ermacora Festschrift* 1–35; David Weissbrodt, 'The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights' [1986] 80 *The American Journal of International Law* 685–99.

insurmountable in so far as country-oriented mandates are concerned. Moreover, a working group or rapporteur, working part-time with inadequate technical or supporting staff, and unable to visit any country for the purpose of observation or investigation without the express consent of the government concerned, is seriously inhibited in fulfilling the relevant mandate.

## The role of non-governmental organizations

Non-governmental organizations have made, and continue to make, a very significant contribution to the formulation, adoption and entry into force of international human rights instruments, and thereafter to their implementation. Indeed, without the active intervention of non-governmental organizations, the development of international human rights law would still be at a very rudimentary stage. 'Left to themselves the individual victims of human rights violations would have few opportunities either to make laws, or to apply them. That burden has traditionally fallen on others, individually more fortunate than the victims, who have banded together to give of their time and effort, often unpaid, and sometimes at the risk of their own liberties, livelihoods, and even their lives, in order to improve the lot of those who have suffered deprivation, oppression, and persecution.'[52] Article 71 of the United Nations Charter authorizes the Economic and Social Council to 'make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence'. ECOSOC resolution 1296 (XLIV) of 23 May 1968 prescribed certain principles for the establishment of consultative relations, and was updated by ECOSOC resolution 1996/31: Consultative Relationship between the United Nations and Non-Governmental Organizations. In addition to a commitment to support the spirit, purposes and principles of the Charter, an organization shall be of 'recognized standing within the particular field of its competence' or of 'a representative character'; with an 'established headquarters', 'a democratically adopted constitution', 'a representative structure' with 'appropriate mechanisms of accountability to its members', and 'the basic resources of the organization shall be derived in the main part from

[52] Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 442.

contributions of the national affiliates or other components or from individual members'.

Non-governmental organizations that enjoy consultative status with ECOSOC are divided into three groups. In category I, enjoying general consultative status, are those NGOs which are concerned with most of the activities of ECOSOC and its subsidiary bodies and can demonstrate that they have made substantive and sustained contributions towards the objectives of the United Nations.[53] In category II, enjoying special consultative status, are those NGOs which have a special competence in and are concerned specifically with only a few of the fields of activity covered by ECOSOC and its subsidiary bodies.[54] On the Roster are those NGOs which can make occasional and useful contributions to the work of ECOSOC or its subsidiary bodies or other United Nations bodies within their competence.[55]

Organizations in categories I and II may nominate observers to attend public meetings of ECOSOC, its commissions, sub-commissions and other subsidiary bodies. They may submit written statements for circulation or present their views orally at these meetings.

## An international human rights regime

A formal regime of human rights law is now in existence regulating the conduct of states towards individuals subject to their jurisdiction.[56] But

[53] NGOs in category I include the International Alliance of Women, International Confederation of Free Trade Unions, International Federation of Red Cross and Red Crescent Societies, Inter-Parliamentary Union, World Confederation of Labour, World Federation of Trade Unions, and the World Federation of United Nations Associations.

[54] NGOs in category II include Amnesty International, Anti-Slavery International, Arab Lawyers Union, Baha'i International Community, Commission of the Churches on International Affairs of the World Council of Churches, Human Rights Advocates, Human Rights Watch, International Alert, International Association of Penal Law, International Commission of Jurists, International Federation of Human Rights, International Federation of Free Journalists, International Federation of University Women, International Human Rights Law Group, International Institute of Humanitarian Law, International League for the Rights and Liberation of Peoples, International Service for Human Rights, Inuit Circumpolar Conference, Latin American Federation of Associations of Relatives of Disappeared Detainees, Law Association for Asia and the Pacific, Oxfam, Pax Christie International, Pax Romana, and World University Service.

[55] Among the NGOs on the roster are Article 19, International Gay and Lesbian Association, International PEN, Minority Rights Group, Saami Council, and the World Peace Council.

[56] On 1 June 2001, only four member states of the United Nations were not a party to any of the principal human rights instruments (the two covenants, the regional conventions, or the five

neither the emergence of this law nor the evolution of this regime has put an end to human rights violations. Human rights treaties, unlike commercial contracts, rarely enable the beneficiaries to effectively enforce their performance. As Paul Sieghart explains, in the case of human rights treaties there are no 'incentives' or 'sanctions' such as the payment of the agreed price or the non-delivery of the goods.

> If Ruritania and Ecuamba enter into such a treaty, neither of them is likely to suffer any immediate loss if the other fails to perform it, nor does either of them usually obtain any benefit from the other's performance. Worse, the *governments* of both these states may feel that they suffer a loss – at all events, in their powers over their own subjects – if they do perform. Although it is the governments of states which enter into these treaties, the trouble is that the beneficiaries are not those governments but their subjects, who are not themselves parties to the treaty. It is as if two sets of parents whose children are about to marry each other were to agree to buy them a house to live in, and then decided to change their minds and to spend the money on something else. None of the parents has anything to lose by breaking the bargain, and the children may have no remedy, because they were not parties to the agreement.[57]

But whether for purely cosmetic reasons or because of a genuine desire to improve conditions within their territories, an overwhelming majority of states have ratified or acceded to numerous human rights instruments. And, as Thomas Buergenthal observes, there is now an international climate that is increasingly sensitive to the illegality of human rights violations, less willing to tolerate them, and more responsive to public and private efforts to prevent them.

> When law, whether domestic or international, mirrors the aspirations of society and captures its imagination, it acquires a moral and political force whose impact can rarely be predicted and often far exceeds the wildest expectations of its particular lawmaker. Those who believe that Realpolitik means only military and political power have not learned the lesson of history about the force of ideas and the irony of hypocrisy.

conventions relating to racial discrimination, the crime of apartheid, discrimination against women, torture the rights of the child). They were Brunei Darussalam, Malaysia, Saudi Arabia and Singapore.

[57] Paul Sieghart, *The Lawful Rights of Mankind* (Oxford: Oxford University Press, 1985), 92–3.

> Many of the countries which have voted in the United Nations for human rights instruments without any intention of complying with them gradually find these instruments impose restraints on them and limit their freedom of action.[58]

[58] Thomas Buergenthal, 'International Human Rights Law and Institutions: Accomplishments and Prospects' (1988) 63 *Washington Law Review* 1–19.

# PART II

## General principles

# 5

# Interpretation

A statement of fundamental rights is significantly different from an ordinary statute in at least two respects. First, its provisions will usually be derived from the Universal Declaration of Human Rights, the two international human rights covenants, or from one of the regional human rights instruments. Second, its provisions will be entrenched either in or through the national constitution, and it will therefore enjoy a superior status in relation to other domestic laws. Accordingly, the principles of interpretation applicable to such a statement (or Bill of Rights) will also be significantly different from those that apply to ordinary statutes.

## Principles of interpretation

When the legislature chooses to implement a treaty by a statute which uses the same words as the treaty, it is reasonable to assume that the legislature intended to import into municipal law provisions having the same effect as the corresponding provisions in the treaty. A statutory provision corresponding to a provision in a treaty, which the statute is enacted to implement, should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law. Indeed, to attribute a different meaning to the statute from the meaning which international law attributes to the treaty is to nullify the intention of the legislature and to invalidate the statute in part or in whole. The method of construction of such a statute is therefore the method applicable to the construction of the corresponding words in the treaty.[1] As the Court of Appeal of Hong Kong observed with reference

[1] *Koorwarta* v. *Bjelke-Petersen*, High Court of Australia (1982) 153 *Commonwealth Law Reports* 168, at 265. See also *Fothergill* v. *Monarch Airlines Ltd*, House of Lords, United Kingdom, [1980] 2 All ER 696: 'Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna

to the newly enacted Hong Kong Bill of Rights, 'the glass through which the interpretation should be viewed is provided by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The court is no longer guided by the ordinary canons of construction of statutes, nor with the dicta of the common law inherent in the training of judges. The courts must look at the aims of the ICCPR and the ICESCR and give full recognition and effect to the statements which commence them.[2] From this stems the entirely new jurisprudential approach.[3]

### *Treaty provisions*

A treaty is required to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[4] The 'context' means the text, including its preamble and annexes, if any. It also includes any agreement relating to the treaty made between the parties in connection with its conclusion, and any agreement made by one or more parties

Convention on the Law of Treaties 1969', per Lord Scarman at 712; *R* v. *Sin Yau-ming*, Court of Appeal of Hong Kong, [1992] 1 HKCLR 127 at 139, per Silke V-P: 'The court should therefore assume that it is the intention of the legislation that international treaty obligations are to be carried out and no effort should be made to evade such an obligation even if it may seem to be contrary to the effort being made to counter a major social problem.'

[2] The preambles to both covenants recite that the states parties consider that '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', and recognize that 'these rights derive from the inherent dignity of the human person', and that 'in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'. The preambles also recite 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 covenants.

[3] *R v Sin Yau-ming*, Court of Appeal of Hong Kong, [1992] 1 HKCLR 127.

[4] Vienna Convention on the Law of Treaties 1969, Art. 31. Account may also be taken, together with the context, of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and of any relevant rules of international law applicable in the relations between the parties. For the application of Articles 31 and 32, see *Golder* v. *United Kingdom*, European Commission, 1 June 1973; *Svenska Lokmannaforbundet* v. *Sweden*, European Commission, (1974) 1 EHRR 617; *East African Asians* v. *United Kingdom*, European Commission, (1973) 3 EHRR 76. A special meaning may be given to a term if it is established that the parties so intended.

in connection with its conclusion and accepted by the other parties as an instrument related to the treaty. The 'object and purpose' of a treaty is usually ascertained by reference to the preamble and to the circumstances in which it originated.[5] The object and purpose of a treaty for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.[6]

Among the material which a court may have recourse to for the purpose of interpreting a treaty provision are the preparatory work of the treaty and the circumstances of its conclusion.[7] A court may also have regard to any explanatory report published with the text.[8] But these are supplementary means of interpretation which may be referred to only in order to confirm the ordinary meaning of the terms used in their context or to determine the meaning when the application of the rule of interpretation referred to above leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[9]

A treaty is a living instrument which must be interpreted in the light of present-day conditions.[10] It must also be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.[11] This principle was applied by the Inter-American

[5] For a discussion of the 'textualist' and 'teleologist' approaches to identifying the object and purpose of a treaty, see Scott Davidson, *The Inter-American Court of Human Rights* (England: Dartmouth Publishing Co Ltd, 1992), 131.

[6] *Loizidou* v. *Turkey*, European Court, (1995) 20 EHRR 99.

[7] Vienna Convention on the Law of Treaties 1969, Art. 32. A summary of the different views expressed by states during the drafting of the ICCPR is contained in M.J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987). However, in *Re BC Motor Vehicle Act,* Supreme Court of Canada, [1985] 2 SCR 486, Lamer J (interpreting the Canadian Charter of Rights and Freedoms) cautioned against giving anything but minimal weight to historical materials, such as the minutes of proceedings and evidence of the special joint committee, which could 'stunt its growth' instead of allowing the newly planted 'living tree' to grow and adjust over time.

[8] In *Read* v. *Secretary of State for the Home Department*, House of Lords, United Kingdom, [1989] LRC (Const) 349.

[9] Vienna Convention on the Law of Treaties 1969, Art. 32. See also *Lawless* v. *Ireland,* European Court, (1961) 1 EHRR 15.

[10] *Tyrer* v. *United Kingdom*, European Court, (1978) 2 EHRR 1. The court observed that it could not but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe.

[11] *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, at 31.

Court in determining the legal status of the American Declaration of the Rights and Duties of Man 1948 (ADRD). The court considered it appropriate to look to the current inter-American system in the light of the evolution it had undergone since the adoption of the ADRD, rather than to examine the normative value and significance which the instrument was believed to have had in 1948.[12] The interpretation of an international treaty should also accord with broad principles of general acceptance and should not be governed by technical rules of municipal law. Accordingly, the Court of Appeal of New South Wales held that the expression 'convicted of a crime' within the meaning of ICCPR 14(5) included a person imprisoned for contempt, whether criminal or civil.[13]

### *Constitutional provisions*

A constitutional instrument is treated as *sui generis*, calling for principles of interpretation of its own suitable to its character, without necessary acceptance of all the presumptions that are relevant to legislation of private law.[14] In the Supreme Court of Canada, Dickson CJ explained why:

> A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future . . . Once enacted its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'.[15]

Other judges have also expressed similar sentiments. In the Supreme Court of Namibia, Mahomed CJ observed that a constitution, which

[12] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Inter-American Court, Advisory Opinion OC-10/89 of 14 July 1989.

[13] *Young* v. *Registrar of the Court of Appeal [No.3]* (1993) 32 *New South Wales Law Reports* 262 (CA); (1994) 20 *Commonwealth Law Bulletin* 440.

[14] *Minister of Home Affairs* v. *Fisher*, Privy Council on appeal from the Supreme Court of Bermuda, [1980] AC 319; *Ong Ah Chuan* v. *Public Prosecutor*, Privy Council on appeal from the Supreme Court of Singapore, [1981] AC 648, per Lord Diplock at 669–70.

[15] *Hunter* v. *Southam*, Supreme Court of Canada, [1984] 2 SCR 145.

is an organic instrument, must be interpreted broadly, liberally and purposively so as to enable it to continue to play 'a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people, and in disciplining its government'.[16] In the Privy Council, Lord Wilberforce called for a generous interpretation avoiding what he described as 'the austerity of tabulated legislation'.[17] In Australia, Dixon CJ reminded that a constitution 'should be construed with all the generality which the words used admit'.[18] In Botswana, Aguda JA stressed that the courts must not allow a constitution to be 'a lifeless museum piece' but must continue to breathe life into it from time to time when opportune to do so.

> The overriding principle must be an adherence to the general picture presented by the constitution into which each individual provision must fit in order to maintain in essential details the picture which the framers could have painted had they been faced with circumstances of today. To hold otherwise would be to stultify the living constitution in its growth. It seems to me that a stultification of the constitution must be prevented if this is possible without doing extreme violence to the language of the constitution. I conceive it that the primary duty of the judges is to make the constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.[19]

The following are some of the principles that have been applied to the interpretation and application of constitutional provisions that seek to protect fundamental rights:

[16] *Government of the Republic of Namibia* v. *Cultura 2000*, Supreme Court of Namibia, [1993] 3 LRC 175.

[17] *Minister of Home Affairs* v. *Fisher*, Privy Council on appeal from the Supreme Court of Bermuda, [1980] AC 319, at 328–9.

[18] *R* v. *The Public Vehicle Licensing Appeal Tribunal of the State of Tasmania, ex parte Australian National Airways Pty Ltd*, High Court of Australia, (1964) 113 Commonwealth Law Reports 207, at 225. See also *Re President's Reference of the Constitution of Vanuatu and the Broadcasting and Television Bill 1992*; *the Business Licence (Amendment) Bill 1992*; *and the Land Acquisition Bill 1992*, Supreme Court of Vanuatu, [1993] 1 LRC 141, per d'Imecourt CJ at 159; *Re Minimum Penalties Legislation*, Supreme Court of Papua New Guinea, [1984] PNGLR 314, per Bredmeyer J at 334.

[19] *Dow* v. *Attorney General*, Supreme Court of Botswana, [1992] LRC (Const) 623 at 668.

1. The rules of statutory interpretation ought not to be applied.[20]
2. The draftsman's intention is irrelevant.[21]
3. A broad, liberal, generous and benevolent construction should be given, not a narrow, pedantic, literal or technical interpretation.[22] A Bill of Rights must be broadly construed in favour of the individual rather than in favour of the state.[23]

[20] *Hinds* v. *The Queen*, Privy Council on appeal from the Court of Appeal of Jamaica (1976) 1 All ER 353, per Lord Diplock at 360. See also C.J. Antieau, *Adjudicating Constitutional Issues* (New York: Oceana Publications, Inc., 1985), 50–1, where he cites several judicial dicta and academic writing supporting this view.

[21] *Re BC Motor Vehicle*, Supreme Court of Canada, [1985] 2 SCR 486, per Lamer J: 'The draftsman's intention is not the key. We must not freeze the Charter in time. Its potential for growth must be preserved.' See also *Missouri* v. *Holland*, United States Supreme Court, 252 US 416 (1920), per Holmes J: 'The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago'; *Edwards* v. *The Attorney General of Canada*, Privy Council on appeal from the Supreme Court of Canada, [1930] AC 124, per Lord Sankey: The constitution is 'a living tree capable of growth and expansion within its natural limits'; *Theophanous* v. *Herald and Weekly Times Ltd*, High Court of Australia, [1994] 3 LRC 369, per Deane J: The intention of the constitution's framers was irrelevant since a constitution was a living force representing the will of contemporary Australians. Social changes since 1901 (such as universal adult franchise, compulsory voting, mass communication, general education and appreciation of the intrinsic equality of all human beings) enhanced the need for unrestricted access to political information; *State* v. *Williams*, Constitutional Court of South Africa, [1995] 2 LRC 103, per Langa J: The interpretation of the concepts contained in the constitution involves the making of a value judgment which 'requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of . . . people as expressed in its national institutions and its constitution, and further having regard to the emerging consensus of values in the civilized international community' (citing Mahomed AJA in *Ex parte Attorney-General of Namibia, Re Corporal Punishment by Organs of State*, Constitutional Court of South Africa, [1992] LRC (Const) 515 at 527). This principle is discussed in Bertha Wilson, 'The Making of a Constitution: Approaches to Judicial Interpretation', 10 *Public Law* 370, at 375–8.

[22] *Bain Peanut Co* v. *Pinson*, United States Supreme Court, 282 US 499 (1930); *Sakal Papers Ltd* v. *The Union of India*, Supreme Court of India, [1962] 3 SCR 842; *Okogie* v. *The Attorney General of Lagos State*, High Court of Nigeria, [1981] 1 NCLR 218; *Nafiu Rabiu* v. *The State*, Supreme Court of Nigeria, [1981] 2 NCLR 293; *Law Society of Upper* v. *Skapinker*, Supreme Court of Canada, [1984] 1 SCR 357; *The State* v. *Petrus*, Court of Appeal of Botswana, [1985] LRC (Const) 699; *Ncube* v. *The State*, Supreme Court of Zimbabwe, [1988] LRC (Const) 442; *A Juvenile* v. *The State*, Supreme Court of Zimbabwe, [1989] LRC (Const) 774; *R* v. *Wong*, Supreme Court of Canada, [1990] 3 SCR 36; *Dow* v. *Attorney General of Botswana*, High Court of Botswana, [1992] LRC (Const) 623; *Rattigan* v. *Chief Immigration Officer*, Supreme Court of Zimbabwe, [1994] 1 LRC 343, per Gubbay CJ; *S* v. *Zuma*, Constitutional Court of South Africa, Case No.CCT/5/94, 5 April 1995, per Kentridge J; *Sekoati* v. *President of the Court Martial*, Court of Appeal of Lesotho, [2000] 4 LRC 511.

[23] *Patel* v. *Attorney General*, Supreme Court of Zambia, (1968) Zambia LR 99 at 116; *Commissioner of Taxes* v. *C W (Pvt) Ltd*, High Court of Zimbabwe, [1990] LRC (Const) 544. See *Namasivayam* v. *Gunawardena*, Supreme Court of Sri Lanka, [1989] 1 Sri LR 394, per

4. A purposive interpretation should be given; i.e. fundamental rights should be interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity.[24] The meaning of a right or freedom should also be ascertained by an analysis of the purpose of the guarantee; it should be understood, in other words, in the light of the interests it is meant to protect. This analysis should be undertaken, and the purpose of the right or freedom sought by reference to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and, where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Bill of Rights.[25]
5. A contextual approach is preferred to an abstract approach; i.e. the content of a right ought to be determined in the context of the real life situation brought to the court by the litigant and on the basis of empirical data rather than on the basis of some abstraction.[26]
6. A hierarchical approach to rights must be avoided when interpreting a human rights instrument.[27]
7. When examining the compatibility of legislation with a Bill of Rights, it is the effect of the legislation rather than its purpose or intent that

Sharvananda CJ: Where a literal interpretation of the period of limitation will defeat the petitioner's right to his constitutional remedy, the one month prescribed for petitioning the court should be calculated, in the case of a person held in detention, from the time that he is under no restraint.

[24] Bertha Wilson, 'The Making of a Constitution: Approaches to Judicial Interpretation' 10 *Public Law* 370, at 380–3; *Okogie* v. *The Attorney General of Lagos State*, Federal Court of Appeal, Nigeria, [1981] 2 NCLR 337; *Reference re Public Service Employees Relations Act (Alberta)*, Supreme Court of Canada, [1987] 1 SCR 313; *Elliott* v. *Commissioner of Police*, Supreme Court of Zimbabwe, [1997] 3 LRC 15; *State* v. *Makwanyane*, Constitutional Court of South Africa, [1995] 1 LRC 269.

[25] *R* v. *Big M Drug Mart Ltd*, Supreme Court of Canada, [1986] LRC (Const) 332 at 364.

[26] *Edmonton Journal* v. *Alberta*, Supreme Court of Canada, [1989] 2 SCR 1326, per Wilson J; *Reference Re: Public Service Employees Relations Act (Alberta)*, Supreme Court of Canada, [1987] 1 SCR 313, at 368, per Dickson CJ. Cf. *Reference Re: Public Service Employees Relations Act (Alberta)*, Supreme Court of Canada, [1987] 1 SCR 313, at 390, per Le Dain J. See also *Dwarkadas Shrinivas* v. *The Sholapur Spinning and Weaving Co Ltd*, Supreme Court of India, [1954] SCR 674 AIR 1954 SC 119; 1954 SCJ 175; *Sakal Newspapers Ltd* v. *The Union of India*, Supreme Court of India, [1962] 3 SCR 842; *R* v. *Edwards Books and Art Ltd*, Supreme Court of Canada, [1986] 2 SCR 713; *PSAC.* v. *Canada*, Supreme Court of Canada, [1987] 1 SCR 424; *RWDSU.* v. *Saskatchewan*, Supreme Court of Canada, [1987] 1 SCR 460.

[27] *Dagenais* v. *Canadian Broadcasting Corporation*, Supreme Court of Canada, [1994] 3 SCR 835.

is relevant.[28] The purpose of the legislation, however, is the initial test of constitutional validity, and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.[29]

## Sources of interpretation

In interpreting the provisions of a Bill of Rights, a court may seek assistance from jurisprudence other than its own.[30] It may also have regard to international human rights norms and practice elsewhere. For example, in determining whether whipping constituted a form of inhuman or degrading punishment, the Supreme Court of Zimbabwe considered: (a) the current trend of thinking among distinguished jurists and leading academics; (b) the fact that whipping had already been abolished in many other countries as being a repugnant penalty; and (c) the progressive move of the courts in countries in which whipping was not susceptible to constitutional attack, to restrict its imposition to instances where a serious, cruel, brutal and humiliating crime had been perpetrated.[31] The Constitution of South Africa 1991 requires a court interpreting the fundamental rights provisions to have regard to public international law applicable to the protection of the entrenched rights and to comparable foreign case law.[32] Accordingly, in determining whether juvenile whipping was unconstitutional, it had reference to legal provisions in eight other countries and the jurisprudence of several international and regional tribunals.[33]

[28] *Elliott* v. *Commissioner of Police*, Supreme Court of Zimbabwe, [1997] 3 LRC 15.
[29] *R* v. *Big M Drug Mart Ltd*, Supreme Court of Canada, [1986] LRC (Const) 332, at 358.
[30] *A Juvenile* v. *The State*, Supreme Court of Zimbabwe, [1989] LRC (Const) 774.
[31] *Ncube* v. *The State*, Supreme Court of Zimbabwe, [1988] LRC (Const) 442.
[32] Section 35(1). The section also requires a court to 'promote the values which underlie an open and democratic society based on freedom and equality'.
[33] *State* v. *Williams*, Constitutional Court of South Africa, [1995] 2 LRC 103. Langa J observed that 'While our ultimate definition of these concepts must necessarily reflect our own

The Court of Appeal of Hong Kong has, however, pointed out that in interpreting those provisions which bear upon questions of 'reasonableness' or the meaning of expressions such as 'undue delay', in relation to criminal proceedings, foreign experiences, while they might assist to some extent in the formulation of principle, should not be allowed to dictate norms which were largely influenced by local cultural, social and economic factors. As an example, the court added that in determining whether there was undue delay in criminal proceedings, Hong Kong should not be compared with Jamaica or Mauritius where long delays might be readily excusable. The administration in Hong Kong had at its disposal the means to provide adequate resources to ensure the proper, efficient and timely disposal of its criminal proceedings.[34]

The following are usually regarded as aids to the interpretation of human rights law. In case of ambiguity or doubt, or where an interpretation appears to conflict with the purpose of the Bill of Rights, recourse to such aids appears to be not only helpful but also necessary:

### *The travaux préparatoires*

The preparatory work of international and regional human rights instruments may be profitably invoked where such material is public and accessible. The preparatory work is particularly relevant when it clearly and indisputably points to a definite legislative intention. While working papers of delegates or memoranda submitted by them for consideration by the conference at which the instrument was drafted may seldom be helpful, an agreed conference minute of the understanding on the basis of which the draft of an article was accepted may be of great value.[35]

### *The jurisprudence of the Human Rights Committee and of the Committee on Economic, Social and Cultural Rights*

The 'general comments' on the scope and content of the articles of the ICCPR, the 'views' expressed on a consideration of individual communications submitted under the Optional Protocol, and the 'concluding observations' made following the examination of reports submitted by

experience and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.'

[34] *R* v. *William Hung*, Court of Appeal of Hong Kong, (1992) 2 HKPLR 282.

[35] *Fothergill* v. *Monarch Airlines Ltd*, House of Lords, United Kingdom, [1980] 2 All ER 696.

states parties may be regarded as the 'jurisprudence' of the Human Rights Committee. With reference to its jurisprudence, the Privy Council has noted that 'the findings of the Human Rights Committee are based on orderly proceedings during which the parties have a proper opportunity to present their cases, and its findings gain their authority from the standing of its judges and their judicial qualities of impartiality, objectivity and restraint. Its rulings are definitive, final and determinative of the issue before it'.[36] The jurisprudence of the Committee on Economic, Social and Cultural Rights is at present limited to its general comments and concluding observations.[37]

### *The jurisprudence of regional human rights institutions*

Both the European Convention on Human Rights and the American Convention on Human Rights contain provisions which are similar, if not identical, to those in the ICCPR. The European Commission of Human Rights, during its forty-year existence, dealt with over 25,000 applications. Since its creation in 1959, the European Court of Human Rights has delivered over 400 judgments 'on the merits'.[38] Together these two institutions have helped to create a very substantial jurisprudence on the interpretation and application of contemporary human rights norms. Similarly, the Inter-American Commission of Human

[36] *Tangiora* v. *Wellington District Legal Services Committee*, Privy Council on appeal from the Court of Appeal of New Zealand, [2000] 4 LRC 44.

[37] For 'general comments', of the Human Rights Committee, see UN document HRI/GEN/1/Rev.5, 26 April 2001, pp. 110–74. The 'views' are published in *Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions)* (New York: United Nations, 1985), UN document No. CCPR/C/OP/1, *Selected Decisions of the Human Rights Committee under the Optional Protocol (Seventeenth to Thirty-Second Sessions)* (New York: United Nations, 1990), and in the Annual Reports of the Human Rights Committee submitted to the United Nations General Assembly (Official Records of the United Nations Bearing General Assembly Supplement No. 40 for the Years since 1978). The 'concluding observations' are published in the Annual Reports. The 'general comments' and 'concluding observations' of the Committee on Economic, Social and Cultural Rights are published in the Official Records of the Economic and Social Council. See *Fok Lai Ying* v. *Governor-in-Council*, Privy Council on appeal from the Court of Appeal of Hong Kong, [1997] 3 LRC 101: Where a Bill of Rights incorporates the provisions of the ICCPR, the general comments and views of the Human Rights Committee are a more direct guide to the interpretation of the Bill of Rights than judgments of the European Court of Human Rights and decisions and reports of the European Commission of Human Rights.

[38] For European jurisprudence, see *European Human Rights Reports*, *Decisions & Reports of the European Commission of Human Rights*, *Collection of Decisions*, and *Digest of Strasbourg Case Law Relating to the European Convention on Human Rights.*

Rights which has its seat in Washington, and the Inter-American Court which sits in San José, Costa Rica, now interpret, apply and enforce the American Convention.[39] In the first twenty years of its existence, the court adopted 16 advisory opinions and dealt with 35 contentious cases, while the Commission has, since 1965, processed more than 12,000 cases. The African Commission of Human Rights, which was established in 1986 under the African Charter on Human and People's Rights, is another potential source of useful jurisprudence.

### *National jurisprudence*

A considerable body of national jurisprudence is now available in published form. The Commonwealth, for many of whose member states the British Foreign and Commonwealth Office adapted its standard draft Bill of Rights – originally prepared for Nigeria in 1959 and modelled on the European Convention on Human Rights – for nearly four decades, is a prolific source of case law. Additionally, human rights case law is forthcoming in increasing measure from countries such as India, Canada, South Africa and Sri Lanka which have drafted their own Bills of Rights without adopting the Commonwealth model.[40] Judgments of the United States Supreme Court, particularly those containing principles relating to the freedom of expression and the prohibition of retroactive criminal law, are also a useful aid to the interpretation of contemporary human rights norms.[41] In increasing measure, courts in Western, Central and Eastern European states are contributing to human rights jurisprudence. Unfortunately, the full texts of the judgments of these and South and Central American courts are not freely available in the English language, although summaries of the former are.[42]

[39] For American jurisprudence, see the Annual Reports of the Inter-American Court of Human Rights and of the Inter-American Commission on Human Rights.

[40] Selected judgments from these jurisdictions are now published regularly in *Law Reports of the Commonwealth*. Summaries of selected judgments are published in the *Commonwealth Law Bulletin*.

[41] See *Attorney General of Hong Kong* v. *Lee Kwong-kut*, Court of Appeal of Hong Kong, [1992] 1 HKCLR 127: In interpreting a Bill of Rights based on the ICCPR, the tests identified in the United States, in applying a Bill of Rights which predates the ICCPR by some 175 years, do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. They should be treated as providing useful general guidance in a case of difficulty.

[42] These are now published regularly by the Council of Europe in *Bulletin on Constitutional Case-Law*. A few summaries are also published in the *Yearbook on the European Convention on Human Rights*.

### *The jurisprudence of other international human rights tribunals*

The comments and views of monitoring bodies established under other international human rights instruments may be a useful source for the interpretation of relevant concepts. Two such bodies are the Committee against Torture established under the Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Committee on the Elimination of Racial Discrimination established under the Convention on the Elimination of All Forms of Racial Discrimination.

### *International human rights instruments*

It is appropriate for a court to have reference to the terms of other international and regional human rights instruments, particularly those dealing with specific rights in greater detail such as the conventions relating to discrimination and torture, in interpreting the scope of those rights in a Bill of Rights.[43] Where an instrument has been ratified by a state, such ratification may be construed as indicating a willingness to be bound by its provisions.[44]

### *International human rights guidelines*

There are several codes and guidelines which may help to interpret the human rights concepts in a Bill of Rights. These include the United Nations Standard Minimum Rules for the Treatment of Prisoners, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The latter was referred to by the Court of Appeal of New Zealand to ascertain the basic standards for the protection of arrested or detained persons, as well as the meaning of expressions such as 'detention' and 'a detained person'.[45] Similarly, the Supreme Court of Zimbabwe referred to the United Nations Standard

[43] *Lawson* v. *Housing New Zealand*, High Court of New Zealand, [1997] 4 LRC 369.

[44] In *Longwe* v. *Intercontinental Hotels*, [1993] 4 LRC 221, the High Court of Zambia referred to the African Charter on Human and People's Rights and the Convention on the Elimination of Discrimination against Women in granting relief to a woman who had been refused entry into a hotel bar on the ground that she was unaccompanied. The court held that the hotel's policy of excluding women unaccompanied by men from entering the bar constituted discrimination on the basis of gender.

[45] *Police* v. *Smith*, Court of Appeal of New Zealand, [1994] 1 LRC 252.

Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) in considering whether the imposition of a sentence of whipping on a juvenile was an inhuman and degrading punishment.[46] The Supreme Court of Canada, in examining the validity of a statutory provision which was challenged on the grounds that it violated the independence of the judiciary and infringed the fundamental right to equality before the law, referred, *inter alia*, to the Code of Minimum Standards of Judicial Independence formulated by the International Bar Association (1982); the Universal Declaration of the Independence of Justice (1983); and the Syracuse Draft Principles on the Independence of the Judiciary (1981). None of these were binding international instruments; nor were they resolutions adopted by governments. Yet, they were 'important international documents [which] have fleshed out in more detail the content of the principle of judicial independence in free and democratic societies'.[47] In New Zealand, the Report of the Working Group on Arbitrary Detention (UN document E/CN/1992/20) was invoked in support of the proposition that ICCPR 9(1) applied to all deprivations of liberty, whether in criminal cases or in other cases, such as, for example, mental illness, vagrancy, drug addiction, educational purposes and immigration controls.[48]

### *The writings of jurists*

The writings of jurists (*la doctrine*) are widely regarded as an admissible aid.[49] The eminence, the experience, and the reputation of a jurist will, of course, be of importance in determining whether, and if so, to what extent, the court should rely on his opinion.

### *The spirit of the constitution*

In an advisory opinion, the Inter-American Court invoked the 'spirit' of the American Convention on Human Rights in requiring that laws restricting rights and freedoms conform to the twin principles of legality

[46] *A Juvenile* v. *The State*, Supreme Court of Zimbabwe, [1989] LRC (Const) 774.
[47] *The Queen* v. *Beauregard*, Supreme Court of Canada, [1987] LRC (Const) 180, per Dickson CJ.
[48] *Police* v. *Smith*, Court of Appeal of New Zealand, [1994] 1 LRC 252.
[49] *Fothergill* v. *Monarch Airlines Ltd*, House of Lords, United Kingdom, [1980] 2 All ER 696.

and legitimacy.[50] The Supreme Court of Papua New Guinea has also claimed that when interpreting a constitutional provision 'it is an essential prerequisite for the judicial mind to be enlightened by the spirit of the constitution itself'. In the context of the constitution of that country, that enlightenment came from 'developing a thorough understanding of the National Goals and Directive Principles, by taking an overview which will place the particular provision in the context of the total legislative scheme of which it forms a part, and by seeking to understand the intention of the founding fathers as they expressed it on behalf of the people, when enacting the constitution and subsequent amendments'. The judicial mind must first be enlightened by the 'spirit of the constitution', and then the actual words must be examined from the viewpoint of that enlightened mind.[51]

## Conclusion

In the final analysis, whether a Bill of Rights will be given an interpretation that fulfils the purpose of the guarantees contained in it and secures for the individual the full benefit of its protection is very much a matter of judicial attitudes. In the High Court of Tanzania, in dealing with a habeas corpus application made by a person held under the Deportation Ordinance, Mwalusanya J responded to the argument that the question before him was reserved for the executive alone to decide, thereby illustrating the challenge that must face every judge called upon to interpret and apply a constitutionally guaranteed fundamental right:

> Is the matter of the legality of the detention of the citizen in this case a matter exclusively for the executive to decide, it being a political question? There are two schools of thought as to whether there is a political doctrine as such. The first school of thought, the 'judicial abstainers', root the political question in what seems to be a rather vague concept of judicial 'prudence', whereby the courts enter into a calculation

[50] *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, Inter-American Court, Advisory Opinion OC-6/86 of 9 May 1986, para 32.

[51] *Reference by Simbu Provincial Executive*, Supreme Court of Papua New Guinea, [1987] PNGLR 151, at 174, per Barnett J. See also *Special Reference No.2 of 1992 by the Public Prosecutor Pursuant to Section 19 of the Constitution [Re Leadership Tribunals]*, Supreme Court of Papua New Guinea, [1993] 2 LRC 114; *NTN Pty Ltd & NBN Ltd* v. *The State*, Supreme Court of Papua New Guinea, [1988] LRC (Const) 333, at 345, per Kapi DCJ.

> concerning the political wisdom of intervention in a sensitive area. This school stands for a 'hands-off' policy on matters which are political in character. They advise that the court should sedulously avoid meeting contentious issues but should sit in resplendent dignity, aloof from the perpetual tussle between liberty and authority . . . However, for my part I subscribe to the other school of thought of 'judicial activists' which holds that anyone whose life, liberty or property has been threatened or impaired by any branch of the government has a justiciable controversy and could properly repair to a judicial tribunal for vindication of his rights. Thus this school defines political questions principally in terms of the separation of powers as set out in the constitution and turns to the constitution itself for the answer to the question when the courts should stay their 'hands-off'.[52]

[52] *Chamchua Marwa* v. *OIC Musoma Prison*, 1988, cited in Issa G. Shivji, 'Contradictory Developments in the Teaching and Practice of Human Rights Law in Tanzania' [1991] 35 *Journal of African Law* 116, at 122–3.

# 6

# Non-discrimination

Non-discrimination constitutes a basic and general principle relating to the protection of human rights. Sieghart explains why:

> The primary characteristic which distinguishes 'human' rights from other rights is their universality: according to the classical theory, they are said to 'inhere' in every human being by virtue of his humanity alone. It must necessarily follow that no particular feature or characteristic attaching to any individual, and which distinguishes him from others, can affect his entitlement to his human rights, whether in degree or in kind, except where the instruments specifically provide for this for a clear and cogent reason – for example, in restricting the right to vote to adults, or in requiring special protection for women and children.[1]

Every instrument, whether international or regional, requires the state to respect and ensure to all persons within its territory and subject to its jurisdiction the guaranteed rights 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] Even when a

[1] Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 75.

[2] International Covenant on Civil and Political Rights (ICCPR), 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'; International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; European Convention on Human Rights (ECHR), Article 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin,

state is allowed to take measures derogating from its obligations under a human rights treaty in time of public emergency, such measures may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[3]

ICCPR 2, ICESCR 2, ECHR 14, ACHR 1 and AfCHPR 2, which prohibit discrimination in the enjoyment of guaranteed rights, have no independent existence; they relate solely to the rights recognized in the respective instruments.[4] They are designed to safeguard individuals, or groups of individuals, placed in comparable situations, from discrimination in the enjoyment of those rights. Therefore, a measure which in itself is in conformity with the requirements of a substantive provision in an instrument may nevertheless infringe that instrument when read in conjunction with one of the above articles for the reason that it is of a discriminatory nature. It is as though these articles formed an integral part of each of the substantive provisions of the instrument.[5] For example, the application of ECHR 14 does not presuppose the breach of one or more of the substantive provisions of that instrument, and to that extent it is autonomous. For ECHR 14 to be applicable it suffices that the facts of a case fall within the ambit of a substantive provision of the convention.[6]

association with a national minority, property, birth or other status'; American Convention on Human Rights (ACHR), Article 1(1): 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'; African Charter on Human and Peoples' Rights (AfCHPR), Article 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

[3] ICCPR 4(1), ACHR 27(1).

[4] These provisions must be distinguished from the substantive right to equality before the law and the equal protection of the law (e.g. ICCPR 26).

[5] See generally *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistic Case (No.2))*, European Court, (1968) 1 EHRR 252.

[6] *Thilimmenos* v. *Greece*, European Court, (2000) 31 EHRR 411. A Jehovah's Witness who had been found guilty of insubordination for refusing to enlist in the army for religious reasons, complained that the law excluding persons convicted of a felony from appointment to a chartered accountant's post did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds, thereby violating his right to freedom of religion and his right not to be subjected to discrimination in

## Discrimination[7]

None of the human rights instruments defines the term 'discrimination' nor indicates what constitutes discrimination. However, the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Article 1). Similarly, the Convention on the Elimination of All Forms of Discrimination against Women provides that 'discrimination against women' shall mean 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' (Article 1).

While these conventions address specific grounds of discrimination, the Human Rights Committee has noted that the term 'discrimination' as used in the ICCPR should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[8] In referring to the 'purpose' or 'effect' of a difference in treatment, the

that respect. The court accepted that the 'set of facts' complained of fell within the ambit of ECHR 9.

[7] In ICCPR 2, the word 'distinction' is used instead of 'discrimination' which is used in ICCPR 26 and which was preferred when the corresponding provision in the ICESCR was being drafted. There is probably no substantial difference in meaning between the two expressions. For a discussion of the debate on the relative merits of the two words, see B.G. Ramcharan, 'Equality and Non-Discrimination' in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 246, at 258–9.

[8] Human Rights Committee, General Comment 18 (1989).

committee encompassed in its definition both direct and indirect discrimination. The former involves treating one person less favourably than another on prohibited grounds and in comparable circumstances. The latter arises when a practice, rule, requirement or condition is neutral on its face but has a disproportionate effect on particular groups without any objective justification.[9] The right not to be discriminated against in the enjoyment of the guaranteed rights is also violated when a state, without an objective and reasonable justification, fails to treat differently persons whose situations are different.[10]

Not every difference in treatment is prohibited, but only a distinction that has no objective and reasonable justification.[11] The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration. A difference of treatment in the exercise of a right must not only pursue a legitimate aim; there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[12] According to the Supreme Court of India, in order to pass the test of permissible classification two conditions must be fulfilled, namely, (a) the classification must be

[9] See *Yick Wo* v. *Hopkins*, United States Supreme Court 118 US 356 (1886): A San Francisco law which prohibited the carrying on of a laundry business within the limits of the city without having first obtained the consent of the Board of Supervisors unless it was located in a building constructed of brick or stone was held to be discriminatory. Of 320 laundries in San Francisco, about 310 were constructed of wood, and about 240 of the 320 were owned and operated by persons of Chinese origin. The petitioner and about 200 other Chinese applied to the Board of Supervisors to continue their clothes-washing business in wooden buildings which they had been occupying for many years, but in all the cases licences were refused, whereas not a single one of the petitions presented by 80 persons who were non-Chinese had been refused. As the court observed, the law had been administered 'with an evil eye and an unequal hand'; *Dothard* v. *Rawlinson*, United States Supreme Court 433 US 321 (1977): A state statute which specified minimum height and weight requirements of five feet, two inches, and 120 pounds for employment as a state prison guard, constituted unlawful sex discrimination since it excluded over 41 per cent of the nation's female population while excluding less than one per cent of the male population. No evidence was presented to correlate the statutory requirements with the amount of strength thought to be essential for the job; Decision of the Constitutional Court of Italy, No.163, 15 April 1993, (1993) 2 *Bulletin on Constitutional Case-Law* 29: A rule which laid down a strict minimum height for men as well as for women as one of the conditions for appointment to senior fire brigade officer level was a source of indirect discrimination because of the statistically established height difference between men and women.

[10] *Thilimmenos* v. *Greece*, European Court, (2000) 31 EHRR 411.

[11] *Broeks* v. *Netherlands*, Human Rights Committee, Communication No.172/1984, HRC 1987 Report, Annex VIII.B.

[12] *Belgian Linguistic Case (No.2)*, European Court, (1968) 1 EHRR 252.

founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (b) the differentia must have a rational relation to the object sought to be achieved by the statute in question. The Inter-American Court has described the position thus: 'No discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.'[13]

There is no requirement of literal equality in the sense of unrelenting identical treatment always.[14] Such rigidity will subvert rather than promote true even-handedness. In certain circumstances, a departure from literal equality will be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment, and any departure therefrom must be justified. To justify such a departure, it must be shown: first, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; second, that the difference embodied in the particular departure selected to meet that

[13] *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica*, Inter-American Court, Advisory Opinion OC-4/84, 19 January 1984, para 57. Examining the proposed nationality law of Costa Rica, the court noted that a less stringent residence requirement for persons of Central American, Ibero-American or Spanish descent than for persons of other nationalities was justifiable since, viewed objectively, the former shared much closer historical, cultural and spiritual bonds with the people of Costa Rica than the latter. The existence of these bonds permitted the assumption that these persons would more easily and more rapidly assimilate within the community and identify more readily with the traditional beliefs, values and institutions of Costa Rica. On the other hand, a provision that gave women, but not men, who married Costa Ricans a special status for purposes of naturalization was, in the view of the Court, based on traditional notions of paternal authority and conjugal inequality which were no longer valid, and could not therefore be justified.

[14] The enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance. In this connection, the provisions of the ICCPR are explicit. For example, ICCPR 6(2) prohibits the death sentence from being imposed on persons below eighteen years of age, and prohibits that sentence from being carried out on pregnant women; ICCPR 10(3) requires the segregation of juvenile offenders from adults; and ICCPR 25 guarantees certain political rights, differentiating on grounds of citizenship.

need is itself rational; and third, that such departure is proportionate to such need.[15] Mere administrative inconvenience or the possibility of abuse cannot be invoked to justify unequal treatment. Accordingly, the Human Rights Committee rejected the submission of the French government that the different treatment, in respect of pension entitlements, of retired African soldiers who had served in the French army but were now living in Africa, was due to the difficulty in establishing their identity and family situations, and the differences in the economic, financial and social conditions prevailing in France and in its former colonies.[16]

## Affirmative action

It was expressly emphasized when ICCPR 2 was being drafted that 'special measures' for the advancement of any socially or educationally backward section of society should not be construed as a 'distinction'. It was agreed that that interpretation, to which there was no objection, should be specially mentioned in the report.[17] Such measures may be necessary in order to diminish or eliminate conditions which cause or help to perpetuate discrimination. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state may take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such affirmative action is needed to correct discrimination in fact, the differentiation is considered to be legitimate.[18]

[15] *R* v. *Man Wai Keung (No.2)*, Court of Appeal of Hong Kong, [1992] 2 HKCLR 207, at 217, per Bokhary JA.

[16] *Gueye* v. *France*, Human Rights Committee, Communication No.196/1985, HRC 1989 Report, Annex X.B.

[17] UN document A/5655, s. 20. See also Human Rights Committee, General Comment 18 (1989).

[18] Human Rights Committee, General Comment 18 (1989). See Decision of the Constitutional Court of Spain, Case No. 269/1994, 3 October 1994, (1994) 3 *Bulletin on Constitutional Case-Law* 282: Reserving a percentage of places in the public service for physically disabled persons is in line with the current general trend to promote the substantial equality of disadvantaged persons. On affirmative action in the United States, see *Plessy* v. *Ferguson*, United States Supreme Court 163 US 537 (1896); *Korematsu* v. *United States*, United States Supreme Court 323 US 214 (1944); *Brown* v. *Board of Education*, United States Supreme

## of any kind

The use of the expression 'of any kind such as' or 'of any kind as to' means that the prohibition of discrimination is open-ended as regards the grounds of distinction. Every distinction of any kind could be relied upon to invoke the prohibition. Interpreting similar language in the corresponding provision in the ECHR, the European Court has observed that 'there is no call to determine on what ground this difference was based', since the list of grounds appearing in the article is not exhaustive.[19] Accordingly, the European institutions have entertained and examined alleged discrimination between: broadcasting organizations and publishers of newspapers and foreign magazines;[20] striking employees and their non-striking colleagues;[21] small trade unions and large trade union federations;[22] male and female homosexuals, and between heterosexuals and homosexuals;[23] journalists and parliamentarians;[24] the legal profession and other professions;[25] processions of a religious, educational, festive or ceremonial character and other public processions;[26]

Court 374 US 483 (1954); *DeFunis* v. *Odegaard*, United States Supreme Court 416 US 312 (1973); *Regents of the University of California* v. *Bakke*, United States Supreme Court 438 US 265 (1978); *Steelworkers* v. *Weber*, United States Supreme Court 443 US 193 (1979); *Fullilove* v. *Klutznick*, United States Supreme Court 448 US 149 (1980); *Sheet Metal Workers* v. *Equal Employment Opportunity Commission*, United States Supreme Court 478 US 421 (1986); *United States* v. *Paradise*, United States Supreme Court 480 US 149 (1987); *Johnson* v. *Santa Clara County*, United States Supreme Court 480 US 1442 (1987); *Firefighters* v. *Stotts*, United States Supreme Court 476 US 561 (1984); *Wygant* v. *Jackson Board of Education*, United States Supreme Court 476 US 267 (1986); *City of Richmond* v. *Croson*, United States Supreme Court, 488 US 469 (1989); *Adarand Constructors* v. *Rena*, United States Supreme Court 115 St. Ct. 2097.

19 *Rasmussen* v. *Denmark*, European Court, (1984) 7 EHRR 371.

20 *De Geillustreerde Pers N.V.* v. *Netherlands*, European Commission, (1976) *Decisions and Reports* 5.

21 *Schmidt and Dahlstrom* v. *Sweden*, European Court, (1976) 1 EHRR 632.

22 *Swedish Engine Drivers' Union* v. *Sweden*, European Court, (1976) 1 EHRR 617. See also *Association A* v. *Germany*, European Commission, Application 9792/82, (1983) 34 *Decisions & Reports* 173.

23 *X* v. *United Kingdom*, European Commission, Application No.7215/75, 12 October 1978. See also *Dudgeon* v. *United Kingdom*, European Commission, (1980) 3 EHRR 40; *Egan* v. *Canada*, Supreme Court of Canada, [1995] 2 SCR 513.

24 *The Sunday Times* v. *United Kingdom*, European Court, (1979) 2 EHRR 245.

25 *Van Der Mussele* v. *Belgium*, European Court, (1983) 6 EHRR 163. See also *X* v. *Germany*, European Commission, Application 8410/78, (1979) 18 *Decisions & Reports* 216 (notaries and other professions).

26 *Christians against Racism and Fascism* v. *United Kingdom*, European Commission, (1980) 21 *Decisions & Reports* 138.

juveniles and adults;[27] Commonwealth citizens and aliens;[28] persons at liberty and persons imprisoned after their respective convictions;[29] and a government tenant and a private tenant renting from a private landlord.[30] In India, it has been held to be reasonable to distinguish between dangerous prisoners and ordinary prisoners, or between 'under trials' and convicts.[31] In Belgium, lawyers and doctors have been distinguished from persons belonging to other professions.[32]

**such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**

These concepts, which are referred to in the instruments, are examined in the chapter dealing with the right to equality.

[27] *X* v. *Switzerland*, European Commission, Application 8500/79, (1979) 18 *Decisions & Reports* 238.

[28] *X* v. *United Kingdom*, European Commission, Application 9088/80, (1982) 28 *Decisions & Reports* 160.

[29] *Morris* v. *United Kingdom*, European Commission, (1984) 35 *Decisions & Reports* 117.

[30] *Larkos* v. *Cyprus*, European Court, (1999) 30 EHRR 597.

[31] *Sobraj* v. *Superintendent, Central Jail, Tihar, New Delhi*, Supreme Court of India, [1978] AIR SC 1514.

[32] Decision of the Court of Arbitration of Belgium, 27 March 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 13. The Belgian law, while prohibiting the practice of telephone tapping, authorized a judge to order surveillance measures when it was necessary to do so. However, the law prohibited such measures from being ordered in respect of premises used for professional purposes or of the residence or means of communication or telecommunications of a lawyer or doctor, unless such persons were themselves under suspicion of having committed an offence. A chartered accountant argued that the law discriminated between doctors and lawyers on the one hand and those who practised other professions and were also subject to the duty of professional confidentiality, like chartered accountants, on the other hand. The court upheld the distinction on the ground that the former have frequent contacts with suspects, they maintained a relationship of trust with their clients which it was vital to protect, and they were responsible to bodies established by law which ensured that professional ethics are observed.

# 7

# Limitations

Since an individual lives in society with other individuals, the exercise by him of his rights must necessarily be regulated, and restricted to the extent necessary, to enable others to exercise their rights. The permissible restrictions on the exercise of rights must be distinguished from the power of the state to derogate from some of its obligations in time of public emergency. While a restriction prescribed by law may remain in force indefinitely, derogation is essentially a temporary measure limited to the period of 'the public emergency threatening the life of the nation'.

## Rights which are expressed in absolute terms

Certain rights are expressed in all the instruments in absolute terms. Their exercise may not be restricted on any grounds whatsoever. These rights, which seek primarily to protect the integrity of the human person, are:

(a) freedom from torture (International Covenant on Civil and Political Rights (ICCPR), Article 7, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 3, American Convention on Human Rights (ACHR), Article 5);
(b) freedom from slavery and servitude (ICCPR 8, ECHR 4, ACHR 6);
(c) right of prisoners to be treated with humanity (ICCPR 10);
(d) freedom from imprisonment for inability to fulfil a contractual obligation (ICCPR 11);
(e) right to a fair trial by a competent, independent and impartial tribunal established by law (ICCPR 14, ECHR 6, ACHR 8);
(f) right not to be subjected to the application of retroactive criminal law (ICCPR 15, ECHR 7, ACHR 9);
(g) right to legal personality (ICCPR 16);

(h) freedom to have or to adopt a religion or belief of one's choice (ICCPR 18, ECHR 9, ACHR 12);
(i) right to marry and to found a family, and the right to equality of rights and responsibilities of spouses (ICCPR 23, ECHR 12);
(j) right of a child to a nationality (ICCPR 24, ACHR 20);
(k) right to equality before the law, the equal protection of the law, and to freedom from discrimination on the ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (ICCPR 26);
(l) right of ethnic, religious, or linguistic minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language (ICCPR 26).

### Rights which are restrictively defined

A few rights are restrictively defined through the introduction of qualifying terms such as 'arbitrarily' and 'unreasonable', thereby limiting their content through definition rather than by subsequent legislative action. For instance, 'No one shall be *arbitrarily* deprived of his life' (ICCPR 6, ACHR 4); 'No one shall be subjected to *arbitrary* arrest or detention' (ICCPR 9, ACHR 7); 'No one shall be *arbitrarily* deprived of his right to enter his own country' (ICCPR 12); 'No one shall be subjected to *arbitrary* or unlawful interference with his privacy, family, home or correspondence' (ICCPR 17, ACHR 11); and 'Every citizen shall have the right and opportunity . . . without *unreasonable* restrictions, to take part in the conduct of public affairs . . . ' (ICCPR 25).

### Rights the exercise of which may be restricted

The exercise of the rights referred to in ICCPR 12 (freedom of movement), 14 (public trial), 18 (freedom of religion), 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (freedom of association), and the corresponding rights in ECHR and ACHR, and in International Covenant on Economic, Social and Cultural Rights (ICESCR) 8 (right to form trade unions), may be restricted, but any such restriction must cumulatively meet the following conditions: it must be provided for by law; it must address one of the aims or interests enumerated in the relevant

article; and it must be necessary to achieve the legitimate purpose.[1] The fact that ICCPR, ECHR and ACHR do not contain a general limitation clause similar to Universal Declaration on Human Rights (UDHR) 29(2)[2] or ICESCR 4,[3] means that limitations under those instruments are permitted only where a specific limitation clause is provided, and only to the extent so permitted.[4]

The limitation clauses attached to each of these rights in the ICCPR were drafted, revised and adopted by the Commission on Human Rights and the Third Committee at different times. Consequently, discrepancies occur. For example, in ICCPR 18 alone 'public order' is not qualified by the term *ordre public*; and the words 'in a democratic society' qualify the principle of necessity in respect of the freedoms of assembly and of association, but not in respect of the freedoms of expression or of movement. It could not have been intended that only some and not the other rights were to be exercised in the context of a 'democratic society'. This apparent variance in terminology appears, therefore, to be of no significance.

## Restrictions

A limitation clause is clearly an exception to the general rule. The general rule is the protection of the right; the exception is its restriction. The restriction – interpreted in the light of the general rule – may not be applied to completely suppress the right. For example, an expression of an opinion or its dissemination may only be restricted in so far as it is necessary for preserving the values sought to be protected by the limitation clause. The grounds permitting such restrictions are exhaustively enumerated in that clause.[5] The power to impose restrictions on fundamental rights is essentially a power to 'regulate' the exercise of

[1] *Ballantyne Davidson and Mclntyre* v. *Canada*, Human Rights Committee, Communication Nos.359/1989 and 385/1989, 31 March 1993.

[2] 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

[3] 'The state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

[4] When the ICCPR was being drafted, the grounds 'the general welfare' and 'economic and social well-being' were rejected as being 'too far-reaching'. UN document 2929, chap.VI, s. 56.

[5] *Handyside* v. *United Kingdom*, European Commission, 30 September 1975.

these rights, not extinguish them.[6] A proposal made at the drafting stage of the ICCPR to add the word 'reasonable' to qualify the word 'restrictions' was opposed since restrictions prescribed by law were necessarily presumed to be reasonable.[7] The Privy Council has held that in determining whether a limitation is arbitrary or excessive, the court would ask itself whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[8]

A state may make regulations only in aid of the protected right. In India, the Supreme Court upheld a provision in the Bombay Police Act 1951 which enabled the commissioner of police to make rules to regulate assemblies and processions, but invalidated a rule made by the commissioner which empowered him to refuse permission to hold a public meeting. The court observed that the power to regulate includes the power to require prior permission to be obtained for holding an assembly or a procession since it was necessary to regulate the conduct and behaviour or actions of persons constituting such an assembly or procession in order to safeguard the rights of others and in order to

[6] *Bennett Coleman & Co* v. *The Union of India*, Supreme Court of India, [1973] 2 SCR 757, at 830. See also *Ram Singh* v. *The State of Delhi*, Supreme Court of India, [1951] SCR 451, per Bose J. A restriction must be narrowly or strictly construed: *Nkomo* v. *Attorney General*, Supreme Court of Zimbabwe, [1993] 2 LRC 375. In Canada, where the Charter of Rights and Freedoms permits guaranteed rights and freedoms to be restricted 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', the Supreme Court has adopted a two-part test. The first part involves asking whether the objective sought to be achieved by the impugned legislation relates to concerns which are 'pressing and substantial in a free and democratic society'. The second part involves balancing a number of factors to determine whether the means chosen by the government are proportional to its objective. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights: *Irvin Toy Ltd* v. *Attorney General of Quebec*, Supreme Court of Canada, [1989] 1 SCR 927.

[7] UN document A/4299, s. 14.

[8] *De Freitas* v. *Permanent Secretary of Agriculture, Fisheries, Lands and Housing*, Privy Council on appeal from the Court of Appeal of Antigua and Barbuda, [1998] 3 LRC 62. See also *State* v. *Smith*, High Court of Namibia, [1997] 4 LRC 330: The exceptions must be interpreted strictly; *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282: Restrictions shall be given a strict and narrow, rather than a wide construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise.

preserve public order. However, the power to regulate did not authorize the formulation of a rule to regulate the conduct, behaviour or actions of persons before an assembly was constituted.[9]

### necessary in a democratic society

When the ICCPR was being drafted, the representative of France proposed that the word 'necessary' in Article 21 (freedom of peaceful assembly) be qualified by the expression 'necessary in a democratic society'. It was argued that freedom of assembly could be effectively protected only if the limitation clause was applied according to the principles recognized in a democratic society. To the objection that the word 'democracy' could be interpreted differently, it was explained that a democratic society might be distinguished by its respect for the principles of the Charter of the United Nations, the UDHR, and the human rights covenants. The proposal was adopted by nine votes to eight, with one abstention.[10] The fact that this qualifying expression was also included in ICCPR 22 (freedom of association), but not in ICCPR 12 (freedom of movement), ICCPR 18 (freedom of religion or belief) or in ICCPR 19 (freedom of expression) which were drafted, revised and adopted at different times, does not appear to have any significance since it could not have been intended that each of the protected rights were to be exercised and enjoyed in different contexts.[11]

In assessing the necessities of a given measure, three principles must be observed. First, the term 'necessary' is not synonymous with 'indispensable'; neither has it the flexibility of such expressions as 'useful', 'reasonable', or 'desirable'.[12] It implies the existence of a 'pressing social need', or a 'high degree of justification',[13] for the interference in

[9] *Himat Lal Shah* v. *Commissioner of Police*, Supreme Court of India, (1973) 1 SCC 227.

[10] UN document A/2929, chap.VI, s. 143.

[11] Daes suggests at least three basic criteria by which the degree of democracy in any community may be tested: first, the extent to which all constituent groups are incorporated in the decision-making processes; second, the extent to which governmental decisions are subject to popular control; third, the degree to which ordinary citizens are involved in public administration, the extent that is, of the experience of ruling and being ruled: Erica-Irene A. Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Freedom of the Individual under Law* (New York: United Nations, 1990), 128. See also UN documents E/CN.4/SR.167, s. 21; E/CN.4/SR.322, p.12.

[12] *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615.

[13] *Coetzee* v. *Government of South Africa*, Constitutional Court of South Africa, [1995] 4 LRC 220.

question.[14] As the Constitutional Court of South Africa described it, the societal reason in favour of interference must be 'sufficiently acute and forceful to pierce the protective constitutional armour provided by the word necessary'.[15] If a compelling governmental objective can be achieved in a number of ways, that which least restricts the right protected must be selected.[16] Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; the restriction must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the particular right. Implicit in this standard is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the protected right more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.[17]

[14] *Handyside* v. *United Kingdom*, European Court, (1976) 1 EHRR 737. See also *Dudgeon* v. *United Kingdom*, European Court, (1981) 4 EHRR 149. For the application of this test, see *The Sunday Times* v. *United Kingdom*, European Court, (1979) 2 EHRR 245; *Gay News Ltd and Lemon* v. *United Kingdom*, European Commission, (1982) 5 EHRR 123; *Barthold* v. *Germany*, European Commission, (1983) 6 EHRR 82; *Muller* v. *Switzerland*, European Court, (1988) 13 EHRR 212; *Autronic AG* v. *Switzerland*, European Court, (1990) 12 EHRR 485; *Purcell* v. *Ireland*, European Commission, 16 April 1991; *The Observer and The Guardian* v. *United Kingdom*, European Court, (1991) 14 EHRR 153; *Castells* v. *Spain*, European Court, (1992) 14 EHRR 445; *Open Door and Dublin Well Woman* v. *Ireland*, European Court, (1992) 15 EHRR 244.

[15] *Coetzee* v. *Government of South Africa*, Constitutional Court of South Africa, [1995] 4 LRC 220.

[16] The requirement of finding 'the least onerous solution' does not impose on the court a duty to weigh each and every alternative with a view to determining precisely which imposed the least burdens. What would matter is that the means adopted by the legislature fell within the category of options which were clearly not unduly burdensome, overbroad, or excessive, considering all the reasonable alternatives: *Coetzee* v. *Government of South Africa*, Constitutional Court of South Africa, [1995] 4 LRC 220.

[17] *Re Compulsory Membership of Journalists' Association*, Inter-American Court, Advisory Opinion OC-5/85, 13 November 1985: The compulsory licensing of journalists did not comply with the requirements of ACHR 13(2) because the establishment of a law that protected the freedom and independence of anyone who practised journalism was perfectly conceivable without the necessity of restricting that practice only to a limited group of the community. See also *NTN Pty Ltd & NBN Ltd* v. *The State*, Supreme Court of Papua New Guinea, [1988] LRC (Const) 333, at 345, where Kapi DCJ thought that what was meant by 'necessary' was 'reasonably necessary'. He added that the word 'necessary' implied that fundamental rights should not be regulated or restricted if there was another way of effectively protecting the public interest. This was consistent with the spirit of the Constitution of Papua New Guinea that the freedom should be enjoyed with the least amount of restriction.

Secondly, pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[18] Of necessity this involves a delicate balance between the wishes of the individual and the utilitarian 'greater good of the majority'. But democratic societies approach the problem from the standpoint of the importance of the individual and the undesirability of restricting the individual's freedom.[19] It is a society which is 'subject to the rule of law, makes basic provision for an effective control of executive action to be exercised, without prejudice to parliamentary control, by an independent judiciary, and assures respect of the human person'.[20] A democratic society is one in which 'it is not necessary that every one should sing the same song'.[21]

The question has been raised whether a distinction ought to be made between a developed society and one which is still developing. Responding to this query, the Supreme Court of Zambia observed that 'one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society'.[22] In identifying the fundamental concept of a 'democratic society', the court had regard to the dictum in *Speiser* v. *Randall*[23] that a democratic country is 'a free society in which government is based upon the consent of an informed

[18] *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615.

[19] *Handyside* v. *United Kingdom*, European Commission, 30 September 1975.

[20] *The Sunday Times* v. *United Kingdom*, European Court (1979) 2 EHRR 245, joint dissenting opinion of Judges Wiarda, Cremona, Thor Vilhjalmsson, Ryssdal, Ganshof van der Meersch, Sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch and Matscher. See also *Woods* v. *Minister of Justice*, Supreme Court of Zimbabwe, [1994] 1 LRC 359: What is reasonably justifiable in a democratic society is an elusive concept. 'It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.'

[21] *Rangarajan* v. *Jagjivan Ram*, Supreme Court of India, [1990] LRC (Const) 412. See also *Maneka Gandhi* v. *The Union of India*, Supreme Court of India, [1978] 2 SCR 621, at 696, per Bhagwati J.

[22] *Patel* v. *Attorney General*, Supreme Court of Zambia, (1968) Zambia LR 99, at 128, per Magnus J.

[23] United States Supreme Court, 357 US 513 (1958).

citizenry and is dedicated to the protection of the rights of all, even the most despised minorities'.

Finally, any restriction imposed on a right must be proportionate to the legitimate aim pursued.[24] The principle of proportionality is, therefore, one of the factors to be taken into account when assessing whether a measure of interference is 'necessary'. The proportionality principle requires that a balance be struck between the requirements of the interests sought to be protected and the essential elements of the recognized right. The pursuit of a just balance must not result in individuals being discouraged, for fear of disciplinary or other sanctions, from exercising their rights.[25] Such a balance had not been struck in the case of an *avocat* (and trade union leader) who was 'reprimanded' by the court for 'a breach of discretion amounting to a disciplinary offence'. He participated, by carrying a placard, in a demonstration of Guadeloupe independence movements and trade unions to protest against two court decisions in which prison sentences and fines were imposed on three militants for criminal damage to public buildings. The European Court noted that the freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – was of such importance that it could not be restricted in any way, even for an *avocat*, so long as the person concerned did not himself commit any reprehensible act on such an occasion.[26] A restriction may, therefore, be considered 'necessary' only if it responds to a pressing public and social need in a democratic society, pursues a legitimate aim, and is proportionate to that aim.

## provided by law

Restrictions on the exercise of protected rights must be 'provided by law', 'prescribed by law', or be 'in accordance with law' or 'in conformity with

[24] *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615.

[25] *Rassemblement Jurassien & Unité Jurassienne* v. *Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93. See *State* v. *Smith*, High Court of Namibia, [1997] 4 LRC 330: Whether a restriction is reasonable is to be determined by having regard to the principle of proportionality; the means chosen by the legislature to achieve the object had to be carefully designed to achieve the object in question and moreover, they had to be rationally connected to the objective; nor could they be arbitrary, unfair or based on irrelevant considerations.

[26] *Ezelin* v. *France*, European Court, (1991) 14 EHRR 362.

law'. In respect of the first three, the corresponding French expression is *prévu par la loi*, suggesting thereby that they have the same meaning.[27] The expression 'imposed in conformity with the law' refers to legitimate administrative action[28] such as an authorization procedure relating to time, manner and place, which may be necessary to ensure the peaceful nature of a meeting or procession.

In the opinion of the European Court,[29] four requirements flow from the expression 'prescribed by law':

1. The impugned measure should have a basis in domestic law.
2. The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.
3. The relevant national law must be formulated with sufficient precision to enable those concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[30]

[27] The same French expression is used in ECHR to render the three English expressions 'in accordance with the law', 'provided for by law' and 'in accordance with law'.

[28] UN document A/2929, chap.VI, s. 141.

[29] *Sunday Times* v. *United Kingdom*, (1979) 2 EHRR 245; *Malone* v. *United Kingdom*, European Court, (1984) 7 EHRR 14. See also *Chappell* v. *United Kingdom*, European Court, (1989) 12 EHRR 1 (an Anton Piller order is granted without the defendant being notified or heard and is capable of producing damaging and irreversible consequences for him. It is, therefore, essential that this measure should be accompanied by adequate and effective safeguards against arbitrary interference and abuse). This view of the European Court is confirmed by ICCPR 12 which requires that a restriction be 'consistent with the other rights recognized in the Covenant'.

[30] If the language of a law is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right, and so long as the possibility of its being applied for purposes not sanctioned by the constitution cannot be ruled out, it must be held to be wholly void: *Chintaman Rao* v. *State of Madya Pradesh*, Supreme Court of India, [1950] SCR 759; A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner

4. The phrase does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law. The phrase thus implies that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with protected rights.

Interpreting article 21 of the Constitution of India which provides that no one may be deprived of personal liberty except according to procedure 'established by law', the Supreme Court observed that any procedure which dealt with the modalities of regulating the exercise of a fundamental right had to be 'fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus understood, "procedure" must rule out anything arbitrary, freakish or bizarre . . . This quality of fairness in the process is emphasized by the strong word "established" which means "settled firmly" not wantonly, whimsically. If it is rooted in the legal consciousness of the community it becomes "established" procedure'.[31]

The word 'law' includes not only statute law, but also unwritten law, such as common or customary law,[32] and case-law in those countries where several branches of positive law are largely the outcome of case-law.[33] Orders, instructions and mere statements of administrative practice do not, of course, have the force of law,[34] but rules of professional conduct do.[35] The Inter-American Court has held that in ascertaining the meaning of the word 'law' regard must be had to the fact that it is a

of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference: *Wingrove* v. *United Kingdom*, European Court, (1996) 24 EHRR 1.

[31] *Maneka Gandhi* v. *Union of India*, Supreme Court of India, [1978] 2 SCR 621, per Krishna Iyer J.

[32] *Sunday Times* v. *United Kingdom*, European Court, (1979) 2 EHRR 245; *Gay News* and *Lemon* v. *United Kingdom*, European Commission, (1982) 5 EHRR 123.

[33] *Huvig* v. *France*, European Court, (1990) 12 EHRR 528; *Kruslin* v. *France*, European Court, (1990) 12 EHRR 547: In a sphere covered by written law, the 'law' is the enactment in force as interpreted by courts. See also *Markt Intern Verlag GmbH* v. *Germany*, European Court, (1989) 12 EHRR 161; *Muller* v. *Switzerland*, European Court, (1988) 13 EHRR 212; *The Observer and The Guardian* v. *United Kingdom*, European Court, (1991) 14 EHRR 153; *Arrowsmith* v. *United Kingdom*, European Commission, (1978) 3 EHRR 218.

[34] *Silver* v. *United Kingdom*, European Court, (1983) 5 EHRR 347; *Malone* v. *United Kingdom*, European Commission, (1982) 5 EHRR 385.

[35] *Barthold* v. *Germany*, European Court, (1985) 7 EHRR 383. The rules were formulated by the Veterinary Surgeon's Council.

term used in an international treaty. It is not, consequently, a question of determining the meaning of the word 'laws' within the context of the domestic law of a state.

> The meaning of the word 'laws' in the context of a system for the protection of human rights cannot be disassociated from the nature and origin of that system. The protection of human rights . . . is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the state or to which the state has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power. In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the legislature in accordance with the constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily. Although it is true that this procedure does not always prevent a law passed by the legislature from being in violation of human rights – a possibility that underlines the need for some system of subsequent control – there can be no doubt that it is an important obstacle to the arbitrary exercise of power.

From that perspective, the Inter-American Court declined to interpret the word 'laws' as a synonym for just any legal norm, since that would be tantamount to an admission that fundamental rights could be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature. Accordingly, the court concluded that the word 'laws' used in ACHR 30[36] meant formal law, that is, a general legal norm tied to the

[36] *Article 30. Scope of Restrictions*: 'The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.'

general welfare, passed by a democratically elected legislative body and formulated according to the procedures set forth by the constitution of the state for that purpose.[37]

## in the interests of

Examining the words 'in the interests of' in relation to public order, the Supreme Court of India observed that these words could not be interpreted to mean that even if the connection between the restriction and public order was remote and indirect, the restriction could be said to be in the interests of public order. A restriction is 'in the interests of' public order only if the connection between the restriction and public order is proximate and direct. Indirect, far-fetched, or unreal connection between the restriction and public order will not fall within the purview of this expression.[38] Similarly, where the restriction must be necessary 'to protect' public order, the relevant law must be designed to directly maintain the public order or to directly protect the general public against any particular evil.[39]

## national security

National security is a permissible basis for restricting the exercise of the freedom of movement and free choice of residence (ICCPR 12, ECHR Protocol 4, Article 2, ACHR 22), the freedom of expression (ICCPR 19, ECHR 10, ACHR 13), the right of peaceful assembly (ICCPR 21, ECHR 11, ACHR 15), the right to freedom of association (ICCPR 22, ECHR 11, ACHR 16), the right to privacy (ECHR 8), and for excluding the press and the public from all or part of a trial (ICCPR 14, ECHR 6).

National security may be invoked to justify measures limiting these rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order, nor can it be used as a pretext for imposing vague or arbitrary

[37] *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, Inter-American Court, Advisory Opinion OC-6/86 of 9 May 1986.
[38] *Ghosh* v. *Joseph*, Supreme Court of India, [1963] Supp. 1 SCR 789 at 795.
[39] *Virendra* v. *The State of Punjab*, Supreme Court of India, [1958] SCR 308 at 317.

limitations.[40] It has been argued that the word 'national' excludes restrictions in the sole interest of a government, regime, or power group. It has also been suggested that limitations are not based on 'national security' if their sole purpose is to avoid riots or other disturbances, or to frustrate revolutionary movements which do not threaten the life of the whole nation. Such grounds for restriction may sometimes fall within the scope of 'public order' or 'public safety', but not 'national security'.[41] But national security may be invoked when a democratic society is threatened by highly sophisticated forms of espionage and terrorism.[42] National security may also permit limitations on the rights of members of the armed forces.[43]

## public safety

'Public safety' is a permissible basis for restricting the exercise of the freedom to manifest one's religion or belief (ICCPR 18, ECHR 9, ACHR 12), the freedom of peaceful assembly (ICCPR 21, ECHR 11, ACHR 15), the freedom of association (ICCPR 22, ECHR 11, ACHR 16), the right to privacy (ECHR 8), the freedom of expression (ECHR 10), and the freedom of movement (ACHR 22).

'Public safety' ordinarily means security of the public or their freedom from danger; the safety of the community from external or internal danger.[44] According to Daes, it implies the existence of a set of provisions intended to ensure, within a country, public peace, social harmony, respect for just law and the legitimate decisions or orders of the public authorities.[45] According to Kiss, the protection of public safety may justify restrictions resulting from police rules and security regulations

[40] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), UN document E/C.12/2000/13, 2 October 2000.

[41] Alexandre Charles Kiss, 'Permissible Limitations on Rights', Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 290, at 297.

[42] *Klass* v. *Germany*, European Court, (1978) 2 EHRR 214; *Glassnapp* v. *Germany*, European Commission, (1984) 6 EHRR 499.

[43] Kiss, 'Permissible Limitations on Rights', 290, at 297.

[44] *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282.

[45] Erica-Irene A. Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Freedom of the Individual under Law* (New York: United Nations, 1990), 177. See also *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282: The term 'public safety' means the safety of the community from external and internal dangers.

tending to protect the safety of individuals in such areas as transportation and vehicular traffic, consumer protection, or the regulation of labour conditions.[46]

## public order

'Public order' may be invoked to impose restrictions on the exercise of the freedom of movement (ICCPR 12, ACHR 22), freedom of expression (ICCPR 19, ACHR 13), freedom of peaceful assembly (ICCPR 21, ACHR 15), freedom of association (ICCPR 22, ACHR 16),[47] and for excluding the press and the public from all or part of a trial (ICCPR 14, ECHR 6). In respect of the freedom to manifest one's religion or belief (ICCPR 18, ECHR 9, ACHR 12) alone, 'public order' is not followed in parentheses by the term '*ordre public*' in the ICCPR.

The term 'public order' ordinarily means the prevention of disorder or crime.[48] 'Public order' is more than the ordinary maintenance of law and order, and is synonymous with public peace, safety and tranquillity, an absence of violence and public disorder. Understood in that sense, the breach of a law which permitted persons to be stopped arbitrarily and arrested merely for not carrying identity documents could not have any potential effect upon the maintenance of public order in the country.[49] But the addition of the French concept '*ordre public*' probably indicates an intention to broaden the meaning and scope of this term.[50] The

[46] 'Permissible Limitions on Rights', 290, at 298. See also *Romesh Thappar* v. *State of Madras*, Supreme Court of India, [1950] SCR 594: It may well mean securing the public against rash driving on a public highway.

[47] Curiously, the exercise of the right to form trade unions, an essential element of the freedom of association, which is also recognized in ICESCR 8(1), may be restricted under that covenant for the protection of 'public order', not 'public order (*ordre public*)' as in the ICCPR.

[48] *Ramburn* v. *Stock Exchange Commission*, Supreme Court of Mauritius, [1991] LRC (Const) 272. See also *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282: Public order is synonymous with public peace, safety and tranquillity.

[49] *Elliott* v. *Commissioner of Police*, Supreme Court of Zimbabwe, [1997] 3 LRC 15. See also *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282.

[50] Humphrey explains how the expression *ordre public* was first introduced into the ICCPR when the text of Article 14 on the right to a fair trial was being discussed: 'As a lawyer I was shocked by the decision to add the French civil law concept of *ordre public* to the list of permissible grounds for imposing restrictions on freedom of movement and residence in article 12. The same expression *ordre public* was later also used in article 19 on freedom of information and articles 21 and 22 on the freedoms of peaceful assembly and association. Unlike the English term "public order", which has no precise legal meaning in common law

expression *'ordre public'* has several meanings in different contexts. It refers principally to the 'police power' of the state broadly conceived. This police power, however, must be exercised in a legal framework which includes fundamental human rights.[51] The Limburg Principles define public order (*ordre public*) as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for fundamental rights is part of public order (*ordre public*).[52] It is also used as a basis for negating or restricting private agreements, or for voiding the application of foreign law. The Spanish term *'orden publican'* refers to the whole body of political, economic and moral principles considered essential to the maintenance of a given social structure.[53] The nearest common law equivalent of these two concepts is probably 'public policy', although this is now disputed.[54]

According to Kiss, 'public order (*ordre public*) may be understood as a basis for restricting the specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity when certain other conditions are met. Examples of what a society may deem appropriate for *'ordre public'* are: prescription for peace and good order; safety; public health; aesthetic and moral considerations; and economic order (e.g. consumer protection). The use of this concept implies, however, that courts are available and function correctly to monitor and resolve its tensions with a clear knowledge of the basic needs of the social organization and a sense of its civilized values.[55]

The Inter-American Court of Human Rights has recognized the difficulty inherent in the attempt to define with precision the concept of

jurisdictions, and in ordinary English usage implies simply the absence of disorder, the civil law concept is so far reaching that it can be interpreted as including public policy and perhaps even *raison d'état*. Although an extreme view, and one that should be rejected because it would defeat the very purposes of the Covenant, it is worth recalling what the representative of Spain said in one of the debates relating to this dangerous concept. "In every country", he said, "the established order could be endangered by the clash of different political, legal and philosophical systems; the state should therefore be able to invoke considerations of public order to safeguard its integrity and sovereignty":' John P Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers, 1984), 262.

[51] Kiss, 'Permissible Limitations on Rights', 290, at 300.

[52] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), UN document E/C.12/2000/13, 2 October 2000.

[53] UN document A/4299, s. 15.

[54] A. Daes, 121.

[55] Kiss, 'Permissible Limitations on Rights', 290, at 302.

'public order'. It has cautioned that the concept can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights on the ground of countervailing interests of the collectivity. But the court has emphasized that 'public order' may under no circumstances be invoked as a means of denying a guaranteed right or to impair or deprive it of its true content. The concept, when it is invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the 'just demands' of 'a democratic society' which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the American Convention.[56]

## public morals

'Public morals' is a permissible basis for restricting the exercise of the freedom of movement (ICCPR 12, ECHR Protocol 4, Article 2, ACHR 22), freedom to manifest one's religion or belief (ICCPR 18, ECHR 9, ACHR 12), freedom of expression (ICCPR 19, ECHR 10, ACHR 13), freedom of peaceful assembly (ICCPR 21, ECHR 11, ACHR 15), freedom of association (ICCPR 22, ECHR 11, ACHR 16), and the right to privacy (ECHR 8), while 'morals' (indicating private morality) is a ground for excluding the press and public from the whole or part of a trial (ICCPR 14, ECHR 6).

There is no universally applicable common moral standard. The conception and contents of 'public morals' are relative, and vary from time to time and from place to place, especially in the contemporary world, characterized as it is by a far-reaching evolution of opinions on the subject. Therefore, the moral standards prevailing in a particular country must be considered in order to determine whether the action taken was necessary to protect those standards.[57] But moral issues are not

[56] *Re: Compulsory Membership of Journalists' Association*, Inter-American Court. Advisory Opinion OC-5/85, 13 November 1985.

[57] *Hertzberg* v. *Finland*, Human Rights Committee, Communication No.61/1979, HRC 1982 Report, Annex XIV; *Handyside* v. *United Kingdom*, European Court, (1976) 1 EHRR 737; European Commission, 30 September 1975; *X Company* v. *United Kingdom*, European Commission, Application 9615/81, 5 March 1983; *Muller* v. *Switzerland*, European Court, (1988) 13 EHRR 212; *Open Door and Dublin Well Woman* v. *Ireland*, European Court, (1992) 15 EHRR 244.

exclusively a matter of domestic concern,[58] particularly in pluralistic and multicultural societies whose citizens may have different and at times conflicting moral codes. State-imposed restrictions on the exercise of rights must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect minority views, including those that offend, shock or disturb the majority.[59]

The term 'protection of morals' covers not only the protection of the morals of the community as a whole, but also the protection of the morals of individual members of the community.[60] It may imply safeguarding the moral ethos or moral standards of a society as a whole, but may also cover protection of the moral interests and welfare of a particular section of society, for example, schoolchildren.[61] The expression 'morality' means public morality and not the private or personal morality of an individual. Therefore, the private morality of a person is an irrelevant consideration for purposes of cancellation of that person's entry permit.[62] In Gibraltar, the Supreme Court considered that gross profiteering might be a matter where public morality is involved. But since the level of legitimate profit may vary between different classes of goods, the fact that in relation to particular goods a trader may be making a profit higher than the consumer protection office considers desirable in the public interest, does not necessarily mean that the trader's conduct is immoral.[63]

## public health

'Public health' is a basis for restricting the exercise of the freedom of movement (ICCPR 12, ECHR P4 2, ACHR 22), freedom to manifest one's religion or belief (ICCPR 18, ECHR 9, ACHR 12), freedom of expression

[58] *Toonen* v. *Australia*, Human Rights Committee, Communication No. 488/1992, HRC 1994 Report, Annex IX.EE.

[59] *Hertzberg* v. *Finland*, Communication No. 61/1979, HRC 1982 Report, Annex XIV, individual opinion of Torkel Opsahl.

[60] *X* v. *Sweden*, European Commission, Application 911/60, (1960) 7 *Collection of Decisions* 7.

[61] *Dudgeon* v. *United Kingdom*, European Court, (1981) 4 EHRR 149.

[62] *Sugumar Balakrishnan* v. *Pengarah Imigresen Negeri Sabah*, Court of Appeal of Malaysia, [2000] 1 LRC 301.

[63] *Garcia* v. *Attorney General*, Supreme Court of Gibraltar, (1978) Gib. LR 53.

(ICCPR 19, ECHR 10, ACHR 13), freedom of peaceful assembly (ICCPR 21, ECHR 11, ACHR 15), the freedom of association (ICCPR 22, ECHR 11, ACHR 16) and the right to privacy (ECHR 8).

Obligatory isolation or hospitalization in certain cases, for example when an individual is suffering from a communicable disease, is a restriction on freedom of movement and the right to liberty and security of person imposed in the interests of public health. The Human Rights Committee has, however, cautioned against the use of the criminal law as a means of protecting public health. For example, the committee accepted that the criminalization of homosexual activity would tend to impede public health programmes by driving underground many of the people at the risk of infection, and run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention.[64]

The term 'public health' covers not only the protection of the general health of the community as a whole but also the protection of the health of individual members of the community. It also necessarily includes the psychological as well as physical well-being of individuals, and a child's mental stability and freedom from serious psychic disturbance. Where a Swedish court took into account an anti-Swedish article written by a parent in awarding custody of the child to the other parent and in determining the question of access for the parent deprived of custody, the European Commission held that the guarantee of freedom of expression did not preclude a court, confronted with the duty of arriving at an appreciation of an individual's character and personality, from taking into consideration statements made by him out of court, whether verbally or in writing, which might throw light, favourable or unfavourable, on his character or personality.[65] Similarly, the European Commission held that the state had a legitimate interest in taking measures to protect the life of vulnerable categories of its citizens, particularly the aged or infirm, against information imparted by a voluntary euthanasia society on the basis of the protection of health.[66]

The term 'public health' may reasonably be extended to require compulsory membership of a health scheme as a condition for the owning of

[64] *Toonen* v. *Australia*, Human Rights Committee, Communication No.488/1992, HRC 1994 Report, Annex IX.EE.

[65] *X* v . *Sweden*, European Commission, Application 911/60, (1960) 7 *Collection of Decisions* 7.

[66] *R* v. *United Kingdom*, European Commission, Application 10083/82, 33 *Decisions & Reports* 270.

cattle. While that requirement might conflict with a person's religious conscience as a member of the Reformed Dutch Church opposed to signing under compulsion an application for membership of any health service, it was necessary to prevent tuberculosis among cattle. That was a valid restriction on the freedom of religion imposed for the protection of public health.[67]

## rights and freedoms of others

'Rights and freedoms of others' is a ground for restricting the exercise of the freedom of movement (ICCPR 12, ECHR Protocol 4, Article 2, ACHR 22), freedom of peaceful assembly (ICCPR 21, ECHR 11, ACHR 15), freedom of association (ECHR 11, ACHR 16), the freedom to manifest one's religion or belief (ICCPR 18, ECHR 9, ACHR 12) and the right to privacy (ECHR 8). The freedom of expression (ICCPR 19, ECHR 10, ACHR 13) may be restricted to protect the 'rights and reputations of others'. The rationale for this ground is that no one infringing the rights of another can justify this infringement by invoking his own individual right, in particular against another individual or against the state.[68]

The protection of which 'rights and freedoms' of others may justify a restriction? If the exercise by a person of a fundamental right or freedom may be restricted in order to enable another to exercise, say, his right to recover a sum of money due to him, the fundamental right or freedom will soon lose much of its content. Where it was argued that the 'rights and freedoms of others' might include a right to have consideration given to the need for price control to be applied to certain goods or services, since that was the accepted method of protecting the public from exploitation, the Supreme Court of Gibraltar held that the reference to 'rights and freedoms of others' must mean the fundamental rights entrenched in the constitution.[69]

[67] *X* v. *Netherlands*, European Commission, Application 1068/61, 5 *Yearbook* 278.

[68] Daes, *Freedom of the Individual under Law*, 175.

[69] *Garcia* v. *Attorney General* (1978) Gib. LR 53. Spry CJ observed that while he did not ignore the importance of price controls in a restricted community in time of inflation, the constitution must be interpreted and applied strictly. He did not think it was open to the court to weigh the public good and the private interests and to prefer the former, when the provision intended to protect it infringed the constitution. He cited with approval the following extract from the judgment of Lord Morris in *Oliver* v. *Buttigieg*, Privy Council on appeal from the Supreme Court of Malta, [1967] AC 115, at 136: 'Their Lordships consider

### general welfare in a democratic society

Any restrictions prescribed by law on the enjoyment of the rights recognized in the ICESCR must be directed solely for the purpose of promoting the general welfare in a democratic society. 'General welfare' is a vague expression whose meaning varies with the time and the state of society and its needs. It basically means the economic and social well-being of the people and the community.[70]

### [No state, group or person may] engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for

ICCPR 5(1), ICESCR 5(1), ECHR 17 and ACHR 29 contain two distinct prohibitions. The first is that no group or individual may use the provisions of the relevant instrument as a shield for activities that will undermine the protected rights. The second is that the state may not use any provision of the instrument as a means to limit or restrict rights and freedoms to an extent greater than that allowed by that instrument. Daes suggests, therefore, that none of these articles may be used to deprive an individual of his rights or freedoms permanently merely because at some given moment he performed an act or engaged in an activity aimed at the destruction of any of the recognized rights or freedoms.[71]

that where fundamental rights and freedoms of the individual are being considered a court should be cautious before accepting the view that some particular disregard of them is of minimal account.'

[70] Daes, *Freedom of the Individual under Law*, 176.

[71] Daes, *Freedom of the Individual under Law*, 130–1.

# 8

# Derogation

In a society subject to the rule of law, a state of emergency proclaimed under existing law enables the government to resort to measures of an exceptional and temporary nature in order to protect the essential fabric of that society. International Covenant on Civil and Political Rights (ICCPR) 4, European Convention on Human Rights (ECHR) 15 and American Convention on Human Rights (ACHR) 27 specify the circumstances under which, in a state of emergency, a state may derogate from its obligations under the relevant instrument, the conditions under which measures derogating from its obligations may be taken, and the notification that is required to be submitted thereon.[1]

[1] The texts of these articles are as follows:
ICCPR 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 inform the other States Parties to the present Covenant, through 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.'
ECHR 15 (1) 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.'
ACHR 27 (1) 'In time of war, public danger, or other emergency that threatens the

When ICCPR 4 was being drafted, it was argued that the eventualities for which it was proposed and the rights to which it might apply were sufficiently covered by the relevant limitation clauses. For instance, it was thought that the concept of 'national security' or of 'public order', already included in a number of articles of the covenant could be invoked to deal with situations which might arise in time of war or national emergency. In reply it was contended that in time of war, for example, states could not be strictly bound by obligations assumed under a convention unless the convention contained provisions to the contrary. There might also be instances of extraordinary peril or crisis, not necessarily in time of war, when derogation from obligations assumed under a convention would become essential for the safety of the people and the existence of the nation. These situations might not fall within the scope of the limitations provided for in respect of the various rights, nor would they be adequately covered by a general limitations clause. It was also important that a state should not be left free to decide for itself when and how it would exercise emergency powers. Reference was made to recent history when emergency powers were invoked to suppress human rights and set up dictatorial regimes.[2]

The situation that activates the power of the state to derogate from its obligations under human rights treaties is, in the case of the ICCPR and

independence or security of a state party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion or social origin. (2) The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to a Nationality) and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. (3) Any state party availing itself of the right of suspension shall immediately inform the other states parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.'

See also The Paris Minimum Standards of Human Rights Norms in a State of Emergency, adopted by the 61st Conference of the International Law Association, Paris, 1 September 1984; The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights; and The Turku Declaration of Minimum Humanitarian Standards 1990.

[2] UN document A/2929, chap.V, ss. 35, 36, 37.

the ECHR, a 'threat to the life of the nation', and in the case of the ACHR, a 'threat to the independence or security' of the state. Both the ECHR and the ACHR refer to 'a time of war or other emergency' (the ACHR adds 'public danger'), while the ICCPR refers to a 'time of public emergency' and makes no reference to 'war'. The ICCPR alone requires the existence of a public emergency to be 'officially proclaimed'. All three instruments limit the extent of the measures derogating from a state's human rights obligations to those 'strictly required by the exigencies of the situation', but the ACHR also limits, by the same test, the period of time during which such measures may remain in force. Under all three instruments, the derogation measures must not entail a breach of the state's other obligations under international law, while the ICCPR and the ACHR prohibit derogation measures of a discriminatory nature. The three instruments also specify which rights must not be derogated from during a time of public emergency.

It must be noted that emergency powers are designed to deal with public safety and good order and not with crime as such. It will, therefore, be improper to invoke or utilize such powers to deal with cases of ordinary crime.[3]

## public emergency which threatens the life of the nation

The only kind of emergency envisaged is a 'public emergency', and such an emergency can occur only when 'the life of the nation' (or the 'independence or security of the state') is threatened and, under ICCPR 4, only when its existence had been 'officially proclaimed' by the state concerned.[4] ICCPR 4 was formulated on the basis that the public emergency should be of such a magnitude as to threaten the life of the nation as a whole. While it was recognized that one of the most serious public emergencies was the outbreak of war, it was felt that the ICCPR should not envisage, even by implication, the possibility of war; the United Nations had been established with the object of preventing war.[5] A public emergency could, of course, be created by natural catastrophies as well as by internal disturbances and strife. The critical element is that there must be a situation which 'threatens the life of the nation'.[6]

[3] *Re Ibrahim*, High Court of Uganda, [1970] EA 162.

[4] UN document A/2929, chap.V, s. 38. [5] UN document A/2929, chap.V, s. 39.

[6] Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 72, at 73.

Interpreting the phrase 'other public emergency threatening the life of the nation' in ECHR 15, the European Court has observed that the natural and customary meaning of the words was sufficiently clear: they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed.[7] There are four separate elements in this definition, namely: (1) the public emergency must be actual and imminent; (2) its effects must involve the whole nation; (3) the continuance of the organized life of the community must be threatened; and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions for the maintenance of public safety, health, and order are plainly inadequate.[8] Buergenthal explains that a public emergency which threatens the life of the nation could presumably exist even if the emergency appeared to be confined to one part of the country – for example, one of its provinces, states, or cantons – and did not threaten to spill over to other parts of the country. A contrary interpretation is unreasonable, since it would prevent a state party from declaring a public emergency in one of its remote provinces where a large-scale armed insurrection was in progress merely because it appeared that the conflict would not spread to other provinces.[9]

Whether there exists or is imminent a 'public emergency that threatens the life of the nation' is usually determined by the head of government. In this respect, he is allowed a certain latitude in judgment similar to the doctrine of the 'margin of appreciation' evolved by the European Commission on Human Rights.[10] His view will necessarily be formed on the basis of information within his knowledge as head of government, and in the exercise of his own judgment as the person ultimately charged with the direction and control of that government. It is as much

[7] *Lawless* v. *Ireland (No.3)* (1961) 1 EHRR 15.

[8] *Denmark, Norway, Sweden and Netherlands* v. *Greece*, (*the Greek Case*), European Commission, (1969) 12 *Yearbook*.

[9] Buergenthal, 'To Respect and to Ensure', 72. See *Peoples Union for Civil Liberties* v. *Union of India*, Supreme Court of India, [1999] 2 LRC 1: Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large, calling for immediate action.

[10] UN document A/5655, s. 49. The 'margin of appreciation' means that a certain discretion must be left to the government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the European Convention: *Ireland* v. *United Kingdom*, European Court, (1978) 2 EHRR 25.

a matter of common sense as it is of intuition and conscience. He may act on reports submitted by his security staff; he may have regard to advice given by cabinet and parliamentary colleagues; or he may simply apply his own political experience and his knowledge of people and matters to what he perceives to be portentous trends.

If the head of government acts contrary to the empowering provisions of law, his determination may, of course, be challenged. In Lesotho, the Emergency Powers Act 1982 provided that the Prime Minister might by proclamation in the Gazette declare that a state of emergency existed, such declaration requiring, within fourteen days, approval by resolution of the Assembly. Where the proclamation was made by the King, pursuant to the Lesotho (No. 2) Order 1986 which established a new system of government under which neither the Prime Minister nor the Assembly existed and all executive and legislative powers were vested in the King acting on the advice of the Military Council, the High Court held that the declaration of a state of emergency was null and void. The Emergency Powers Act clearly intended that the power to make a declaration of a state of emergency was not to be vested in one authority: the Prime Minister's discretion was subject to the scrutiny and approval of the Assembly, in whom was vested the power to extend any such declaration.[11]

If the head of government is the sole judge of the question whether a state of public emergency exists or is imminent, is he entitled to determine that question mala fide? If, for instance, he anticipates a parliamentary defeat due to the temporary absence from the country of certain members of his party, can he invoke, until their return, the regulation-making power usually provided for in public security legislation by falsely determining that a state of public emergency exists or is imminent? In 1945, the Privy Council thought that it was only if he acted bona fide and in accordance with his statutory powers, that the courts could not challenge his view that the emergency existed.[12] That

[11] *Law Society of Lesotho* v. *Minister of Defence*, Supreme Court of Lesotho, [1988] LRC (Const) 226, per Cullinan CJ. Cf. *The State* v. *Adel Osman*, Supreme Court of Sierra Leone, [1988] LRC (Const) 212: The proclamation by the president of a 'state of public economic emergency' was valid since the constitution conferred on the president the power to determine the existence of a state of emergency, and his characterization of any particular situation as 'economic' was purely descriptive and did not affect the validity of his proclamation.

[12] *King Emperor* v. *Benoari Lal Sarma*, Privy Council on appeal from the Supreme Court of India, [1945] 1 All ER 210.

absence of good faith would vitiate a determination made by the head of government is a principle that has been applied in several other jurisdictions too. In Uganda, the High Court refused to recognize the existence of a state of emergency despite a government's proclamation. 'It is common knowledge', the court stated, 'that the government extended the period of emergency from time to time, not because there was any real emergency, but for purposes of expediency, so as to enable them to keep in force emergency regulations. It is not in dispute that . . . there was no real emergency, but, on the contrary, stability throughout the country.' It was a period when there was 'a fictitious state of emergency in law but no real emergency in fact'.[13] In India, the Supreme Court while conceding that the judicial process was unsuitable for reaching decisions on national security, observed that where a decision was challenged on the ground that it had been reached by a process of unfairness, the government was under an obligation to produce evidence that the decision had, in fact, been based on the grounds of national security.[14]

In the absence of any evidence of mala fide, is a court entitled to inquire whether it was reasonable for the head of government to have made the determination that a state of public emergency existed or was imminent? The European Commission has asserted that it always has the competence and the duty to examine and pronounce upon a government's determination of the existence of a public emergency threatening the life of the nation.[15] Examining the situation in Northern Ireland, the European Court held that the existence of a 'public emergency threatening the life of the nation' was reasonably deduced from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the state, thus seriously jeopardizing the relations of the Republic of Ireland with its neighbour; thirdly, a steady and alarming increase in terrorist

[13] *Namwandu* v. *Attorney-General*, High Court of Uganda, [1972] EA 108.

[14] *Peoples Union for Democratic Rights* v. *Ministry of Home Affairs*, Supreme Court of India, [1986] LRC (Const) 546. See also *Janatha Finance and Investments* v. *Liyanage*, Supreme Court of Sri Lanka, (1983) 10 Sri LR 373.

[15] *Greece* v. *United Kingdom*, European Commission, (the first Cyprus Case), (1958–9) 2 *Yearbook* 174.

activities.[16] On the other hand, the European Commission thought that there was not a public emergency threatening the life of the nation in Greece, despite three factors which had been adduced by the government, which had seized power by military force, namely, the threat of a communist takeover of the legitimate government by force; the state of public order; and a constitutional crisis immediately preceding a general election that was due to be held.[17]

Buergenthal argues that ICCPR 5(1)[18] forms an integral part of all the provisions that authorize derogations, limitations or restrictions. Therefore, a government's exercise of the right of derogation under ICCPR 4 must be judged not only for its formal compliance with the requirements of that provision, but also by asking, in reliance on ICCPR 5(1), what the government's 'aim' or 'purpose' is. If the aim in fact is the destruction of any of the guaranteed rights, then the derogation will be impermissible even if it otherwise comports with ICCPR 4. By focusing on the 'aim' of a given activity, ICCPR 5(1) calls for a scrutiny of motives and purposes and permits subjective elements to be taken into account in addition to the objective criteria for judging compliance with ICCPR 4(1). Consequently, a derogation under ICCPR 4(1) may conflict with ICCPR 5(1) if the national emergency was created and proclaimed by a group which

[16] *Lawless* v. *Ireland (No.3)*, European Court, (1961) 1 EHRR 15. See also *Ireland* v. *United Kingdom*, European Commission, (1976) 19 *Yearbook* 512: There existed at all material times a public emergency threatening the life of the nation. The degree of violence, with bombing, shooting and rioting was on a scale beyond what could be called minor civil disorder. The violence used was in many instances planned in advance, by factions of the community organized and acting on para-military lines. To a great extent the violence was directed against the security forces which were severely hampered in their function to keep or restore the public peace.

[17] *Denmark et al* v. *Greece*, European Commission, (1969) 12 *Yearbook*. On the first point, the commission found no evidence that a displacement of the lawful government by force of arms by the Communists and their allies was imminent; indeed, the evidence indicated that it was neither planned, nor seriously anticipated by either the military or the police authorities. On the second point, the picture of strikes and work stoppages did not differ markedly from that in many other countries in Europe over a similar period, and there was no evidence of any serious disorganization, let alone one involving the whole nation, of vital supplies, utilities or services as a result of strikes. On the third point, it did not agree that there was an imminent threat of such political instability and disorder that the organized life of the community could not be carried on.

[18] 'Nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

seized power in a state with the aim of establishing a regime committed to the denial of human rights.[19]

### the existence of a public emergency to be officially proclaimed

ICCPR 4 requires the existence of a public emergency to be 'officially proclaimed'. This is designed to prevent a state from derogating arbitrarily from its obligations where such an action is not warranted by events.[20] A formal, public act of derogation, such as a declaration of a state of emergency, is required. Where no such act has been proclaimed, ICCPR 4 does not apply.[21] 'Officially proclaimed' means proclaimed by an authority competent to do so.[22] 'Proclamation' implies publication and publicity, indicating that a public announcement must accompany the official proclamation of the public emergency.[23] A verbal declaration of a state of emergency is unacceptable.[24] Whenever the executive authority is competent to declare a state of emergency, the official declaration shall always be subject to confirmation by the legislature, within the shortest possible time.[25]

### measures derogating from human rights obligations

Under ICCPR 4, ECHR 15 and ACHR 27, no derogation is permitted in respect of: the right to life, the prohibition of torture, the prohibition

[19] Buergenthal, 'To Respect and to Ensure', 72, at 86. Examining the role of the judiciary during a state of emergency, the International Law Association has expressed the view that the judiciary must have the power and jurisdiction to decide: firstly, whether or not an emergency legislation is in conformity with the constitution of the state; secondly, whether or not any particular exercise of emergency power is in conformity with the emergency legislation; thirdly, to ensure that there is no encroachment upon the non-derogable rights and that measures derogating from other rights are in compliance with the rule of proportionality; and fourthly, where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect. A court of law must have full powers to declare null and void any emergency measures (legislative or executive) or any act of application of any emergency measure which does not satisfy these tests: The Paris Minimum Standards of Human Rights Norms in a State of Emergency, section B, paragraph 5, [1985] 79 *The American Journal of International Law* 1072.

[20] UN document A/2929, chap.V, s. 41.

[21] *Cyprus* v. *Turkey*, European Commission, (1976) 4 EHRR 482.

[22] UN document A.5655, s. 48.

[23] Buergenthal, 'To Respect and to Ensure', 72, at 80.

[24] *Law Society of Lesotho* v. *Minister of Defence and Internal Security*, Supreme Court of Lesotho, [1988] LRC (Const) 226.

[25] The Paris Minimum Standards of Human Rights Norms in a State of Emergency, section A, paragraph 2, [1985] 79 *The American Journal of International Law* 1072.

of slavery and servitude, the prohibition of retroactive criminal laws and penalties, and freedom of thought, conscience and religion. Additionally, ICCPR 4 prohibits any derogation in respect of the prohibition of imprisonment for non-fulfilment of contractual obligations, and the right to be recognized as a person, while ACHR 27 prohibits derogation in respect of the right to juridical personality, rights of the family, the right to a name, rights of the child, the right to a nationality, the right to participate in government, or the judicial guarantees essential for the protection of such rights. This prohibition is absolute and no measures derogating from these rights may be taken even if they appear to be strictly required by the exigencies of the situation. The Inter-American Court has explained why the judicial guarantees essential for the protection of these rights must necessarily remain in force: 'The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning'.[26]

The measures which a state may take in derogation of its obligations after a public emergency has been proclaimed are subject to three conditions: they must be 'to the extent strictly required by the exigencies of the situation'; they must not be inconsistent with the state's other obligations under international law; and they must not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.[27] It follows that the strict observance of these conditions must be judicially monitored.[28]

### extent strictly required by the exigencies of the situation

Since states of emergency may be declared to deal with different situations, and since the measures that may be taken in each case must be tailored to 'the exigencies of the situation', what might be permissible in

[26] *Habeas Corpus in Emergency Situations*, Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, 11 EHRR 33.

[27] UN document A/2929, chapter V, section 42. See also *Weismann* v. *Uruguay*, Human Rights Committee, Communication No.8/1977, HRC 1980 Report, Annex VI.

[28] *Judicial Guarantees in States of Emergency*, Inter-American Court, Advisory Opinion OC-9/87, 6 October 1987, para 21.

one type of emergency may not necessarily be lawful in another. The lawfulness of the measures taken to deal with each of the special situations will depend, moreover, upon the character, intensity, pervasiveness and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.[29]

In Uruguay, the Institutional Act of 1976 prohibited all persons who had been candidates for elective office in 1966 and 1971 on the lists of 'Marxist and pro-Marxist Political Parties or Groups' from engaging in any activities of a political nature, including exercising the franchise, for a period of fifteen years. Even on the assumption that there existed a state of emergency in Uruguay, the Human Rights Committee failed to 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 previous elections, of any political right for a period as long as fifteen years. That measure applied to everyone, without distinction as to whether such person sought to promote his or her political opinions by peaceful means or by resorting to, or advocating the use of, violent means. Accordingly, it held that the government had failed to show that the interdiction of any kind of political dissent was required in order to deal with the alleged emergency situation and pave the way back to political freedom.[30]

[29] *Habeas Corpus in Emergency Situations*, Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, (1987) 11 EHRR 33. See also Joan Hartman, 'Derogation from Human Rights Treaties in Public Emergencies', (1981) 22 *Harvard International Law Journal* 1, at 17: 'This phrase contains three significant words of limitation – "extent", "strictly", and "exigencies". By focusing upon the *extent* of the measures, the articles underline the principle of proportionality. The derogation must be proportional to the danger, both as a matter of degree and duration. When the danger ceases to be one which threatens the life of the state, the special measures must likewise terminate; and if the emergency develops in stages of varying intensity, the measures during each phase should likewise vary. The term "strictly required" strengthens this element of proportionality and indicates an implicit obligation to act in good faith. A government is not to make opportunistic use of an emergency to take repressive action against political rivals or disfavored minorities. Even when a government is not designedly overreacting, the phrase demands caution and discretion – a duty to take care in assessing the necessity of a measure. The objective cast of this phrase implies that necessity, rather than the government's subjective evaluation, should determine legitimacy of a derogation. The word 'exigencies' likewise stresses absolute necessity. A derogating government must canvass the possible less restrictive alternatives before suspending fundamental rights. If equivalent results could be achieved without a violation of basic rights, then the measures cannot be said to have been "strictly required by the exigencies of the situation".

[30] *Silva* v. *Uruguay*, Human Rights Committee, Communication No.34/1978, HRC 1981 Report, Annex XII.

The administrative detention of individuals suspected of intending to take part in terrorist activities in Northern Ireland was upheld by the European Court. Having regard to the fact that the ordinary law had proved ineffective in checking the growing danger which threatened the Republic of Ireland; that the ordinary criminal courts were not sufficient to restore peace and order; that the gathering of evidence to convict persons involved in activities of the Irish Republican Army and its splinter groups was proving difficult owing to the military, secret and terrorist character of those groups and the fear they created among the population; and that the sealing of the border with Northern Ireland where these groups mainly operated would have had extremely serious repercussions, the court considered the measure to be strictly required by the exigencies of the situation. The court also considered it relevant that the Offences against the State (Amendment) Act of 1940 was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention.[31]

The justification for measures in derogation of human rights obligations does not follow automatically from a high level of violence. There must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations do not entirely disappear. They can only be suspended or modified to the extent strictly required.[32]

### measures not inconsistent with other obligations under international law

Even measures strictly required by the exigencies of the situation may nevertheless be impermissible if they conflict with other obligations of the derogating state under international law. These obligations may arise

[31] *Lawless* v. *Ireland (No.3)*, European Court, (1961) 1 EHRR 15. The application of the Act was subject to constant supervision by Parliament, which not only received precise details of its enforcement at regular intervals but could also at any time, by a resolution, annul the government's proclamation which had brought the Act into force. The Act provided for the establishment of a Detention Commission comprising an officer of the Defence Force and two judges. Any person detained under the Act could refer his case to the Commission whose opinion, if favourable to the release of the person concerned, was binding on the government.

[32] *Ireland* v. *United Kingdom*, European Commission, (1976) 19 *Yearbook* 512.

under the Charter of the United Nations, other human rights treaties or under customary international law.

### discrimination solely on the ground of race, colour, sex, language, religion or social origin

The word 'solely' was included to indicate that a state might take measures derogating from the rights recognized in the ICCPR that could be construed as discriminatory merely because the persons affected belonged to a certain race, religion, etc., although the actual reason for the derogation might be otherwise. It was therefore important to emphasize that the evil to be avoided was discrimination based solely on the grounds mentioned.[33]

### other states parties to be informed of the provisions from which a state has derogated and of the reasons by which it was actuated

When a state avails itself of the right of derogation in time of public emergency, it is required to comply with three steps concerning notification of its actions. It shall in each case 'inform immediately' the other states parties to the relevant instrument, through the intermediary of the relevant secretary-general, first, of the provisions from which it has derogated; second, of the reasons by which it was actuated; and third, of the date on which it has terminated such derogation.[34] But the substantive right to take derogatory measures may not depend on a formal notification being made.[35] Where the government of Uruguay, in a note to the UN secretary-general, stated merely that the existence of an emergency situation was 'a matter of common knowledge', and no attempt

[33] UN document A/2929, chap.V, s. 44.

[34] UN document A/2929, chap.V, s. 46. It was generally agreed at the drafting stage that the proclamation of a public emergency and consequential derogation from the provisions of the Covenant was a matter of the gravest concern, and the states parties to the Covenant had the right to be notified of such action. It was further agreed that since the use of emergency powers had often been abused in the past, a mere notification would not be enough. The derogating state should also furnish the reason by which it was actuated, although this might not include every detail of each particular measure taken. Moreover, separate notification should be given immediately of the date on which the derogation was terminated. See also UN documents A/2929, chap.V, s. 47; A/5655, s. 54.

[35] *Silva* v. *Uruguay*, Human Rights Committee, Communication No.34/1978, HRC 1981 Report, Annex XII.

was made to indicate the nature and the scope of the derogations actually resorted to with regard to the guaranteed rights, or to show that such derogations were strictly necessary, there had been no compliance with Article 4(3). Full and comprehensive information is required to be furnished.[36]

[36] *Silva* v. *Uruguay*, Communication No.34/1978, HRC 1981 Report, Annex XII. Cf. *Lawless* v. *Ireland (No.3)*, European Court, (1961) 1 EHRR 15.

# PART III

## The substantive rights

# 9

# The right of self-determination

## Texts

### *International instruments*

#### International Covenant on Civil and Political Rights/International Covenant on Economic, Social and Cultural Rights (ICCPR/ICESCR)

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.

### *Regional instruments*

#### African Charter on Human and Peoples' Rights (AfCHPR)

20 (1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

(2) Coloured or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
(3) All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

21 (1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
(2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
(3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
(4) The states parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
(5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

*Related texts:*

The Charter of the United Nations, Articles 1(2), 55, 73, 76.
International Convention against the Recruitment, Use, Financing, and Training of Mercenaries 1989.

UNGA Resolution 421D (V) of 4 December 1950: The Right of Peoples and Nations to Self-Determination.
UNGA Resolution 545 (VI) of 5 February 1952: Inclusion in the International Covenant or Covenants on Human Rights of an Article Relating to the Right of Peoples to Self Determination.
UNGA Resolution 637A (VII) of 16 December 1952: The Right of Peoples and Nations to Self-Determination.

UNGA Resolution 742 (VIII) of 27 November 1953: Factors Which Should Be Taken into Account in Deciding Whether a Territory Is or Is not a Territory Whose People Have Not Yet Attained a Full Measure of Self-Government.

UNGA Resolution 1514 (XV) of 14 December 1960: Declaration of the Granting of Independence to Colonial Countries and Peoples.

UNGA Resolution 1541 (XV) of 15 December 1960: Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter.

UNGA Resolution 1654 (XVI) of 27 November 1961: The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

UNGA Resolution 1803 (XVII) of 14 December 1962: Permanent Sovereignty over Natural Resources.

UNGA Resolution 2105 (XX) of 20 December 1965: Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

UNGA Resolution 2131 (XX) of 21 December 1965: Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.

UNESCO Declaration on the Principles of International Cultural Co-operation of 4 November 1966.

UNGA Resolution 2160 (XXI) of 30 November 1966: Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination.

Final Act of the International Conference on Human Rights, Teheran, 11 May 1968, Resolution VIII.

UNGA Resolution 2542 (XXIV) of 11 December 1969: Declaration on Social Progress and Development, Article 3.

UNGA Resolution 2625 (XXV) of 24 October 1970: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

UNGA Resolution 2734 (XXV) of 16 December 1970: Declaration on the Strengthening of International Security.

UNGA Resolution 3201 (S-VI) of 1 May 1974: Declaration on the Establishment of a New International Economic Order.

The Vienna Declaration and Programme of Action, 25 June 1993.
Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, UNGA Resolution 50/6, 9 November 1995.
Final Act of the Conference on Security and Co-operation in Europe ('Helsinki Final Act'), Helsinki, 1975, Principle VIII: Equal Rights and Self-Determination of Peoples.
Additional Protocol 1 to the 1949 Geneva Conventions on the Victims of War, 1977 (UN Document A/322/144 Annex 1).

## Comment

The principle of self-determination was first enunciated by President Woodrow Wilson towards the end of the First World War, and was the purported basis of the Versailles Peace Settlement of 1919.[1] The Wilsonian concept focused principally on communities defined by race, religion, language or culture, and was formulated within a European context. In 1941, during the Second World War, the principle of self-determination was invoked in a global perspective in the Atlantic Charter, a joint declaration in which President Roosevelt and Prime Minister Churchill made known 'certain common principles in the national policies of their respective countries' on which they based their hopes for a new world order.[2] These principles included the following: (1) no aggrandizement, territorial or otherwise; (2) no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; (3) respect for the right of all peoples to choose the form of government under which they will live; and (4) restoration of sovereign rights and self-government to those who have been forcibly deprived of them. These principles were affirmed in the Declaration by United Nations, signed

[1] For a recent discussion of the Wilsonian concept, see Anthony Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' [1994] 43 *International and Comparative Law Quarterly* 99. On self-determination generally, see Rupert Emerson, 'Self-Determination', [1971] 65 *The American Journal of International Law* 459; Ved Nanda, "Self-Determination in International Law" [1972] 66 *The American Journal of International Law* 321; James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), 84–128; Aureliu Cristescu, *The Right to Self-Determination* (New York: United Nations, 1981); R.N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' [1988] 82 *The American Journal of International Law* 80; Michael K. Addo, 'Political Self-Determination within the Context of the African Charter on Human and Peoples' Rights' [1988] 32(2) *Journal of African Law* 182; Hurst Hannum, 'Rethinking Self-Determination' [1993] 34 *Virginia Journal of International Law* 1.

[2] US Department of State Bulletin, 16 August 1941, p.125.

in Washington DC on 1 January 1942 by twenty-six nations engaged in the war,[3] and later adhered to by a further twenty-one.[4]

The 'principle of equal rights and self-determination of peoples' is referred to in Articles 1(2) and 55 of the Charter of the United Nations in the context of the development of friendly relations among states. It is the rationale for the requirement in Article 73 of the Charter that member states who have responsibility for the administration of non-self-governing territories should recognize the principle that the interests of the inhabitants of those territories are paramount, and accept as a sacred trust the obligation, *inter alia*, to promote self-government. Article 76 contains a similar injunction in respect of trust territories.

In 1950, the United Nations General Assembly recognized 'the right of peoples and nations to self-determination' and called for recommendations on ways and means to ensure the enjoyment of this right.[5] In 1952, the General Assembly decided 'to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations'. This article would be drafted in the following terms: 'All peoples shall have the right of self-determination', and it would stipulate that all states, including those having responsibility for the administration of non-self-governing territories, should promote the realization of that right, in conformity with the purposes and principles of the United Nations, and that states having responsibility for the administration of non-self-governing territories should promote the realization of that right in relation to the peoples of such territories.[6]

The General Assembly thereby shifted the focus from the inhabitants of non-self-governing territories alone to 'all peoples', and extended the obligation to promote the realization of the right of self-determination from colonial powers to 'all states'. Meanwhile, parallel to the drafting of

[3] United States of America, United Kingdom, Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa and Yugoslavia. See United States Department of State Bulletin, 3 January 1942, p. 3.

[4] Mexico, Philippine Commonwealth, Ethiopia, Iraq, Brazil, Bolivia, Iran, Colombia, Liberia, France, Ecuador, Peru, Chile, Paraguay, Venezuela, Uruguay, Turkey, Egypt, Saudi Arabia, Syria and Lebanon. See United States Department of State Bulletin, 12 August 1945, p. 123.

[5] UNGA resolution 421D (V) of 4 December 1950.

[6] UNGA resolution 545 (VI) of 5 December 1952.

the Covenants, the General Assembly intensified its efforts to secure the rapid dismantling of colonial regimes, through a series of resolutions culminating in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. In that Declaration, the General Assembly demonstrated its impatience at the pace of decolonization by requiring that immediate steps be taken in non-self-governing territories to 'transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinctions as to race, creed or colour, in order to enable them to enjoy complete independence and freedom'.[7]

The obligation in Article 73 of the Charter 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement' was overridden by the declaration that 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.[8]

The right of self-determination recognized in the two Covenants is broader in scope and content than the right articulated in the 1960

[7] In the context of decolonization, the pre-ICCPR 1960 Declaration described as incompatible with the purposes and principles of the United Nations Charter 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country' (Article 6). This prohibition appears to have been motivated by a desire to protect a non-self-governing territory from being dismembered by the administering power prior to independence, in particular to prevent a wealthier part from remaining attached to the administering power. In practice, however, several adjustments were in fact made in the course of decolonization. For example, British Togoland joined the Gold Coast to become the sovereign state of Ghana, while French Togoland attained independence as Togo; French Cameroons became the Republic of Cameroon, while British Cameroons was divided into two regions, with the north being absorbed by Nigeria and the south by Cameroon; British Somaliland joined Italian Somaliland and acceded to independence as Somalia; Ruanda-Urundi became independent as two separate states: Rwanda and Burundi, with dominant Hutu and Tutsi populations respectively; and the Gilbert and Ellice Islands emerged into independence as Kiribati (Micronesian) and Tuvalu (Polynesian). The United Nations acquiesced in all these adjustments. See Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1982); S.K.N. Blay, 'Self-Determination *versus* Territorial Integrity in Decolonization' [1986] 18 *International Law and Politics* 441; Robert McCorquodale, 'Self-Determination: a Human Rights Approach' [1994] *International and Comparative Law Quarterly* 857.

[8] See the opinion of Judge Dillard in the *Western Sahara Case*, ICJ Reports 1975, 12 at 121: 'The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations.'

Declaration. Firstly, it is the right of 'all peoples' and not merely of the inhabitants of non-self-governing territories. The obligation imposed upon 'all states' to promote the realization of this right, 'including' those administering non-self-governing territories, affirms this principle. Secondly, the 'political status' they may determine is not qualified in any respect. In particular, the concern previously expressed by the General Assembly that the process of decolonization should not lead to the partial or total disruption of the territorial integrity of a country[9] is not reflected in either Covenant.

According to the Human Rights Committee, the right of self-determination is an 'inalienable right'. It is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that the right of self-determination is set forth in a provision of positive law in both Covenants, apart from and before all of the other rights. Its practical exercise will require the establishment of constitutional and political processes in each country.[10] However, the Human Rights Committee has so far declined to take cognizance of communications relating to the right of self-determination.

The first communication it received alleged that the Government of Canada had denied and continued to deny to the people of the Mikmaq tribal society the right of self-determination, by depriving them of their means of subsistence and by enacting and enforcing laws and policies destructive of the family life of the Mikmaqs and inimical to the proper education of their children. The government argued that since the right of self-determination was a collective right, the author, a member of the Mikmaq tribal society, could not claim that his own rights had been violated. Without specifically addressing this issue, the committee declared the communication inadmissible on the grounds that the author had not established that he was authorized to act as a representative on behalf of the Mikmaq tribal society, and that he had 'failed to advance any pertinent facts supporting his claim that he is personally a victim of a violation of any rights contained in the Covenant'.[11]

[9] See UNGA resolutions 1514 (XV) of 15 December 1960 and 2625 (XXV) of 24 October 1970.

[10] Human Rights Committee, General Comment 12 (1984).

[11] *A.D.* v. *Canada*, Human Rights Committee, Communication No.78/1980, HRC 1984 Report, Annex XVI.

The second communication alleged that the Government of Canada had violated the Lubicon Lake Band's right of self-determination and, in particular, the right of its members to dispose freely of their natural wealth and resources. The committee held that the author, an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination, since ICCPR 1 dealt with rights conferred upon peoples. In its view, the Optional Protocol provided a procedure under which individuals could claim that their individual rights had been violated. These rights were set out in part III of the covenant.[12] This view was affirmed in two later cases. In one, six Colombian citizens residing in the islands of San Andres, Providence, and Catalina, which form an archipelago 300 miles north of mainland Colombia, invoked ICCPR 1 to challenge, *inter alia*, recent Colombian legislation that sought to dispossess many islanders of their land and 'Colombianize' the islands whose population was overwhelmingly English-speaking Protestant.[13] In the other, fourteen members of the Union für Südtirol alleged that the right of self-determination of the people of South Tirol had been violated by numerous acts and decrees adopted by the Italian Parliament which encroached on the 'autonomous legislative and executive regional power' of the province provided for in the 1946 De Gasperi–Gruber Accord and developed further in the Autonomy Statutes of 1948 and 1972.[14]

When the ICCPR was being drafted, it was argued by certain states which opposed the inclusion of a right of self-determination, that it 'is a collective right and therefore would not fit into the covenant, which

[12] *Ominayak* v. *Canada*, Human Rights Committee, Communication No.167/1984, HRC 1990 Report, Annex IX.A.

[13] *E.P.* v. *Colombia*, Human Rights Committee, Communication No.318/1988, HRC 1990 Report, Annex X.P.

[14] *A.B.* v. *Italy*, Human Rights Committee, Communication No.413/1990, HRC 1991 Report, Annex XII.O. See also *R.L.* v. *Canada*, Human Rights Committee, Communication No.358/1989, HRC 1992 Report, Annex X.1. It may be noted that ICCPR 1 does not distinguish between the right of self-determination and the other rights recognized therein. Nor does the Optional Protocol seek to limit the jurisdiction of the Human Rights Committee to 'individual rights' as distinct from 'collective rights'. Some of the rights recognized in the ICCPR are by their very nature capable of being exercised by an individual only when he is acting collectively with other individuals, or in community with others: for example, the right of peaceful assembly, and the right of a member of an ethnic, religious or linguistic minority who is prevented from enjoying, in community with other members of the group, 'the right to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

was concerned only with rights and freedoms of the individual'.[15] Not only was this argument rejected, but the Optional Protocol, in Article 7, emphasized that its provisions 'shall in no way limit the right of petition granted by the Charter and other international conventions and instruments to colonial peoples in respect of their right of self-determination'. According to the Supreme Court of Canada, the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law.[16]

## Interpretation

### *All peoples*

ICCPR 1 does not contain a definition of the term 'all peoples', and as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of 'all peoples', the result has been that the precise meaning of the term 'all peoples' remains somewhat uncertain.[17] In an early draft, the expression 'All peoples and nations' was used. Later, the reference to 'nations' was deleted, since 'peoples' was considered to be the more comprehensive term.[18] According to the *travaux préparatoires*, the word 'all peoples' was understood to mean peoples in all countries and territories, whether independent, trust or non-self-governing. A proposal by India to define 'all peoples' to mean 'large compact national groups' was not voted upon. It was thought that the term 'all peoples' should be understood in its most general sense and that no definition was necessary.[19] What is clear is that 'all peoples' may include only a portion of the population of an existing state. To restrict the definition of the term to the population of existing states

[15] Antonio Cassese, 'The Self-Determination of Peoples' in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 92, at 93. These countries included France, Turkey, New Zealand, Australia, Sweden, Netherlands, Belgium, Denmark and Canada.

[16] *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 4 LRC 712, at 752, per Lamer CJ.

[17] *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 4 LRC 712, at 752, per Lamer CJ.

[18] UN document A/3077, s. 63. [19] UN document A/2929, Chap. IV, s. 9.

would render the granting of a right of self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.[20]

In the Charter of the United Nations, the words 'states', 'nations' and 'peoples' are frequently used, sometimes in juxtaposition to each other. In a memorandum prepared by the secretariat of the San Francisco conference at which the Charter was drafted in 1945, it was explained that the word 'state' is used to indicate a definite political entity, as well as a member of the United Nations; the word 'nation' to include political entities such as colonies, mandates, protectorates, and quasi-states as well as states; and the word 'peoples' to convey the idea of 'all mankind' or 'all human beings', and therefore to mean all groups of human beings who may, or may not, comprise states or nations.[21]

In a 1981 study prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities,[22] Aureliu Cristescu suggested that from discussions on the subject at the United Nations the following elements of a definition of the term 'peoples' had emerged: (a) a social entity possessing a clear identity and its own characteristics; and (b) a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population.[23] A Meeting of Experts on Further Study of the Rights of

[20] *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 4 LRC 712, at 752, per Lamer CJ.

[21] *Documents of the United Nations Conference on International Organization*, CO/156 (vol. XVIII, 657–8) cited in Aureliu Cristescu, *The Right of Self-Determination* (New York: United Nations, 1981), para 262. A part of the citizens of a country may feel that it has an individuality different from the rest of the nation, based on history, culture, and a long attachment to a given land and seeks to ensure its survival even if it does not contest its appurtenance to the nation: Alexandre Kiss, 'The People's Right to Self-Determination' [1986] *Human Rights Law Journal* 165 at 173.

[22] Cristescu, *Right of Self-Determination*, paragraph 279.

[23] In 1967, a former British army officer occupied an abandoned 1300 square metre anti-aircraft platform erected by the United Kingdom eight miles off its southern coast and attached by concrete pillars to the seabed, and proclaimed the 'Duchy of Sealand'. Ten years later, a German citizen by birth who held the title of Foreign Secretary and President of the State Council of the Duchy of Sealand brought an action for a declaration that, as one of the 106 persons who had acquired the citizenship of the Duchy, he had lost his German citizenship. In ruling the action admissible but unfounded, the Administrative Court of Cologne held that whilst size was irrelevant, in order to constitute 'a people' (one of the three essential attributes required by international law for statehood) the group of persons

Peoples, convened by UNESCO in 1990, agreed that a people for the purposes of the rights of peoples in international law, including the right of self-determination, has the following characteristics:

1. A group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life;
2. The group must be of a certain number which need not be large (e.g. the people of micro states) but must be more than a mere association of individuals within a state;
3. The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness; and
4. Possibly, the group must have institutions or other means of expressing its common characteristics and will for identity.

The inhabitants of non-self-governing colonial territories constitute a 'people' entitled to exercise the right of self-determination.[24] This was clarified by the United Nations in 1952 when it called upon administering states to ascertain the freely expressed wishes of such people through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations.[25] According to the International Court of Justice, the consultation of the inhabitants of a colony in regard to the future political status of that colony is now an 'inescapable imperative'.[26] During the discussions on draft ICCPR 1 it was generally

in question must form a cohesive vibrant community. 'These "nationals" have not acquired their "nationality" in order to live with one another and handle all aspects of their lives on a collective basis, but on the contrary they continue to pursue their individual interests outside the "Duchy". The common purpose of their association is limited to a small part of their lives, namely their commercial and tax affairs. This degree of common interest cannot be regarded as sufficient for the recognition of a "people" within the meaning of international law': *In re Duchy of Sealand* (1989) 80 *International Law Reports* 683.

[24] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 4.

[25] UNGA resolution 637A (VII), 16 December 1952. See also UNGA resolution 1514 (XV), 14 December 1960.

[26] Per Judge Nagendra Singh, in *Western Sahara*, ICJ Reports 1975, 81.

understood that 'peoples' included the peoples of federated states.[27] It is of the essence of federalism, which is a voluntary union, that two or more units choosing to federate retain the right to withdraw from the federation in accordance with agreed constitutional processes. Indigenous peoples are 'peoples' in every social, cultural and ethnological sense of the term. As Erica-Irene Daes, the chairperson of the UN Working Group on Indigenous Populations, has observed, they have their own specific languages, laws, values and traditions; their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have so long lived. 'It is neither logical nor scientific to treat them as the same "peoples" as their neighbours, who obviously have different languages, histories and cultures, and who often have been their oppressors'.[28]

Antonio Cassese has argued that two conditions must be satisfied before the people of a national component of a multinational state have the right of self-determination. First, the national group must be a member of a state made up of different national groups of comparable dimensions, not one where there is a majority and one (or more) identifiable minority groups. States contemplated included the former USSR and Yugoslavia, and perhaps India. Second, the national or ethnic group must be recognized constitutionally, having a distinct legal status within the constitutional framework; for example, the republics of the former USSR. According to him, an 'ethnic group' is entitled to self-determination only when it achieves the dimension and importance of other components of the state, both in fact and in constitutional conception. He concedes, however, that where some doubt exists as to whether these two conditions are satisfied, neither the text nor the preparatory record provides any guidance as to how that question should be decided.[29] Alexandre Kiss disagrees on the ground that these two conditions are 'too restrictive'. An important minority may, even if it cannot be numerically compared to the majority of the population, have the economic, social and cultural structures which should enable

[27] UN document A/C.3/SR.668, paras 14–16.

[28] Erica-Irene Daes, 'The Right of Indigenous Peoples to "Self-Determination" in the Contemporary World Order', Donald Clark and Robert Williamson (eds.) *Self-Determination: International Perspectives*, (London: MacMillan Press Ltd., 1996), 47, at 51.

[29] Antonio Cassese, 'The Self-Determination of Peoples' in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 92, at 95.

it to be considered as a people, especially if it has a strong historical relationship with a territory. On the other hand, the requirement that the 'people' is recognized constitutionally is, according to Kiss, dangerous, since it may be an incitation for states to withhold the recognition of the particular identity of different groups living on its territory.[30]

Do 'peoples' include a minority within a sovereign state that identifies itself as a 'people' but does not satisfy the conditions proposed by Cassese? A factor that appears to militate strongly against the inclusion of minority groups is the following statement in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations:[31]

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

This statement is often cited in support of the proposition that minority groups are not to be regarded as 'peoples', or that even if they were, they are not entitled to the option of 'secession' in the event of exercising their right of self-determination. On the other hand, what this paragraph asserts is that minority groups do not enjoy the right of 'secession' when the state to which they belong is conducting itself in compliance with the principle of equal rights and self-determination of peoples (for example, by not subjugating, dominating or exploiting any group of peoples); and it possesses a government that represents the whole people belonging to the territory without distinction as to race, creed or colour. In other words, a people living within a sovereign and independent state may, in

[30] Alexandre Kiss, 'The People's Right to Self-Determination', [1986] *Human Rights Law Journal* 165, at 173.

[31] UNGA resolution 2625 (XXV) of 24 October 1970. Having regard to the context in which this paragraph appears, it was probably developed in the wake of events involving groups such as the Katangese in Zaire, the Ibos in Nigeria, and the Karens in Burma, to prevent the disruption, whether by internal or external forces, of the territorial integrity of newly independent states.

the exercise of their right of self-determination, decide to secede if: (a) that state is pursuing a policy of discrimination against such 'people' on the basis of race, creed or colour; and (b) such 'people' are not represented in the government of that state; or as the Supreme Court of Canada described it, 'where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development'.[32]

To sum up, therefore, 'peoples' means the inhabitants of all countries and territories, whether sovereign and independent or non-self-governing. The term probably includes indigenous peoples as well as ethnic, religious and linguistic minorities within such countries and territories, oppressed majorities, and displaced peoples. Whether in any given context a group constitutes a 'people' will depend on the extent to which that group shares ethnic, linguistic, religious or cultural bonds and possesses a collective desire to live together. This is essentially a process of self-definition.[33]

### *the right of self-determination*

The right of self-determination has two aspects. The internal aspect is the right of all peoples to pursue their economic, social and cultural development without outside interference. In this respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level. In consequence, the government must represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition on subjecting peoples to alien subjugation, domination and exploitation.[34] Under international law, the right to self-determination only generates, at best, a right to external

[32] *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 4 LRC 712, at 752, per Lamer CJ.

[33] The principle of self-identification is recognized in the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No.169 of 27 June 1989, Art. 1(2).

[34] Committee on the Elimination of Racial Discrimination, General Recommendation XXI (1996).

self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.[35]

The essence of the right of self-determination is choice; a free, genuine and voluntary choice in securing the continuing restructuring of human communities in accordance with the evolving aspirations of the members of such communities. Although ICCPR 1 does not specify how such choice may be expressed, United Nations and state practice suggests that a people may express themselves at a plebiscite or a referendum or, indeed, at a general election. Since human rights are continuing rights, the people's choice may be expressed from time to time;[36] 'self-determination is not a single event – one revolution or one election'.[37] It is not a single choice to be made in a single day. It is the right of a group to adapt their political position in a complicated world to reflect changing capabilities and changing opportunities.[38] The continuing nature of this right is implicit in the Human Rights Committee's description of it as 'inalienable'. The right is not exhausted upon its first exercise. For instance, it cannot be forfeited by a colonial people once they have chosen to end their state of political tutelage. Such people may subsequently wish to alter their political status into that of free association with a neighbouring state. Or they may need to exercise that right again if their territory is militarily occupied by another state. In 1990 the people of the sovereign states of the Federal Republic of Germany and the German

[35] *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 4 LRC 712, at 752, per Lamer CJ.

[36] See Helsinki Act, Principle VII: 'By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.' The continuing nature of this right is also recognized in UNGA resolution 1541 (XV), 15 December 1960: see reference to 'free association'.

[37] Ms E. Young, Representative of the United Kingdom to the Third Committee of the United Nations General Assembly, in a speech made on 15 October 1986, *British Yearbook of International Law* (Oxford: Clarendon Press, 1986), 516.

[38] Roger Fisher, 'The Participation of Microstates in International Affairs', 1968 Proceedings, *American Society of International Law* 166.

Democratic Republic in the exercise of their right of self-determination created a single German state,[39] and shortly thereafter the people of the sovereign state of Czechoslovakia resolved to divide their country into two states – the Czech Republic and the Slovak Republic. Earlier, the people of West Pakistan asserted their independence and established their own sovereign state of Bangladesh, and the people of Singapore seceded from Malaysia to establish their own independent republic.[40]

### *freely determine their political status and freely pursue their economic, social and cultural development*

'Political status' refers to the status of a people within the international community. Such status may be that of a sovereign independent state; free association with an independent state; integration with an independent state; or, indeed, emergence into any other political status.[41]

#### Sovereign independent state

The United Nations has enumerated several factors which are 'indicative of the attainment of independence'. They are:

a. full international responsibility of the territory for the acts inherent in the exercise of its external sovereignty and for the corresponding acts in the administration of its internal affairs;
b. eligibility for membership in the United Nations;
c. power to enter into direct relations of every kind with other governments and with international institutions and to negotiate, sign and ratify international instruments;
d. sovereign right to provide for its national defence;

[39] Treaty on the Final Settlement with Respect to Germany 1990. For the text, see (1990) 29 *International Legal Materials* 1186. See also Robert McCorquodale, 'Self-Determination: a Human Rights Approach' [1994] 43 *International and Comparative Law Quarterly* 857.

[40] The Constitutional Court of Turkey has held that when the Turkish people decided that the Turkish Republic should be a unitary state, and that decision was incorporated in the constitution, Turkey became an indivisible entity, and every Turkish citizen was bound to obey that constitutional preference. Federalism was thus excluded from the constitution and no political party may advocate a federal system in Turkey. Accordingly, the court upheld a decision dissolving the People's Labour Party, which advocated the division of the Turkish Republic into two federating units: 'Turkish' and 'Kurdish'. See Decision of the Constitutional Court of Turkey, 14 July 1993, 1992/1, (1993) *2 Bulletin on Constitutional Case-Law* 59–60. This judgment failed to recognize the continuing nature of the right of self-determination.

[41] UNGA resolution 2625 (XXV), 24 October 1970.

e. complete freedom of the people of the territory to choose the form of government which they desire;
f. freedom from control or interference by the government of another state in respect of the internal government (legislature, executive, judiciary and administration of the territory);
g. complete autonomy in respect of economic, social and cultural affairs.[42]

### Free association with an independent state

Principles formulated by the United Nations suggest that free association with an independent state should be the result of a free and voluntary choice by the peoples of the territory concerned, expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for such peoples the freedom to modify the status of association through the expression of their will by democratic means and through constitutional processes. The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.[43]

### Integration with an independent state

According to the same principles, integration with an independent state may take place only in the following circumstances:

(a) the integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
(b) the integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.

[42] UNGA resolution 742 (VIII), 27 November 1953.
[43] UNGA resolution 1541 (XV), 15 December 1960, principle VII.

Integration with an independent state should be on the basis of complete equality between the peoples of the integrating territory and those of the independent state with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.[44]

### Any other political status

The principles described above were formulated by the United Nations in the context of decolonization and, therefore, appear to contemplate the exercise of the right of self-determination by *all* the peoples of a territory. When the right is sought to be exercised by a smaller collectivity living within a territory, such as a group of indigenous peoples or an ethnic, religious or linguistic minority, such collectivity may desire a political status other than independence, association or integration; in other words a political status that does not involve secession. Viable options that are favoured may be regional autonomy or self-government, or such peoples may prefer to assimilate with the remainder of the population under existing political structures. The principles that would be indicative of the effective establishment of such a political status have not yet been identified.

### *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international co-operation, based upon the principle of mutual benefit, and international law*

The original draft of ICCPR 1 read: 'The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources.' That text was opposed on the ground that 'permanent sovereignty' was not a tenable concept as any state could voluntarily limit its own sovereignty at any time. The proposition was also considered dangerous in that it would sanction unwarranted expropriation or confiscation of foreign property and would subject international

[44] UNGA resolution 1541 (XV), 15 December 1960, principles VIII and IX.

agreements and arrangements to unilateral renunciation.[45] On the other hand, it was argued that the right of self-determination certainly included the simple and elementary principle that a people should be master of its own natural wealth or resources. It was emphasized that the draft as formulated was not intended to frighten off foreign investment by a threat of expropriation or confiscation. It was intended rather to warn against such foreign exploitation as might result in depriving the local population of its own means of subsistence.[46] Finally it was agreed to delete the reference to 'permanent sovereignty' and to redraft the article in the above form in order to meet the objections which had been expressed that it could be invoked to justify expropriation without proper compensation.[47]

According to Cassese, ICCPR 1(2) has two distinct consequences. For dependent peoples, the right implies that the governing authority is under the duty to use the economic resources of the territory in the interest of the dependent people. In a sovereign state, the government must utilize the natural resources so as to benefit the whole people. He argues that where it is demonstrated that the government of a country exploits the natural resources in the exclusive interest of a small segment of the population, plainly disregarding the needs of the vast majority of the people, or where the government has surrendered control over the natural resources of the country to a foreign state or private company without ensuring that the exploitation of those resources would be carried out primarily in the interest of the people, that government would be in violation of ICCPR 1(2).[48]

The *travaux préparatoires* indicate that the references to international law and international co-operation were included 'to allay any fears regarding foreign investments in a country', while the words 'based upon the principle of mutual benefit' would 'provide certain safeguards'.[49]

[45] UN document A/2929, chap. IV, s. 20. [46] UN document A/2929, chap. IV, s. 21.

[47] UN document A/3077, s. 65. But see Art. 47 of the ICCPR which reaffirms the 'inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources'.

[48] Cassesse, 'Self-Determination of Peoples' 92, at 103.

[49] On the meaning of 'international law', see the advisory opinion of the International Court of Justice that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 31.

*In no case may a people be deprived of its own means of subsistence*

This clause suggests that a people may not be deprived of their basic resources and thereby denied their means of subsistence. An example cited at the drafting stage was of a tribe that is deprived of its ancestral land and resettled elsewhere against its will.[50] This clause also suggests that even where international law requires a government to pay compensation for the expropriation of foreign investments, it may avoid doing so if the effect of making the payment would be to deprive the people of its means of subsistence.

*The States Parties, 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*

It was originally proposed that this paragraph should only set forth the obligation of states that were responsible for the administration of non-self-governing and trust territories to promote the realization of the right of self-determination. That proposal was amended to include all states, whether or not they were administering states.[51] However, specific reference was made to administering states since it was considered that the most urgent contemporary problem was the achievement of independence by the peoples of non-self-governing and trust territories.[52]

This paragraph imposes specific obligations on states, not only in relation to their own peoples but vis-à-vis all peoples who have not been able to exercise or have been deprived of the possibility of exercising their right of self-determination. The obligations exist irrespective of whether a people entitled to self-determination depends on such states or not. It follows that all states should take positive action to facilitate the realization of and respect for the right of peoples to self-determination.[53] This requirement that all states shall promote the realization of the right of self-determination appears to support the view that ICCPR 1 reaches

[50] UN document A/C.3/SR.674, para. 8.
[51] UN document A/2929, chap. IV, s. 17.
[52] UN document A/3077, s. 66.
[53] Human Rights Committee, General Comment 12 (1984).

beyond colonial and trust territories and encompasses all peoples including those in sovereign and independent states.[54]

The United Nations has urged governments to take appropriate steps and to exercise the utmost vigilance against the activities of mercenaries and to ensure by legislative measures that territories under their control, as well as their nationals, are not used for the recruitment, assembly, financing, training, and transit of mercenaries, or for the planning of activities designed to destabilize or overthrow the government of another state, to threaten the territorial integrity of another state, or to fight any national liberation movement struggling against colonial domination and foreign intervention or occupation. Mercenaries are commonly recruited to commit acts of sabotage against a third country, to carry out selective assassinations of prominent persons, and to participate in armed conflicts.[55]

### *in conformity with the provisions of the Charter of the United Nations*

Any action taken by states to facilitate the realization of, and respect for, the right of self-determination must be consistent with obligations under the Charter of the United Nations and other international law. In particular, states must refrain from interfering in the internal affairs of other states and thereby adversely affecting the exercise of the right of self-determination.[56] It is perhaps not without significance that at the drafting stage, proposals to insert the following two qualifying clauses were not adopted: that states should promote the right of self-determination 'in accordance with constitutional processes' and 'with proper regard for the rights of other states and peoples'. Since the former clause was intended to mean that the right of self-determination should

[54] Upon acceding to the covenant, the Government of India declared its understanding that the words 'the right of self-determination' in Article 1 'apply only to the peoples under foreign domination and that these words do not apply to sovereign independent states or to a section of a people or nation – which is the essence of national integrity'. Several governments took objection to this declaration on the ground that it sought to attach conditions not provided for in the covenant. See the response of the Governments of France, Germany, and the Netherlands: UN document CCPR/C/2/Rev.3 of 12 May 1992.

[55] UNGA resolution 49/150 of 13 December 1994. On the use of mercenaries as a means of impeding the exercise of the right of self-determination, see Report of Enrique Bernales Ballesteros, Special Rapporteur, UN document E/CN.4/1996/27 and earlier reports.

[56] Human Rights Committee, General Comment 12 (1984).

be promoted 'by legal and peaceful means', it was feared that it might become an insurmountable obstacle to the realization of that right if it meant, for instance, that before the right was granted to a non-self-governing or trust territory, the constitution of the metropolitan state had to be amended. The latter clause was opposed on the ground that it permitted the exercise of a basic right only on the condition that all the rights of other states and peoples – and possibly secondary or acquired rights – were not injured thereby.[57]

[57] UN document A/2929, chap. IV, s.18.

# 10

# The right to life

## Texts

### *International instruments*

### Universal Declaration on Human Rights (UDHR)

3 Everyone has the right to life . . .

### International Covenant on Civil and Political Rights (ICCPR)

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 judgment rendered by a competent court.

(3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

(5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

### Second Optional Protocol to the ICCPR (2 OP)

1 (1) No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed.

(2) Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

2 (1) No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

(2) The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

(3) The State Party having made such a reservation shall notify the Secretary-General of the United Nations at the beginning or ending of a state of war applicable to its territory.

6 (1) The provisions of the present Protocol shall apply as additional provisions to the Covenant.

(2) Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

## *Regional Instruments*

### American Declaration of the Rights and Duties of Man (ADRD)

1 Every human being has the right to life . . .

### American Convention on Human Rights (ACHR)

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

(2) In countries that have not abolished the death penalty, this may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance

with a law establishing such punishment, enacted prior to the commission of the crime. Its application shall not be extended to crimes to which it does not presently apply.

(3) The death penalty shall not be re-established in States that have abolished it.

(4) In no case shall capital punishment be inflicted for political offences or related crimes.

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

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

## Protocol to the ACHR (P/ACHR)

1 The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

2 (2) No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

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

2 (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.

### ECHR, Protocol No. 6 (ECHR P6)

1 The death penalty shall be abolished. No one shall be condemned to such penalty or executed.
2 A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.
3 No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.
4 No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol.

### African Charter on Human and Peoples' Rights (AfCHPR)

4 Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

*Related texts:*

Convention on the Prevention and Punishment of the Crime of Genocide.
International Convention on the Suppression and Punishment of the Crime of Apartheid 1973.
International Convention against the Taking of Hostages 1979.
Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Resolution 47/33 of 18 December 1992.
Statute of the International Tribunal for the Former Yugoslavia, Security Council Resolution 827, Annex, Article 24(1).
Statute of the International Tribunal for Rwanda, Security Council Resolution 955, Annex, Article 23(1).
Safeguards Guaranteeing Protection on the Rights of Those Facing the Death Penalty, ECOSOC Resolution 1984/50 of 25 May 1984.
United Nations Basic Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC Resolution 1989/65 of 24 May 1989.

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990.

## Comment

The right to life is the supreme right of the human being.[1] It is the right from which all other rights flow, and is therefore basic to all human rights. It is one of the rights which constitute 'the irreducible core of human rights'.[2] It is, therefore, non-derogable even in time of public emergency which threatens the life of the nation.

When ICCPR 6 was being drafted, different opinions were expressed as to how the right should be formulated. One view was that it should enunciate the principle that no one should be deprived of his life under any circumstances. It was maintained that in formulating the most fundamental of all rights, no mention should be made of circumstances under which the taking of life might seem to be condoned. Against this view it was contended that the covenant must be realistic: that circumstances did exist under which the taking of life was justified. A second view was that in a covenant which would not admit progressive implementation of its provisions, it was desirable to define as precisely as possible the exact scope of the right and the limitations thereto in order that states would be under no uncertainty in regard to their obligations. The proper method of formulating the right would be to spell out specifically the circumstances in which the taking of life would not be deemed a violation of the general obligation to protect life. Against this view it was maintained that any enumeration of limitations would necessarily be incomplete and would, moreover, tend to convey the impression that greater importance was being given to the exceptions than to the right. An article drafted in such terms would seem to authorize killing rather than safeguard the right to life. A third view, which prevailed, was that a general formulation which did not list exceptions was preferable. The

[1] Human Rights Committee, General Comment 6 (1982). See also *Camargo* v. *Colombia*, Human Rights Committee, Communication No. 45/1979, HRC 1982 Report, Annex XI.

[2] Per Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, at 506.

article should simply but categorically affirm that 'no one shall be arbitrarily deprived of his life' and that 'everyone's right to life shall be protected by law'. 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 the possible exceptions in detail.[3] This formula was adopted in ACHR 4, but not in ECHR 2 which prohibits 'intentional' killing and proceeds to specify three distinct exceptions to that prohibition.

Another problem that arose at the drafting stage of ICCPR 6 was the fact that there were at the time several countries in which domestic law authorized the application of the death penalty. Some opposition was expressed to any recognition of this fact by the inclusion in the article of provisions dealing with capital punishment. It was feared that an impression might be conveyed that the practice was sanctioned by the international community. It was maintained that an article which guaranteed the right to life should not in any way sanction the taking of life, but should prohibit the death penalty. It was also argued that capital punishment had no deterrent effect on crime, and was contrary to the modern concept of punishment, which was to bring about the rehabilitation of the offender. On the other hand, it was recognized that since capital punishment did exist in certain countries, its rejection in the covenant would create difficulties of ratification for those countries which had not yet abolished it. Its abolition was often a highly controversial domestic question that ought to be left to each state to resolve. It was finally agreed that without requiring the immediate abolition of the death penalty, ICCPR 6 would impose restrictions to delimit strictly its scope and application in terms that strongly suggested that early abolition was desirable. Adequate safeguards would be provided to ensure that the death penalty was not imposed unjustly or capriciously in disregard of human rights. Indeed, in order to avoid the impression that the covenant sanctioned capital punishment, it was also agreed to add a clause to the effect that nothing in ICCPR 6 should be invoked to delay

[3] UN document A/2929, chapter VI, sections 1, 2, 3. See also A/3764, section 114. For the legislative history of the right to life clauses in the Universal Declaration and the International Covenant on Civil and Political Rights, see C.K. Boyle, 'The Concept of Arbitrary Deprivation of Life' in B.G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff, 1985), 221; H.A. Kabaalioglin, 'The Obligation to "Ensure" the Right to Life', *ibid.*, 160.

or prevent the abolition of capital punishment by any state.[4] The ACHR goes further by prohibiting its application to 'political offences or related crimes'; prohibiting the extension of the death penalty to new offences; and prohibiting its re-establishment once it has been abolished.

An international commitment to abolish the death penalty has now been made with the adoption in 1989 of the Second Optional Protocol to the ICCPR. That instrument, which is now in force, requires that no one be executed and that each State take all necessary measures to abolish the death penalty within its jurisdiction. An exception is permitted in respect of 'a most serious crime of a military nature committed during wartime'. Similar instruments have also been adopted at regional levels by the member states of the Council of Europe and by the states parties to the ACHR. All new members of the Council of Europe are required to sign the former within one year and ratify it within three years of joining the organization, and are also required to place an immediate moratorium on executions.[5]

## Interpretation

### *Every human being*

#### The unborn child

ICCPR 1 declares that 'every human being' has the inherent right to life, while in respect of other rights the expressions used are 'everyone', 'every person', 'every child', or 'every citizen'. This deliberate use of different terminology raises the question whether 'every human being' has a more expansive meaning than that usually attributed to 'every person'; in particular, whether it also includes an unborn child.

This status of the unborn child was raised, but remained unresolved, before the European Commission of Human Rights. In an application

[4] UN documents A/2929, chapter VI, section 5; A/3764, section 98.

[5] According to a report prepared by the UN Secretary-General in 1998, (a) there are 65 totally abolitionist countries; (b) 16 countries abolitionist for ordinary crimes only; (c) 26 countries that can be considered abolitionist in the sense that no execution has been carried out in the past 10 years or more; and (d) 87 retentionist countries, many of whom are known to have carried out executions during the past 10 years. It is estimated that in 1998 at least 2,258 persons were executed in 37 countries, including 1,700 in China alone. In the same year, more than 4,800 persons were sentenced to death in 78 countries: UN document E/CN.4/2000/3 of 25 January 2000.

which concerned the German criminal law on the termination of pregnancy, the commission expressly left open the question whether the unborn child was covered by ECHR 2. It noted, however, that in many states certain rights were attributed to the conceived but unborn child, in particular the right to inherit.[6] In an application from the United Kingdom, which concerned the Abortion Act 1967, the commission observed that the term 'life' may be subject to different interpretations in different legal instruments, depending on the context in which it is used. The general usage of the term 'everyone' in the convention 'tend[s] to support the view that it does not include the unborn'. The limitations, in paragraphs (1) and (2) of ECHR 2, of 'everyone's' right to life, 'by their nature, concern persons already born and cannot be applied to the foetus'. It concluded that 'it is not in these circumstances called upon to decide whether ECHR 2 does not cover the foetus at all or whether it recognises a "right to life" of the foetus with implied limitations'. The authorization, by the United Kingdom authorities, of the abortion complained of was compatible with ECHR 2(1), 'because, if one assumes that this provision applies at the initial stage of pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the "right to life" of the foetus'.[7]

The reluctance of the European Commission to offer an authoritative answer to the question when life begins is probably due to the wide divergence of thinking that exists within Europe on this matter. While some believe that life begins with conception, others tend to focus upon the point when the foetus becomes 'viable', or upon live birth. For instance, interpreting the provision 'Everyone has a right to life' in article 2(2) of the Basic Law of Germany, the Federal Constitutional Court stated thus:[8]

> Life in the sense of the historical existence of a human individual exists according to established biological and physiological knowledge at least from the 14th day after conception (nidation, individuation). The process of development beginning from this point is a continuous one so that no sharp divisions or exact distinction between the various stages of development of human life can be made. It does not end

[6] *Brüggeman and Scheuten* v. *Germany* (1977) 3 EHRR 244.
[7] *Paton* v. *United Kingdom* (1980) 3 EHRR 408. The case concerned a termination of pregnancy in its early stages on medical advice.
[8] Judgment of 25 February 1975.

> at birth; for example, the particular type of consciousness peculiar to the human personality only appears a considerable time after the birth. The protection conferred by article 2(2), first sentence of the Basic Law, can therefore be limited neither to the 'complete' person after birth nor to the foetus capable of independent existence prior to birth. The right to life is guaranteed to every one who 'lives'; in this context no distinction can be made between the various stages of developing life before birth or between born and unborn children. 'Everyone' in the meaning of article 2(2) of the Basic Law is 'every living human being'; in other words: every human individual possessing life; 'everyone' therefore includes unborn human beings.

Similarly, the Constitutional Court of Poland observed that while one may choose not to have children by refusing to conceive, one is not entitled to decide whether to have a child when it is already conceived and is growing in the prenatal phase.[9]

In contrast, the Austrian Constitutional Court, interpreting ECHR 2, which enjoys constitutional status in that country, adopted a strictly legalistic approach. Noting the different views expressed on this question in legal writings, the court held that, viewed in the context of the entire Article 2, the sentence 'Everyone's right to life shall be protected by law' did not cover the unborn life.[10] The Constitutional Court of Spain has preferred a median approach. The right of every human being to life recognized in article 15 of the Constitution of Spain is a fundamental right possessed by 'every born individual'. It does not extend to the unborn, although the life of the unborn is a 'legal interest' enjoying constitutional protection under that article. Such protection implies two general obligations for the state authorities: to refrain from interfering with or impeding the natural process of gestation, and to institute a legal system to preserve life, which presupposes its effective

[9] Case No. K26/96, 28 May (1997) 2 *Bulletin on Constitutional Case-Law* 235.

[10] Decision of 11 October 1974. In Case No.15.664, 16 June 1995, the Supreme Court of the Netherlands held that ECHR 2 did not prevent the termination of pregnancy on certain conditions. See also *Paton* v. *British Pregnancy Advisory Service* [1978] 3 WLR 687, where the High Court in England held that in English law a foetus had no right of action until birth. In *C* v. *S*, [1987] 1 All ER 1230, at 1241, the Court of Appeal approved and applied the principles in *Paton*. Prof Glanville Williams sums up the position in English law thus: 'English law does not try to answer the question when human life begins, but it gives a clear answer to the question when human personhood begins. It begins with birth, which means that the child must be completely extruded and must breathe': (1994) 33 *Cambridge Law Journal* 71, at 71–2.

protection and also comprises criminal law provisions as an ultimate safeguard.[11]

While the ACHR 4(1) requires the right to life to be protected 'in general, from the moment of conception', the earlier ADRD 1 contains no such reference. A majority of the Inter-American Commission expressed the view that the concept 'from the moment of conception' could not be read into ADRD 1.[12] They were persuaded by the fact that whereas the original draft of ADRD 1 stated that 'This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane', the definitive text finally approved simply read 'Every human being has the right to life'. There were, however, two strong dissenting opinions.

Dr Marco Cabra argued that in the absence of a definition, one could resort to medical science which has concluded that life has its beginnings in the union of two series of chromosomes. Most scientists agree that the foetus is a human being and is genetically complete. He described the physiological process of pregnancy and referred to the fact that even Roman law, now incorporated in many civil codes, recognized that rights could be granted to an infant who had been conceived but not yet born, provided that enjoyment of those rights was recognized as being subject to the actual fact of birth, which constituted the beginning of the existence of the person (*infans conceptus pro nato habetur, quoties de commodis eius agitur*).[13] He stressed that life is the primary right of every individual, the condition for the existence of all other rights.

> If human existence is not recognized, there is no subject upon which to predicate the other rights. It is a right that antecedes other rights and exists by the mere fact of being, with no need for the state to recognize it as such. It is not up to the state to decide whether that right shall

[11] Case No.212/1996, 19 December 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 426. The court upheld a law which sought to regulate the donation and use of 'unviable' human embryos and foetuses or their cells, tissues or organs on the ground that 'they were never to be born in the sense of never being able to lead lives of their own in complete independence from the mother'.

[12] *'Baby Boy' Abortion Case*, Resolution No. 23/81, Case 2141 (United States of America) 6 March 1981.

[13] See, for example, *Pinchin NO* v. *Santam Insurance Co Ltd* 1963 (2) SA 254 (W), in which a South African court recognized a person's right to claim, after birth, compensation for injuries sustained *in ventre matris*.

> be recognized in one case and not in another, since that would mean discrimination. The life of the unborn child, the infant, the young, the old, the mentally ill, the handicapped, and that of all human beings in general, must be recognized.

Dr Luis Castro thought the question could not be answered by simply examining the drafting process. It was necessary first to answer the transcendental question of the nature of the unborn: 'In other words: at what moment in his long process of formation, development, decadence, and death, is it considered that there exists a "human being" with the "right to life" and to the protection given him by the basic legal instruments of the new discipline of Human Rights? . . . when the woman's ovum is fertilized by action of the man, has a human being been constituted and does it have the right to life?' Citing several scientists who considered the unborn child to be 'a living being from the moment of conception', he concluded that when ADRD 1 stated that 'every human being has the right to life' it referred to the complete period of human life, from conception to death. Life did not begin at birth – the final phase of the process of gestation – but at the moment of conception, which was the moment at which a new human being, distinct from the father and from the mother, was formed. He also drew support from ICCPR 6(5) which could 'only be explained if one starts from the legal assumption that a human being is living in the womb of the woman who would have to be executed, and since this small and unseen human being had not been covered by the sentence, neither morally nor legally could it be made to suffer the death penalty that would fatally be derived from the execution of the mother. He saw that provision as 'an evident recognition by the United Nations and by the law in force in many countries that a human being has existence, life, during the entire period of pregnancy of the woman'.

As the European and American experiences demonstrate, judges who have attempted to define when life begins have been faced with the dilemma whether to treat the question as scientific, linguistic or legal. In Canada, Dickson CJ found the scientific arguments about the biological status of a foetus not to be determinative: 'The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls

outside the concerns of scientific classification.' Nor did he think that a linguistic analysis could settle that difficult and controversial question: 'A purely linguistic argument suffers from the same flaw as a purely scientific argument; it attempts to settle a legal debate by non-legal means; in this case by resorting to the purported "dictionary" meaning of the term "human being".' And, treating the question as one that was purely legal, he concluded that the provision 'Every human being has a right to life' in the Quebec Charter of Human Rights and Freedoms, viewed as a whole, displayed no clear intention to consider the status of a foetus.[14]

The difference in opinion on the question whether life begins, and therefore warrants protection, from the moment of conception, appears to result from differing religious, philosophical and moral beliefs. At the national level, it is determined by policy rather than law. An overwhelming practical consideration is undoubtedly the need to preserve laws that provide for abortion, particularly when it appears to be necessary, in the interests of the health and, indeed, the life of the mother, to terminate a pregnancy. Excluding that consideration, the trend in the international instruments is to extend the protection of the right to life to the unborn child. For example, the Genocide Convention defines 'genocide' to include the imposition of 'measures intended to prevent births' within a national, ethnical, racial or religious group (Article II(d)), and the Declaration of the Rights of the Child requires special care and protection to be provided both to the child and to the mother, 'including adequate pre-natal and post-natal care' (principle 4). When ICCPR 6 was being drafted, a group of countries including Belgium, Brazil, El Salvador, Mexico and Morocco, proposed an amendment which required the right to life to be protected 'from the moment of conception'. Supporters of the amendment maintained it was only logical that the right to life should be guaranteed from the moment life began. Opponents argued it would

[14] *Daigle* v. *Tremblay*, Supreme Court of Canada, [1990] LRC (Const) 578. See also *Roe* v. *Wade*, United States Supreme Court, 410 US 113 (1965), where the word 'person' in the Fourteenth Amendment to the United States Constitution was held not to include the unborn. In *Christian Lawyers Association of South Africa et al* v. *Minister of Health et al* [1999] 3 LRC 203, an action instituted for an order to strike down the Choice on Termination of Pregnancy Act 1996 in its entirety on the ground that it was in conflict with section 11 of the Constitution of South Africa, which guaranteed that 'everyone has the right to life', the High Court viewed the issue as a purely legal one and held that, whatever its status under the common law, under the constitution the foetus was not a legal person.

be impossible for a state to determine the moment of conception and, therefore, to undertake to protect life from that moment. Referred to a vote, the amendment was rejected by thirty-one votes to twenty, with seventeen abstentions.[15] Nevertheless, by insisting that the sentence of death not be carried out on pregnant women, ICCPR 6(5) does seek to protect the life of the unborn child.

### Mentally or physically defective persons

The term 'every human being' could not have been intended to mean only the young, intelligent, physically fit or attractive human beings. Such a construction would have legitimized, rather than rejected, the policies of Nazi Germany which resulted in the liquidation of those considered socially and economically undesirable, such as the physically and mentally unfit, Jews, and Gypsies and which, ironically, led to the recognition of the individual as a subject of international law. This proposition is perhaps so axiomatic that it does not appear to have been put in issue in recent decades. The only reported judicial decision appears to be that of the Federal Administrative Court of Germany which, in 1968, examined the culpability of a doctor on the staff of a mental hospital who was charged with killing some 150 mentally defective persons and who pleaded that he was formally authorized or exempted from prosecution by the laws in force under the national-socialist regime or by authoritative decrees or commands to which the national-socialist ideology gave force of law.[16]

The court observed that what counted in this regard was not formal conformity with the law (*formale Gesetzmässigkeit*), but the material unlawfulness of the act (*materieller Unrechtscharakter des Verhaltens*) according to the criterion of the 'characteristic principles of a constitutional state'. These principles are founded, *inter alia*, on the idea of the existence, prior to any legal order, of certain fundamental rights, including individual rights whose scope may be defined legally but which neither derive from, nor can be abolished or restricted in their essence by, the law. To these belong the individuals' right to life with the corresponding obligation on the part of the legal order (*Rechtsordnung*) to protect human life and safeguard it within its natural limits . . .

[15] UN document A/3764, sections 97, 113, 120.
[16] *Deutsches Verwaltungsblatt*, year 83 (1968), 983–5.

> Every human being, and hence every sick, mentally defective or physically deformed person, is entitled to have his human dignity respected and to have his right to life protected by the legal order. Consequently, it is contrary to the characteristic principles of a constitutional state to destroy human life, and hence also to induce the premature death of sick persons, even where such an act is committed out of pity, for no member of society has the right not to respect these principles, which are binding on all, for personal motives or to ignore them on grounds materially contrary to these principles, even if the said personal motives are based on genuine or mistaken human feeling . . .

The court noted that according to the characteristic criteria of a constitutional state, the killing of a human being can neither be authorized nor tolerated by a formal law. Nor is there any constitutional state (*Rechtsstaat*) whose legal order would approve or authorize such actions or exempt them from punishment: wherever these principles are recognized in formal laws, such actions are prosecuted and punished in accordance with a general conviction as to the necessity for so doing.

### The aged, senile, and terminally ill persons

The Supreme Court of India has considered the question whether the right to life includes the right to die. In 1994, two judges of that court held that a provision in the statute law that penalized attempted suicide was inconsistent with the constitutional right to life, which had enough 'positive content' in it to also include the 'right to die', which inevitably leads to the right to commit suicide. The court thought it would be cruel and irrational to punish a person who had already suffered agony and would be undergoing ignominy because of his failure to commit suicide. The court also observed that an act of suicide has no baneful effect on society and causes no harm to others. But the substantial reason for the court's decision appeared to be that fundamental rights have their positive as well as negative aspects. For example, freedom of speech and expression includes the freedom not to speak; the freedom of association and movement includes freedom not to join any association or move anywhere. Logically, it must follow that the right to live will include the right not to live, i.e. the right to die or to terminate one's life. The court noted the argument that this analogy was 'misplaced' because a superficial comparison between the freedoms ignores the inherent difference

between one fundamental right and the other. But, in the court's view, a person has the right not to live a forced life.

> One may refuse to live, if his life be not according to the person concerned worth living or if the richness and fullness of life were not to demand living further. One may rightly think that having achieved all worldly pleasures or happiness, he has something to achieve beyond this life. This desire for communion with God may very rightly lead even a very healthy mind to think that he would forego his right to live and would rather choose not to live. In any case, a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking.[17]

Two years later, a bench of five judges of the same court overruled this decision. Rejecting the appeal of six persons convicted of abetting the suicide of another who had argued that they were merely assisting the suicide in the enforcement of that person's fundamental rights as previously recognized by the court, the judges observed that a significant difference in the nature of rights had to be borne in mind. Some fundamental rights are of a positive kind. Freedom of speech, freedom of association, and freedom of movement belong to that category, and include the negative aspect of there being no compulsion to exercise any of these rights by doing the guaranteed positive act. The right to do an act includes also the right not to do an act. It does not follow that if the right is for protection from any intrusion thereof by others (in other words, the right has the negative aspect of not being deprived by others of its continued exercise), then the converse positive act also flows therefrom to permit expressly its discontinuance or extinction by the holder of such right. When a person commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within, the protection of the 'right to life' under article 21 of the constitution. The significant aspect of 'sanctity of life' is also not to be overlooked.

> Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of the imagination can 'extinction of life' be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing

[17] *Rathinam* v. *Union of India* (1994) 3 SCC 394.

> suicide, we find it difficult to construe article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. The 'right to life' is a natural right embodied in article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'.

The court noted that to give meaning and content to the word 'life' in article 21, it had been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it, but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life, resulting in effacing the right itself. The court held that the 'right to die', if any, is inherently inconsistent with the 'right to life' as is 'death' with 'life'.[18]

The decision of the German Federal Administrative Court referred to above suggests that the practice of euthanasia (i.e. mercy killing of one individual by another) is incompatible with a human being's inherent right to life. Protagonists of euthanasia, however, argue that existence in a persistent vegetative state is not a benefit to a person suffering from a terminal illness. Alluding to this inconclusive debate, the Supreme Court of India observed that the 'right to life', including the right to live with human dignity, would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life.

> A question may arise in the context of a dying man who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as part of the right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating the conclusion of the process of natural death which has already commenced.

[18] *Gian Kaur* v. *State of Punjab* [1996] 2 LRC 264.

The court reiterated, however, that the argument to support the view of permitting termination of life in such cases and to reduce the period of suffering in the process of certain natural death is not available to interpret article 21 of the Constitution of India to include therein the right to curtail the natural span of life.[19]

In respect of terminally ill persons, English courts have drawn a distinction between a doctor administering a lethal drug to a patient, actively to bring his patient's life to an end, and deciding not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life. The following principles have been recognized:

(1) The principle of self-determination requires that respect be given to the wishes of a patient, so that, if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for the care must give effect to his wishes, even though they do not consider it to be in his best interests to do so.[20] Accordingly, a patient of sound mind may, if properly informed, require that life support be discontinued. A patient's refusal to give his consent may have been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it, though in such circumstances special care may be necessary to ensure that the prior refusal of consent is still properly to be regarded as applicable in the circumstances which have subsequently occurred.[21]

(2) A doctor who has in his care a patient who is incapable of deciding whether or not to consent to treatment is under no obligation to prolong the patient's life regardless of the circumstances or the quality of the patient's life. Medical treatment, including artificial feeding and the administration of antibiotic drugs, may lawfully be withheld from an insensate patient with no hope of recovery when it is known that the result will be that the patient will shortly thereafter die, provided responsible and competent medical opinion is of the view that it will be in the patient's best interests not to prolong his life by continuing that form of medical treatment because such continuance is futile and

[19] *Ibid.*

[20] *S* v. *S*, *W* v. *Official Solicitor*, House of Lords, United Kingdom, [1970] 3 All ER 107, at 111; *Sidaway* v. *Bethlem Royal Hospital Governors*, House of Lords, United Kingdom, [1985] 1 All ER 643, at 649.

[21] *Re T*, Court of Appeal, United Kingdom [1992] 4 All ER 649.

will not confer any benefit on him.[22] The discontinuance of life support by the withdrawal of artificial feeding or other means of support does not amount to a criminal act because if the continuance of an intrusive life support system is not in the patient's best interests, the doctor is no longer under a duty to maintain the patient's life but is simply allowing his patient to die because of his pre-existing condition. His death will be regarded in law as exclusively caused by the injury or disease to which his condition is attributable. It is regarded as no different from not initiating life support in the first place.[23]

### *inherent right to life*

The use of the term 'inherent' is intended to emphasize the supreme character of the right to life: a right which is not conferred on the individual by society or by the state,[24] but which inheres by reason of one's humanity. It follows, therefore, that one's right to life cannot be taken away by the state or waived, surrendered or renounced by him, since a human being cannot be divested, nor can he divest himself, of his humanity. Hence, the absolute prohibition in the covenant of torture or the subjection of an individual to slavery, being forms of treatment which are incompatible with one's humanity.

It has been argued that the term 'life' should be construed in a strict sense, and that the right to life, therefore, concerns only two issues: the termination and preservation of life; in other words, that what is recognized in Article 6 is merely that a human being has the right to

[22] *Airedale NHS Trust* v. *Bland*, House of Lords, United Kingdom, [1993] 3 LRC 340.

[23] The court differentiated the doctor's conduct in such a situation from that of an interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. The interloper is actively intervening to stop the doctor from prolonging the patient's life. See *F* v. *West Berkshire Health Authority*, House of Lords, United Kingdom, [1990] LRC (Const) 511; *Bolam* v. *Friern Hospital Management Committee*, High Court of England, [1957] 2 All ER 118; *Auckland Area Health Board* v. *Attorney-General*, High Court of New Zealand, [1993] 1 NZLR 235; *Re G*, High Court of New Zealand, [1997] 4 LRC 146. See also British Medical Association (Medical Ethics Committee), *Treatment of Patients in Persistent Vegitative State* (September 1992); Jordan J. Paust, 'The Human Right to Die with Dignity', (1995) 17 *Human Rights Quarterly* 463.

[24] UN document A/3764, section 112. See also Human Rights Committee, General Comment 6 (1982).

be safeguarded against arbitrary killing.[25] This narrow biological view of 'life', was criticized as far back as 1877 in the United States Supreme Court:

> By the term 'life' as here used (14th Amendment), something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The prohibition equally prohibits the mutilation of the body by the amputation of an arm or leg, or the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.[26]

Recent judicial decisions have given the term 'life' a relatively broad interpretation.

## Right to dignity

The right to life incorporates the right to dignity. It is more than mere existence; it is a right to be treated as a human being with dignity. Without dignity, human life is substantially diminished. In the Constitutional Court of South Africa, O'Regan J explained that the right to life is, in one sense, antecedent to all other rights. 'Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values'.[27]

A similar view was expressed in the Constitutional Court of Hungary: 'It is the untouchability and equality contained in the right to human dignity that results in man's right to life being a specific right to human

[25] Franciszek Przetacznik, 'The Right to Life as a Basic Human Right', (1976) *Human Rights Journal* 585, at 585–7. See also Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in Louis Henkin (ed.), *The International Bill of Rights: the Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), 114.

[26] *Munn* v. *Illinois*, 94 US 113 (1877), at 142, per Field J (dissenting opinion).

[27] *The State* v. *Makwanyane* [1995] 1 LRC 269.

life (over and above animals' and artificial subjects' right to being); . . . Human dignity is a naturally accompanying quality of human life.'[28] In the High Court of Namibia, Levy J observed that the concept of life imprisonment 'destroys human dignity reducing a prisoner to a number behind the walls of a gaol waiting only for death to set him free'. When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of gaol a free person, one who has paid his or her debt to society. Life imprisonment robs the prisoner of this hope. 'Take away this hope and you take away his dignity and all desire he may have to continue living.' Accordingly, he held that the provision in article 6 of the Constitution of Namibia that 'no court or tribunal shall have power to impose a sentence of death upon a person' categorically prohibits a sentence of life imprisonment because 'life imprisonment is a sentence of death'.[29] This decision was not approved by the Supreme Court where Mahomed CJ noted that a sentence of life imprisonment did not terminate the life of the imprisoned but merely invaded his liberty. While conceding that such sentence will not be constitutionally sustainable if it effectively amounted to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he were a 'thing' instead of a person without any continuing duty to respect his dignity, the judge noted that a person sentenced to life imprisonment was not effectively abandoned without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and perpetual incarceration for the rest of his or her natural life, since the hope of release was inherent in the statutory mechanisms in the Prisons Act.[30]

## Right to livelihood

The right to life includes also the right to livelihood. A group of pavement and slum dwellers in the city of Bombay, some of whom had been forcibly evicted and had their pavement and slum dwellings demolished by the Bombay Municipal Corporation, argued in the Supreme Court of India that their fundamental right to life had been infringed. They did not contend they had a right to live on the pavements. Their contention was that they had a right to live, a right which could not be exercised

[28] Case No.23/1990, (X.31) A.B, translated by George Feher.
[29] *The State* v. *Nehemia Tjijo*, 4 September 1991 (unreported).
[30] *The State* v. *Tcoeib* [1997] 1 LRC 90.

without the means of livelihood. They had no option but to migrate to big cities like Bombay, which provided the means of a bare subsistence. They chose a pavement or a slum which was nearest to their place of work. In other words, their plea was that the right to life was illusory without a right to the protection of the means by which alone life could be lived; and the right to life could only be taken away or abridged by a procedure established by law, which had to be fair and reasonable, not fanciful or arbitrary such as was prescribed by the Bombay Municipal Corporation Act. They invoked article 21 of the Constitution of India which guaranteed that 'No person shall be deprived of his life or personal liberty except according to the procedure established by law.' Assuming for purposes of argument the factual correctness of the premise that if the petitioners were evicted from their dwellings they would be deprived of their livelihood, the court posed the question whether the right to life included the right to livelihood.

> We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law if the right to livelihood is not regarded as a part of the right to life. That which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.[31]

[31] *Tellis et al* v. *Bombay Municipal Corporation* [1987] LRC (Const) 351. Cf. *Lawson* v. *Housing New Zealand* [1997] 4 LRC 369, where the High Court of New Zealand observed that 'it requires an unduly strained interpretation' to conclude that the right not to be deprived of life encompasses a right not to be charged market rent for accommodation without regard to affordability and impact on a tenant's living standards. The court thought that providing

This decision was applied by the High Court of Bombay at the instance of a casual labourer employed to load drums onto trucks, whose name had been deleted from the selection panel of casual labourers with immediate effect because of his positive HIV test. The court held that he had not ceased to be capable of performing the normal job functions and did not pose any threat to the interests of other persons at the workplace during his normal activities, and that the deletion of his name from the selection panel merely on the ground of his having an ailment was arbitrary and unreasonable.[32] The right to a livelihood may also be adversely affected by sexual harassment at one's place of work, particularly when submission to or rejection of unwelcome sexual advances or other such conduct by the female employee was capable of being used to affect her employment and unreasonably to interfere with her work performance, and had the effect of creating an intimidating or hostile working environment for her.[33]

### *This right shall be protected by law*

It is the duty of the state to protect human life against unwarranted actions by public authorities as well as by private persons.[34] This is usually done by enacting appropriate laws to criminalize the intentional taking of life and by ensuring that such laws are enforced. But the obligation to protect the right to life also implies other positive preventive measures appropriate to the general situation. For example, the Human Rights Committee considers it desirable that a state should take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[35] A complaint against an eviction order served on a widow who was in poor health was declared admissible by the European Commission since, on the basis of medical evidence it could not be excluded that an eviction

such an expansive interpretation of 'life' would 'serve to submit all elements of the welfare state to judicial review'.

[32] *X* v. *Y Corp and Another* [1999] 1 LRC 688.

[33] *Apparel Export Promotion Council* v. *Chopra*, Supreme Court of India, [2000] 1 LRC 563.

[34] UN document A/2929, chapter VI, section 4.

[35] General Comment 6 (1982). See R. Cook, 'Reducing Maternal Mortality: a Priority for Human Rights Law' in Sheila McLean (ed.), *Legal Issues in Human Reproduction* (Aldershot: Gower, 1989), 185–212.

would endanger her life.[36] But a complaint by a married couple that the execution of a sentence of imprisonment imposed on the husband could induce the wife to commit suicide was declared inadmissible.[37] Where a small number of fatalities arose out of a vaccination scheme designed to eliminate an infectious disease, it could not be said that the state had not taken adequate and appropriate steps to protect life.[38]

## Offences against the person

Interpreting ECHR 2(1), the European Court noted that the state's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and penalization of breaches of such provisions. The duty to protect the right to life also implies in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a requirement to take operational measures to prevent that risk from materializing. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to book, including guarantees contained in ECHR 5 and ECHR 8.[39] Where a woman residing in Northern Ireland complained on behalf of herself and her dependent children in respect of the murder of her husband and her brother, the European Commission observed that a positive obligation to exclude any possible violence could not be deduced from ECHR 2. The state was not required to take measures beyond those actually taken by the relevant authorities

[36] *X* v. *Germany*, Application 10565/83, (1984) 7 EHRR 152.
[37] *Naddaf* v. *Germany*, (1986) 50 *Decisions & Reports* 259.
[38] *Association X* v. *United Kingdom*, Application 7154/75, (1978) 14 *Decisions & Reports* 31.
[39] *Osman* v. *United Kingdom*, (1998) 29 EHRR 245.

to protect the inhabitants of Northern Ireland against terrorist attacks.[40] Nor is the state obliged to offer an individual the continued protection of a personal bodyguard for an indefinite period of time.[41]

Where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their duty to prevent and suppress offences against the person, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk need not be tantamount to gross negligence or wilful disregard of the duty to protect life. It is sufficient to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case. For example, following a shooting incident that resulted in the death of one member of a family and the wounding of another by a person who had, to the knowledge of the police, stated on three separate occasions that he intended to commit a murder, the European Court held it was not possible to identify any decisive stage in the sequence of events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the two persons were at real and immediate risk from the assailant. While the applicants had pointed to a series of missed opportunities that would have enabled the police to neutralize the threat posed by the assailant, it could not be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it.[42]

[40] *Mrs W* v. *United Kingdom*, Application 9438/81 (1983) 32 *Decisions & Reports* 190, (1983) 5 EHRR 504. See also *X* v. *United Kingdom and Ireland*, European Commission, (1985) 8 EHHR 49.

[41] *X* v. *Ireland*, European Commission, Application 6040/73, (1973) 44 *Collection of Decisions* 121.

[42] *Osman* v. *United Kingdom* (1998) 29 EHRR 245. See also *LCB* v. *United Kingdom*, European Court, (1998) 27 EHRR 212.

A general legal prohibition of arbitrary killing by the agents of the state will be ineffective, in practice, if there existed no procedure (e.g. public inquest proceedings) for reviewing the lawfulness of the use of lethal force by state authorities. The obligation to protect the right to life, read in conjunction with the state's general duty to 'secure to everyone within their jurisdiction' the rights and freedoms recognized in ECHR 1 requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the state.[43]

### Persons held in custody

When the authorities fail to take appropriate measures to protect the life of a person held in custody, the right to life is violated. Examining a complaint from Uruguay, the Human Rights Committee found that the author's cousin, Hugo Barbato, was arrested in 1972 and subsequently sentenced to eight years' imprisonment. He completed serving his sentence in July 1980 and thereafter was kept in detention pursuant to 'prompt security measures'. He was informed he would be released only if he left the country, a condition which was not mentioned in the judgment against him. After he had obtained an entry visa from the Swedish Government, the Uruguayan authorities informed him he was to be released on 11 December 1980. But on 9 December he was told he would not be granted permission to leave the country. His whereabouts were unknown to his relatives until 28 December, when his mother was called to the military hospital to identify his body. She was told he had committed suicide. The state did not submit any report on the circumstances in which Hugo died or any information as to what inquiries had been made or the outcome of such inquiries. On the other hand, information submitted by the author indicated that a few days before Hugo's death he had been seen by other prisoners and was reported to have been in good spirits. While the committee could not arrive at a definite conclusion as to whether Hugo committed suicide, was driven to suicide or was killed by others while in custody, 'the inescapable conclusion' it reached was that in all the circumstances, the Uruguayan authorities either by act or

[43] *McCann* v. *United Kingdom*, European Court, (1995) 21 EHRR 97. The European Court has since held that the obligation to conduct an effective investigation is not confined to cases where the killing was caused by an agent of the state; it arises by the mere fact that the authorities are informed of a murder: *Tanrikulu* v. *Turkey*, European Court, (1999) 30 EHRR 950.

omission were responsible for not taking adequate measures to protect his life.[44]

A similar conclusion was reached in respect of a Zairian national who was alleged by the authorities to have died on 23 June 1985 at a hospital in Kinshasa of injuries sustained in a road traffic accident. The Human Rights Committee found that he had been kidnapped and taken to a military camp at Kinshasa on 20 or 21 June 1985 where he was subjected to torture by members of the armed forces. Contrary to the report of the traffic police, the victim had not been involved in a road accident, but had died of traumatic wounds probably caused by a blunt instrument. Not only had the public prosecutor failed to conduct an inquiry into the death, but the military officer who was said to have delivered the victim to the hospital following the alleged traffic accident refused to be questioned. Having taken into account the failure of the state to furnish any information or clarifications, the committee concluded that the facts disclosed a violation of ICCPR 6.[45]

The requirement in ECHR 2 that 'everyone's life shall be protected by law' enjoins the state to take appropriate steps to safeguard life. This principle was applied by the European Commission in an application concerning a prisoner who was on a hunger strike. He complained that on the sixteenth day of his hunger strike he was transferred to another prison where the chief physician after examining him concluded it would be necessary to submit him to forcible feeding twice a day. The procedure thereafter adopted was described as follows: Twice a day he was brought to the prison operating room where he was tied to a chair with leather straps around his arms, feet and chest. He was asked whether he would eat the prison food voluntarily. When he refused, the forcible feeding would start. A guard first pressed his head against the back of the chair. Thereafter a metal spatula wrapped in plaster was pressed against the jaw from the side in order to open his mouth wide enough to place a clip between the teeth. By means of this clip the jaws were then pressed apart and the mouth opened. The doctor in charge would then lead a rubber or plastic tube through the gullet to the stomach and food in the form of a special fluid would be introduced through this tube. After having obtained the necessary court permission, this

[44] *Barbato* v. *Uruguay*, Communication No.84/1981, HRC 1983 Report, Annex IX.
[45] *Miango* v. *Zaire*, Communication No.194/1985, HRC 1988 Report, Annex VII.F.

procedure was carried out on him on seven occasions in the course of four days. The prisoner invoked ECHR 3 complaining that forcibly feeding him constituted inhuman and degrading treatment. While agreeing that the forced feeding of a person did involve degrading elements which in certain circumstances may be regarded as prohibited, the commission observed that in this case there was a conflict between an individual's right to physical integrity and the state's obligation to protect life. The authorities had acted in the best interests of the prisoner when choosing to take action to secure his survival although such action might infringe his human dignity. Having regard to the medical assessment that his life was in danger, and to the relatively short period during which the treatment was carried out, the commission held that this measure, taken with a view to securing his health or even saving his life, did not subject the prisoner to more constraint than necessary to achieve that goal.[46]

A prison inmate suffering from a serious and irreversible heart condition is entitled to conditional release if it is impossible for him to obtain appropriate treatment in prison. It is irrelevant that the prison authorities think the inmate can undergo an operation because the right to physical and moral integrity in no way authorizes the imposition of medical assistance on any person against his wishes, whatever his reasons for refusing. The conditional release of a person suffering from a very serious and incurable disease has to be based on the definite danger that imprisonment poses to his life and physical integrity, i.e. his health in general. The right to life is absolute and cannot be limited by any judicial sentence or decision.[47]

## Extradition or deportation

An extraditing state must ensure that the person being extradited is not exposed to a real risk of a violation of his right to life in the receiving state. If a state takes a decision to extradite a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's right to life will be violated in another jurisdiction, the former state may be in violation of its obligation to protect the right to life. This follows from the fact that a state party's duty under ICCPR 2 (to respect and to ensure

[46] *X* v. *Germany*, Application 10565/83, (1984) 7 EHRR 152.

[47] Constitutional Court of Spain (applying article 15 of the Constitution of Spain), Case No. 48/1996, 25 March 1996 (1996) 1 *Bulletin on Constitutional Case-Law* 96.

to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant) would be negated by the handing over of a person to another state (whether a state party to the covenant or not) where treatment contrary to the covenant is certain or is the very purpose of the handing over.[48]

In Canada, which is a party to the covenant and has abolished the death penalty, an interesting question arose whether the extradition to the United States, which was then not a party to the covenant and still retained capital punishment, of an American citizen who had been convicted of murder and kidnapping but had escaped from custody before sentence of death was imposed on him, constituted a violation of ICCPR 6. The Human Rights Committee posed two related questions: (a) Did the requirement under ICCPR 6(1) to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (i.e. a necessary and foreseeable consequence) of losing his life in circumstances incompatible with ICCPR 6 as a consequence of extradition to the United States? (b) Did the fact that Canada had abolished capital punishment require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under the extradition treaty, that the death penalty would not be imposed on the prisoner?

As to question (a), the committee noted that Article 6(1) must be read together with 6(2), which does not prohibit the imposition of the death penalty for the most serious crimes. If the prisoner had been exposed, through extradition from Canada, to a real risk of a violation of Article 6(2) in the United States, that would have entailed a violation by Canada of its obligations under 6(1). Noting that the prisoner was convicted of premeditated murder, undoubtedly a very serious crime; he was over eighteen years of age when the crime was committed; and he had not claimed that he was denied a fair hearing at his trial; and noting also the fact that extradition was preceded by extensive proceedings in the Canadian courts, which had reviewed all the evidence submitted concerning the trial and conviction, the committee held that the obligations arising under Article 6(1) did not require Canada to refuse the prisoner's extradition.

As to question (b), the committee observed that the abolition of capital punishment does not release a state of its obligations arising under

[48] *Kindler* v. *Canada*, Human Rights Committee, Communication No.470/1991, 30 July 1993.

extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a state which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The extradition of the prisoner would have violated Canada's obligations under Article 6 if the decision to extradite without assurances had been taken arbitrarily or summarily. Noting the reasons given by Canada for not seeking assurances (a decision reached after hearing arguments in favour of seeking assurances), the absence of 'exceptional circumstances', the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder, the committee held that the terms of Article 6 did not necessarily require Canada to refuse to extradite or to seek assurances.

In separate opinions, five members of the Human Rights Committee disagreed.[49] In their view, the decision to extradite the prisoner without seeking an assurance from the receiving state that he would not be executed (as it was empowered to do under the extradition treaty) constituted an arbitrary deprivation of the right to life. Rajsoomar Lallah stressed that the notion of 'protection' requires prior preventive measures, particularly in the case of a deprivation of life. These preventive measures necessarily include the prevention of any real risk of the deprivation of life. By extraditing the prisoner without seeking assurances that the death penalty would not be applied to him, Canada put his life at real risk. He expressed the inherent contradiction in the majority view: 'Canada through its judicial arm could not sentence an individual to death under Canadian law, whereas Canada through its executive arm, found it possible under its extradition law to extradite him to face the real risk of such a sentence'. Bertil Wennergren explained that if an issue arises in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to bilateral treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply as there is no room for it under covenant obligations. Christine Chanet pointed out that Article 6(2) refers only to countries in which the death penalty has not been abolished and thus rules out its

[49] See the opinions of Bertil Wennergren, Rajsoomar Lallah, Christine Chanet, Fausto Pocar and Francisco José Aguilar Urbina.

application to countries which have. Therefore, it was an error to apply to Canada, which had abolished the death penalty, a text reserved exclusively for non-abolitionist countries. She saw the decision to extradite the prisoner as Canada re-establishing the death penalty 'by proxy'.[50]

National courts have not followed the majority opinion of the Human Rights Committee. Under the Portuguese Constitution, a person may not be extradited in respect of a crime punishable with death 'under the law of the requesting state'. This prohibition flows from the absolute protection afforded to the right to life. Therefore, it is unconstitutional for Portugal to co-operate in an extradition for the purposes of applying and executing the death penalty, which could not be imposed under any circumstances for any type of crime upon any person in Portugal, whether citizen or foreigner. The words 'under the law of the requesting state' refer to 'the domestic law in force in that state, comprising solely its code of penal norms, including the possibility of the death penalty in the abstract, and the mechanisms – and only those mechanisms – that belong imperatively to criminal law and procedure, from which it should follow that the death penalty will never be executed in reality because it can never be applied'. Having examined a request from the Chinese government for the extradition of a suspect living in Macau (then a Portuguese colony) to stand trial for intentional homicide punishable by death, the Constitutional Court held that a promise made by China's ministry of state security, forwarded by the Xinhua press agency (which has quasi-diplomatic functions in Macau) not to sentence the suspect to death was a guarantee of a political and diplomatic character and, although obligatory from the international viewpoint, was not binding on the Chinese courts.[51]

A provision in an extradition treaty between Italy and the United States of America, which enabled Italy's minister of justice in his

[50] In *Ng* v. *Canada*, Communication No.469/1991, HRC 1994 Report, Annex IX.CC, the committee once more held, by a majority, that this article did not necessarily require the state to refuse to extradite or to seek assurances; it was sufficient if the decision to extradite had not been taken 'summarily or arbitrarily'. Similar majority and minority opinions were expressed in *T* v. *Australia*, Communication No.706/1996, HRC 1998 Report, Annex XI.U, which concerned the deportation to Malaysia (where drug trafficking carries a mandatory death penalty) of a Malaysian citizen married to an Australian following his conviction for importing heroin from Malaysia into Australia. But now see *Minister of Justice* v. *Burns and Rafay*, Supreme Court of Canada, [2001] SCJ 8; 2001 SCC 7: Assurances are constitutionally required in all but exceptional cases.

[51] Case No.417/1995, 4 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 186.

discretion to allow the extradition of a person to stand trial in the United States on a charge of first degree homicide, a crime for which the state of Florida prescribed the death penalty, on 'adequate assurances' being given that such penalty would not be carried out was not regarded as consistent with the constitution which guaranteed the unconditional right to life and prohibited the death penalty. The Constitutional Court of Italy asserted that protection of life necessitated an absolute guarantee. What needed to be ascertained was whether the guarantees which the state applying for extradition was capable of providing with regard to the death penalty were adequate to ensure that the death penalty was not imposed, even though the law provided for it or at least that it would not be applied in the case in question.[52]

## Actions of state officers

The Human Rights Committee has stated that the deprivation of life by the authorities of the state is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.[53] The defence of state immunity is inconsistent with the protection of the right to life, and it is not open to an official of the state to plead that he had caused the death of an individual in discharge of the sovereign functions of the state. Accordingly, the Supreme Court of India held that the government must pay compensation to the families of two persons who had been arrested on suspicion of involvement in terrorist activity and had then been shot dead by the police while in custody. The court rejected police evidence that the deaths had occurred in cross-fire between police and terrorists.[54]

To enact legislation which justifies a penal act when it is committed by members of the police force is to act in breach of the duty to protect the right to life. In Colombia, a legislative decree established a new ground of defence that could be pleaded by members of the police force to exonerate themselves 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 kidnapping, and the production and processing of and trafficking in narcotic drugs'. When the decree

[52] Case No.223/1996, 27 June 1996, (1996) 2 *Bulletin on Constitutional Case-Law* 228.
[53] Human Rights Committee, General Comment 6 (1982).
[54] *People's Union for Civil Liberties* v. *Union of India* [1999] 2 LRC 1.

was invoked in aid of members of a police patrol who were charged with causing the violent death of seven persons during a police operation, and the evidence indicated that the action of the police resulting in the deaths was disproportionate to the requirements of law enforcement, the Human Rights Committee held that inasmuch as the police action was made justifiable as a matter of Colombian law by the legislative decree, the right to life was not adequately protected by law as required by ICCPR 6.[55]

## The environment

The illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the right to life.[56] In India, the Supreme Court found that several chemical industrial plants established in a major industrial complex were producing substances such as oleum (concentrated sulphuric acid), single super phosphate (SSP), and 'H' acid which gave rise to highly toxic effluents, in particular iron-based and gypsum-based sludge. Some 2,500 metric tons of highly toxic sludge and other pollutants were then discarded untreated with waste waters in the open around the complex, so that the water seeped deep into the earth, polluting the aquifers and the subterranean supply of water, rendering it unfit for consumption, irrigation or cultivation, and spreading disease, death and disaster in the village and surrounding area. The court held that it had the power to intervene to protect the constitutionally guaranteed right to life by ordering the closure of the plants and by directing the government to determine and recover the cost of remedial measures from the owners of the plants. The court also recommended the strengthening of environmental protection machinery.[57]

A serious issue with regard to the obligation of a state to protect human life could arise from a government's failure to take adequate steps to protect the community from excessive exposure to radioactivity known to cause cancer and genetic defects. In Canada, during the years 1945 to 1952, the Eldorado Nuclear Ltd, a federal crown corporation

[55] *Camargo* v. *Colombia*, Communication No.45/1979, HRC 1982 Report, Annex XI.

[56] *Vienna Declaration and Programme of Action*, part I, paragraph II. See also Fatma Zohra Ksentini, Special Rapporteur, *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, Preliminary Report, UN document E/CN.4/1996/17.

[57] *Indian Council for Enviro-Legal Action et al* v. *Union of India et al* [1996] 2 LRC 226.

and Canada's only radium and uranium refinery, disposed of nuclear waste in dumpsites within the confines of Port Hope, Ontario, a town of 10,000 inhabitants, located in an area which was planned to become one of the most densely populated in North America. In 1975, large-scale pollution of residences and other buildings was discovered when unsuspecting citizens used material from the dumpsites as fill or building material for their houses. The Atomic Energy Control Board, a federal government licensing and regulating agency with responsibility regarding nuclear matters in Canada, initiated a cleaning operation and, from 1976 to 1980, the excavated waste material from approximately 400 locations was removed and relocated elsewhere, at distances ranging from 6 miles to 200 miles away from Port Hope. Then, quite suddenly, the new dumpsites were closed for further removal of radioactive waste from Port Hope. It was claimed that the reasons were political in that no other constituency was willing to accept the waste and the federal government was unwilling to come to grips with the problem. Meanwhile, about 200,000 tons of radioactive waste remained in Port Hope, stored in eight 'temporary' disposal sites near or directly beside residences, one approximately 100 yards from a public swimming pool. It was argued that the Atomic Energy Control Board was hampered in its efforts on behalf of the inhabitants of Port Hope by the failure of the federal government to make alternative dumpsites available. While observing that the communication raised serious issues with regard to the obligation of the state to protect human life, the Human Rights Committee did not proceed to consider the merits of the case owing to the author's failure to fulfil the admissibility criteria relating to exhaustion of domestic remedies.[58]

## Access to medical services

The Supreme Court of India has held that the obligation of the state to safeguard the right to life of every person means that the preservation of human life is of paramount importance. Accordingly, government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment

[58] *EHP* v. *Canada*, Communication No.67/1980, (1982) 2 *Selected Decisions of the Human Rights Committee* 20 (not previously published in HRC Reports). See also *LCB* v. *United Kingdom*, European Court (1998) 27 EHRR 212.

to a person in need of such treatment results in a violation of his right to life guaranteed under article 21 of the constitution. In this case, the claimant had suffered serious head injuries and brain haemorrhage as a result of having fallen off a train. He was taken to various hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private hospital. The court found that the claimant could in fact have been accommodated in more than one of the hospitals which turned him away and that the persons responsible for that decision had been guilty of misconduct.[59]

The Constitutional Court of South Africa distinguished the above case when a 41-year old unemployed man who was a diabetic, suffering from ischaemic heart disease and cerebrovascular disease, and in the final stages of chronic renal failure, invoked the right to life entrenched in section 11 of the constitution to obtain admission to a state hospital for renal dialysis treatment. He had been refused admission because he did not qualify under guidelines which had been drawn up and adopted, owing to shortage of resources, to determine which patients with chronic renal failure should receive treatment. The court referred to structural differences between the Indian and South African constitutions; in particular to the positive obligation imposed on the state by section 27(3) of the latter: 'No one may be refused emergency medical treatment'. The court held that while the right to emergency medical treatment did not have to be inferred from the right to life, the claimant's condition was not an 'emergency' calling for immediate remedial treatment but an ongoing state of affairs resulting from a deterioration of his renal function which was incurable. Chaskalson P noted that one could not but have sympathy for the claimant and his family who faced the cruel dilemma of having to impoverish themselves to secure the treatment necessary to prolong his life. 'Unfortunately this is true not only of the appellant but of many others who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to "human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity." ' Sachs J observed that in open and democratic society based on dignity, freedom

[59] *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*, (1996) AIR SC 2426.

and equality, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to healthcare.[60]

## War and nuclear weapons

The Human Rights Committee expanded the concept of protection in ICCPR 6 by requiring states to take positive action to avoid war and other acts of mass violence which continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. It noted that 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. 'States, therefore, 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 thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.'[61] The committee also focused on nuclear arms: 'It is evident that the designing, testing, manufacture, possession, and deployment of nuclear weapons, unless prohibited and recognized as crimes against humanity, are among 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 in the event of war, but even through human or mechanical error or failure.'[62]

The International Court of Justice, in an advisory opinion, while agreeing that the protection of the ICCPR does not cease in times of war except by operation of Article 4 whereby certain provisions may be derogated from in time of national emergency, observed that the test of what is an arbitrary deprivation of life falls to be determined by the applicable *lex specialis*, namely, the law applicable to armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to

[60] *Soobramoney* v. *Minister of Health, KwaZulu-Natal* [1998] 2 LRC 524.

[61] Human Rights Committee, General Comment 6 (1982).

[62] Human Rights Committee, General Comment 14 (1984). In UNGA resolution 38/75 of 15 December 1983, nuclear war was condemned 'resolutely, unconditionally and for all time' as being 'contrary to human conscience and reason, as the most monstrous crime against peoples, and as a violation of the foremost human right, the right to life'.

be considered an arbitrary deprivation of life contrary to ICCPR 6 can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the covenant itself.[63] In a separate dissenting opinion, Judge Weeramantry noted that when a weapon has the potential to kill between one million and one billion people, 'human life becomes reduced to a level of worthlessness that totally belies human dignity as understood in any culture. Such a deliberate action by any state is, in any circumstances whatsoever, incompatible with a recognition by it of that respect for basic human dignity on which world peace depends, and respect for which is subsumed on the part of all member states of the United Nations.' He endorsed the general comment of the Human Rights Committee and observed that all human rights follow from one central right – 'the right to exist', which is the foundation of the elaborate structure of human rights that has been painstakingly built by the world community in the post-war years. 'Any endorsement of the legality of the use, in any circumstances whatsoever, of a weapon which can snuff out life by the million would tear out the foundation beneath this elaborate structure.'[64]

The court was unanimous that (1) there is neither in customary nor conventional international law any specific authorization of the threat or use of nuclear weapons; (2) a threat or use of force by means of nuclear weapons that is contrary to Article 2(4) of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful; and (3) a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons. The court was divided, eleven to three, when it held that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. It was divided seven to seven when it held, by the president's casting vote, that while the threat or use of nuclear weapons would generally be contrary

[63] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, at 240.
[64] *Ibid.*, 506–8.

to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law, in view of the current state of international law, and of the elements of fact at its disposal, the court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.[65] In a dissenting opinion which examined comprehensively the principles of customary international law and humanitarian law, Judge Weeramantry concluded that the use or threat of use of nuclear weapons was absolutely prohibited by existing law – in all circumstances and without reservation.[66]

In 1979, following a decision by NATO to upgrade its nuclear capabilities, the Netherlands agreed to deploy forty-eight cruise missiles fitted with nuclear warheads on a military base near the town of Woensdrecht. Construction work for this purpose commenced in April 1986 and was completed by November 1989. In December 1989, following the adoption of the Intermediate-Range Nuclear Forces (INF) Treaty between the United States and the Soviet Union, plans to station cruise missiles at the Woensdrecht base were cancelled. In 1990, 6,588 citizens of the Netherlands petitioned the Human Rights Committee claiming that when their government agreed to deploy cruise missiles, they were placed in a situation where a real risk of a violation of their right under this article existed. They argued that a cruise missile base constituted a target for any military enemy, and submitted that documentation prepared by the World Health Organization indicated that the use of only one cruise missile would cause the death, from nuclear fallout, of 55 per cent of the population in an area of 120 square kilometres, and 100 per cent fatalities in an area of 90 square kilometres. The committee declared the communication inadmissible on the purely technical ground that the preparations for the deployment of cruise missiles between 1986 and 1989 did not, at the relevant period of time, place the authors in a position to claim to be victims whose right to life was violated or was under imminent prospect of violation. Nine years after its general comment on the subject of nuclear weapons, the committee was of the view that 'the procedure laid down in the Optional Protocol was not designed for

[65] *Ibid.*, 266. [66] *Ibid.*, 553.

conducting public debate over matters of public policy, such as support for disarmament and issues concerning nuclear and other weapons of mass destruction'.[67]

### *No one shall be arbitrarily deprived of his life*

When ICCPR 6 was being drafted, there did not appear to be general agreement on the meaning of the term 'arbitrarily'. Some delegates held that it meant 'illegally', while others interpreted it to mean 'unjustly', and still others understood it to mean both.[68] The Human Rights Committee has since observed that the protection against arbitrary deprivation of life, which is explicitly required, is of paramount importance. States should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the state is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.[69]

#### Death being the unintended outcome of the use of force

ECHR 2(2) enumerates three different situations in which deprivation of life is not to be regarded as a violation of the right to life: when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a

[67] *E.W. et al* v. *Netherlands*, Communication No.429/1990, 8 April 1993. Cf. *Operation Dismantle Inc and Others* v. *The Queen* [1986] LRC (Const) 421, where the Supreme Court of Canada dismissed an application for a declaration that the decision by the federal Cabinet to permit testing of cruise missiles by the United States of America in Canadian territory was an infringement of the right to life. The court observed that 'to succeed at trial, the appellants would have to demonstrate, *inter alia*, that the testing of the cruise missile would cause an increase in the risk of nuclear war'.

[68] UN document A/2929, chapter VI, sections 1, 2, 3. See also A/3764, section 114.

[69] The extent to which the arbitrary deprivation of life continues in many countries is evident from the annual reports (since 1983) of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. Her most recent report (UN document E/CN.4/2000/3) records several instances of: (a) violation of the right to life in connection with the death penalty; (b) death threats; (c) deaths in custody; (d) deaths due to the use of force by law enforcement officials, or persons acting in direct or indirect compliance with the state; (e) deaths due to attacks by security forces of the state, by paramilitary groups, death squads or other private forces co-operating with or tolerated by the government; (f) violations of the right to life during armed conflicts; (g) expulsion or *refoulement* of persons to a country where their lives were in danger; (h) genocide.

lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[70]

The situations referred to above are considered to be exhaustive and to be narrowly interpreted, being exceptions to, or indicating limits of, a fundamental right. These are not situations where it is permitted intentionally to kill an individual, but where it is permissible to 'use force' which may result, as the unintended outcome of the use of force, in the deprivation of life. The use of the force – which has resulted in the deprivation of life – must be shown to have been 'absolutely necessary' for one of the enumerated purposes and, therefore, justified in spite of the risks it entailed for human life. It must also be strictly proportionate to the achievement of the permitted purpose. In assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, the dangers to life and limb inherent in the situation, and the degree of the risk that the force employed might result in loss of life. Due regard will be had to all the relevant circumstances surrounding the deprivation of life.[71]

The use of the term 'absolutely necessary' in ECHR 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is 'necessary in a democratic society' (for example, under ECHR 8(2), 10(2) or 11(2)). Accordingly, a court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the state who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.[72]

The use of force by agents of the state in pursuit of one of the above aims may be justified where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the state and its law enforcement personnel in the

[70] For a discussion of these exceptions, see *The State* v. *Makwanyane*, Constitutional Court of South Africa, [1995] 1 LRC 269, per Chaskalson P.

[71] *Stewart* v. *United Kingdom*, European Commission, (1984), 7 EHRR 453. For the application of these principles, see also *Wolfgram* v. *Germany*, European Commission, (1986), 9 EHRR 548.

[72] *McCann* v. *United Kingdom*, European Court, (1995) 21 EHRR 97.

execution of their duty, perhaps to the detriment of their lives and those of others.[73]

In a case which concerned the killing in Gibraltar by members of the British security services of three members of the Irish Republican Army suspected of involvement in a bombing mission, the European Court held that having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous, and to the automatic recourse to lethal force when the soldiers opened fire, ECHR 2(2)(a) had been breached. The court was not persuaded that the killing of the three suspects constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence. Nine members of the nineteen-member court disagreed with this finding.[74]

Where police action resulting in the death of a person is disproportionate to the requirements of law enforcement in the circumstances of the case, the state is liable for arbitrarily depriving such person of her life. In Colombia, a judicial order authorized a house in Bogota to be raided in the belief that a former Colombian ambassador who had been kidnapped some days earlier by a guerilla organization, was being held prisoner inside. Despite the fact that the ex-ambassador was not found, the police patrol decided to hide in the house to await the arrival of the 'suspected kidnappers'. Seven persons who subsequently entered the house were shot by the police and died. Although the police initially stated that the victims had died while resisting arrest, brandishing and even firing various weapons, the forensic and ballistics reports and the results of a paraffin test 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 the victims were not all killed at the same time but at intervals, as they arrived at the

[73] *McCann* v. *United Kingdom*, European Court, (1995) 21 EHRR 97. For the application of this principle, see *Andronicou and Constantinou* v. *Cyprus*, Supreme Court of Cyprus (1997) 25 EHRR 491 where a young couple engaged in a violent quarrel were shot dead by members of a special police unit during a rescue operation. Cf. *Burrell* v. *Jamaica*, Communication No.546/1993, HRC 1996 Report, Annex R, where the Human Rights Committee found a violation of ICCPR 6 when a prisoner was shot dead following a hostage-taking of some warders, but after the warders had been released and the need for force no longer existed.

[74] *McCann* v. *United Kingdom*, European Court, (1995) 21 EHRR 97.

house, and that most of them had been shot while trying to save themselves from the unexpected attack. In the case of one of them the forensic report showed she had been shot several times after she had died from a heart attack. It was 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. The police action was apparently taken without warning the victims and without giving them any opportunity to surrender or to offer any explanation of their presence or intentions. There was no evidence that what the police did 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 than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of the protection of due process under the ICCPR.[75]

A similar finding was reached by the Human Rights Committee following the examination of a communication from Suriname, submitted on behalf of a lawyer who was allegedly arrested by military authorities on 8 December 1982 and whose corpse was delivered to the mortuary on 9 December showing signs of severe maltreatment and numerous bullet wounds. According to the unrefuted facts on which the committee based its views, in the early hours of 8 December 1982, fifteen prominent persons in Paramaribo, including journalists, lawyers, professors and businessmen, were arrested in their homes by the police and subjected to violence. The bodies of these fifteen persons were delivered to the mortuary following an announcement by the authorities that a coup attempt had been foiled and that a number of arrested persons had been killed while trying to escape. The bodies were seen by family members but neither autopsies nor official investigations of the killings took place. It was evident from the fact that fifteen prominent persons lost their lives as a result of the deliberate action of the military police that the deprivation of life was intentional. The state failed to submit any evidence proving these persons were shot while trying to escape. Accordingly, the victims were arbitrarily deprived of their lives contrary to ICCPR 6.[76]

[75] *Camargo* v. *Colombia*, Human Rights Committee, Communication No.45/1979, HRC 1982 Report, Annex XI.

[76] *Baboeram-Adhin* v. *Suriname*, Human Rights Committee, Communication No.146/1983, HRC 1985 Report, Annex X.

## Enforced or involuntary disappearances

The enforced or involuntary disappearance of a person is a particularly heinous violation of this article. It occurs when a person is arrested, detained, abducted or otherwise deprived of his liberty by officials of different branches or levels of government, or by organized groups or private individuals acting on their behalf, or with the support, direct or indirect, consent or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of his or her liberty, thereby placing such person outside the protection of the law.[77]

Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon.[78] The Human Rights Committee has required states to take specific and effective measures to prevent the disappearance of individuals. They 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.[79] The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. Where the state fails to take appropriate measures to prevent the disappearance and subsequent killing of a person and to investigate effectively the responsibility for his murder, the right to life is violated.

This right is also violated when the identity of the state agents responsible for the disappearance and subsequent death of a person is known, but the state fails to prosecute criminally, try, and punish such person. Where the Colombian government submitted that disciplinary sanctions had been applied to military officers responsible for abducting, torturing and killing Nadia Erika Bautista de Arellana, a thirty-five-year old political activist, and that compensation had been awarded to the victim's family by an administrative tribunal, the Human Rights Committee held that

[77] See the Declaration on the Protection of All Persons from Enforced Disappearance, UNGA resolution 47/33 of 18 December 1992, and the Report of the UN Working Group on Enforced or Involuntary Disappearances, UN document E/CN.4/1996/38.

[78] *Velasquez Rodriguez* v. *Honduras*, Inter-American Court, 29 July 1988.

[79] General Comment 6 (1982).

while the ICCPR did not provide a right for an individual to require that the state criminally prosecute another person, a state was under a duty to do so when the perpetrators of a forced disappearance had been identified. Purely disciplinary and administrative remedies did not constitute adequate and effective remedies within the meaning of ICCPR 2(3) in the event of particularly serious violations of human rights.[80]

The Inter-American Court of Human Rights has, on several occasions, found states to be in breach of ACHR 4. In one such case, the court investigated the disappearance of Manfredo Velasquez Rodriquez, a student at the National Autonomous University of Honduras who had been arrested without warrant on 12 September 1981. The context in which the disappearance occurred and the lack of any information seven years later in regard to his fate created a reasonable presumption that he had been killed. Even if there was a minimal margin of doubt in this respect, it must be presumed that his fate was decided by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment. This, together with the failure to investigate, was a violation by Honduras of a legal duty to ensure the rights recognized by Article 4. That duty was to ensure to every person subject to its jurisdiction the inviolability of the right to life and the right not to have one's life taken arbitrarily.

Referring to the context in which the disappearance occurred, the court noted that during the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras and many were never heard from again. Those disappearances followed a similar pattern, beginning with the kidnapping of the victim by force, often in broad daylight and in public places, by armed men in civilian clothes, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false or no licence plates. It was public knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders. The disappearances were carried out in a systematic manner, the following circumstances being particularly relevant: (i) The victims were usually persons whom Honduran officials considered dangerous to state security and who had usually been under surveillance for long periods of

[80] *Nydia Erika Bautista de Arellana* v. *Colombia*, Human Rights Committee, Communication No.563/1993, Human Rights Committee, HRC 1996 Report, Annex VIII.S.

time; (ii) The weapons employed were reserved for the official use of the military and police, and the vehicles used had tinted glass which required special official authorization. In some cases, the kidnappings were carried out openly and without any pretence or disguise; in others, government agents cleared the areas where the kidnappings were to take place and, on at least one occasion, they stopped the kidnappers and then allowed them to continue freely on their way after examining their identification; (iii) The kidnappers blindfolded the victims and moved them from one secret unofficial detention centre to another. They interrogated the victims and subjected them to cruel and humiliating treatment and torture. Some were ultimately murdered and their bodies were buried in clandestine cemeteries; (iv) When queried by relatives, lawyers and persons or organizations interested in the protection of human rights, or by judges charged with executing writs of habeas corpus, the authorities systematically denied any knowledge of the detentions or the whereabouts or the fate of victims. That attitude was seen even in the cases of persons who later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate; (v) Military and police officials as well as those from the executive and judicial branches either denied the disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains. The investigative committees established by the government and the armed forces did not produce any results. Any judicial proceedings instituted were processed slowly with a clear lack of interest and some were ultimately dismissed.

Based on the above facts, the court held that: (1) a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984; (2) Manfredo Velasquez disappeared at the hands of or with the acquiescence of those officials within the framework of that practice; and (3) the Government of Honduras failed to guarantee the human rights affected by that practice.[81]

[81] *Velasquez Rodriguez* v. *Honduras*, 29 July 1988. See also *Godinez Cruz* v. *Honduras*, Inter-American Court, 20 January 1989. Cf. *Fairen Garbi and Solis Corrales* v. *Honduras*, Inter-American Court, 15 March 1989, where it was held that it had not been proved that the disappearances occurred within the framework of the practice of disappearances carried out or tolerated by Honduran authorities. For a case under the ICCPR, see *Mojica* v. *Dominican Republic*, Human Rights Committee, Communication No.449/1991, HRC 1994 Report, Annex W.

### *Imposition of the death penalty*

The death penalty violates the essential content of the right to life in that it extinguishes life itself. In the Constitutional Court of the Republic of South Africa, Mahomed J explained:

> The deliberate annihilation of the life of a person systematically planned by the state as a mode of punishment . . . is not like the act of killing in self-defence, an act justifiable in the defence of the clear right of the victim to the preservation of his life. It is not performed in a state of sudden emergency, or under the extraordinary pressures which operate when insurrections are confronted or when the state defends itself during war. It is systematically planned long after – sometimes years after – the offender has committed the offence for which he is to be punished, and while he waits impotently in custody, for his date with the hangman. In its obvious and awesome finality, it makes every other right, so vigorously and eloquently guaranteed by . . . the Constitution, permanently impossible to enjoy. Its inherently irreversible consequence, makes any reparation or correction impossible, if subsequent events establish, as they have sometimes done, the innocence of the executed or circumstances which demonstrate manifestly that he did not deserve the sentence of death.

He noted that the death sentence must, in some measure, manifest a philosophy of indefensible despair in its execution, accepting as it must do, that the offender it seeks to punish is so beyond the pale of humanity as to permit of no rehabilitation, no reform, no repentance, no inherent spectre of hope or spirituality; nor the slightest possibility that he might one day, successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms protected in the constitution, the exercise of which is possible only if the 'right to life' is not destroyed. The finality of the death penalty allows for none of these redeeming possibilities. It annihilates the potential for their emergence. Moreover, it cannot accomplish its objective without invading in a very deep and distressing way, the guarantee of human dignity afforded by the constitution, as the person sought to be executed spends long periods in custody, anguished by the prospect of being 'hanged by the neck until he is dead'. The invasion of his dignity is inherent. He is effectively told: 'You are beyond the pale of humanity. You are not fit to live among humankind. You are not entitled to life. You are

not entitled to dignity. You are not human. We will therefore annihilate your life'. Chaskalson P, who delivered the principal judgment in that case, focused on the final and irrevocable nature of the penalty: 'It leaves nothing but the memory in others of what has been and the property that passes to the deceased's heirs'. Krieglar J considered the debate need go no further inasmuch as 'capital punishment, by definition, strikes at the heart of the right to life'.[82]

A similar view was taken by the Constitutional Court of Hungary which declared capital punishment to be in violation of 'the inherent right to life and human dignity' guaranteed by section 54 of the Constitution of Hungary. According to the court, capital punishment imposed a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably. As such it was unconstitutional. The court stressed the relationship between the rights of life and dignity, and their absolute nature. 'Together they are the source of all other rights. Other rights may be limited or even withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These are the essential content of all rights under the constitution. Take them away, and all other rights cease.'[83] In the Supreme Court of Canada, Cory J concluded that 'The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity.'[84]

Notwithstanding these pronouncements on the incompatibility of the death penalty with the protection of the right to life, ICCPR 6, for reasons which have already been discussed, seeks to regulate its application and execution in those states which have not yet abolished it. Articles 6(2)–(6) require that sentence of death (a) be imposed only for the most serious crimes; (b) be in accordance with the law in force at the time of the commission of the crime; (c) not be contrary to the provisions of the covenant or of the Genocide Convention; (d) only be carried out

[82] *The State* v. *Makwanyane* [1995] 1 LRC 269. [83] Case No.23/1990(X.31) AB.

[84] *Kindler* v. *Minister of Justice*, Supreme Court of Canada, (1992) 6 CRR (2nd) 193 (SCC) at 241. The execution of the death penalty has been described by Professor Chris Barnard as follows: 'The man's spinal cord will rupture at the point where it enters the skull, electrochemical discharges will send his limbs flailing in a grotesque dance, eyes and tongue will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor' (quoted by O'Regan J in *The State* v. *Makwanyane* [1995] 1 LRC 269.

pursuant to a final judgment rendered by a competent court; (e) not be imposed for crimes committed by persons below eighteen years of age; (f) not be carried out on pregnant women; and (g) that any person sentenced to death be entitled to seek pardon or commutation of sentence, and, without so seeking, be granted amnesty, pardon or commutation of sentence. ACHR 4 contains similar provisions.

The provisions of ICCPR 6(2) are in the nature of a derogation from the inherent right to life and must therefore be strictly construed.[85] They are only concerned with the secondary and subordinate object of enabling those states that have not abolished the death penalty to resort to it for the time being. This 'dispensation' merely releases such states from their obligations under ICCPR 2 and 6, namely to respect and to ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons who have committed 'most serious crimes'. What Article 6(2) does not do is to permit states that have abolished the death penalty to reintroduce it at a later stage.[86] Article 6(2) does not imply for any state an authorization to delay its abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Consequently, a state that has abolished the death penalty is under a legal obligation not to reintroduce it. This obligation refers both to a direct reintroduction within the state's jurisdiction, and to an indirect one, as is the case when a state acts – through extradition, expulsion or compulsory return – in such a way that an individual within its territory and subject to its jurisdiction is exposed to capital punishment in another state.[87] It must be noted that Article 6(2) refers only to countries in which the death penalty has not been abolished, thus ruling out the application of the text to countries which have abolished the death penalty.[88]

### Sentence of death may be imposed only for the most serious crimes

During the drafting process, this phrase was criticized as lacking precision, since the concept of 'serious crimes' differed from one country

[85] Per Rajsoomer Lallah, individual opinion, *Kindler* v. *Canada*, Human Rights Committee, Communication No.470/1991, 30 July 1993.
[86] Per Bertil Wennergren, individual opinion, *ibid.*
[87] Per Fausto Pocar, individual opinion, *ibid.*
[88] Per Christine Chanet, individual opinion, *ibid.*

to another. But a suggestion that the term be more clearly defined, and that 'political crimes' should be specifically excluded, was not accepted.[89] This was in contrast to ACHR 4 which proceeded to state quite categorically that 'in no case shall capital punishment be inflicted for political offences or related common crimes'. The Human Rights Committee has observed that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure.[90] According to ECOSOC, a serious crime is one whose scope does not go beyond intentional crimes with lethal or other extremely grave consequences.[91] These restrictions, in the opinion of the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary executions, exclude the possibility of imposing death sentences for economic and other so-called victimless offences, or activities of a religious or political nature – including acts of treason, espionage and other vaguely defined acts usually described as 'crimes against the state' or 'disloyalty'. This principle also excludes actions primarily related to prevailing moral values, such as adultery and prostitution, as well as matters of sexual orientation.[92]

A Zambian law required the imposition of the death penalty for aggravated robbery in which firearms were used. Where an accused was convicted and sentenced to death under that law in a case in which the use of firearms did not cause the death or wounding of any person, and the court could not under the law take these elements into account in imposing sentence, the mandatory imposition of the death sentence violated article 6(2).[93]

### in accordance with the law in force at the time of the commission of the crime

This clause is intended to ensure that a law imposing the death penalty should not be made retroactive.[94] But it may also operate to deny an officer of the executive branch of government the power to choose a

[89] UN document A/2929, chapter VI, section 6.
[90] General Comment 6 (1982).
[91] *Safeguards Guaranteeing Protection on the Rights of Those Facing the Death Penalty*, ECOSOC resolution E/RES/1984/50, 25 May 1984, para 1.
[92] UN document E/CN/4.2000/3, 25 January 2000.
[93] *Lubuto* v. *Zambia*, Human Rights Committee, Communication No.390/1990, HRC 1996 Report, Annex VIII.B.
[94] UN document A/3764, section 116.

method of trial for an offence in circumstances where that choice would lead inevitably to the imposition of the sentence of death.

In Mauritius, the Dangerous Drugs Ordinance 1986 created the offence of unlawful importation of drugs but did not prescribe the penalty. Instead, it authorized the Director of Public Prosecutions to choose whether to prosecute an offender before an Intermediate or District Court (which had power to impose a fine and a term of penal servitude) or in the Supreme Court before a judge sitting without a jury (which had no discretion as to punishment but was obliged to impose the death penalty). The Privy Council, invalidated the empowering provision. As Lord Keith observed: 'The vice of the present case is that the Director's discretion to prosecute importation with an allegation of trafficking either in a court which must impose the death penalty on conviction with a requisite finding or in a court which can only impose a fine or imprisonment enables him in substance to select the penalty to be imposed in a particular case.' The judges pointed out that a discretion vested in a prosecuting authority to choose the court before which to bring an individual charged with a particular offence is not objectionable if the selection of the punishment to be inflicted on conviction remains at the discretion of the sentencing court.[95]

## and not contrary to the provisions of the . . . Covenant and the Convention on . . . Genocide

It was originally suggested that a death sentence must be imposed in accordance with law 'not contrary to the principles of the Universal Declaration of Human Rights'. It was sought to ensure thereby that a person would not be deprived of his life pursuant to unjust laws. But the reference to the UDHR was opposed on the ground, *inter alia*, that its provisions were sometimes broad and vague and lacking in legal precision.[96] It was then agreed that reference be made instead to the ICCPR. The reference to the Genocide Convention was included in the belief that an individual's right to life could not be safeguarded adequately if the group to which he belonged was threatened with extinction. That

[95] *Ali* v. *The Queen*, Privy Council on appeal from the Supreme Court of Mauritius, [1992] 2 WLR 357.

[96] UN document A/2929, chapter VI, section 8.

reference was also intended to further limit the imposition of the death penalty.[97]

The need to conform to the provisions of the ICCPR means that the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of sentence.[98] An extreme case that illustrates the application of this principle concerned a Zairian citizen and former provincial governor. He was living in Brussels, when he was twice sentenced to death by Zairian tribunals without the necessary steps being taken to inform him of the proceedings pending against him (Article 14(3)(a)); without being given adequate time and facilities to prepare his defence (Article 14(3)(b)); without being afforded an opportunity of defending himself through legal assistance of his own choosing (Article 14(3)(d)); and without affording him an opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (Article 14(3)(e)). The Human Rights Committee held that these acts violated Article 6(2) because he was twice sentenced to death in circumstances contrary to the provisions of the covenant, and of Articles 14(3)(a), (b), (d) and (e) because he was charged, tried and convicted in circumstances in which he could not effectively enjoy the safeguards of due process enshrined in these provisions.[99]

The rigorous observance of all the minimum guarantees for a fair trial set out in ICCPR 14 admits of no exception. Accordingly, the Human Rights Committee has found Article 6 to have been violated:

(a) when sentence of death was imposed following a trial at which vital information of an exculpatory nature which was available to the court was not brought to the attention of the jury (Article 14(1));[100]

[97] UN document A/3764, section 117.

[98] Human Rights Committee, General Comment 6 (1982). See also *Peart and Peart* v. *Jamaica*, Human Rights Committee, Communication Nos.464/1991 and 482/1991, HRC 1995 Report, Annex X.E.

[99] *Mbenge* v. *Zaire*, Communication No.16/1977, HRC 1983 Report, Annex X.

[100] *Wright* v. *Jamaica*, Communication No.349/1989, HRC 1992 Report, Annex IX.O. The time of death fixed by the doctor who performed the post-mortem on the deceased implied that the accused was already in police custody when the deceased was shot.

(b) when the accused was sentenced to death following a trial prior to which he had not been granted sufficient time to adequately prepare his defence (Article 14(3)(b));[101]

(c) When sentence of death was imposed without due respect for the requirement that an accused be tried without undue delay (Article 14(3)(c));[102]

(d) where the accused was absent at the hearing of the appeal at which his sentence of death was confirmed although he had specifically indicated that he wished to be present (Article 14(3)(d));[103]

(e) when sentence of death was imposed following a trial at which the accused was not adequately defended by counsel of his own choosing, or where he was not effectively represented on appeal, or even where there had been a failure to make legal representation available at a preliminary hearing (Article 14(3)(d));[104]

(f) where reasonable steps were not taken by the authorities to facilitate the attendance in court of a witness required by the accused (Article 14(3)(e));[105]

[101] *Little* v. *Jamaica*, Communication No.283/1988, HRC 1992 Report, Annex IX.J. The accused had half an hour for consultation with counsel prior to the trial and approximately the same length of time for consultation during the trial. He was not able to consult with counsel prior to or during the appeal. See also *Smith* v. *Jamaica*, Communication No. 282/1988, 31 March 1993, where the defence was prepared on the first day of trial.

[102] *Wright and Harvey* v. *Jamaica*, Communication No.459/1991, HRC 1996 Report, Annex VIII.F (retrial twenty-two months after re-arrest), *McLawrence* v. *Jamaica*, Communication No.702/1996, HRC 1997 Report, Annex VI.V (delay of thirty-one months between trial and dismissal of appeal); *Taylor* v. *Jamaica*, Communication No.707/1996, HRC 1997 Report, Annex VI.W (delay of twenty-eight months between arrest and trial).

[103] *Campbell* v. *Jamaica*, Communication No.248/1987, HRC 1992 Report, Annex IX.D; *Simonds* v. *Jamaica*, Communication No.338/1988, 23 October 1992.

[104] *Pinto* v. *Trinidad and Tobago*, Communication No.232/1987, HRC 1990 Report, Annex IX.H. The accused did not see or approve the grounds of appeal filed on his behalf, nor was he provided with an opportunity to consult with counsel on the preparation of the appeal. In fact, he did not wish to be represented by counsel assigned by the court and had made arrangements to have another lawyer represent him before the Court of Appeal. See also *Kelly* v. *Jamaica*, Communication No.253/1987, HRC 1991 Report, Annex XI.D; *Campbell* v. *Jamaica*, Communication No.248/1987, HRC 1992 Report, Annex IX.D; *Simonds* v. *Jamaica*, Communication No.338/1988, 23 October 1992; *Grant* v. *Jamaica*, Communication No.353/1988, HRC 1994 Report, Annex IX.H; *Wright and Harvey* v. *Jamaica*, Communication No.449/1991, HRC 1996 Report, Annex VIII.F, *Graham and Morrison* v. *Jamaica*, Communication No.461/1991, HRC 1996 Report, Annex VIII.G; *Kelly* v. *Jamaica*, Communication No.537/1993, HRC 1996 Report, Annex VIII.O.

[105] *Grant* v. *Jamaica*, Communication No.353/1988, 31 March 1994; *Burrell* v. *Jamaica*, Communication No.546/1993, HRC 1996 Report, Annex R; *Steadman* v. *Jamaica*,

(g) where there was a failure to make available to the accused the police statement of the only eye witness which contained serious discrepancies (Article 14(3)(e));[106]
(h) where the accused had been compelled under direct or indirect physical or psychological pressure from the investigating authorities to make a statement (subsequently led in evidence at the trial) that was incriminatory in nature (Article 14(3)(g));[107]
(i) where the court of appeal failed to make available reasons in writing following the dismissal of an appeal in a case where sentence of death had been imposed (Article 14(5).[108]

Where the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it is to be carried out is so prolonged – a delay measured in years rather than in months – as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment, it is possible to argue that the taking of the condemned man's life was not 'by due process of law'.[109]

## pursuant to a final judgment rendered by a competent court

The term 'competent court' means a properly constituted court with jurisdiction *ratione materiae*, *ratione personae*, and *ratione loci* previously established by law.[110] A suggestion made at the drafting stage of the ICCPR that the court should also be 'independent' was opposed on the ground that the independence of tribunals was already provided for elsewhere.[111] Proposals for the addition of the words 'rendered

Communication No.528/1993, HRC 1997 Report, Annex VI.C; *Price* v. *Jamaica*, Communication No.572/1994, HRC 1997 Report, Annex X.E.

106 *Peart and Peart* v. *Jamaica*, Communication Nos.464/1991 and 482/1991, HRC 1995 Report, Annex IX.D.

107 *Berry* v. *Jamaica*, Communication No.330/1988, 7 April 1994.

108 *Kelly* v. *Jamaica*, Communication No.253/1987, HRC 1991 Report, Annex XI.D (delay of five years); *Francis* v. *Jamaica*, Communication No.320/1988, 24 March 1993 (delay of nine years); *Smith* v. *Jamaica*, Communication No.282/1988, 31 March 1993 (delay of four years).

109 *Abbot* v. *Attorney-General of Trinidad and Tobago*, Judicial Committee of the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago, (1979) 32 WIR 347, at 352, per Lord Diplock.

110 A similar expression is used in ICCPR 14(1).

111 UN document A/2929, chapter VI, section 7.

unanimously' and 'acting as a court of first instance' were not voted upon.[112] Under the contemporary international and regional human rights regimes, the expression 'competent court' will include the Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights in respect of countries which have accepted the jurisdiction of these bodies, since 'by ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system'.[113]

## the right to seek pardon or commutation of the sentence of death

It was thought essential to mitigate the death penalty in countries where it was still imposed by giving persons sentenced to death the right 'to seek pardon or commutation of the sentence'. It was originally proposed that 'the right to seek amnesty' be also included. That proposal was rejected since amnesty, being a measure decided *proprio motu* by the executive and being in the nature of a collective pardon, it was considered inappropriate to envisage that an individual should seek it.[114]

Does the recognition of a 'right' to seek pardon transform what has hitherto been a purely executive act into one which is judicial, or at least quasi-judicial, in nature? An analogous question was raised in Trinidad and Tobago where the exercise of the prerogative of mercy is now regulated by the constitution. Section 70(1) empowers the Governor-General to grant a pardon or commute a sentence. Section 70(2) requires him to act on the advice of the appropriate minister. Section 71 establishes an advisory committee on the prerogative of mercy which the minister may consult, but whose advice he is not obliged to accept, before tendering his own advice to the Governor-General. It was argued that the functions of the advisory committee were quasi-judicial in their nature and that the condemned prisoner was, therefore, entitled (1) to be shown the material which the minister had placed before it, and (2) to be heard by that committee in reply at a hearing at which he was legally represented. It was also submitted that the possibility of bias existed since both the

[112] UN document A/2929, chapter VI, section 7.

[113] Per Lord Millet in *Thomas* v. *Baptiste*, Judicial Committee of the Privy Council, [1999] 2 LRC 733 at 745.

[114] UN document A/2929, chapter VI, section 9.

minister and the attorney-general were members of that committee. The Privy Council agreed with the Court of Appeal that the constitutional provisions did not have the effect of converting the functions of the minister, in relation to the advice he tendered to the Governor-General, from purely discretionary into in any sense quasi-judicial: 'Mercy is not the subject of legal rights. It begins where legal rights end'.[115]

A few years later, a powerful dissent expressed in the Judicial Committee in an appeal from Jamaica questioned the correctness of this view. Lord Scarman and Lord Brightman observed that the right of the prisoner to the proper exercise of the discretion vested by the constitution in the Governor-General was a 'de facto right', in the sense of a right for which no remedy existed unless its infringement could be shown to be a contravention of one or more of the constitutional provisions that sought to protect fundamental rights. They noted that although the Governor-General derived his powers as a matter of history from the Crown's prerogative of mercy, they were now statutory in character; part of the written constitution. Their effect is to require the Governor-General in every capital case (save in an emergency) to seek the advice of the Privy Council of Jamaica so that he may be advised as to the exercise of his power to delay or commute the sentence; and he is obliged to act on the recommendation of the Privy Council. It is an executive power subject to the sort of safeguard, i.e. the confidential advice of a distinguished independent body, which is a familiar feature in administrative and public law. The condemned man, although the power exists for his protection as well as for the protection of the public interest, has no right to be heard in the deliberations of the Privy Council and the Governor-General (who must, so far as practicable, attend and preside at all its meetings). In short, the exercise of this executive power is a classic illustration of an administrative situation in which the individual affected has a right to expect the lawful exercise of the power but no legal remedy; that is to say, no legal remedy unless the constitution itself provides a remedy.[116]

Neither the Constitution of Trinidad and Tobago nor that of Jamaica expressly recognized a 'right to seek pardon or commutation of sentence'.

[115] *De Freitas* v. *Benny et al* (1975) 27 WIR 318; (1974) 26 WIR 523(CA).

[116] *Riley* v. *Attorney-General* (1982) 35 WIR 279. In other respects (without examining this issue) the minority opinion in this case has now been upheld by the Privy Council on appeal from the Court of Appeal of Jamaica in *Pratt* v. *Attorney-General for Jamaica* [1993] 2 LRC 349.

In those legal systems which have done so by incorporating the provisions of ICCPR 6(4) or ACHR 4(6), a court will probably go beyond the frontiers reached by Lords Scarman and Brightman. If the right to seek pardon is a legal right, the principles of natural justice may, at the very least, need to be observed whenever that right is sought to be exercised.

### Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age

This clause was included as a recognition that minors are accorded preferential treatment under the criminal legislation of most countries. Under firm moral and intellectual guidance, it was believed that the delinquent minor could become a useful member of society. Having considered several formulations, such as 'minors', 'children and young persons', and 'juveniles', it was decided by a majority vote to adopt the words 'persons below eighteen years of age'.[117] ACHR 9(6) also includes persons over seventy years of age. Brennan J of the United States Supreme Court explained why the 'irresponsible conduct' of a juvenile is not considered as morally reprehensible as that of an adult: 'Adolescents are more vulnerable, more impulsive, and less self-disciplined than adults, and are without the same capacity to control their conduct and to think in long-range terms. They are particularly impressionable and subject to peer pressure, and prone to experiment, risk-taking and bravado. They lack experience, perspective, and judgment. Moreover, the very paternalism that our society shows towards youths and the dependency it forces upon them means that society bears a responsibility for the actions of juveniles that it does not for the actions of adults who are at least theoretically free to make their own choices.'[118]

The Inter-American Commission found the United States Government to have violated ADRD 1 in executing two young men, Roach and

[117] UN document A/3764, section 119.

[118] *Stanford* v. *Kentucky*, 492 US 361 (1989), at 394. He also noted that in the United States, all states but two have set the majority age at eighteen or above. No state has lowered its voting age below eighteen. Nor does any state permit a person under eighteen to serve on a jury. Only four states permit persons below eighteen to marry without parental consent. Thirty-seven states have specific enactments requiring that a patient have attained eighteen before she may validly consent to medical treatment. States require parental consent before a person below eighteen may drive a motor car. Legislation in forty-two states prohibits those under eighteen from purchasing pornographic materials. Where gambling is legal, adolescents under eighteen are generally not permitted to participate in it, in some or all of its forms.

Pinkerton, for crimes which they were adjudged to have committed, and which they perpetrated, before their eighteenth birthday. The United States, while being a member state of the Organization of American States (and therefore bound by the ADRD), was not a state party to the ACHR which provided, *inter alia*, that 'capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age'. However, the commission held that in the member states of the OAS there is recognized a norm of *jus cogens* which prohibits the state execution of children. This norm is accepted by all states of the Inter-American system, including the United States. While the commission agreed that 'there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty', such a norm 'is emerging'. The liability of the United States was based on the fact that the federal government had left the issue of the application of the death penalty to juveniles to the discretion of state officials.

> [This] results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right – the right to life – results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man respectively.[119]

[119] *Re Roach and Pinkerton*, Inter-American Commission, Resolution No.3/87, case 9647 (United States), 27 March 1987. But see *Stanford* v. *Kentucky* (above) and *Wilkins* v. *Missouri* 492 US 361 (1989), where five judges of the United States Supreme Court upheld the death penalty for murders committed at sixteen and seventeen years of age by rejecting international standards and opting instead for 'American conceptions of decency'. According to Scalia J, there was no modern national consensus forbidding the imposition of the death penalty for crimes committed at those ages, given that: (a) a majority of the states that permit capital punishment authorize it for crimes committed at age sixteen or above, (b) the number of states which do not permit capital punishment at all is irrelevant to the specific question of the propriety of the death penalty for juveniles, and (c) foreign countries' sentencing practices not reflecting American conceptions of decency are irrelevant to such questions. In his dissenting judgment, Brennan J (with whom Marshall J, Blackmun J

## Sentence of death . . . shall not be carried out on pregnant women

The principal reason for providing that the death sentence should not be carried out on a pregnant woman is to save the life of an innocent unborn child.[120] While it can be argued that the clause merely seeks to delay the carrying out of the sentence of death until the child is born, it would appear that the intention of this clause was that the death sentence should not be carried out at all if it concerned a pregnant woman. The predominant view during the drafting process appeared to be that the normal development of the unborn child might be affected if the mother were to live in constant fear that, after the birth of the child, the death sentence would be carried out.[121] ECOSOC now requires that the death sentence shall not be carried out on new mothers.[122]

and Stevens J agreed) held that to take the life of a person as punishment for a crime committed when below the age of eighteen was cruel and unusual and hence was prohibited by the Eighth Amendment. The majority view was at odds with the prohibition against the execution of minors in the ICCPR 6(5); ACHR 4(5); and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC resolution 1984/50, endorsed in UNGA resolution A/Res/39/51. Legislation prohibiting the death penalty for persons under eighteen years must relate to the offender's age at the time of the offence.

[120] UN document A/3764, section 119.

[121] UN documents A/3764, section 119; A/2929, chapter VI, section 10.

[122] ECOSOC, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, resolution 1984/50, 25 May 1984.

# 11

# The right to freedom from torture

## Texts

### *International instruments*

#### Universal Declaration on Human Rights (UDHR)

5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

#### International Covenant on Civil and Political Rights (ICCPR)

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.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

26. Every person accused of an offence has the right . . . not to receive cruel, infamous or unusual punishment.

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

3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

#### American Convention on Human Rights (ACHR)

5 (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

African Charter on Human and Peoples' Rights (AfCHPR)

5. All forms of exploitation and degradation of man particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

*Related texts*

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (26 June 1987).

Inter-American Convention to Prevent and Punish Torture 1985.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 (1 February 1989).

Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Prisoners 1955, and approved by ECOSOC resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA resolution 3452 (XXX) of 9 December 1975.

Code of Conduct for Law Enforcement Officials, UNGA resolution 34/169 of 17 December 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, UNGA resolution 37/194 of 18 December 1982.

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC resolution 1984/50 of 25 May 1984.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), UNGA resolution 40/33 of 29 November 1985.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173 of 9 December 1988.

Basic Principles for the Treatment of Prisoners, UNGA resolution 45/111 of 14 December 1990.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, UNGA resolution 45/113 of 14 December 1990.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

## Comment

The prohibition of torture enshrines one of the most fundamental values of democratic society.[1] 'Its presence in a national constitution commits the country, and specially its law enforcement officers, to performing their difficult duties with due regard to the essential dignity of every human being. The constitutional instruction must be obeyed by all. It must be enforced, even in hard cases, by the court.'[2]

The right to freedom from torture, as defined in the international and regional instruments, encompasses the prohibition of seven distinct forms of conduct: torture, cruel treatment, inhuman treatment, degrading treatment, cruel punishment, inhuman punishment, and degrading punishment.[3] In respect of each form of conduct, the prohibition is absolute and non-derogable even in a situation of public emergency. The prohibition is unqualified in the sense that recourse to any such form of conduct is not permitted even if it is conclusively demonstrated that law and order cannot be maintained without such recourse.[4] Even in the most difficult of circumstances, such as combating organized terrorism and crime, the human rights instuments prohibit in absolute terms the use of torture or cruel, inhuman or degrading treatment or punishment.[5] No justification or extenuating circumstances may be invoked to excuse a violation of this article[6]; the victim's conduct is irrelevant,[7] and so is any suspicion, however wellfounded, that a person may be involved

[1] *Chahal* v. *United Kingdom,* European Court, (1996) 23 EHRR 413 at 456,

[2] Per Kirby P in *Osifelo et al* v. *R*, Court of Appeal of the Solomon Islands, [1995] 3 LRC 602 at 608.

[3] *Ex parte Attorney-General of Namibia: Re Corporal Punishment* by Organs of State, Supreme Court of Namibia [1992] LRC(Const) 515, at 527–8. ECHR 2 omits reference to 'cruel' treatment or punishment. ADRD 26 refers only to 'cruel, infamous and unusual punishments' imposed on accused persons.

[4] *Tyrer* v. *United Kingdom*, European Court, (1978) 2 EHRR 1, paragraph 38.

[5] *Selcuk and Askar* v. *Turkey*, European Court, (1998) 26 EHRR 477; *Chahal* v. *United Kingdom* (1996) 23 EHRR 413 at 456; *Tomasi* v. *France*, European Court, (1992) 15 EHRR 1 at 33.

[6] Human Rights Committee, General Comment 20 (1992).

[7] *Chahal* v. *United Kingdom*, European Court (1996) 23 EHRR 413, at 457.

in criminal activities.[8] Although torture in all its manifestations is still known to be widely practised by many governments, the international consensus that now exists in respect of its prohibition has probably resulted in the right to freedom from torture attaining the status of a peremptory norm of international law.[9]

According to Matthew Lippman,[10] the use of torture is not a historically unique phenomenon. 'In past eras, torture has been used to "test" the veracity of "unreliable witnesses", such as slaves, or to extract confessions of guilt from suspected criminal offenders, or to force heretics to admit or to recant their religious beliefs. In all such cases, the use of torture was relatively strictly supervised and regulated.' He contrasted the 'new torture' which originated in the Third Reich and which is characterized by the systematic and widespread use of sophisticated scientific techniques against a regime's political opponents. 'Torture thus has become a tool of regimes seeking to govern by the "reign of terror". At the same time, no regime will admit to using torture and the practice of torture generally remains covert and unregulated.' Lippman identifies four purposes for which torture is used by contemporary regimes: (1) to extract information; (2) to prepare defendants for 'show trials'; (3) to incapacitate an individual psychologically or physically and thereby render the individual politically ineffective, or through 'mind control' techniques to 'rehabilitate' or 'brainwash' an individual; (4) to inculcate a climate of fear and political apathy in the general population.[11]

[8] *Aydin* v. *Turkey*, European Court, (1997) 25 EHRR 251.

[9] In *Filartiga* v. *Pena Irala*, 630F. 2d 876 (1980), 77 ILR 169, the United States Court of Appeals, Second Circuit, held that, 'In light of the universal condemnation of torture in numerous international instruments, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice) . . . an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations . . . The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.'

[10] Matthew Lippman, 'The Protection of Universal Human Rights: the Problem of Torture' 1 (4) *Universal Human Rights* (Oct–Dec 1979), 25, at 28. See also N. Rodley, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press, 1987).

[11] Torture was prohibited by law even as far back as in the seventeenth century. The 1688 English Bill of Rights (An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown) prohibited excessive bail, excessive fines, and cruel and unusual punishments. The 1789 French Declaration of the Rights of Man and of the Citizen provided that 'the law should impose only such penalties as are absolutely and evidently necessary'. In 1791, the Eighth Amendment to the United States Constitution mirrored the

By prohibiting torture, the human rights instruments seek to protect both the dignity and the physical and moral integrity of the individual. The state is, therefore, required to afford protection, through legislative and other appropriate measures, against the prohibited acts, whether inflicted by persons acting in their official capacity, outside their official capacity, or in a private capacity. The prohibitions relate not only to acts that cause physical pain but also to those that cause mental suffering to the victim.[12] The protection is not restricted to persons held in detention, but extends also, in particular, to children, pupils and patients in teaching and medical institutions.[13] The Supreme Court of Sri Lanka has held that ragging in a training college for teachers which causes pain or suffering, or physical, mental or emotional distress, to the victims is cruel, inhuman and degrading.[14]

The prohibited forms of conduct are not defined in any of the instruments. In its general comments as well as in its practice, the Human Rights Committee has not attempted to draw sharp distinctions between the various prohibited forms of treatment or punishment. According to the committee, these distinctions depend on the nature, purpose and severity of the particular treatment. Accordingly, in some cases the impugned conduct has been described as 'torture',[15] and in others quite similar treatment has been described as constituting 'treatment';

English Bill of Rights by providing that 'Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' While the English injunction appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as to those disproportionate to the offence involved, the American draftsmen were primarily concerned with proscribing 'tortures' and other 'barbarous' methods of punishment: *Gregg* v. *Georgia*, United States Supreme Court 428 US 153 (1976), per Stewart J at 169.

[12] In *Quinteros* v. *Uruguay*, Communication No.107/1981, HRC 1983 Report, Annex XXII, the Human Rights Committee held that the mental anguish suffered by a mother due to the disappearance of her daughter constituted a violation of this article.

[13] Human Rights Committee, General Comment 20 (1992).

[14] *Navaratne* v. *Chandrasena*, 16 December 1997, SC 172–179/1997, unreported, cited in *Re Supreme Court Special Determination Nos. 6 and 7 of 1998* [1992] 2 LRC 579, at 584–5.

[15] These include the following:

(a) For three months, a detainee was made to stand upright with his eyes blindfolded throughout the day ('planton'). He was only able to rest and sleep for a few hours at a time; he was beaten and given insufficient food; and he was not allowed to receive visitors: *Setelich* v. *Uruguay*, Communication No.63/1979, HRC 1982 Report, Annex VIII.

(b) For ten days, a detainee was kept hanging for hours with his arms behind him. He was given electric shocks, thrown on the floor, covered with chains that were connected

'severe treatment'; 'inhuman and degrading treatment'; 'conditions'; 'ill-treatment'; or 'torture and inhuman treatment'.[16]

with electric current, and kept naked and wet: *De Lopez* v. *Uruguay*, Communication No.52/1979, HRC 1981 Report, Annex XIX.

(c) Over a period of approximately fifty days, a detainee was subjected to the application of electric shocks, the use of the 'submarino' (putting his hooded head into foul water), insertion of bottles or barrels of automatic rifles into his anus, and forced to remain standing, hooded and handcuffed and with a piece of wood thrust into his mouth, for several days and nights: *Motta* v. *Uruguay,* Communication No.11/1977, HRC 1980 Report, Annex X.

(d) An Argentinian concert pianist was threatened with torture or violence to relatives and friends, with deportation to Argentina where he was liable to be executed, and was put through a mock amputation with an electric saw: *Estrella* v. *Uruguay*, Communication No.74/1980, HRC 1983 Report, Annex XII.

(e) A university professor was kept hooded and sitting up straight for seven days and nights ('planton de silla' or 'cine'). He was not allowed to move, but when having a meal he had to kneel on the floor and use the same chair as a table. His wrists were bound with wire and he was taken only twice a day to the toilet. The only opportunity he had to sleep was on the cement floor when he either fell unconscious from the chair or fainted from exhaustion. For many hours at a time he could hear piercing shrieks which appeared to come (and perhaps did come) from an interrogation under torture. The shrieks were accompanied by loud noises and by music played at a very high volume. He was repeatedly threatened with torture and from time to time was abruptly transferred to other places: *Cariboni* v. *Uruguay,* Communication No.159/1983, HRC 1988 Report, Annex VII.A.

[16] A typical example of this practice is the case of *Gilboa* v. *Uruguay*, Communication No.147/1983, HRC 1986 Report, Annex VIII.B, where the committee held that the treatment described below, which was inflicted over a period of fifteen days on a twenty-six-year-old female university student with a view to extracting from her a confession concerning her political activities, constituted 'torture and cruel and degrading treatment':

> The detainee was brutally beaten at the time of her arrest, on the street itself and in full view of passers-by. An "electric prod" was applied, particularly in the genital region. She was strung up, handcuffed, by the chain of her handcuffs. This was carried out in an open yard, in mid-winter, with the victim naked, and happened only once. As a result she lost consciousness, so that she was unable to say how long she was kept in that position. She was also subjected to 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.

The methods described above were allegedly intended gradually to destroy the detainee's personality by continuously assaulting her psychological equilibrium and undermining her physical integrity. See also: *Ramirez* v. *Uruguay*, Communication No.4/1977, HRC 1980 Report, Annex VIII; *Weinberger* v. *Uruguay*, Communication No.28/1978, HRC 1981 Report, Annex IX; *Bouton* v. *Uruguay*, Communication No.37/1978, HRC 1981 Report, Annex XIV; *Carballal* v. *Uruguay*, Communication No.33/1978, HRC 1981 Report, Annex XI; *Izquierdo* v. *Uruguay,* Communication No.73/1980, HRC 1982 Report, Annex XVII; *Penarrieta et al* v. *Bolivia,* Communication No.176/1984, HRC 1988 Report, Annex VII.C; *Portorreal*

Interpreting ECHR 3, the European Court has observed that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the prohibition. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[17] It would seem permissible, therefore, in ascertaining whether torture or any other prohibited treatment or punishment has been inflicted, to apply not only an objective test but also a subjective test. Judge Zekia offered the example of an elderly sick man who is exposed to a harsh treatment – after being given several blows and beaten to the floor, is dragged and kicked on the floor for several hours. 'I would say without hesitation that the poor man has been tortured. If such treatment is applied on a wrestler or even a young athlete, I would hesitate a lot to describe it as an inhuman treatment and I might regard it as a mere rough handling.' He also gave the example of a mother who, for interrogation, is separated from her suckling baby by keeping them apart in an adjoining room and the baby starts yelling of hunger for hours within the hearing of the mother, 'Again I should say both the mother and the baby have been subjected to inhuman treatment; the mother by being agonized and the baby by being deprived of the urgent attention of the mother. Neither the mother nor the child has been assaulted.'[18]

v. *Dominican Republic*, Communication No.188/1984, HRC 1988 Report, Annex VII.D; *Domukovsky et al* v. *Georgia*, Communication Nos.623–4, 626–7/1995, HRC 1998 Report, Annex XI.M; *McTaggart* v. *Jamaica*, Communication No.749/1997, HRC 1998 Report, Annex XI.Y.

[17] *Ireland* v. *United Kingdom*, European Court, (1978) 2 EHRR 25; *Selcuk and Askar* v. *Turkey*, European Court, (1998) 26 EHRR 477. This approach has also been adopted by the Human Rights Committee: see *Vuolanne* v. *Finland*, Communication No.265/1987, HRC 1989 Report, Annex X.J.

[18] *Ireland* v. *United Kingdom* (1978) 2 EHRR 25, at 108. A subjective test was applied by the Supreme Court of Sri Lanka in *Wijeyasiriwardene* v. *Inspector of Police, Kandy* [1989] 2 Sri L R 312, where it was found that a police officer had dealt a blow on the face of a 16-year old, 6-foot athlete who was one of a group of 500 students demonstrating outside a school by stopping vehicles and pasting posters on them. According to M.D.H. Fernando J, while the force used was 'justified' though 'quite excessive', it did not amount to inhuman treatment. He drew a distinction between force which would be cruel in relation to a frail old lady but not necessarily so in relation to a tough young man; force which would be degrading if used on a student inside a quiet orderly classroom, but not so regarded if used in an atmosphere charged with tension and violence.

The inclusion of the word 'treatment' suggests an intention to expand the protection since 'treatment' is broader in scope than 'punishment'.[19] The Supreme Court of Canada thought that it was designed to bring within the prohibition not only punishment imposed by a court as a sentence, but also treatment (something different from punishment) which may accompany the sentence. In other words, the conditions under which a sentence is served.[20] In the Supreme Court of Zimbabwe, Gubbay JA agreed that treatment has a different connotation from punishment. 'It seems to me that what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of sentences of imprisonment are now subject to the proscription. The frequency and conditions of searches of convicts and remand prisoners, the denial of contact with family and friends outside the prison, crowded and unsanitary prison cells and the deliberate refusal of necessary medical care, might afford examples.'[21] The actual application of this article, however, has demonstrated that 'treatment' is not confined to treatment accompanying punishments. Its relevance extends beyond the field of the criminal law and prison administration.

To assess the evidence on which to base the decision whether there has been a violation of this article, the standard of proof to be adopted is proof beyond reasonable doubt. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account.[22] A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented.[23] The European Commission noted, however, that there are certain inherent difficulties in the proof of allegations of torture or ill-treatment: 'First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents

[19] See UN document A/4045, section 19.
[20] *Smith* v. *R* [1988] LRC (Const) 361, per McIntyre J at 388.
[21] *Ncube et al* v. *The State*, Supreme Court of Zimbabwe, [1988] LRC (Const) 442, at 459.
[22] *Ireland* v. *United Kingdom*, European Court, (1978) 2 EHRR 25.
[23] *Denmark et al* v. *Greece*, European Commission, (1976) 12 *Yearbook* 196.

of the police or armed services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authorities, whether the police or armed services or the ministers concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence, there may be reluctance of higher authority to admit, or allow inquiries to be made into, facts which might show that the allegations are true. Lastly, physical traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves little external marks.'[24] Moreover, complete accuracy is seldom to be expected from victims of torture. Such inconsistencies as may exist in the presentation of facts will not necessarily raise doubts about the general veracity of the claim.[25]

Focusing on the responsibility of the state to implement ICCPR 7, the Human Rights Committee has observed that it is not sufficient to prohibit the different forms of treatment or punishment or to make them crimes. Legislative, administrative, judicial and other measures must also be taken to prevent acts of torture or other ill-treatment. Those who violate this article, whether by encouraging, ordering, tolerating or perpetrating prohibited acts must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment. The right to lodge complaints against prohibited forms of treatment must be recognized in the domestic law, and appropriate redress guaranteed by the legal system. Amnesties are generally incompatible with the duty of states to investigate acts of torture,

[24] *Denmark et al* v. *Greece*, European Commission, (1976) 12 *Yearbook* 186–510. The Supreme Court of Sri Lanka has been ambivalent on the question of medical evidence of torture. In *Namasivayam* v. *Gunawardena* [1989] 1 Sri LR 394, Sharvananda CJ held that a complaint of torture, denied by the respondent and not corroborated by medical evidence, was not sufficient to establish a violation of this article. In *Fernando* v. *Perera* [1992] 1 Sri LR 411, Kulatunge J did not consider it proper to reject an allegation of torture merely because the police denied it or because the complainant could not produce medical evidence of injuries. He thought the allegation could be established even in the absence of medically supported injuries.

[25] *Tala* v. *Sweden*, Committee against Torture, Communication No.43/1996, 15 November 1996.

to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.[26] The state is morally responsible for any person held in detention. In the event of injuries being sustained during official custody, it is for the government to satisfactorily establish that the injuries were caused otherwise than – entirely, mainly or partly – by the treatment the detainee underwent while in custody. The requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of the individual.[27]

The difficulty of formulating appropriate definitions, and the fact that inherent in any definition would be the means for its own evasion, probably led the draftsmen of international instruments to leave to judges the function of interpreting and applying the different concepts. While an attempt is made below to analyse the different terms used in the instruments, it is necessary to emphasize that the relevant article in each instrument must be read as a whole and the measures complained of, whatever their description, assessed in each case to see whether, in the context of the article, they constitute one or more of the prohibited forms of treatment. In each case, the facts must be viewed in the light of the circumstances as a whole.

## Interpretation

### *torture*

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines the term 'torture' for the purposes of that instrument as follows:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the

[26] Human Rights Committee, General Comment 20 (1992).
[27] *Ribitsch* v. *Austria*, European Court, (1995) 21 EHRR 573.

> consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.[28]

This definition suggests that:

1. The pain or suffering caused must be severe in order to constitute torture. To determine whether any particular form of ill-treatment should be characterized as 'torture', the European Court stated that regard must be had to the distinction drawn in ECHR 3 between this notion and that of inhuman treatment or degrading treatment. This distinction would appear to have been embodied in the convention to allow the special stigma of 'torture' to attach only to 'deliberate inhuman treatment causing very serious and cruel suffering'.[29] In a complaint against Greece, the European Commission found the following physical brutalities to amount to torture: 'falanga' or 'bastinado' (beating of the feet with a wooden or metal stick or bar which made no skin lesions and left no permanent and recognizable marks, but caused intense pain and swelling of the feet); the application of electric shock, the placing of a metal clamp on the head which was then screwed into both sides of the temples, pulling out of hair from the head or pubic region, kicking of the male genital organs, dripping water on the head, intense noises to prevent sleep, introduction of a stick into the rectum, burning with cigarettes, burial up to the head, insertion of pins under nails, being hung up head downwards over a fire, having one's hands manacled behind the back for several days, or being kept handcuffed for a prolonged

[28] Article 1. Since the Torture Convention seeks to regulate state actions, the definition in that convention is focused on the acts of public officials. A broader definition is contained in the Declaration of Tokyo which was adopted by the Twenty-ninth World Medical Assembly in Tokyo on 10 October 1975. That definition, which is directed to medical personnel, reads thus: 'torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authorities, to force another person to yield information, to make a confession, or for any other reason'. (Cited in Alice Armstrong, 'Torture, Inhuman and Degrading Treatment and the Admissibility of Evidence' (1987) 5 *Zimbabwe Law Review* 95, at 96). For the full text of the Tokyo Declaration, see (1986) 2 *South African Journal on Human Rights* 230. On the Torture Convention, see J.H. Burgers and Hans Danelius, *The UN Convention against Torture* (Netherlands: Martinus Nijhoff Publishers, 1988), Andrew Byrnes, 'The Committee against Torture' in Philip Alston (ed.), *The United Nations and Human Rights* (Oxford: Clarendon Press, 1992), 509.

[29] *Ireland* v. *United Kingdom* (1978) 2 EHRR 25; *Aydin* v. *Turkey* (1997) 25 EHRR 251.

period.[30] In a complaint against Turkey, the European Court considered that 'Palestinian hanging', a practice which involved an individual in police custody being stripped naked and hung by his arms, to be of such a serious and cruel nature that it can only be described as torture.[31]

2. Torture may be either physical or mental. Mental suffering is inflicted through the creation of a state of anguish and stress by means other than bodily assault. As Judge Evrigenis has observed, torture does not necessarily involve violence. 'It can be – and indeed is – carried out by subtle techniques perfected in multidisciplinary laboratories which call themselves scientific. It aims, through new forms of suffering which have little in common with the bodily pain caused by the conventional torments, at inducing even temporarily the disintegration of the human personality, the destruction of man's mental and psychological balance and the annihilation of his will.'[32] In the complaint against Greece, the European Commission accepted the evidence of such forms of non-physical torture. These included solitary confinement, isolation in a police cell without food, water or access to toilets, mock executions, threats to throw a person out of a window, the use of insulting language, rubbing the head with vomit, being forced to strip naked, and being compelled to be present at the torture or inhuman or degrading treatment of relatives or friends. These constituted torture because they were forms of intimidation and humiliation designed to destroy an individual's will and conscience.[33]

3. Torture must be intentionally inflicted. In other words, there must be an intention to cause, or substantial grounds for believing that the individual concerned faces a real risk of being subjected to, physical or mental pain or suffering as a necessary element of the act.[34]

4. The reason motivating torture is irrelevant. The fact that torture was used for cruel and sadistic reasons rather than to obtain information does not detract from its culpability.[35]

[30] *Denmark et al* v. *Greece*, (1976) 12 *Yearbook*,

[31] *Aksoy* v. *Turkey*, (1996) 23 EHRR 553.

[32] *Ireland* v. *United Kingdom*, European Court, (1978) 2 EHRR 25, at 143.

[33] *Denmark et al* v. *Greece* (1976) 12 *Yearbook* 196. See also UN document A/2929, chapter VI, section 13.

[34] *Chahal* v. *United Kingdom*, European Court, (1996) 23 EHRR 413, at 457.

[35] See decision of the Court Martial, Liège, Belgium, of 20 November 1972, *Journal des tribunaux*, 3 March 1973, 148. Cf. *Saman* v. *Leeladasa*, Supreme Court of Sri Lanka, [1989]

5. Pain or suffering arising from lawful sanctions does not constitute torture. The Declaration on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975 exempts 'lawful sanctions' only 'to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners'. In ratifying the convention, two states declared their understanding that the term 'lawful sanctions' refers to those sanctions which are lawful not only under national law but also under international law. None of the other ratifying states questioned this interpretation.[36]

### *cruel treatment*

There is as yet no jurisprudence on the interpretation of the term 'cruel treatment'. Cruel probably implies inhuman and barbarous.[37] Where a prisoner under sentence of death was set upon by prison guards and beaten with a metal detector on his testicle, and all his personal belongings destroyed, the Human Rights Committee described the acts as 'cruel treatment'.[38] The abduction and disappearance of a person and prevention of contact with the family and with the outside world also constitutes cruel (and inhuman) treatment.[39]

### *inhuman treatment*

The distinction between torture and inhuman treatment is derived principally from a difference in the intensity of the suffering inflicted.[40] But the difficulty in distinguishing between 'torture' and 'inhuman

1 Sri LR 1 at 13, where M.D.H. Fernando J mistakenly thought that a brutal attack by a prison officer on a prisoner did not constitute torture because of the absence of a further element: 'an objective of forcing a confession, or of facilitating an interrogation, or otherwise influencing future statements or behaviour'.

[36] See the declarations made by Luxembourg and the Netherlands: UN document CAT/C/2/Rev.1 of 26 February 1991.

[37] *Weems* v. *United States*, United States Supreme Court 217 US 349 (1910), at 370.

[38] *Peart and Peart* v. *Jamaica*, Human Rights Committee, Communication Nos.464/1991 and 482/1991, HRC 1995 Report, Annex X.E.

[39] *Tshshimbi* v. *Zaire*, Human Rights Committee, Communication No.542/1993, HRC 1996 Report, Annex VIII.Q; *Laureano* v. *Peru*, Human Rights Committee, Communication No.540/1993, HRC 1996 Report, Annex VIII.P.

[40] *Ireland* v. *United Kingdom*, European Court, (1978) 2 EHRR 25, paragraph 167.

treatment' is evidenced by the different responses to the treatment complained of in *Ireland* v. *United Kingdom*. In that case, it was established that five techniques of interrogation were applied by the British government in Northern Ireland. These were: *wall-standing*: forcing the detainee to remain for periods of several hours in a 'stress position', described as being spreadeagled against the wall, with the fingers placed high above the head against the wall, the legs spread apart and the feet back, causing him to stand on his toes with the weight of the body mainly on the fingers; *hooding*: placing a black or navy blue bag over the detainee's head and, at least initially, keeping it there all the time except during interrogation; *subjection to noise*: pending his interrogation, holding the detainee in a room where there was a continuous loud and hissing noise; *deprivation of sleep*: pending his interrogation, depriving the detainee of sleep; *deprivation of food and drink*: subjecting the detainee to a reduced diet pending interrogation.

In the unanimous view of the European Commission, the combined use of these five techniques constituted a practice of torture. Applied together, the five techniques were designed to put severe mental and physical stress, causing severe suffering, on a person in order to obtain information from him. Compared with inhuman treatment, the stress caused by the application of the five techniques was not only different in degree. The combined application of methods which prevented the use of the senses, especially the eyes and the ears, directly affected the personality physically and mentally. The will to resist or to give in could not, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break or even eliminate the will. It is this character of the combined use of the five techniques which rendered them not only inhuman and degrading treatment, but also torture. Indeed, the systematic application of the techniques for the purpose of inducing a person to give information showed a clear resemblance to those methods of systematic torture which had been known over the ages. 'Although the five techniques – also called "disorientation" or "sensory deprivation" techniques – might not necessarily cause any severe after-effects, the Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions.'

A majority of the European Court, however, disagreed. The five techniques were applied in combination, with premeditation and for hours at a stretch. They caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. On these two points, the court was of the same view as the commission. In order to determine whether the five techniques should also be qualified as torture, a majority of the court looked for a distinction which derived principally from a difference in the intensity of the suffering inflicted. 'Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.'

In a separate opinion, Judge Matscher did not agree that the distinguishing criterion between inhuman treatment and torture lay primarily in the intensity of suffering imposed.[41] In his view, 'the distinguishing test of the concept of torture is the systematic, calculated (and so deliberate) and prolonged infliction of treatment causing physical or psychological suffering of a certain intensity, the aims including the extraction of admissions, the obtaining of information or simply the breaking of a person's will in order to force him to do something which he would not otherwise do, or even to cause suffering to a person for other reasons (sadism, aggravation of a penalty, etc.)'. While agreeing that the word 'torture' can only be used when treatment inflicted on a person is such as to cause in him physical or psychological suffering of a certain grievousness, he considered the intensity factor to be supplementary to the systematic: 'the more the method is studied and refined, the less sharp will be the pain (physical pain, in the first place) which it needs to cause in order to attain its purpose. One is aware of those modern methods of torture which, superficially, are quite different from the brutal

[41] *Ireland* v. *United Kingdom* (1978) 2 EHRR 25, at 145.

and primitive methods which were used in the past. In that sense torture is in no wise inhuman treatment raised to a greater degree. On the contrary, one can think of brutality causing much more painful bodily suffering but which does not thereby necessarily fall within the concept of torture.'

A mere threat of prohibited conduct, if it is sufficiently real and immediate, may itself be in conflict with the prohibition. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment'.[42]

### *degrading treatment*

Treatment which grossly humiliates an individual before others or drives him to act against his will or conscience is 'degrading'.[43] Accordingly, the five techniques used by the British security forces in the interrogation of suspects in Northern Ireland (see above) were degrading since 'they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.[44] The Austrian Constitutional Court has held that the unnecessary application of physical force in escorting an arrested person to the police station, i.e. forcible seizing, taking hold of the trousers, rapid pushing forward, and violent thrusting into a room, constituted degrading treatment. In its view, acts of physical coercion amount to degrading treatment 'when they are aggravated by being coupled with a disregard of the personal feelings of the individual concerned in a way which affronts his human dignity'.[45] The use of handcuffs on prisoners is not degrading, even if a prisoner so handcuffed is taken through a town;[46] but an issue could arise where a prisoner is secured by fastening one hand and one foot in the same handcuff.[47] The

[42] *Campbell and Cosans* v. *United Kingdom*, European Court, (1982) 4 EHRR 293, paragraph 26.
[43] *Denmark et al* v. *Greece*, European Commission, (1976) 12 *Yearbook*.
[44] *Ireland* v. *United Kingdom*, European Court, (1978) 2 EHRR 25. Cf. *Kamma* v. *Netherlands*, European Commission, (1972) 42 *Collection of Decisions* 22.
[45] Decision of 6 October 1977, (1978) *Juristische Blätter* 312, (1978) 21 *Yearbook* 675.
[46] *X* v. *Italy and Germany*, European Commission, Application 5078/71, (1972) 46 *Collection of Decisions* 35; *X* v. *Austria*, European Commission, Application 2291/64, (1967) 24 *Collection of Decisions* 20.
[47] *Wiechert* v. *Germany*, European Commission, (1964) 7 *Yearbook* 104. See also 114, 124.

use of a strait jacket because of a prisoner's violent behaviour does not fall within the prohibition;[48] nor does the requirement to wear prison uniform.[49] To transfer a prisoner and to display him to the press in a cage, however, constitutes degrading treatment;[50] as does placing him in leg-irons or chains.[51]

The European Commission has found that the rigorous, impersonal application of disciplinary measures on a prisoner, on occasions to the point of absurdity (for example, punishing him for putting his hands in his pockets) had a depressing and discouraging effect upon him, but did not constitute degrading treatment.[52] But four members of the commission who dissented were of the view that the extremely repressive application of disciplinary measures with its destructive effect on the applicant, who was described by a medical witness as a 'hysterical psychopath', amounted to degrading treatment. They found it inadmissible that a prison system should reduce a prisoner to an 'animal-like' state. 'The inflexibility of the prison staff in their rigorous insistence that the applicant conform to the Prison Rules, the isolation of the applicant from other prisoners and from contact with outside help, such as from lawyers, the lack of facilities in the prisons concerned, the understaffing and overcrowding, all took their toll on the applicant . . . that he was reduced to a state of self-degradation for which no serious solution was attempted or found.'[53]

A physical act or condition is not a prerequisite of degrading treatment. The general purpose of the prohibition of degrading treatment is to prevent interference of a particularly serious nature with the dignity of an individual. Accordingly, any action which lowers a person in rank, position, reputation or character can be regarded as 'degrading treatment' if it reaches a certain level of severity. Publicly to single out a group of persons for differential treatment on the basis of race might,

[48] *Zeidler-Kornmann* v. *Germany,* European Commission, (1967) 11 *Yearbook* 1020.

[49] *McFeeley et al* v. *United Kingdom*, European Commission, (1980) 20 *Decisions & Reports* 44.

[50] *Polay Campos* v. *Peru*, Human Rights Committee, Communication No.577/1994, HRC 1998 Report, Annex XI.F.

[51] *Namunjepo* v.*Commanding Officer, Windhoek Prison*, Supreme Court of Namibia, [2000] 3 LRC 360.

[52] *Hilton* v. *United Kingdom*, European Commission, (1978) 3 EHRR 104.

[53] Dissenting Opinion of Messrs Fawcett, Tenekides, Trechsel and Klecker, at 128.

in certain circumstances, constitute a special form of affront to human dignity; and the differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such issue. In the United Kingdom, the Commonwealth Immigrants Act 1968, by subjecting to immigration control citizens who were of Asian origin, discriminated against that group of people on grounds of their colour or race. The racial discrimination to which they had been publicly subjected by the application of the immigration legislation constituted an interference with their human dignity which, in the circumstances, amounted to degrading treatment.[54]

An issue of degrading treatment may arise if state authorities refuse to give formal recognition to an individual's change of sex by effecting a change of name in her identity papers;[55] or on a state's failure to issue a nomadic group with aliens' passports or other documents of identity.[56] But neither the withdrawal of the right to practise medicine as a disciplinary penalty for professional misconduct,[57] nor the obligation to accept a job, to which arguably 'social discredit' is attached, in order to profit from unemployment benefits,[58] adversely affects an individual's personality as to constitute degrading treatment. The Constitutional

[54] *East African Asians* v. *United Kingdom*, Applications 4403–19/70, 4422/70, 4434/70, 4443/70, 4476/70, 4478/70, 4486/70, 4501/70, 4526–30/70, (1973) 3 EHRR 76. In *De Silva* v. *Chairman, Ceylon Fertilizer Corporation* [1989] 2 Sri LR 393, the Supreme Court of Sri Lanka found that an employee of the Fertilizer Corporation who had complained against her chairman to a presidential commission on corruption had been placed on compulsory leave. She was later recalled, but was not allowed the use of her cubicle or allocated any work. The treatment meted out to her gradually deteriorated. She was made to sit in the verandah at a broken table on a broken chair and was sometimes even locked out. The court found that she had been 'degraded and humiliated' by her employer, and had 'suffered a great deal of anguish', but was unwilling to hold that the employer's conduct constituted degrading treatment. According to Jameel J, the treatment amounted to'grossly unfair labour practice', and according to Amerasinghe J, this article is 'not concerned with the conduct of public officials in relation to such matters as one's contractual rights in a place of work'. Both judges apparently overlooked the purpose of the prohibition of degrading treatment, which is to protect the dignity of the individual from any interference of a particularly serious nature, whatever the circumstances in which the interference takes place.

[55] *X* v. *Germany*, Application 6699/74, (1977) 11 *Decisions & Reports* 16.

[56] *48 Kalderas Gypsies* v. *Germany*, (1978) 11 *Decisions & Reports* 221.

[57] *Albert and Le Compte* v. *Belgium*, European Court, (1983) 5 EHRR 533.

[58] *X* v. *Netherlands*, Application 7602/1976, (1976) 7 *Decisions & Reports* 161.

Council of France has held that the concept of human dignity founded on the constitutional prohibition of all forms of degrading treatment makes the possibility for everyone to have a decent home a constitutionally supported objective.[59]

### *Categories of impugned 'treatment'*

#### Use of physical force

The use of physical force may constitute inhuman treatment when it shows a serious disregard for the human dignity of the affected person.[60] Where a participant in a demonstration was pulled by his hair and stepped on by members of the security forces, ECHR 3 was violated.[61] Where in the course of breaking up another demonstration, a participant was kicked in the lower part of his body and hit with a truncheon on his legs by a member of the security force, it was held that, in view of the large number of demonstrators and the small number of members of the security force, the use of truncheons to induce the participants to leave the place was reasonable. The kicking, however, had no connection with the aim of the intervention. It was neither necessary nor moderate, and constituted a violation of ECHR 3.[62] Similarly, on another occasion, the use of rubber batons to overcome resistance was reasonable, but pushing a participant so hard that his head broke through a glass pane constituted inhuman treatment.[63] Where during the clearance of a house one of the occupants was forced by a police officer to raise her jumper and partially expose herself, the court held that the police action demonstrated gross disregard for the human person and constituted a diminution of human dignity.[64]

In a Turkish village, the homes and most of the property of a family were destroyed by security forces, depriving them of their livelihoods and forcing them to leave their village. The exercise appeared to be premeditated and was carried out contemptuously and without respect

[59] Case No.94-359 DC, 19 June 1995, (1995) 1 *Bulletin on Constitutional Case-Law* 31.
[60] Decision of 29 September 1992, Constitutional Court of Austria, B.590/89.
[61] Decision of 10 June 1988, Constitutional Court of Austria, B.483/86.
[62] Decision of 27 February 1987, Constitutional Court of Austria, (1987) 30 *Yearbook* 273.
[63] Decision of 26 February 1991, Constitutional Court of Austria, B.538/89.
[64] Decision of 25 February 1991, Constitutional Court of Austria, B.1605/88.

for the feelings of the individuals concerned who had lived in that village all their lives. They were taken unprepared and had to stand by and watch the burning of their homes. Inadequate precautions were taken to secure their safety, their protests were ignored, and no assistance was provided to them afterwards. Considering in particular the manner in which their homes were destroyed and their personal circumstances, the European Court held that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorized as inhuman treatment within the meaning of ECHR 3. Even if it were the case that the acts in question were carried out without any intention of punishing the individuals concerned, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill-treatment.[65]

## Methods of interrogation

The European Court has observed that where an individual is taken into police custody in good health, but is found to be injured on release, it is incumbent on the state to provide a plausible explanation as to the cause of injury, failing which a clear issue arises under ECHR 3.[66] In respect of such a person, any recourse to physical force which is not made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of ECHR 3.[67] Certain methods of interrogation may, therefore, constitute inhuman treatment. For example, where a person being interrogated is slapped on his ears, beaten on his chest and stomach, and then kicked, such treatment would be inhuman.[68] To keep a suspect chained during his interrogation would also constitute inhuman treatment.[69] It was alleged that during a forty-hour interrogation by the French police, a suspect 'was slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; spat upon, made to stand naked in front of an open window, deprived of food, threatened

[65] *Selcuk and Asker* v. *Turkey* (1998) 26 EHRR 477.
[66] *Aksoy* v. *Turkey*, (1995) 21 EHRR 573.
[67] *Ribitsch* v. *Austria*, (1995) 21 EHRR 573.
[68] *Ireland* v. *United Kingdom*, European Commission, (1976) 19 *Yearbook* 82. The report also details several other instances of physical violence used by security officers on persons being interrogated which constituted inhuman treatment.
[69] Decision of 27 February 1990, Constitutional Court of Austria, B.976/1989.

with a firearm and so on'. The large number of blows inflicted on the applicant and their intensity, which were corroborated by independent medical evidence, constituted inhuman and degrading treatment.[70] The rape of a detainee by an official of the state is an especially grave and abhorrent form of ill-treatment, given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim, and amounts to torture.[71]

The European Commission has observed that all methods of interrogation which go beyond the mere asking of questions and which may bring some pressure on the person being interrogated cannot, by that fact alone, be classified as inhuman.[72] It has attempted to distinguish between inhuman treatment and 'rough treatment': '[There may sometimes be] a certain roughness of treatment of detainees by both police and military authorities [which] is tolerated by most detainees and even taken for granted. Such a roughness may take the form of slaps or blows of the hand on the head or face. This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive varies between different societies and even between different sections of them.'[73] The fact that a person under interrogation submits to such 'rough treatment', particularly when that person is in the custody of the interrogators, cannot mean that such treatment is neither 'inhuman' nor 'degrading'. It is incompatible with the dignity of the human being that he or she should be subjected to any form of physical violence when under interrogation by law enforcement officers.

In the Solomon Islands, a prisoner who had been convicted of murder on the basis of a cautioned statement made by him to the police in the course of their investigations alleged that the statement had been made following a period of cautioned interrogation lasting from 4.36 am to 11.20 am, after more than six days in police custody, and following a general interrogation from about 11.20 pm after having been deprived of rest, food, cigarettes and betel-nut. He alleged that he had been beaten, deprived of food, denied sleep and interviewed in handcuffs. In the

[70] *Tomasi* v. *France,* European Court, (1992) 15 EHRR 1.
[71] *Aydin* v. *Turkey*, European Court, (1997) 25 EHRR 251.
[72] *Ireland* v. *United Kingdom*, European Commission, (1976) 19 *Yearbook* 82.
[73] *Denmark et al* v. *Greece*, European Commission (1976) 12 *Yearbook* 186, at 510.

Court of Appeal, Kirby P expressed the view that if it were established that an accused person in police custody had not only been interviewed by police over the extended hours and at the times stated, but had also been subjected to the ill-treatment described above, such conduct would be inhuman treatment within the constitutional prohibition. He was also inclined to consider commencing a cautioned interrogation at 4.36 am an inhuman treatment in the case of an accused already remanded in police custody for many days.[74]

In this respect, the Human Rights Committee has emphasized the importance of recording the time and place of all interrogations, together with the names of all those present, and of making this information available for purposes of judicial and administrative proceedings. Keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing torture or ill-treatment. To guarantee the effective protection of detained persons, provision should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. Provision should be made against incommunicado detention, and places of detention should be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of detainees also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members. Finally, the committee has stressed that in order to discourage recourse to impugned conduct, the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.[75]

## Conditions of detention

Conditions of detention may give rise to a complaint of inhuman treatment, particularly when such conditions cause a prisoner physical harm

[74] *Osifelo et al* v. *R* [1995] 3 LRC 602. Kirby P was of the view that a confession, even if voluntary in the technical sense, should be excluded if it had been extracted in circumstances which were unfair.

[75] General Comment 20 (1992).

or mental suffering.[76] For example, overcrowded prison cells and prolonged solitary confinement both constitute inhuman treatment.[77] To deprive a prisoner of access to fresh air, sunlight and the ability to exercise properly also constitutes inhuman treatment. The Supreme Court of Zimbabwe explained that treatment incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensibilities which emerge as civilization advances. The court was referring to a high security prisoner under sentence of death for a politically motivated murder who was kept in a small windowless cell and allowed out for half an hour each day for ablution purposes and for a further half hour on weekdays for exercise in an enclosed yard.[78]

In respect of solitary confinement, the European Commission has sought to draw a distinction between, on the one hand, complete sensory isolation coupled with total social isolation which can destroy the personality of a prisoner and which, therefore, constitutes inhuman treatment and, on the other hand, the segregation of a prisoner or

[76] Decision of 16 October 1964, Oberlandesgericht (Court of Appeal), Hamburg, (1965) *Neue Juristische Wochenschrift* 357; (1965) 7 *Yearbook* 534.

[77] Human Rights Committee, General Comment 20 (1992). See also: *Massiotti* v. *Uruguay*, Human Rights Committee, Communication No.25/1978, HRC 1982 Report, Annex XVIII (35 prisoners held in three cells, each measuring 4m by 5m, and 100 prisoners held in a hut measuring 5m by 10m); *Bazzano* v. *Uruguay*, Human Rights Committee, Communication No.5/1977, HRC 1979 Report, Annex VII (five political prisoners confined together in a cell measuring 4.50 by 2.50 metres in conditions seriously detrimental to their health); *Marais* v. *Madagascar*, Human Rights Committee, Communication No.49/1979, HRC 1983 Report, Annex XI (a prisoner kept in solitary confinement for eighteen months in a cell measuring 1m by 2m in the basement of a political police prison); *Bequio* v. *Uruguay*, Human Rights Committee, Communication No.88/1981, HRC 1983 Report, Annex XXII (a prisoner held in solitary confinement for one month in a prison wing of small cells without windows, where an artificial light was left on twenty-four hours a day and other facilities consisted only of a cement bed and a hole in the floor for a WC); *Acosta* v. *Uruguay*, Human Rights Committee, Communication No.110/1981, HRC 1984 Report, Annex XI (a prisoner held incommunicado in a punishment cell for forty-five days); *Wright* v. *Madagascar*, Human Rights Committee, Communication No.115/1982, HRC 1985 Report, Annex VIII (a prisoner kept in a solitary room in a political police prison, chained to a bed spring on the floor, with minimal clothing and a severe rationing of food, for a period of three and a half months).

[78] *Conjwayo* v. *Minister of Justice of Zimbabwe*, Supreme Court of Zimbabwe, (1992) 12 *Commonwealth Law Bulletin* 1582. See also *McCann* v. *The Queen*, Federal Court of Canada (1976) 1FC 570 (T.D.); *Deidrick* v. *Jamaica*, Human Rights Committee, Communication No.619/1995, HRC 1998 Report, Annex XI.K; *Shaw* v. *Jamaica*, Human Rights Committee, Communication No.704/1996, HRC 1998 Report, Annex XI.S.

removal from association with other prisoners for security, disciplinary or protective reasons, which does not amount to inhuman treatment.[79] In making an assessment in each case, the commission has had regard to the surrounding circumstances, including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.[80]

The use of restraints on a prisoner who suffered from a sociopathic personality disturbance did not constitute inhuman treatment.[81] Nor did isolation and strict surveillance of a psychopathic prisoner deemed highly dangerous and untreatable.[82] In appropriate circumstances, the forced administration of medicines to a mentally abnormal prisoner in a psychiatric hospital subject to judicial control would be justified.[83] But the withholding of an adequate supply of food and drinking water or of adequate medical treatment to persons under detention constitutes inhuman treatment,[84] although an issue will not necessarily arise when the authorities withhold access to a particular medical expert if there is a possibility of obtaining medical treatment elsewhere.[85] The repeated soaking of the bedding of a detainee is degrading treatment.[86]

[79] *De Courcy* v. *United Kingdom*, (1966) 24 *Collection of Decisions* 93; *Wemhoff* v. *Germany,* (1969) 30 *Collection of Decisions* 56; *X* v. *United Kingdom,* Application 4203/69, (1970) 13 *Yearbook* 836; Eggs v. *Switzerland*, (1976) 20 *Yearbook* 448; *X* v. *Germany*, Application 7408/76, (1977) 10 *Decisions & Reports* 221; *Ensslin, Baader and Raspe* v. *Germany*, (1978) 21 *Yearbook* 418; *Reed* v. *United Kingdom*, (1979) 19 *Decisions & Reports* 113; *Bonzi* v. *Switzerland*, (1978) 12 *Decisions & Reports* 185; *Krocher and Moller* v. *Switzerland*, (1982) 34 *Decisions & Reports* 24; *X* v. *United Kingdom*, Application 9907/82, (1983) 6 EHRR 576; *R* v. *Denmark*, Application 10263/1983, (1985) 41 *Decisions & Reports* 149.

[80] But cf. observation of Sears J of the High Court of Hong Kong in *Re Suwannapeng* [1990] LRC (Const) 835, at 838, that 'there is no justification in common sense for a man to be put in solitary confinement merely because it is thought he might escape'.

[81] *The State* v. *Frawley* (1976) Irish Reports 365.

[82] *M* v. *United Kingdom*, European Commission, Application 9907/1982, (1983) 35 *Decisions & Reports* 130.

[83] *X* v. *Germany*, European Commission, Application 8518/1979, (1980) 20 *Decisions & Reports* 193.

[84] *Cyprus* v. *Turkey,* European Commission, (1976) 4 EHRR 482, paragraph 405; *Linton* v. *Jamaica,* Human Rights Committee, Communication No.255/1987, 22 October 1992; *Miha* v. *Equatorial Guinea*, Human Rights Committee, Communication No.414/1990, HRC 1994 Report, Annex IX.O; *Williams* v. *Jamaica,* Human Rights Committee, Communication No.609/1995, HRC 1998 Report, Annex XI.I; *Whyte* v. *Jamaica*, Human Rights Committee, Communication No.732/1997, HRC 1998 Report, Annex XI.V.

[85] *X and Y* v. *Switzerland*, Applications 7289/75 and 7349/76, (1977) 20 *Yearbook* 372.

[86] *Young* v. *Jamaica,* Human Rights Committee, Communication No.615/1995, HRC 1998 Report, Annex XI.J.

The Supreme Court of Sri Lanka has observed that while prison rules require prison officers 'without exception, to treat the prisoners with kindness and humanity', the enforcement of discipline might occasionally warrant the use of some force, and some latitude was, perhaps, permissible in deciding whether in the circumstances of a particular case the force used was excessive. According to one judge, 'action and reaction can seldom be nicely balanced where a strict application of [the rule] may not always be practicable'. While a single blow with a baton would be unlawful, he thought it would seldom amount to inhuman treatment. But where a prisoner was subjected to a brutal assault, commencing with kicks and blows, and continued in an aggravated form – by repeated blows with a baton – even after the prisoner complied with the order given by the officer, the court held that the conduct amounted to cruel, inhuman and degrading treatment.[87]

An issue may arise in relation to any lawful sentence of imprisonment as regards the manner of its execution or its length. Life imprisonment as such does not constitute inhuman treatment.[88] But a specialized committee has concluded that 'it is inhuman to imprison a person for life without any hope of release', and that 'nobody should be deprived of the chance of possible release'.[89] Accordingly, a Council of Europe

[87] *Saman* v. *Leeladasa*, Supreme Court of Sri Lanka, [1989] 1 Sri LR 1, per M. D. H. Fernando J. See also *Fernando* v. *Perera* [1992] 1 Sri LR 411, where the Supreme Court of Sri Lanka held that unlawful custody for forty-nine days and detention for fifteen days without a semblance of authority for such detention, and assaults, humiliation and pain (by being blindfolded and chained to a bench) inflicted during this period, constituted degrading treatment and punishment. But cf. *Fernando* v. *Kapilaratne* [1992] 1 Sri LR 305, where the same court held that 'considerable force' used on a detainee was 'perhaps unfortunate' but did not constitute inhuman or degrading treatment. The allegation of force consisted of assaults, including blows on the face, assaults with wooden poles, and kicks on the lower abdomen.

[88] Decision of 27 February 1976, Court of Appeal of the Hague, Netherlands, 8 *Netherlands Yearbook of International Law* (January 1978), (1978) 20 *Yearbook* 772. This same view was taken by the German Federal Constitutional Court in a judgment dated 21 June 1977: (1977) *Europäische Grundrechte Zeitschrift* 267, and by the Italian Constitutional Court in a judgment dated 7/22 November 1974 (1974) 42 *Raccolta uffiziale delle sentenze é ordinanze delle Corte Constituzionale* 353, (1977) *Europäische Grundrechte Zeitschrift* 294–5. But both courts stated that there ought to exist for the prisoner a legal possibility of obtaining conditional release after a reasonable time by means other than an act of grace. See *Kotalla* v. *Netherlands*, European Commission, (1978) 21 *Yearbook* 522; *The State* v. *Tcoeib*, Supreme Court of Namibia, [1997] 1 LRC 90.

[89] General Report on the Treatment of Long-Term Prisoners Prepared by the Sub-Committee No. XXV of the European Committee on Crime Problems 1975, paragraph 77.

resolution recommended to governments of member states, *inter alia*, to 'adapt to life sentences the same principles as apply to long-term sentences and to ensure that a review of sentences with a view to determining whether or not a conditional release can be granted should take place if not done before, after eight to fourteen years of detention and be repeated at regular intervals'.[90] The continued detention of a prisoner whose health has deteriorated is not contrary to this prohibition if the authorities provide the necessary medical care.[91] However, the possibility cannot be excluded that in all the circumstances of a given case the conditions of detention may constitute 'inhuman treatment' which may only be remedied by the termination of detention. This is particularly so in cases of prolonged detention of elderly persons in need of medical attention.[92]

### Delay in the execution of the death sentence

Judicial opinion is divided on whether a delay in the execution of a death sentence, in those countries which retain that penalty, constitutes inhuman treatment.

According to the Privy Council, a state which wishes to retain the death penalty must accept the responsibility for ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. While a condemned person will take every opportunity to save his life through use of the appellate procedure, if he is able thereby to prolong the hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. Accordingly, where a prisoner convicted by a court in Jamaica had spent fourteen years in death row awaiting execution, the delay constituted inhuman treatment. Commuting the sentence of death into one of imprisonment, Lord Griffiths explained: 'There is an

[90] Resolution (76)2 on the Treatment of Long-Term Prisoners, adopted by the Ministers' Deputies of the Council of Europe, 17 February 1976.

[91] *Kotalla* v. *Netherlands*, European Commission, (1978) 21 *Yearbook* 522.

[92] *Bonnechaux* v. *Switzerland*, European Commission, (1979) 3 EHRR 259 (a seventy-four-year-old person was detained pending trial for almost thirty-five months. He had long been a diabetic and subject for sometime to cardiovascular disorders); *X* v. *Ireland*, Application 9554/1981, (1983) 6 EHRR 336; *X* v. *Germany*, Application 9610/81, (1983) 6 EHRR 110.

instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.' While recommending that the entire domestic appeal process ought to be completed within approximately two years, the judges considered that no execution should take place more than five years after sentence.[93]

This period of five years is treated by the Privy Council as the overall period which, in ordinary circumstances, must have passed since sentence of death before it can be said that execution will constitute cruel or inhuman punishment. It is not, however, regarded as a fixed limit applicable in all cases, but rather as a norm which may be departed from if the circumstances of the case so require. Accordingly, in an appeal from Trinidad and Tobago, it was held that execution following a total delay of four years and ten months would constitute cruel and unusual punishment.[94] In an appeal from The Bahamas which, unlike Jamaica, did not provide its citizens with the right of access to the Human Rights Committee, the Privy Council held that in the context of a legal system in which the target period for appeals was two years, the lapse of an overall period of three and a half years following sentence of death before execution, with all the agony of mind which that entailed for the condemned person, was an inordinate time and therefore constituted inhuman or degrading treatment.[95]

The Privy Council observed that it was undesirable to impose any hard and fast limit on the matters to be taken into account when considering whether the right to freedom from cruel, inhuman or degrading treatment had been infringed. Although not generally appropriate, the possibility that pre-trial delay, if sufficiently serious in character, might be capable of being taken into account for the purpose of assessing the impact of delay in carrying out a death sentence could, therefore, not be

[93] *Pratt* v. *Attorney General for Jamaica* [1993] 2 LRC 349. The Privy Council, on appeal from the Court of Appeal of Jamaica, approved a powerful dissenting opinion of Lord Scarman and Lord Brightman expressed ten years previously in *Riley* v. *Attorney General of Jamaica* [1982] 3 All ER 469 that while 'a period of anguish and suffering is an inevitable consequence of sentence of death', a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. 'And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading.'

[94] *Guerra* v. *Baptiste* [1995] 1 LRC 507.

[95] *Henfield* v. *Attorney General* [1997] 1 LRC 506.

excluded. In his dissenting opinion, Lord Steyn argued that it was not realistic to assume that the agony associated with a sentence of death only commenced upon pronouncement of that sentence. From the time of his arrest and charge, or at least from the time of his judicial committal on a charge of murder, an accused person is in real jeopardy of eventually being sentenced to death and hanged, and will usually be held in prison conditions where he will be exposed to the terror of executions from time to time. Therefore, if due to the failure of the state there is inflicted on an accused person the agony of a prolonged delay of his trial on a charge of murder, that must logically be relevant as a contributory and aggravating factor which, depending on the circumstances, may tilt the balance in a given case.[96]

A majority of members of the Human Rights Committee, however, have repeatedly affirmed that prolonged delay in the execution of a sentence of death does not *per se* constitute cruel, inhuman or degrading treatment. In reaching that decision, they considered the following factors: (a) The covenant does not prohibit the death penalty, though it subjects its use to severe restrictions; (b) ICCPR 6 refers generally to abolition in terms which strongly suggest that abolition is desirable. Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the covenant; (c) The provisions of the covenant must be interpreted in the light of the covenant's objects and purposes. As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the covenant that may encourage a state party that retains the death penalty to make use of that penalty should, where possible, be avoided. In the light of these factors, the committee examined the implications of holding the length of detention on death row, *per se*, to be in violation of ICCPR 7.

The first and most serious implication is that if a state party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the covenant, whereas if it refrains from doing so, it will violate the covenant. An interpretation of the covenant leading to this result cannot be consistent with the covenant's object and purpose. This implication cannot be avoided by refraining from determining a definite period of detention

[96] *Fisher* v. *Minister of Public Safety and Immigration et al*, Privy Council on appeal from the Court of Appeal of the Bahamas [1997] 4 LRC 344.

on death row, after which there will be a presumption that detention constitutes cruel and inhuman treatment. Setting a cut-off date exacerbates the problem and gives the state party a clear deadline for executing a person if it is to avoid violating its obligations under the covenant.

The second implication of making the time factor *per se* the determining one, i.e. the factor that turns detention on death row into a violation of the covenant, is that it conveys a message to states parties retaining the death penalty that they should carry out the death sentence as expeditiously as possible after it was imposed. This is not a message the committee would wish to convey. Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the state party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times, the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed.[97]

The Human Rights Committee has stressed that it does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon flows directly from the non-abolition of the death penalty. Nor does it imply that other circumstances connected with detention on death row may not transform that

[97] *La Vende* v. *Trinidad and Tobago*, Communication No.554/1993, HRC 1998 Report, Annex XI.B. See also *Pratt and Morgan* v. *Jamaica*, Communication No.210/1988, HRC 1989 Report, Annex X.F; *Barrett & Sutcliffe* v. *Jamaica*, Communication Nos.270/1988 and 271/1988, HRC 1992 Report, Annex IX.F; *Kindler* v. *Canada*, Communication No.470/1991, 30 July 1993; *Simms* v. *Jamaica,* Communication No.541/1993, HRC 1995 Report, Annex XI.M; *Chaplin* v. *Jamaica*, Communication No.596/94, HRC 1995 Report, Annex VIII.Y; *Clement Francis* v. *Jamaica*, Communication No.606/1994, HRC 1995 Report, Annex X.N; *Graham and Morrison* v. *Jamaica*, Communication No.461/1991, HRC 1996 Report, Annex VIII.G; *Johnson* v. *Jamaica*, Communication No.588/1994, HRC 1996 Report, Annex VIII.W (See also the dissenting opinion of Christine Chanet, P. Bhagwati, M. Bruni Celli, J. Prado Vallejo, F. Pocar, and Francisco José Aquilar Urbina); *Adams* v. *Jamaica*, Communication No.607/1994, HRC 1997 Report, Annex VI.P; *Shaw* v. *Jamaica*, Communication No.704/1996, HRC 1998 Report, Annex XI.S; *Leslie* v. *Jamaica*, Communication No.564/1993, HRC 1998 Report, Annex XI.D; *Deidrick* v. *Jamaica*, Communication No.619/1995, HRC 1998 Report, Annex XI.K; *Whyte* v. *Jamaica*, Communication No.732/1997, HRC 1998 Report, Annex XI.V; *Daley* v. *Jamaica*, Communication No.750/1997, HRC 1998 Report, Annex XI.Z.

detention into cruel, inhuman or degrading treatment or punishment. The committee's jurisprudence has been that where further compelling circumstances relating to the detention are substantiated, that detention may constitute a violation of ICCPR 7. For instance, where a convicted prisoner's mental health seriously deteriorated during a twelve-year incarceration on death row, and other evidence suggested that the prisoner had been regularly beaten by warders and subjected to ridicule and strain during the five days spent in the death cell awaiting execution, the committee agreed that this article had been violated.[98]

The Supreme Court of India agreed with the Privy Council, with the caveat that the cause of the delay is immaterial when the sentence is death. 'Be the cause for the delay the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanizing character of the delay'.[99] In that case, the court held that a delay exceeding two years would be sufficient to entitle a person under sentence of death to demand the quashing of his sentence on the ground that it offended against article 21 of the Indian Constitution, which provides: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' In later cases, the court thought that 'no hard and fast rule' could be laid down that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle a person under sentence of death to invoke article 21 and demand the quashing of the sentence of death,[100] although 'If . . . there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed'.[101]

The Supreme Court of Zimbabwe also considered delay in the execution of a sentence of death relevant, but Gubby CJ refused to accept that delay occasioned by use of appeal procedures should be distinguished:

[98] *Clement Francis* v. *Jamaica*, Communication No.606/1994, HRC 1995 Report, Annex X.N. In *Higgs and Mitchell* v. *Minister of National Security et al* [2000] 2 LRC 656, the Privy Council on appeal from the Court of Appeal of Jamaica thought that the question of whether the treatment of a prisoner was such as to render his subsequent execution an inhuman punishment had to be 'looked at in the round', taking into account all matters that made the totality of his punishment something more than 'the straightforward death penalty'. The matters to be taken into account had to have been an aggravation of the punishment of death.

[99] *Vatheeswaram* v. *State of Tamil Nadu* [1983] 2 SCR 348 at 353, per Reddy J.

[100] *Sher Singh* v. *State of Punjab* [1983] 2 SCR 582.

[101] *Triveniben* v. *State of Gujarat* [1989] 1 SCJ 383, [1992] LRC (Const) 425.

'It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available the condemned prisoner would have shortened and not lengthened his suffering. The situation could be otherwise if he had resorted to a series of untenable and vexatious proceedings which, in consequence, had the effect of delaying the ends of justice.'[102]

### Failure to give sufficient notice of execution

The Privy Council has observed that justice and humanity require that a prisoner under sentence of death should be given reasonable notice of the time of his execution. Such notice is required to enable him to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can to face his ultimate ordeal. The giving of reasonable notice to a condemned person of his impending execution has another distinct purpose to perform, which is to provide him with a reasonable opportunity to obtain legal advice and to have resort to the courts for such relief as may at that time be open to him. The most important form which such relief may take in the circumstances is an order staying his execution. Accordingly, to execute a condemned person without first giving him such notice of his execution would constitute cruel and unusual punishment. The Privy Council considered the settled practice in Trinidad and Tobago of giving the condemned person the benefit of at least four clear days (which included a weekend) between the reading of the death warrant and his execution, to be reasonable notice.[103]

### Deportation or extradition

It is well established in the case law of the European Court that expulsion by a contracting state to the ECHR may give rise to an issue under Article 3, and hence engage the responsibility of that state under that

[102] *Catholic Commission for Justice and Peace* v. *Attorney General*, Supreme Court of Zimbabwe, [1993] 2 LRC 279. Cf. *Jabar* v. *Public Prosecutor* [1995] 2 LRC 349, where the Court of Appeal of Singapore held that, in that country, in cases that carried a mandatory death penalty, the courts had no jurisdiction to consider whether events subsequent to the completion of the judicial process amounted to an infringement of a prisoner's constitutional rights.

[103] *Guerra* v. *Baptiste*, Privy Council on appeal from the Court of Appeal of Trinidad and Tobago [1995] 1 LRC 407.

convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. In these circumstances, ECHR 3 implies the obligation not to expel the person in question to that country.[104] The Human Rights Committee has held that, in such cases, the extraditing state must ensure that such person is not exposed to a real risk of a violation of his rights in the receiving state. In other words, if a state takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the ICCPR will be violated in another jurisdiction, the former state itself will be in violation of the covenant.[105] This view is confirmed by Article 3 of the UN Convention against Torture which states that no state party shall expel, return ('*refouler*') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Since the aim of the determination is to establish whether the individual intended to be deported will be personally at risk of being

[104] *Chahal* v. *United Kingdom* (1996) 23 EHRR 413. This obligation also arises if there is a real danger that a sentence might be imposed in the receiving state which is much harsher than the maximum sentence possible in the requested state: Decision of 23 May 1996, State Council of Liechtenstein, (1996) 2 *Bulletin on Constitutional Case-Law* 236. See also *X* v. *Belgium*, Application 984/61, (1961) 6 *Collection of Decisions* 39; *X* v. *Germany*, Application 1465/62, (1962) 5 *Yearbook* 256; *X* v. *Austria*, Application 2143/62, (1964) 7 *Yearbook* 304; *X* v. *Germany*, Application 3040/67, (1967) 10 *Yearbook* 518; *X* v. *Germany*, Application 6315/73, (1974) 1 *Decisions & Reports* 73; *Becker* v. *Denmark*, (1975) 4 *Decisions & Reports* 215; *X* v. *Germany,* Application 7216/75, (1976) 3 *Decisions & Reports* 137; *Lynas* v. *Switzerland*, (1976) 20 *Yearbook* 412; Decision of 14 December 1994, Constitutional Court of Austria, (1995) 1 *Bulletin of Constitutional Case-Law* 6. ECHR 3 may not be invoked, however, if what is alleged is the mere eventuality of a criminal prosecution for an offence recognized in the deporting state: *X* v. *Germany*, Application 4162/69, (1969) 13 *Yearbook* 806; *X* v. *Germany*, Application 4314/69, (1970) 13 *Yearbook* 900; *X* v. *Denmark*, Application 7465/76, (1976) 7 *Decisions & Reports* 153; *Agee* v. *United Kingdom*, (1976) 7 *Decisions & Reports* 164; *X* v. *Germany*, Application 10564/83, (1984) 8 EHRR 262; *Lukka* v. *United Kingdom*, (1986) 9 EHRR 552.

[105] *Cox* v. *Canada,* Human Rights Committee, Communication No.539/1993, HRC 1995 Report, Annex VIII.M.

subjected to torture in the country to which he will return, it follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person will be in danger of being subjected to torture upon his return to that country. Additional grounds must exist that indicate that the individual concerned will be personally at risk. Similarly the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances.[106] In evaluating the risks run by the person to be deported or extradited, account may be taken of the fact that the deporting or extraditing state has not taken adequate protective measures in regard to the individual concerned, and that the receiving state is not a party to international human rights instruments; or if it is, that it has not recognized the right of individual petition.[107] The prohibition applies even when the danger emanates from persons or groups of persons who are not public officials, if it is shown that the risk is real and that the authorities of the receiving state are unable to obviate the risk by providing appropriate protection.[108] Where a person has not yet been deported, the material point in time must be that of the court's consideration of the case. It follows that, although the historical position is of interest in so far as it might shed light on the current

[106] *Mutombo* v. *Switzerland*, Committee against Torture, Communication No.13/1993, 27 April 1994: the expulsion or return of the author to Zaire in the prevailing circumstances would constitute a violation of CT 3. See also *Khan* v. *Canada*, Committee against Torture, Communication No.15/1994, 15 November 1994: substantial grounds existed for believing that the author, a Kashmiri student leader, would be in danger of being subjected to torture and, consequently, his expulsion or return to Pakistan in the then prevailing circumstances would constitute a violation of CT 3; *Tala* v. *Sweden*, Committee against Torture, Communication No.43/1996, 13 November 1996: the forcible return to Iran of the author, in view of his political affiliations and his history of detention and torture, would constitute a violation of CT 3; the serious human rights situation in Iran, in particular, the high number of executions and instances of torture, had been documented by the UN Special Representative on the Situation of Human Rights in the Islamic Republic of Iran.

[107] *Altun* v. *Germany*, (1983) 36 *Decisions & Reports* 209; *X* v. *Switzerland*, Application 12146/86, (1986) 10 EHRR 10; *X* v. *Netherlands*, Application 12543/86, (1986) 10 EHRR 161.

[108] *HLR* v. *France*, European Court, (1997) 26 EHRR 29: the threat of reprisals by drug traffickers. See also *X* v. *United Kingdom*, Application 8581/79, (1980) 29 *Decisions & Reports* 48: danger from autonomous groups against which the authorities allegedly do not protect the individual concerned.

situation and its likely evolution, it is the present conditions which are decisive.[109]

These principles were applied by the European Court when it examined a complaint from Chahal, a well-known supporter of Sikh separatism who was detained in custody in the United Kingdom pending deportation to India. Although the court did not doubt the good faith of the Indian government in providing assurances about Chahal's safety, it noted that the violation of human rights by certain members of the security forces in the Punjab and elsewhere in India was a recalcitrant and enduring problem. Against that background, the court was not satisfied that the assurances would provide Chahal with an adequate guarantee of safety. The court also considered Chahal's high profile and alleged involvement in terrorism would be more likely to increase the risk to him of harm than otherwise.[110] Examining a complaint from a Somali national who had lost his refugee status in Austria after being convicted of attempted robbery, the European Court attached particular weight to the fact that four years previously the Austrian minister of the interior had granted the applicant refugee status, finding credible his allegations that his activities in an opposition group and the situation in Somalia gave grounds to fear that, if he returned there, he would be subjected to persecution. The court held that the activities of an individual, however undesirable or dangerous, cannot be a material consideration. The protection afforded by ECHR 3 is thus wider than that provided by Article 33 of the Convention on the Status of Refugees 1951.[111]

[109] *Chahal* v. *United Kingdom*, European Court, (1996) 23 EHRR 413. One of the earliest cases in which this principle was invoked concerned a Moroccan air force officer who had participated in an abortive attempt to overthrow the Moroccan government, including an attempt to assassinate the king. He fled to Gibraltar where he requested political asylum. His request being refused, he was sent back to Morocco on the following day. On his return he was tried and executed. In an application brought by his widow, a friendly settlement was reached in the European Commission. Without admitting a violation of ECHR 3, the British government agreed to make a payment of UKP 17,000 to the widow. See *Amekrane* v. *United Kingdom*, European Commission Application 5961/72, 44 *Collection of Decisions* 101 (admissibility), Report of the Commission (friendly settlement), 19 July 1974.

[110] *Chahal* v. *United Kingdom* (1996) 23 EHRR 413.

[111] *Ahmed* v. *Austria* (1996) 24 EHRR 278. See also *Cruz Varas et al* v. *Sweden*, European Court, (1991) 14 EHRR 1; *Vilvarajah et al* v. *United Kingdom*, European Court, (1991) 14 EHRR 24; Decision of 27 May 1991, Verwaltungsgericht Stuttgart, Germany, (1991) 13(10) *Informationsbrief Ausländerrecht*, 298–9 (expulsion of a Palestinian to territories under Israeli occupation would expose him to danger of torture or other treatment prohibited by this article); Decision of 8 October 1992, Schleswig-Holsteinisches Oberverwaltungsgericht,

On the issue of deporting to the country of 'origin' on account of criminal or anti-social behaviour on the part of 'second generation' aliens, including those who had come as children accompanying their migrant worker parents, Judge Morenilla observed in the European Court that while the deportation of such dangerous 'non-nationals' may be expedient for a state, which in this way rids itself of persons regarded as 'undesirable', it is both cruel and inhuman and clearly discriminatory in relation to 'nationals' who find themselves in such circumstances. A state which, for reasons of convenience, accepts immigrant workers and authorizes their residence becomes responsible for the education and social integration of the children of such immigrants as it is for the children of its 'citizens'. Where such social integration fails, and the result is antisocial or criminal behaviour, the state is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question.[112]

A case of extradition concerned Soering, a German national detained in prison in the United Kingdom who was wanted by the United States of America to face charges of murder in the Commonwealth of Virginia, where there was a serious likelihood that he would be sentenced to death.[113] Soering argued that in the circumstances and, in particular, having regard to the 'death row phenomenon',[114] he would thereby be subjected to inhuman treatment. Under the extradition treaty the United Kingdom had sought from the United States an assurance that, in the event of Soering being surrendered and being convicted of the crimes for which he had been indicted, the death penalty, if imposed, would not be carried out. In response, a Virginia county attorney certified that while he intended to seek the death penalty, a representation would be made to the judge at the time of sentencing that it was the wish of the United Kingdom that the death penalty should not be imposed or carried out. This was not an 'assurance' by the executive branch of government as contemplated in the extradition treaty. Meanwhile, following an interview in prison with a German prosecutor from Bonn to whom

(1992) 15(1) *Informationsbrief Ausländerrecht* 18–21 (deportation to Syria of a Syrian Christian who had evaded military service exposed him to real danger of torture).

[112] *Nasri* v. *France* (1995) 21 EHRR 458.

[113] *Soering* v. *United Kingdom*, European Court, (1989) 11 EHRR 439.

[114] The period that a condemned prisoner could expect to spend on death row in Virginia before being executed was on average six to eight years.

Soering made a sworn statement admitting complicity in the murder, a request for his extradition was also made by Germany, a country which, like the United Kingdom, had abolished the death penalty for murder. The European Court recognized that the county attorney's undertaking did not eliminate the risk of the death penalty being imposed. The likelihood of the feared exposure to the 'death row phenomenon' was therefore established. Having regard also to the personal circumstances of the applicant, especially his age and mental state at the time of the offence,[115] the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by ECHR 3, and would give rise to a breach of that article. A further consideration of relevance was that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

A similar question arose when a person who had been found guilty of first degree murder and kidnapping in the State of Pennsylvania, and in respect of whom the jury had recommended the imposition of the death penalty, escaped from prison before he was sentenced and fled to Canada. Following his arrest he argued that the decision of the Canadian minister of justice to surrender him to the United States without first seeking assurances that the death penalty would not be imposed or executed (as provided for in the extradition treaty between the two countries) violated his right under the Canadian Charter of Rights and Freedoms not to be subjected to any cruel or unusual treatment or punishment. Four of the seven judges of the Supreme Court of Canada confirmed the extradition order. In their view, if the execution did take place, it would be in the United States under American law against an American citizen in respect of an offence that took place in the United States; the government had a right and duty to prevent Canada becoming a haven for criminals; there was no clear consensus in the country that capital punishment was morally abhorrent and absolutely unacceptable; and it was important to maintain effective extradition arrangements with other countries. The three dissenting judges (Lamer CJ, Sopinka J and Cory J) proceeded on the basis that the death penalty was *per se* a cruel and unusual punishment. In their view, Canada was obliged not

[115] At the time of the alleged murders, the applicant was eighteen years old, and there was some psychiatric evidence that he 'was suffering from [such] an abnormality of mind . . . as substantially impaired his mental responsibility for his acts'.

to extradite a person to face a cruel and unusual punishment; there was no evidence that American murderers would flood into Canada if the minister had sought assurances in relation to the death penalty; Canada had committed itself in the international community to the abolition of the death penalty; to refuse to seek the assurances was to give an official blessing to the death penalty despite the fact that Canadian public policy stood firmly opposed to its use; and it was possible to achieve the goals of an effective extradition system in a manner that did not deprive the fugitive of the protection of the Charter. As Cory J put it, 'the ceremonial washing of his hands by Pontius Pilate did not relieve him of responsibility for the death sentence imposed by others and has found little favour over the succeeding centuries'.[116]

Other situations in which expulsion may constitute inhuman treatment are where there are adequate medical grounds for the assumption that such a measure might, owing to the mental state of the person concerned, lead to serious damage to health or the danger of suicide;[117] or where there are reasons to fear that extradition, although requested exclusively for common crimes, had been sought in order to proceed against the individual, in violation of the principle of speciality, for political offences or even merely for his political views.[118] However, the expulsion of a married man is not 'inhuman treatment' if his wife, who has acquired his nationality by marriage, had the possibility of following him.[119]

[116] *Kindler* v. *Minister of Justice of Canada*, Supreme Court of Canada, [1991] 2 SCR 779. The Human Rights Committee, by a majority decision, held that ICCPR 7 had not been violated. *Soering* was distinguished on the basis that the facts differed as to the age and mental state of the offender and the conditions on death row in the respective prison systems: *Kindler* v. *Canada,* Communication No.470/1991, 30 July 1993. The Supreme Court of Canada has now held that assurances are constitutionally required in all but exceptional cases: *Minister of Justice* v. *Burns and Rafay* [2001] SCJ 8, 2000 SCC.7.

[117] *Brückman* v. *Germany*, European Commission, (1974) 17 *Yearbook* 458, 46 *Collection of Decisions* 202. The European Court confirmed this view in *D* v. *United Kingdom*, (1997) 24 EHRR 423 when it held that removal of a convicted drug courier in the advanced stages of AIDS to the country of his origin, St Kitts, would expose him to a real risk of dying in the most distressing circumstances and thus to inhuman treatment. See also Decision of 27 June 1995 of the Supreme Administrative Court of Finland, (1995) 2 *Bulletin on Constitutional Case-Law* 154; Decision of 4 February 1997 of the Supreme Administrative Court of Finland, (1996) 3 *Bulletin on Constitutional Case-Law* 349.

[118] *Altun* v. *Germany*, European Commission, (1983) 36 *Decisions & Reports* 209.

[119] Verwaltungsgerichtshof (VwG), Stuttgart, Germany, Decision of 6 November 1953, *Die Öffentliche Verwaltung* (OVw) 1954, 223; Bundesverwaltungsgericht (BVwG) Germany, Decision of 15 December 1955, (1955) 3 *Entscheidungen des Bundesverwaltungsgerichts*

### *cruel punishment*

It has been suggested that 'cruel punishment' imports the same idea as, but probably has a narrower reference than, 'inhuman punishment', since the latter encompasses not only cruel punishment, but also one that is not in accord with human dignity.[120] On the other hand, according to the United States Supreme Court, 'cruel' means 'degrading to the dignity of human beings' and refers to 'inhuman and uncivilized punishments'.[121] In Canada, the prohibition of 'cruel punishment' in section 12 of the Canadian Charter of Rights and Freedoms was considered to govern the quality of the punishment and to be concerned with the effect that the punishment might have on the person on whom it was imposed. The test was one of gross disproportionality, because it was aimed at punishments that were more than merely excessive.[122]

### *inhuman punishment*

The principles which apply to cruel punishments will, in most instances, apply to inhuman punishments as well.

### *degrading punishment*

Since a person may be humiliated by the mere fact of being criminally convicted, a punishment is regarded as 'degrading' if such person is humiliated not simply by his conviction but by the execution of the punishment imposed on him. However, since in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system, for a punishment to be 'degrading' the humiliation or debasement involved

(E/BVwG) 58. Other situations held not to constitute inhuman treatment include the compulsory purchase of a home with a view to demolition: *X* v. *United Kingdom*, European Commission, Application 9261/81, (1982) 28 *Decisions & Reports* 28; the loss by a prisoner of his conjugal and paternal rights: *X* v. *United Kingdom*, European Commission, Application 6564/74, (1975) 2 *Decisions & Reports* 105; and the failure to provide either resources or employment to an ex-prisoner on his release from prison: *X* v. *Belgium*, European Commission, Application 7697/76 (1977) 9 *Decisions & Reports* 194.

[120] *The State* v. *Petrus*, Court of Appeal of Botswana, [1985] LRC (Const) 699, at 725, per Aguda JA.

[121] *Furman* v. *Georgia* 408 US 238 (1972), at 272–5, 282.

[122] *Smith* v. *R* [1988] LRC (Const) 361, at 379–81.

must attain a particular level and must in any event be other than the usual element of humiliation involved in judicial punishment, or must entail a degree of degradation recognizably greater than that inherent in any normal punishment that takes the form of coercion or deprivation of liberty. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.[123]

A degrading punishment does not lose its degrading character because it is believed to be, or actually is, an effective deterrent or aid to crime control. Nor does the fact that one penalty may be preferable to, or have less adverse effects or be less serious than, another penalty of itself mean that the first penalty is not 'degrading'. Publicity may be a relevant factor in assessing whether a punishment is 'degrading', but the absence of publicity will not necessarily prevent a particular punishment from falling into that category since a victim might be humiliated in his own eyes, even if not in the eyes of others.[124]

## *Categories of impugned 'punishment'*

### Punishment involving torture

In the United States, where the Eighth Amendment to the Constitution prohibited 'cruel and unusual punishments', a punishment was originally considered to be cruel only if it involved torture or a lingering death. A legislative act of Utah passed in 1852, which provided that a person convicted of a capital offence 'shall suffer death by being shot, hanged or beheaded' as the court may direct or 'he shall have his option as to the manner of his execution' passed the test of constitutional validity.[125] Similarly, 'causing to pass through the body of a convict a current of electricity of sufficient intensity to cause death' was not considered

[123] *Tyrer* v. *United Kingdom*, European Court, (1978) 2 EHRR 1.

[124] *Tyrer* v. *United Kingdom*, European Court, (1978) 2 EHRR 1. But where a punishment is not actually inflicted, an issue does not arise under this article. Therefore, pupils at a school where degrading punishment is used are not, solely by reason of the risk of being subjected thereto, humiliated or debased in the eyes of others to the requisite degree or at all. See *Campbell and Cosans* v. *United Kingdom*, European Court, (1982) 4 EHRR 293.

[125] *Wilkerson* v. *Utah* 99 US 130 (1878). The court thought that only torturous methods of execution, such as burning a live offender, would violate the Eighth Amendment.

cruel.[126] Nor was it cruel to proceed with the execution of a sentence of death after an accidental failure of equipment had rendered a previous attempt unsuccessful. The Supreme Court sought to draw a distinction between cruelty inherent in the method of punishment and the necessary suffering involved in any method employed to extinguish life humanely. But Justice Burton, speaking for a minority of four justices, argued that instantaneous death should be distinguished from death by instalments. 'If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake.' While five applications would be more cruel and unusual than one, he considered the uniqueness of the case demonstrated that two separated applications were sufficiently 'cruel and unusual' to be prohibited.[127]

The death penalty is a cruel punishment according to the Constitutional Court of South Africa. Describing the manner of execution, Chaskalson P explained: 'Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty.'[128] Ackermann J regarded it as a cruel punishment because of its arbitrary nature: 'Where the arbitrary and unequal infliction of punishment occurs at the level of a punishment so unique as the death penalty, it strikes me as being cruel and inhuman. For one person to receive the death sentence, where a similarly placed person does not, is, in my assessment of values, cruel to the person receiving it. To allow chance, in this way, to determine the life or death of a person, is to reduce the person to a cypher in a sophisticated judicial lottery.'

[126] *In Re Kemmler* 136 US 436 (1890).

[127] *Louisiana* v. *Resweber* 329 US 459 (1947). Besides Justice Burton, the other dissenting judges were Justices Douglas, Murphy and Rutledge.

[128] *The State* v. *Makwanyane* [1995] 1 LRC 269. See also *Mbushuu* v. *The Republic* [1995] 1 LRC 216, where the Court of Appeal of Tanzania also held that the death sentence amounted to cruel and degrading punishment; and *Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney-General* [1993]2 LRC 279 which examined the 'death row phenomenon'.

## Grossly disproportionate punishment

At the turn of the twentieth century, the United States Supreme Court observed that the Eighth Amendment 'is progressive' and did not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but might acquire wider meaning as public opinion became enlightened by humane justice. Accordingly, it measured the relationship between the punishment and the offence and held that punishment for crime should be graduated and proportioned to the offence.[129] In 1910, a sentence of twelve years' imprisonment, in chains, at hard and painful labour, with the automatic loss of many basic civil rights and subjection to lifetime surveillance, for the offence of falsifying an official document, was considered excessive and out of all proportion to the offence, and was therefore cruel.[130] In 1977, the imposition of the death penalty for the crime of rape was considered to be grossly disproportionate and excessive and, therefore, cruel.[131]

Discussing the test of gross disproportionality in the Supreme Court of Canada, Dickson CJ and Lamer J noted that the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter the particular offender or to protect the public from him. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. The two judges added that the effect of the sentence actually imposed must also be measured. The effect is often a composite of many factors and is not limited

[129] This principle was also enshrined in the Magna Carta 1215: A free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity.

[130] *Weems* v. *United States* 217 US 349 (1910).

[131] *Coker* v. *Georgia* 433 US 584 (1977). Cf. *Runyowa* v. *R* [1966] 1 All ER 633, on appeal from the Supreme Court of Southern Rhodesia, where the Privy Council thought that a court could not declare an enactment imposing a punishment to be ultra vires on the ground that the punishment was inappropriate or excessive for the particular offence.

to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied. Sometimes by its length alone or by its very nature the sentence will be grossly disproportionate to the purpose sought. Sometimes it will be the result of the combination of the factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality. For example, twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement.[132]

Any analysis of disproportionality should focus on whether a person deserves the punishment, not simply on whether the punishment will serve a utilitarian goal. 'A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice'.[133] The deprivation of civic rights as a punitive measure for a comparatively light offence is disproportionate.[134]

The forfeiture of the beneficial interests in a property of two persons convicted of offences of selling cannabis, made by a court under the Proceeds of Crime Act 1991, was upheld by the Court of Appeal of New Zealand. The court observed that there was nothing excessive in the forfeiture of tainted property, and it was not disproportionately severe treatment or punishment. There would always be some hardship to an offender and sometimes to a third party when a forfeiture order was made, and to that extent hardship as a consideration under the 1991 Act had to be disregarded. The property in question was largely dedicated to drug dealing. Those who established drug houses could normally expect to lose them unless there was gross or severe disproportion between the gravity of offending and the value of the property sought to be forfeited coupled with any other punishment inflicted on the offender.[135]

[132] *Smith* v. *R*, Supreme Court of Canada, [1988] LRC (Const) 361, at 379–81.

[133] *Rummel* v. *Estelle*, United States Supreme Court, 445 US 263 (1980), at 288, per Powell J.

[134] Decision of 25 January 1963, Amtsgericht, Wiesbaden, (1963) *Neue Juristiche Wochenschrift* 967. See also, Decision of 10 June 1963, Oberlandesgericht (Court of Appeal), Cologne, (1963) *Neue Juristische Wochenschrift* 1748; Decision of 19 January 1965, Bundesgerichtshof (Federal Court of Justice), Federal Republic of Germany, (1965) *Neue Juristische Wochenschrift* 1088; Decision of 20 January 1965, Kammergericht (Court of Appeal), Berlin, (1965) 8 *Yearbook* 550; Decision of 4 October 1967, Amtsgericht (District Court), Berlin-Tiergarten, (1968) *Neue Juristische Wochenschrift* 61.

[135] *Lyall* v *Solicitor-General* [1998] 1 LRC 162.

### Punishment that does not accord with human dignity

In the mid-twentieth century, the United States Supreme Court, reaffirming that the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society', observed that a punishment which did not accord with the dignity of man was cruel. Accordingly, it invalidated the use of denationalization as a punishment for desertion from the army in time of war. 'There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself.'[136]

The punishment of a 'status' is cruel since it involves punishment for a mere propensity, a desire to commit an offence; the mental element is not simply one part of the crime but may constitute all of it. For example, a Californian statute which made the 'status' of narcotic addiction an offence offended the Eighth Amendment. As Justice Douglas observed, 'If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person'.[137] There is, however, a substantial difference between a 'status' and a 'condition'. The offence of 'being found in a state of intoxication in a public place' falls into the latter category. The punishment is not for being a chronic alcoholic, but for being in public while drunk on a particular occasion; behaviour 'which may create substantial health and safety hazards, both for the offender and for members of the general public, and which offends the moral and aesthetic sensibilities of a large segment of the community'.[138]

### Punishment that serves no valid social aim

A punishment is cruel if it makes no measurable contribution to acceptable goals, and hence is nothing more than the purposeless and needless imposition of pain and suffering. Among the criteria to be considered are whether the permissible aims of punishment – such as

[136] *Trop* v. *Dulles* 356 US 86 (1957), at 101. [137] *Robinson* v. *California* 370 US 660 (1962).
[138] *Powell* v. *Texas* 392 US 514 (1968), at 532, per Justice Marshall.

deterrence, isolation, and rehabilitation – can be achieved as effectively by punishing an offence less severely; and whether, if such aims can be so achieved, the imposition of a more severe punishment constitutes unnecessary cruelty.[139] In the Supreme Court of the United States some judges have observed that the imposition of the death penalty is not necessary as a means of stopping convicted individuals from committing further crimes. There was no reason to believe that the death penalty as then administered was necessary either to deter the commission of capital crimes or to protect society. It could not be concluded that death served the purpose of retribution more effectively than imprisonment. It was likely that the death penalty could not be shown to be serving any penal purpose which could not be served equally well by some less severe punishment.[140]

In Canada, the dissenting view of three members of the Supreme Court was that capital punishment *per se* constituted cruel and unusual punishment. 'The death penalty not only deprives the prisoner of all vestiges of human dignity. It is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity . . . If corporal punishment, lobotomy and castration are no longer acceptable and contravene section 12 then the death penalty cannot be considered to be anything other than cruel and unusual punishment. It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration.[141]

The Human Rights Committee as well as some national courts have avoided focusing on the death penalty as such, preferring instead to look for elements in the actual execution of that penalty which might be considered cruel or inhuman. For example, the committee has held

[139] *Rudolph* v. *Alabama*, United States Supreme Court, 375 US 889, per dissenting opinions of Justices Goldberg, Douglas and Brennan.

[140] See, for example, *Furman* v. *Georgia* 408 US 238 (1972). In later judgments – see, for example, *Gregg* v. *Georgia* 428 US 153 (1976) – the same court held that the death penalty does not, in all circumstances, constitute cruel punishment. See also the dissenting opinion of McIntyre JA of the Court of Appeal for British Columbia in *R* v. *Miller and Cockreill* (1975) 24 CCC(2d) 401. The majority in the Court of Appeal and all the judges of the Supreme Court – see *Miller and Cockriell* v. *The Queen* [1977] 2 SCR 680 – agreed that capital punishment for murder did not constitute cruel and unusual punishment.

[141] *Kindler* v. *Minister of Justice of Canada* [1991] 2 SCR 779, at 818, per Cory J. See also *Reference re Ng Extradition (Can)*, Supreme Court of Canada, [1991] 2 SCR 858; *Smith* v. *R*, Supreme Court of Canada [1988] LRC (Const) 361, at 395.

that execution by gas asphyxiation did not meet the test of 'least possible physical and mental suffering' and was therefore cruel and inhuman.[142] The reason for this appears to be the belief that because ICCPR 6 recognizes the continued application of the death penalty in countries which have not abolished it, death as a sanction is for that reason neither cruel nor inhuman. But the covenant did not authorize the death penalty. It merely recognized the fact that in 1966 there were several countries whose domestic law permitted its application. Accordingly, without requiring its immediate abolition, it imposed restrictions on its use in terms which strongly suggested that early abolition was desirable. The fact that it was regarded as an exception of a very temporary nature cannot transform the fundamental character of the death penalty into anything other than a cruel, inhuman and degrading punishment.[143]

### Mandatory or minimum sentence

There are two important principles relating to sentencing. The first is that infliction of punishment is pre-eminently a matter for the discretion of the trial court. Such a discretion permits of balanced and fair sentencing. The second and related principle is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. A mandatory sentence – i.e. a sentence prescribed by the legislature which leaves the court with no discretion at all, either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof – runs counter to both these principles. 'It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence.'[144]

The question whether a mandatory or minimum sentence prescribed by statute constitutes a cruel punishment has been examined in several jurisdictions. While not declaring that the imposition of a mandatory

[142] *Ng* v. *Canada*, Communication No.469/1991, HRC 1994 Report, Annex IX.CC.
[143] See the dissenting opinion of Francisco Aguilar Urbina in *Ng* v. *Canada*, Communication No.469/1991, 5 November 1993.
[144] *The State* v. *Thoms*, 1990 (2) SA 802 (A).

sentence is *per se* unconstitutional, the United States Supreme Court has held that mandatory death sentence statutes were unconstitutional for failing to focus on the circumstances of the particular offence and the character and propensities of the offender.[145] Similarly, in Canada, the Supreme Court has held that the minimum sentence of seven years' imprisonment prescribed by section 5(2) of the Narcotic Control Act for an offence of importing or exporting any narcotic was a cruel and unusual punishment. It was grossly disproportionate in view of the wide net cast by that section, which applied to many instances of varying degrees of dangerousness and disregarded the quantity of drugs imported, the purpose of importing and the offender's previous record. What was offensive was the 'certainty' of the sentence, 'not just the potential'.[146] The Supreme Court of Papua New Guinea examined the question whether certain laws which prescribed minimum custodial sentences for certain offences violated article 36(1) of the Constitution which prohibited, *inter alia*, cruel punishments. Two of the four judges who answered in the negative were nevertheless of the view that such mandatory sentences might constitute cruel punishment if they were excessively disproportionate to the offences. The fifth, McDermott J, concluded that to treat all offences as equally reprehensible up to an arbitrarily set level of punishment was a 'crudely applied, across-the-board approach' which prevented the court from considering any of the usual factors relevant in sentencing offenders, and was therefore unconstitutional.[147]

In Namibia, the Full Bench of the High Court examined the validity of the Stock Theft Act 1990 which provided, *inter alia*, that in the case of a second or subsequent conviction for an offence under the act relating to stock other than poultry, a person would be liable to imprisonment for a period of not less than three years. The court noted that (a) there

[145] *Woodson* v. *North Carolina* 428 US 280 (1976); *Roberts* v. *Louisiana* 428 US 325 (1976); *Roberts* v. *Louisiana* 431 US 633 (1977). See also, *Ncube* v. *The State*, Supreme Court of Zimbabwe, [1988] LRC (Const) 442 at 460.

[146] *Smith* v. *R* [1988] LRC (Const) 361, per Dickson CJ and Lamer J. See also *R* v. *Goltz* (1991) 131 NR 1, where the Supreme Court of Canada held that a minimum penalty of seven days imprisonment, to be served intermittently on consecutive three-day weekends, and a fine of $300 to be paid within three months, for the offence of driving a motor vehicle while prohibited, was not a cruel and unusual punishment.

[147] *Special Constitutional Reference No.1 of 1984: Re Minimum Penalties Legislation* [1985] LRC (Const) 642; [1984] PNGLR 314.

was no limit on the number of years which might elapse between the date of the last previous conviction and the offence in respect of which the minimum penalty was to be applied (in this case a period of approximately twenty-six years); and (b) apart from excluding poultry, the law did not distinguish between the different kinds of stock despite the fact that, for example, it was common knowledge that the value of cattle were five to six times that of sheep. Accordingly, while observing that minimum sentences were not *per se* unconstitutional, the court held that since a sentence of six months' imprisonment would have been appropriate in the instant case, and hypothetically other cases where the minimum sentence would be regarded as equally 'shocking' were 'likely to arise', the provision of law prescribing the mandatory minimum sentence 'of not less than three years' violated the constitutional prohibition of cruel, inhuman and degrading punishment.[148]

Three years later, the High Court of Namibia made a similar finding in respect of the Arms and Ammunition Act 1996 which prescribed a minimum sentence of ten years' imprisonment for possession of 'any armanent'. Recognizing that the principal purpose of the provision was to outlaw the import, supply or possession of arms used in war or insurrection, the court noted that no distinction was made in respect of weapons brought into the country or possessed for reasons entirely unconnected with war or insurrection, such as protection of livestock or persons. A minimum mandatory sentence regardless of whether it is a case of importing, supplying or possessing, and regardless of the purpose of importing, supplying or possessing, casts a very wide net and catches the relatively harmless violation together with the worst. In the result, when it comes to sentencing no distinction is made between the offender who unlawfully keeps a machine rifle on his cattle post in order to protect his livestock from wild animals and the offender who has a cache of weapons for the purpose of insurrection. Accordingly, the court struck out the prescribed minimum term of imprisonment.[149]

[148] *The State* v. *Vries* [1997] 4 LRC 1.

[149] *The State* v. *Likuwa* [2000] 1 LRC 600. Cf. *Shorter et al* v. *R* (1988) 40 WIR 72, where the Court of Appeal of Bermuda, examining the validity of a mandatory consecutive sentence provision, thought that the 'net' cast by section 30(1) of the Firearms Act 1973 could not be said to be unduly wide: 'One does not use a gun in the process of keeping a brothel, or a common gaming house, or counterfeiting currency, or receiving stolen property, or committing offences relating to bankruptcy, etc . . . It is while committing certain offences against the person such as robbery and rape that guns are frequently used.'

The Supreme Court of Sri Lanka has held that imprisonment for not less than two years or a fine not less than Rs.2000 or both, the mandatory forfeiture of an offender's movable and immovable property, and the mandatory removal of his name from a professional register, for the contravention (irrespective of its gravity) of any of the provisions of a proposed Essential Public Services Bill 'savours of cruelty'. The court concluded that 'the piling of punishment on punishment indiscriminately, whether they be old forms of punishment or new, is not a case of the mere excessiveness of the punishments, but one of inhuman treatment and punishment'.[150] In a later case, the same court held that requiring a judge to impose on a person convicted of ragging a mandatory minimum sentence of imprisonment, automatic expulsion from his educational institution, and lifelong disability for admission to any higher educational institution, violated the prohibition of cruel, inhuman or degrading treatment or punishment.[151]

The imposition of a heavier penalty for repeated offences may not amount to a cruel punishment.[152] The purpose of a recidivist statute is to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offences serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. 'This segregation and its duration are based not merely on that person's most recent offence but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for the crimes.'[153] Nor is it cruel to impose a mandatory consecutive sentence of imprisonment.[154]

## Civil imprisonment

Civil imprisonment involves the imprisonment of the debtor at the instance of the creditor, in a public prison, for a fixed term or until, before

[150] *Wickremanayake* v. *The State*, Hansard, 2 October 1979.

[151] *Re Supreme Court Special Determination Nos. 6 and 7 of 1998* [1999] 2 LRC 579.

[152] *Graham* v. *State of West Virginia*, United States Supreme Court, 224 US 616 (1912); *McDonald* v. *Massachusetts*, United States Supreme Court, 180 US 311 (1901).

[153] *Rummel* v. *Estelle*, United States Supreme Court, 445 US 263 (1980), at 284, per Rehnquist J. But see the dissenting opinion of Justices Powell, Brennan, Marshall and Stevens that the mandatory life sentence imposed on the defendant in this case upon his third conviction of a felony was 'grossly disproportionate to his offenses' and therefore cruel.

[154] *Shorter et al* v. *R*, Court of Appeal of Bermuda, (1988) 40 WIR 72.

the expiration of such period, he has paid the debt owing by him. The Supreme Court of Zimbabwe held that imprisonment for a maximum permissible period of three months of a recalcitrant debtor who defiantly refused to pay even though able to do so, would not subject him to a level of severity of treatment within the concept of 'degrading' because such imprisonment was remedial in nature, the debtor having it within his power to end the period of incarceration immediately by paying the debt. Accordingly, since the choice whether to undergo or avoid the indignity and humiliation of incarceration rested with the debtor, the procedure of civil imprisonment did not contravene the constitutional prohibition of degrading punishment.[155] The Constitutional Court of South Africa, however, struck down the statutory authority for such orders in that country on the ground that they were 'overboard'. The law did not adequately distinguish between the fundamentally different categories of judgment debtors: those unwilling to pay even though having the means to do so, and those who simply cannot pay but who failed to prove their inability to do so.[156]

In India, the Supreme Court considered it 'appalling' to cast a person in prison because of his poverty and consequent inability to meet his contractual liability. 'To be poor in this country is no crime and to "recover" debts by the procedure of putting one in prison is too flagrantly violative of article 21 of the constitution ['No person shall be deprived of his life and liberty except according to procedure established by law'] unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills.' The court insisted on some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. What needed to be established was not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree.[157]

[155] *Chinamora* v. *Angwa Furnishers (Pvt) Ltd* [1997] 1 LRC 149.
[156] *Coetzee* v. *Government of the Republic of South Africa, Matiso* v. *Commanding Officer, Port Elizabeth Prison* [1995] 4 LRC 220.
[157] *Vergese* v. *The Bank of Cochin* [1980] 2 SCR 913.

## Judicial corporal punishment

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. It is also institutionalized violence, that is, violence permitted by the law, ordered by the judicial authorities of the state and carried out by the police authorities of the state. The European Court has held that while an offender may not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constitutes an assault on precisely that which it is one of the main purposes of ECHR 3 to protect, namely a person's dignity and physical integrity. It cannot be excluded that the punishment may have adverse psychological effects. The institutionalized character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it are total strangers to the offender. The indignity of having the punishment administered over the bare posterior aggravates to some extent the degrading character of the punishment.[158]

In Botswana, a law which authorized a magistrate to sentence a person to undergo repeated and delayed corporal punishment, i.e. four strokes each quarter in the first and last years of his term of imprisonment, was held to contravene the constitutional prohibition of inhuman or degrading punishment.[159] Similarly, in Namibia, the Supreme Court has held that corporal punishment, whether under an order of a judicial or quasi-judicial authority, constituted degrading and inhuman punishment. Conceding that the question involved the exercise of a value judgment by the court, Mahomed AJA observed that it was a value

[158] *Tyrer* v. *United Kingdom* (1978) 2 EHRR 1. In this case, the offender was fifteen years old when he was sentenced to three strokes of the birch by a juvenile court in the Isle of Man on conviction of assault occasioning actual bodily harm to a senior pupil at his school, the latter having reported the applicant for taking beer into the school. Prior to his appeal being heard by the High Court, he was medically examined and declared fit to receive the punishment. On the same afternoon, after his appeal had been dismissed and having waited a considerable time for a doctor to arrive, the birching was carried out in the presence of his father and the doctor. He was made to take down his trousers and underpants and bend over a table; two policemen held him while a third administered the punishment, pieces of birch breaking at the first stroke. His father had to be restrained from attacking one of the police officers. The applicant's skin was raised but not cut and he was sore for about a week and a half afterwards.

[159] *The State* v. *Petrus,* Court of Appeal of Botswana, [1985] LRC (Const) 699.

judgment which required objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its institutions and its constitution, and further having regard to the emerging consensus of values in the civilized community (of which Namibia is a part) which Namibians share. 'This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.'[160] In Barbados, the Court of Appeal held that whipping with the 'cat-o-nine-tails' was degrading because 'it was calculated to, and it is probable that it will, humiliate and debase the prisoner to such an extent as to constitute an assault on his dignity and feelings as a human being'.[161] The Supreme Court of Zimbabwe has also held that a sentence of whipping imposed on an adult person was an inhuman or degrading punishment.[162]

A similar approach was adopted in Zimbabwe to the imposition of judicial corporal punishment on juveniles. Where a juvenile had been sentenced to receive 'a moderate correction of whipping of four cuts with a light cane, to be administered in private by a prison officer', Gubbay JA observed that there would be no room to differentiate between a moderate correction of whipping and the whipping of an adult solely on account of the dimensions of the cane used. If anything, the extent of the inhumanity, traumatic and psychological effect, present in such a

[160] *Ex parte Attorney General of Namibia, In re Corporal Punishment by Organs of State* [1992] LRC (Const) 515.

[161] *Hobbs et al* v. *The Queen*, 1 September 1991, (1994) 20 *Commonwealth Law Bulletin* 44.

[162] *Ncube et al* v. *The State* [1988] LRC (Const) 442. The process in Zimbabwe was described thus: 'Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down upon a bench in a prone position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. A small square of thin calico is dipped in water, wrung out, and then tied over his buttocks and a blanket or similar form of kidney protector is secured across the small of the prisoner's back above his buttocks. The prisoner's body is then strapped to the bench. The cane is immersed in water to prevent splitting. The strokes are administered from one side across the whole of the buttocks. It is within the power of the officer administering the strokes to determine their strength, timing and, to some extent, their placement upon the buttocks. A second stroke upon the same part as an earlier stroke undoubtedly causes greater pain than were it to be placed elsewhere.'

method of administration would be far greater where the recipient was an impressionable youth. He stressed that the concern of the prohibition was not with the gradation of the number of cuts; it was with the essential nature of the punishment itself. He was prepared to go further than the European Court and hold that judicial whipping, no matter the nature of the instrument used and the manner of execution, is a punishment inherently brutal and cruel; for its infliction is attended by acute physical pain. He considered whipping, which invades the integrity of the human body, to be 'an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime'. In a concurring opinion, Korsah JA added that any law which compels a person, against his will, to expose his posterior to the gaze of total strangers while blindfolded and strapped to a wooden bench degrades and debases that person, and if this is done for the sole purpose of subjecting him to a whipping, then it also dehumanizes him.[163]

## Non-judicial corporal punishment

In Europe the attitude towards the imposition of non-judicial corporal punishment appears to be ambivalent. In the European Court, Judge Fitzmaurice, drawing on his own personal experience, observed that such punishment did not, in the case of a juvenile, attain the level of degradation needed to constitute it as a breach of ECHR 3. 'I have to admit that my own view may be coloured by the fact that I was brought up and educated under a system according to which the corporal punishment of schoolboys (sometimes at the hands of the senior ones – prefects or monitors – sometimes by masters) was regarded as the normal sanction for serious misbehaviour, and even sometimes for what was much less serious. Generally speaking, and subject to circumstances, it was often considered by the boy himself as preferable to probable alternative punishments such as being kept in on a fine summer's evening to copy out 500 lines or learn several pages of Shakespeare or Virgil by heart, or be denied leave of absence on a holiday occasion.' He could not remember that any boy felt degraded or debased; 'indeed, such is the natural perversity of the young of the human species that these occasions were often seen as matters of pride and congratulation – not unlike the way

[163] *A Juvenile* v. *The State* [1989] LRC (Const) 774.

in which members of the student corps in the old German universities regarded their duelling scars as honourable.[164]

But in a dissenting opinion in the European Commission, Mr Klecker asserted that corporal punishment amounted to a total lack of respect for the human being, irrespective of age. He recalled that until the twentieth century, physical chastisement was commonplace in all European countries, in the home as well as at school. Frequently inflicted by husbands on their wives and by masters on their apprentices, it sometimes took the form, in barracks and on board ship, of the most inhuman cruelty. 'The fact is that, having declined everywhere, it can nowadays be legally inflicted only on children.' He considered that corporal punishment had a direct influence on the propensity to learn. 'Pedagogical research has established that, where punishment is severe and accompanied by intense fear, it wholly absorbs the attention and causes panic and mental confusion. Harsh punishment inhibits mental activity and ruins the possibility to learn.'[165]

Where corporal punishment was inflicted on a sixteen-year-old girl pupil in an English school, who under the law was a woman of marriageable age, by a man in the presence of another man, resulting in an injury visible for several days, the European Commission held that the humiliation caused had attained a sufficient level of seriousness to be regarded as degrading.[166] Where a fifteen-year-old boy pupil at an independent school in England was caned four times on his buttocks through his trousers, causing heavy bruising and swelling of both buttocks, the European Commission found a violation of ECHR 3, but the application was subsequently struck out by the court following a friendly settlement under which the British government, without any admission of liability, paid the applicant a sum of UKP 8,000 together with legal costs.[167] But a few months later, where a seven-year-old pupil in an English

[164] *Tyrer* v. *United Kingdom,* European Court, (1978) 2 EHRR 1, at 22–4.

[165] *Campbell and Cosans* v. *United Kingdom*, European Commission: (1980) 3 EHRR 531, at 554. In this case, the European Court (1982) 4 EHRR 293 held that the existence of corporal punishment as a disciplinary measure in the schools attended by the applicants' children violated their rights under Article 2 of Protocol 1 to the European Convention on Human Rights. For a discussion of the judgment, see Sandy Ghandhi, 'Spare the Rod: Corporal Punishment in Schools and the European Convention on Human Rights', [1984] 33 ICLQ 488.

[166] *Warwick* v. *United Kingdom*, Application 9471/81, (1986) 60 *Decisions & Reports* 5.

[167] *Y* v. *United Kingdom*, (1992) 17 EHRR 238.

independent boarding preparatory school was given three 'whacks' on the bottom through his shorts with a rubber-soled gym shoe, without causing any visible bruising but allegedly turning a 'confident, outgoing seven-year-old into a nervous and unsociable child', the European Court held that the punishment was not degrading since the minimum level of severity had not been attained.[168]

In Zimbabwe, Dumbutshena CJ expressed the view that the same considerations governing judicial corporal punishment should apply to physical chastisement of children by schoolteachers, and that even a parent's common law right to 'spank' a child was limited. He was not unmindful of the fact that most parents spanked their wayward children on the buttocks, usually with an open hand or a small switch. 'Some believe that such spankings make men out of children. I do not think so. It is said that spanking children is the parents' common law right. I agree. But if the parents in the process inflict bruises, lacerations, fractures or other such injuries, such corporal punishment would be beyond the protection afforded to the parents by their own common law right.' Such infliction of injury would, in his view, amount to child abuse and would be punishable at common law and, more importantly, it would violate the constitutional prohibition of inhuman or degrading punishment.[169]

In Namibia, the Supreme Court has held that corporal punishment imposed on students in government schools pursuant to a disciplinary code formulated by the ministry of education was both degrading and inhuman. It did not become less so because a juvenile might conceivably have recovered from such a basic infliction on his dignity sooner than an adult might have in comparable situations. Mahomed AJA noted that most of the objections against corporal punishment continued to

[168] *Costello-Roberts* v. *United Kingdom*, (1993) 19 EHRR 12. Feelings of apprehension are not sufficient to constitute degrading punishment; punishment must actually be inflicted on a person: *X* v. *United Kingdom*, European Commission, Application 9119/1980, (1984) 8 EHRR 47.

[169] *A Juvenile* v. *The State* [1989] LRC (Const) 774, at 790. By the Constitution of Zimbabwe (Amendment) (No.11) Act 1990, section 15(3), Parliament provided that 'No moderate punishment inflicted . . . in execution of the judgment or order of a court upon a male person under the age of 18 years as a penalty for breach of any law shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading.' See John Hatchard, 'The Fall and Rise of the Cane in Zimbabwe' [1991] 35 *Journal of African Law*, Nos.1 & 2, 198.

apply where such corporal punishment is sought to be inflicted for acts of indiscipline. 'It remains an invasion on the dignity of the students sought to be punished. It is equally clearly open to abuse. It is often retributive. It is equally alienating. It is also degrading to the student sought to be punished, notwithstanding the fact that the head of the school who would ordinarily impose the punishment might be less of a stranger to the student concerned than a prison official who administers strokes upon a juvenile offender pursuant to a sentence imposed by a court.'[170]

The Constitutional Court of South Africa confirmed the African trend on this issue when it outlawed juvenile whipping. Langa J rejected the argument that corporal punishment might have a reformative effect on the young: 'One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the state, as role model par excellence, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and and respect for the rights of others will be diminished.'[171]

The Human Rights Committee has commented that the prohibition in ICCPR 7 extends to corporal punishment 'including excessive chastisement ordered as a punishment for a crime or as an educative or disciplinary measure' since the article's protection extends also to 'children, including pupils in teaching institutions'.[172] Under English law it is a defence to a charge of assault on a child that the treatment in question amounted to 'reasonable chastisement'. Where a child was severely beaten by his stepfather with a garden cane with considerable force on more than one occasion, this plea was successfully taken before a jury at the latter's trial. The European Court held that the ill-treatment had reached the level of severity prohibited by ECHR 3, but that English law did not provide adequate protection against it. Accordingly, the failure to provide such protection constituted a violation of that article.[173]

[170] *Ex parte Attorney General of Namibia, In re Corporal Punishment by Organs of State* [1992] LRC (Const) 515.

[171] *State* v. *Williams*, Constitutional Court of South Africa, [1995] 2 LRC 103.

[172] Human Rights Committee, General Comment 20 (1992).

[173] *A* v. *United Kingdom* (1998) 27 EHRR 611.

*medical or scientific experimentation*

Medical and scientific experimentation without the free consent of the person concerned is prohibited. Such consent should be sought only after the person concerned has been informed by a physician of the nature, significance and implications of the proposed experiment. Such person may withdraw his or her consent at any time. It follows, therefore, that such experiments ought not to be conducted on minors or persons of unsound mind, or on persons held in custody by judicial order or official directive.[174]

A woman in Denmark complained that she had admitted herself to a hospital to be sterilized since she wished to avoid having further children. Prior to the surgical intervention, she was informed that the result would be almost irreversible and she signed a declaration of consent. The intervention took place by the electric cauterization of the oviducts, a method used for more than two years. The surgeon used, however, a new model of pincers that had been introduced approximately three months earlier which, according to him, had the advantage of preventing damage to adjacent areas, the two poles of the electric current being binded to the pincer itself. On leaving hospital, the applicant was informed that no preventive measures nor any control visits would be necessary. A few weeks later she found herself pregnant. For reasons of principle, she refused to have an abortion, carried through her pregnancy and gave birth to a boy. An official enquiry revealed that on seventy-two sterilizations carried out with pincers of that sort, ten had failed. But according to expert evidence, general sterilization operations included a 1–2 per cent failure rate, and there was no proof that the new instrument produced a bigger failure rate than the old one. The European Commission held that the operation itself could not be considered as such a medical experiment which, if carried out without consent, could constitute a violation of ECHR 3. The applicant voluntarily underwent an operation generally accepted to include a 1–2 per cent failure rate. The operation was carried out in conformity with a generally acknowledged and dependable method which had been in use since 1973. The introduction of the new instrument, which only varied slightly and in a technical way, from the

[174] For national legislation on the subject, see *Human Rights and Bioethics*, Report of the Secretary-General, UN document E/CN.4/1995/74 of 15 November 1994, paragraphs 65–83.

old one, did not change the procedure of the operation as such, but was solely intended to prevent or minimize side-effects already known to the medical staff. The commission also took into consideration that at the time of the operation there was no indication that the operation in question would be less effective and secure from a medical point of view.[175]

[175] *X* v. *Denmark*, Application 9974/82, (1983) 32 *Decisions & Reports* 282.

# 12

# The right to freedom from slavery

## Texts

*International instruments*

Universal Declaration on Human Rights (UDHR)

4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

International Covenant on Civil and Political Rights (ICCPR)

8. (1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
   (2) No one shall be held in servitude.
   (3) (a) No one shall be required to perform forced or compulsory labour;
   (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
   (c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include:
   (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
   (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
(iv) Any work or service which forms part of normal civil obligations.

*Regional instruments*

American Declaration on the Rights and Duties of Man (ADRD)

34. It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defence and preservation, and, in case of public disaster, to render such services as may be in his power.

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

4. (1) No one shall be held in slavery or servitude.
(2) No one shall be required to perform forced or compulsory labour.
(3) For the purpose of this Article the term 'forced or compulsory labour' shall not include:
(a) any work required to be done in the ordinary course of detention imposed according to the provision of Article 5 of this convention or during conditional release from such detention;
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
(d) any work or service which forms part of normal civic obligations.

American Convention on Human Rights (ACHR)

6. (1) No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
(2) No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is

deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

(3) For the purposes of this article the following do not constitute forced or compulsory labour:

(a) work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

(b) military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;

(c) service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

(d) work or service that forms part of normal civic obligations.

### African Charter on Human and Peoples' Rights (AfCHPR)

5. All forms of exploitation and degradation of man, particularly slavery, slave trade, . . . shall be prohibited.

*Related texts:*

Slavery Convention, 25 September 1926 (9 March 1927).

Protocol Amending the Slavery Convention, 23 October 1953 (7 December 1953).

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956 (30 April 1957).

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949 (25 July 1951).

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (3 September 1981).

Convention on the Rights of the Child, 20 November 1989 (2 September 1990).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990.

Rome Statute of the International Criminal Court 1998, Article 7(2)(c).

Inter-American Convention on International Traffic in Minors, 18 March 1994.

ILO Convention (No.29) Concerning Forced Labour, 28 June 1930 (1 May 1932).

ILO Convention (No.105) Concerning the Abolition of Forced Labour, 25 June 1957 (17 January 1959).

## Comment

Freedom from slavery was the first human right to be protected under international law. Under the 1885 General Act of the Berlin Conference on Central Africa, 'trading in slaves' was forbidden. The Slavery Convention which was signed in Geneva on 25 September 1926 was the first multilateral human rights treaty, and was designed to prevent and suppress the slave trade, and to bring about the complete abolition of slavery in all its forms. The Supplementary Convention on the Abolition of Slavery, which was adopted by a conference of plenipotentiaries in 1956, sought to eliminate several institutions and practices similar to slavery. ICCPR 8, ECHR 4 and ACHR 6 contain an absolute prohibition of slavery in all its forms; ICCPR 8 and ACHR 6 also contain an absolute prohibition of the slave trade; and in the case of the latter, of traffic in women. The prohibition of slavery has now crystallized into a rule of customary international law and attained the character of a peremptory norm.[1] Indeed, the International Court of Justice has identified protection from slavery as one of two examples of 'obligations *erga omnes* arising out of human rights law', or obligations owed by a state to the international community as a whole.[2]

ICCPR 8, ECHR 4 and ACHR 6 also contain an absolute prohibition of servitude (in the case of the latter, 'involuntary' servitude) and what

[1] Human Rights Committee, General Comment 24 (1994).

[2] *Barcelona Traction, Light and Power Co. Ltd.* Case *(Belgium* v. *Spain)*, ICJ Reports 1970, 3. See also *Contemporary Forms of Slavery*, Working Paper prepared by David Weissbrodt and Anti-Slavery International, UN Document E/CN.4/Sub.2/2000/3.

appears to be a qualified prohibition of forced or compulsory labour. However, the European Court has explained that ECHR 4(3) which, like ICCPR 8(3)(c) and ACHR 6(3), enumerates four categories of work or service which are deemed not to be included in the concept of forced or compulsory labour, is not intended to 'limit' the exercise of the right to freedom from forced or compulsory labour but to 'delimit' the very content of that right, for it forms a whole with ECHR 4(2) and indicates what 'the term "forced or compulsory labour" shall include' (*'ce qui n'est pas considéré comme "travail forcé ou obligatoire"'*). This being so, ECHR 4(3) serves as an aid to the interpretation of ECHR 4(2). The four categories, 'notwithstanding their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is normal in the ordinary course of affairs'.[3]

Slavery and servitude appear primarily to refer to the status of an individual or the condition of his life, while forced or compulsory labour – 'an expression which has become, at least in legal usage, a term of art' – characterizes the kind of work or service, often incidental or temporary, which he or she performs.[4]

## Interpretation

### *slavery and the slave-trade in all their forms*

'Slavery' is defined in the Slavery Convention as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[5] The 'slave trade' means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged;

[3] *Van Der Mussele* v. *Belgium* (1983) 6 EHRR 163.

[4] J.E.S.Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Clarendon Press, 1987), 55.

[5] Article 1(1). This definition does not refer solely to the concept of slavery in the traditional sense, i.e. as resulting from the African slave trade, but encompasses domestic slavery and other conditions such as debt slavery, the enslaving of persons disguised as adoption of children, and the acquisition of girls by purchase disguised as payment of dowry. See *Report of the Temporary Slavery Commission to the Council of the League of Nations* cited in *Contemporary Forms of Slavery*, Working Paper prepared by David Weissbrodt and Anti-Slavery International, UN Document E/CN.4/Sub.2/2000/3.

and, in general, every act of trade or transport in slaves by whatever means of conveyance.[6] When ICCPR 8 was being drafted, a suggestion to substitute 'trade in human beings' for 'slave-trade', in order that traffic in women would also be covered, was not accepted. It was thought that this article should deal only with the slave-trade as such.[7]

In 1956, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery identified the following institutions and practices which it described collectively as 'servile status':[8]

(a) Debt bondage, i.e. the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.
(b) Serfdom, i.e. the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.
(c) Any institution or practice whereby:

    (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group;
    (ii) the husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or
    (iii) a woman on the death of her husband is liable to be inherited by another person.

(d) Any institution or practice whereby a child or young person under the age of eighteen years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

[6] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, Article 7(c). For an earlier and very similar definition, see Slavery Convention 1926, Article 1(2).
[7] UN Document A/2929, chapter VI, section 17. [8] Articles 1, 7.

The combined definition of slavery set forth in the Convention of 1926 and the Supplementary Convention of 1956 has remained unchanged. 'Ownership' is the common theme in both conventions, but the use of the phrase 'any or all of the powers attaching to the right of ownership' enables a more expansive and comprehensive meaning to be given to this definition. The circumstances of the 'enslaved person' are crucial to identifying what practices constitute slavery, including: (i) the degree of restriction of the individual's inherent right to freedom of movement; (ii) the degree of control of the individual's belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties. These elements of control and ownership, often accompanied by the threat of violence, are central to identifying the existence of slavery. 'The migrant worker whose passport has been confiscated by his or her employer, the child sold into prostitution, or the "comfort woman" forced into sexual slavery – all have the element of choice and control of their lives taken from them and passed to a third party, either an individual or a state.'[9]

## *servitude*

When ICCPR 8 was being drafted, a suggestion to substitute the words 'peonage and serfdom' for 'servitude' was rejected as those words were too limited in scope and had no precise meaning. A proposal was also made to insert the word 'involuntary' before 'servitude' to make it clear that the clause dealt with compulsory servitude and did not apply to normal contractual obligations between persons competent to enter into such obligations. That proposal was rejected on the ground that servitude in any form, whether involuntary or not, should be prohibited. A person may not even contract himself into bondage.[10]

[9] *Contemporary Forms of Slavery*, Working Paper prepared by David Weissbrodt and Anti-Slavery International, UN Document E/CN.4/Sub.2/2000/3, paragraphs 16–20. See also UN Documents E/CN.4/Sub.2/2000/3/Add.1 (forms of slavery); E/CN.4/Sub.2/2000/23 (report of the Working Group on Contemporary Forms of Slavery); E/CN.4/Sub.2/1998/13 (final report of Gay J.McDougall, special rapporteur); E/CN.4/Sub.2/2000/21 (update to the final report); UN Centre for Human Rights, *Contemporary Forms of Slavery* (Geneva: United Nations, 1992); Benjamin Whitaker, *Slavery* (New York: United Nations, 1984).

[10] UN document A/2929, chapter VI, s. 18. ACHR 6, however, retains the expression 'involuntary servitude'.

The term 'servitude' has not been defined in any of the instruments. The European Commission considered that, in addition to the obligation to provide another with certain services, the concept of servitude also includes the obligation on the part of the 'serf' to live on another's property and the impossibility of changing his condition.[11] The High Court of Kenya has held that, where conditions are such that a husband can enforce compliance by his wife with his physical demands without exposing himself to a criminal charge, the order of a Khadi court for restitution of conjugal rights would subject the wife to the effective dominion of the husband to an extent which constitutes 'servitude' within the meaning of section 73(1) of the Constitution of Kenya.[12] In the United Kingdom, four servicemen who had as minors joined the military with the consent of their parents, and served thereafter for a period of nine years, applied for discharge from service. When their applications were refused by the ministry of defence, they complained that their continued service without any possibility of discharge constituted servitude. While noting that there were historical examples of slavery or servitude being used for purposes of military service, the European Commission thought that 'the terms of service if not amounting to a state of servitude for adult servicemen, can neither have that character for boys who enter the services with their parents' consent'. Apart from the fact that changed circumstances could well have vitiated the parents' consent, the commission appears to have overlooked the fact that these servicemen, having reached adulthood, no longer wished to remain in service, and were therefore not comparable to adults who had freely chosen to enter military service.[13]

A situation can be regarded as 'servitude' only if it involves a 'particularly serious' form of 'denial of freedom'. Where a Belgian recidivist was detained in a penal colony in which he was required to work and which he might not leave without permission granted at the discretion of the executive, the European Commission found that the detention was limited in time, subject to revision, and did not affect the legal status of the person concerned. The commission noted that in addition

[11] *Van Droogenbroeck* v. *Belgium*, 9 July 1980. The European Court held that a recidivist placed at the governments disposal was not being held in servitude: (1982) 4 EHRR 443.

[12] *The Republic* v. *Khadi, ex parte Nasreen* [1973] EA 153.

[13] *W, X, Y, and Z* v. *United Kingdom*, Applications 3435–8/67, (1968) 28 *Collection of Decisions* 109.

to the obligation to provide another with certain services, the concept of servitude included the obligation on the part of the 'serf' to live on another's property and the impossibility of changing his condition.[14]

### *forced or compulsory labour*

The question was raised at the drafting stage of ICCPR 8 whether the term 'forced or compulsory labour' should be defined. Reference was made to Article 2 of the ILO Convention Concerning Forced or Compulsory Labour 1930. Paragraph 1 of that article defined the term 'forced or compulsory labour' to mean 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. Paragraph 2 listed a number of exceptions. This definition, especially when read in the light of the exceptions, was not considered entirely satisfactory for inclusion in the covenant.[15] Neither the Council of Europe documents nor the preparatory work of the ECHR provides any guidance on the meaning of this term in ECHR 4(2). But the European Court, considering it 'evident' that the authors of ECHR 4, 'following the example of the authors of ICCPR 8' had based themselves, to a large extent, on ILO Convention No.29, decided to adopt the definition in that convention as 'a starting point' for the interpretation of ECHR 4(2). The court noted a striking similarity 'which is not accidental' between ECHR 4(3) and Article 2(2) of that convention.[16]

In its early jurisprudence, the European Commission expressed the opinion that for there to be forced or compulsory labour – which cannot

[14] *Van Droogenbroeck* v. *Belgium*, 9 July 1980.

[15] UN document A/2929, chapter VI, section 19. In 1957, the ILO adopted a new Convention on the Abolition of Forced Labour which prohibited the use of any form of forced or compulsory labour:

(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
(b) as a method of mobilizing and using labour for purposes of economic development;
(c) as a means of labour discipline;
(d) as a punishment for having participated in strikes; or
(e) as a means or racial, social, national or religious discrimination.

[16] *Van Der Mussele* v. *Belgium* (1983) 6 EHRR 163.

be understood solely in terms of the literal meaning of the words – two cumulative conditions have to be satisfied; firstly, the labour is performed by a person against his or her will; and secondly, either the obligation to carry it out is 'unjust' or 'oppressive', or its performance constitutes 'an unavoidable hardship; in other words, it is 'needlessly distressing' or 'somewhat harassing'. Accordingly, where a Norwegian dentist complained that he had been required by law to perform obligatory public dental service in a remote part of the country for up to two years, the majority of the commission held that since such service was for a short period, provided favourable remuneration, did not involve any diversion from chosen professional work, was only applied in the case of posts not filled after being duly advertised, and did not involve any discriminatory, arbitrary or punitive application, the requirement to perform that service was not unjust or oppressive.[17] In an application from the Netherlands, an unemployed specialized building worker complained to the commission that the obligation imposed on him to accept, in order to receive unemployment benefits, a job offer not in conformity with his qualifications, constituted 'compulsory labour'. Rejecting this complaint, the commission observed that he was not compelled, by any penalty, to accept such an offer; nor did a refusal constitute an infringement of the law. A refusal was only penalized by the temporary loss of unemployment benefits.[18] The obligation imposed by Austrian law on employers to calculate and withhold certain taxes and social security contributions from the salaries and wages of their employees was not a form of compulsory labour.[19]

The European Court, however, has adopted a different approach. It noted that the term 'labour' is not restricted to manual work, but also bears the broad meaning of the French word 'travail' and, therefore, includes professional work too. Labour is 'forced' if it involves physical or mental constraint. 'Compulsory' labour refers not just to any form of legal compulsion or obligation. For example, work to be carried out in pursuance of a freely negotiated contract cannot be regarded as falling within the scope of ECHR 4(2) on the sole ground that one of the parties has undertaken with the other to do that work and will be subject to sanctions if he does not honour his promise. What there has to be is

[17] *Iversen* v. *Norway*, (1963) 12 *Collection of Decisions* 80. See also, *Van Der Mussele* v. *Belgium*, European Commission, 3 March 1982.
[18] *X* v. *Netherlands*, Application 7602/76, (1976) 7 *Decisions and Reports* 161.
[19] *Four Companies* v. *Austria*, European Commission, (1976) 7 *Decisions & Reports* 148.

work 'exacted under the menace of any penalty', and also performed against the will of the person concerned, that is work for which he 'has not offered himself voluntarily'.[20]

The European Court applied these principles when a pupil advocate complained that he was compelled by regulations of the *Ordre* of Avocats (advocates) in Belgium to represent clients without payment if so directed by the *Ordre*. While his refusal to do so would not have been punishable with any sanction of a criminal character, he would run the risk of having the Council of the *Ordre* strike his name off the roll of pupils or deny entry to the register of advocates. These prospects were sufficiently daunting to be capable of constituting the 'menace of a penalty'. The court next considered whether or not the applicant had 'offered himself voluntarily' for the work in question. The service required of the applicant would fall within the prohibition of compulsory labour if it imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of the profession that the service could not be treated as having been voluntarily accepted beforehand. But the court noted that the services to be rendered did not fall outside the ambit of the normal activities of an advocate; they differed from the usual work of members of the Bar neither by their nature nor by any restriction of freedom in the conduct of the case. Secondly, a compensatory factor was to be found in the advantages attaching to the profession, including the exclusive right of audience and of representation enjoyed by advocates in Belgium as in several other countries. In addition, the services in question contributed to the applicant's professional training in the same manner as did the cases in which he had to act on the instructions of paying clients of his own or of his pupil-master. They gave him the opportunity to enlarge his experience and to increase his reputation. In that respect, a certain degree of personal benefit went hand in hand with the general interest which was foremost. Moreover, the obligation to which the pupil advocate objected constituted a means of securing for his client the benefit of counsel; in other words, it was similar to a 'normal civic obligation'. Finally, the burden imposed on the applicant was not disproportionate. While remunerated work may also qualify as forced or compulsory labour, the lack of remuneration constitutes a relevant factor when considering what is proportionate or in the normal course of affairs. But in this instance, while the applicant

[20] *Van Der Mussele* v. *Belgium* (1983) 6 EHRR 163.

did suffer some prejudice by reason of the lack of remuneration, that prejudice went hand in hand with advantages and had not been shown to be excessive. The applicant did not have a disproportionate burden of work imposed on him, and the amount of expenses directly occasioned by the cases in question was relatively small.[21]

The European Commission also considered prior consent to be a decisive factor in determining whether the work complained of is 'forced or compulsory'. In the Netherlands, a professional football player who renounced his contract with his football club was prevented from entering into a contract with another club in view of the system of compensation for the transfer of professional football players prescribed by the Royal Dutch Football Association in the Rules on Professional Football. These rules required the club entering into a contract with such player to pay compensation to the former club. In view of the prohibitive sum that was requested by the former club, which the club with which he wished to contract was unable to pay, he was compelled either to work for his previous employer or accept employment with another club against his will. The commission observed that the applicant had freely chosen to become a professional football player knowing that he would be affected by rules governing the relationship between him and his future employers. It could not be claimed, therefore, that he had acted against his will. Nor could the system of compensation be considered to be oppressive since it did not directly affect the applicant's contractual freedom.[22] The European Court, however, has since held that prior consent, without more, does not warrant the conclusion that the obligations incumbent on a person did not constitute forced or compulsory labour. Account must necessarily also be taken of other factors.[23]

### *the performance of hard labour in pursuance of a sentence to such punishment by a competent court*

ICCPR 8 states that the prohibition of forced or compulsory labour does not preclude, in countries where imprisonment with hard labour may be

[21] *Van Der Mussele* v. *Belgium* (1983) 6 EHRR 163. See also, *X* v. *Germany*, Application 4653/70, (1974) 46 *Collection of Decisions* 22; *Gussenbauer* v. *Austria,* (1972) 42 *Collection of Decisions* 41; *X and Y* v. *Germany*, Application 7641/76, (1976) 10 *Decisions & Reports* 224; *X* v. *Germany*, Application 8410/78, (1979) 18 *Decisions & Reports* 216.

[22] *X* v. *Netherlands*, Application 9322/81, (1983) 32 *Decisions & Reports* 180.

[23] *Van Der Mussele* v. *Belgium* (1983) 6 EHRR 163.

imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court. The performance of hard labour may be required only if explicitly stated in the sentence of the court. The expression 'hard labour', however, is not intended to denote some special form of punishment, but the penalty which existed in some countries at the time when ICCPR 8 was being drafted.[24]

*any work or service . . . 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*

This is the first of four kinds of work or service not deemed to be included within the term 'forced or compulsory labour'. It covers ordinary prison work which persons under detention pursuant to a court order may be required to do. It includes routine work performed in the course of detention and work done to promote the prisoner's rehabilitation. The phrase 'normally required of a person who is under detention' refers to work ordinarily done by prisoners and not to hard labour. The inclusion of the word 'normally' was intended as a safeguard against arbitrary decisions by prison authorities with regard to the work which might be required of persons under detention. The term 'detention' covers all forms of compulsory residence in institutions in consequence of a court order.[25] The reference to conditional release is a recognition of the fact that in certain countries the law permits the release of a convicted person before the end of his sentence, with a view to his rehabilitation and preparation for normal life. Any work required of such a person is also not considered 'forced or compulsory labour'.[26]

The following has been regarded as work 'required to be done in the ordinary course of detention' within the meaning of ECHR 4(3)(a):

(a) work required under Belgian law of a person who has, by order of a magistrate, been placed at the disposal of the government under legislation 'for the suppression of vagrancy and begging'; because it is aimed at his or her rehabilitation and is based on a general

[24] UN document A/2929, chapter VI, sections 20, 21.
[25] UN document A/2929, chapter VI, section 22. [26] UN document A/4045, section 28.

standard which finds its equivalent in several member states of the Council of Europe;[27]

(b) carpentry in a specially equipped workshop in Switzerland;[28]

(c) a requirement in Belgium that a recidivist 'placed at the government's disposal' for ten years earn from work at least 12,000 BF in order to qualify for conditional release (the sum being sufficient to cover the cost of his board and lodging during the first month of his release) 'since it was calculated to assist him in reintegrating himself into society';[29]

(d) a system of prison labour in Germany described as 'lease', 'contract' and 'piece-price', whereby prisoners were employed by private firms for extremely small remuneration, since 'such work offered more possibilities of professional training and re-adaptation'.[30]

But where the Cyprus government complained that a great number of persons detained by the Turkish army in the Turkish-occupied areas of the island, including women, were during their period of detention required to work, under threat of arms and in many cases throughout the whole period of detention, on cleaning water-courses, repairing houses, constructing roads and bridges, erecting monuments, removing dead bodies out of houses, cleaning military headquarters, and transporting looted goods, the European Commission found 'indications of compulsion to perform certain work'. However, by a majority vote it decided that 'the incompleteness of the investigation does not allow any conclusions to be made on this issue'.[31]

### *any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors*

Service of a military character and any national service required by law of conscientious objectors is not regarded as 'forced or compulsory work'.[32]

[27] *De Wilde, Ooms and Versyp* v. *Belgium (No.1)*, European Court, (1971) 1 EHRR 373.

[28] *X* v. *Switzerland*, Application 8500/79, (1979) 18 *Decisions & Reports* 238.

[29] *Van Droogenbroeck* v. *Belgium,* European Court, (1982) 4 EHRR 443.

[30] *21 Detained Persons* v. *Germany*, European Commission, (1968) 27 *Collection of Decisions* 97.

[31] *Cyprus* v. *Turkey*, (1976) 4 EHRR 482.

[32] *L T K* v. *Finland*, Human Rights Committee, Communication No.185/1984, HRC 1985 Report, Annex xxi. It does not necessarily follow that a right to conscientious objection is thereby created.

A proposal that ICCPR 8 specify that the national service required of conscientious objectors 'be carried out in conditions equal to those accorded to all other citizens subjected thereto', and that such service 'be compensated with maintenance and pay not inferior to what a soldier of the lowest rank receives', was rejected. In support of its inclusion it was pointed out that in certain countries where conscientious objectors were released from military obligations, they were subjected to treatment inconsistent with human dignity; hence it was essential to provide some minimum safeguards. Those who opposed the proposal argued that it was inappropriate to go into details concerning the treatment of conscientious objectors.[33]

It was unsuccessfully argued before the Human Rights Committee that a Finnish law that required conscientious objectors to perform either eleven months of unarmed service in the military or sixteen months of civilian service in lieu of eight months of military service, was discriminatory within the meaning of ICCPR 26.[34] In Belgium, the rule stipulating that a soldier who had resigned was liable for active service if he had been paid during his period of freely provided training was held not to constitute forced or compulsory labour. The length of service set by law (one and a half times the training period or five years after appointment to the rank of second-lieutenant) did not seem manifestly disproportionate to the aim sought which was the reduction of numbers of the Belgian armed forces. On the other hand, a measure whereby a candidate officer or reserve officer who had completed his contractual term of active service was obliged to serve as a 'short-term volunteer' for a maximum period of three years was an excessive infringement of individual freedom.[35]

### *any service exacted in cases of emergency or calamity threatening the life or well-being of the community*

The service contemplated here is that which is required of members of a community 'in the event of war or of a calamity or threatened calamity,

[33] UN document A/2929, chapter VI, section 23.

[34] *Jarvinen* v. *Finland*, Communication No.295/1988, HRC 1990 Report, Annex IX.L. Messrs Francisco Aguilar Urbina, Fausto Pocar, and Bertil Wennergren disagreed. In their view, the longer duration of civilian service resulted in a sanction against conscientious objectors, and therefore ran counter to the requirement of equality before the law.

[35] Court of Arbitration, Case No.81/95, 14 December 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 287.

such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstances that would endanger the existence or the well-being of the whole or part of the population'.[36]

### *any work or service which forms part of normal civic obligations*

This category probably includes minor communal services of a kind which, being performed by the members of the community in the direct interest of the community, can therefore be considered as normal civic obligations incumbent upon them, provided that they or their representatives have the right to be consulted in regard to the need for such services.[37] The notion of 'normal civic obligations' may also extend to obligations incumbent on a specific category of citizens by reason of the positions they occupy, or the functions they are called upon to perform, in the community.[38] But work or labour that is in itself 'normal' may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors.[39]

The obligation of a lessor to arrange for the upkeep of his building constitutes work or service forming part of his normal civic obligations.[40] The European Court held that compulsory fire service is one of the normal civic obligations envisaged in ECHR 4(3)(d). A financial contribution which is payable in Germany in lieu of service is a 'compensatory charge'. On account of its close links with the obligation to serve, the obligation to pay also falls within the scope of ECHR 4(3)(d).[41]

[36] ILO Convention No.29 Concerning Forced Labour, Article 2(2)(d).
[37] ILO Convention No.29 Concerning Forced Labour, Article 2(2)(e).
[38] *Van Der Mussele* v. *Belgium*, European Court, (1983) 6 EHRR 163. This question was raised but was left unanswered by the court.
[39] *Ibid.*
[40] X v. Austria, European Commission, Application 5593/72, (1973) 45 *Collection of Decisions* 113.
[41] *Karlheinz Schmidt* v. *Germany*, 18 July 1994, Series A. No. 291-B.

# 13

# The right to liberty

## Texts

### *International instruments*

### Universal Declaration on Human Rights (UDHR)

3. Everyone has the right to . . . liberty and security of person.
9. No one shall be subjected to arbitrary arrest, detention . . .

### International Covenant on Civil and Political Rights (ICCPR)

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 procedures as are established by law.

(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

11. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

### *Regional instruments*

#### American Declaration on the Rights and Duties of Man (ADRD)

1. Every human being has the right to . . . liberty and the security of his person.
25. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for non-fulfilment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise to be released.

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

5. (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

## ECHR Protocol 4 (ECHR P4)

1. No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

## American Convention on Human Rights (ACHR)

7. (1) Every person has the right to personal liberty and security.

(2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the state party concerned or by a law established pursuant thereto.

(3) No one shall be subject to arbitrary arrest or imprisonment.

(4) Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

(5) Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to

be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

(6) Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In states parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The arrested party or another person on his behalf is entitled to seek these remedies.

(7) No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non fulfilment of duties of support.

### African Charter on Human and Peoples' Rights (AfCHPR)

6. Every individual shall have the right to liberty and to the security of the person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

*Related texts:*

Code of Conduct for Law Enforcement Officials, UNGA resolution 34/169 of 17 December 1979.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173 of 9 December 1988.

Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

Basic Principles for the Treatment of Prisoners, UNGA resolution 45/111 of 14 December 1990.

United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, and approved by UNGA resolution 45/110 of 14 December 1990.

## Comment

The right of an individual to liberty has been described by the High Court of Zimbabwe as 'one of the pillars of freedom in a democratic society'.[1] In the Supreme Court of Ceylon (now Sri Lanka), T. S. Fernando ACJ emphasized twenty years previously that, even in the absence of a Bill of Rights, 'the liberty of the subject is not a slogan . . . but is a valuable right of a citizen and the courts must be vigilant in ensuring that it is not unprofitably thwarted'.[2] Early constitutional documents, such as those of the United States, India and Canada, merely sought to ensure that no person was deprived of his or her liberty without due process of law. Courts in these countries have often interpreted the concept of 'liberty' in broad terms, encompassing other freedoms such as of movement, contract, privacy, and of choosing one's occupation. The more recent international and regional human rights instruments, and national constitutions based on these instruments, define the concept into distinct elements, all of which are designed to protect the individual against arbitrary arrest or detention. With one significant exception, ICCPR 9 and 11, ECHR 5 and P4, and ACHR 7 contain similar provisions. ECHR 5 alone contains 'the positive element of the negative proposition that arrest and detention shall not be arbitrary'[3]. That article defines exhaustively the cases in which a person may be deprived of his or her liberty.

With respect to ECHR 5, the European Court has noted the fundamental importance of the guarantees contained in that article for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. The court has repeatedly stressed in its case law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law, but must equally be in keeping with the purpose of ECHR 5, namely to protect the individual from arbitrariness. This insistence on the protection of the individual against any abuse of power is illustrated by the fact that ECHR 5(1) circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation

[1] *Makomberedze* v. *Minister of State (Security)* [1987] LRC (Const) 504, per Ebrahim J.
[2] *Premasiri* v. *Attorney-General* (1967) 70 NLR 193, at 199.
[3] Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 139.

having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom.[4]

The European Court has also stressed that the authors of ECHR reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimize the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of ECHR 5(3) and (4) with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees of the right to life and freedom from torture or inhuman or degrading treatment or punishment. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.[5]

The right to liberty may be invoked in respect of all deprivations of liberty, whether arising in relation to the application of the criminal law, or by reason of mental illness, vagrancy, drug addiction, educational requirements, or immigration control. While some elements of the right (part of ICCPR 9(2), ECHR 5(2) and ACHR 7(4), and the whole of ICCPR 9(3), ECHR 5(3) and ACHR 7(5)) are only applicable to persons against whom criminal charges are brought, the rest, and in particular the important guarantee contained in ICCPR 9(4), ECHR 5(4) and ACHR 7(6), i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.[6] This right is enjoyed not only by civilians, but also by members of the armed forces. But the particular characteristics of military life and its effects on the situation of individual members of the armed forces

[4] *Kurt* v. *Turkey* (1998) 27 EHRR 373. [5] *Ibid.*

[6] Human Rights, General Comment 8 (1982). Litton JA's statement in the Court of Appeal, Hong Kong, in *Ex parte Lee Kwok-hung*, [1994] 1 LRC 150, that the arrest and detention referred to here is confined to the 'criminal context' is, therefore, incorrect; although in the circumstances of that case, his finding that 'it would be wholly contrived and artificial to

have to be borne in mind when interpreting and applying its provisions. While the existence of a system of military discipline implies the possibility of placing on members of the armed forces limitations incapable of being imposed on civilians, military discipline *per se* does not fall outside the scope of this right.[7]

ICCPR 9 is also applicable to so-called 'preventive' or 'executive' detention, usually resorted to for reasons of public security. Such detention may not be arbitrary, and must be based on grounds and procedures established by law. Reasons must be given, and judicial review not denied. Compensation must be payable in the event of wrongful detention. If criminal charges are brought following such detention, the protection of ICCPR 9(2) and (3), as well as ICCPR 14, must also be extended.[8] The Supreme Court of Cyprus has held that the constitutionally protected right of personal liberty renders inadmissible in evidence a statement made by a suspect whilst he was unlawfully detained.[9]

## Interpretation

### *Everyone has the right to liberty and security of person*

The 'right to liberty' contemplates individual liberty in its classic sense, that is, the physical liberty of the person. Its aim is to ensure that a person is not dispossessed of his liberty in an arbitrary manner.[10] The 'right to security', on the other hand, is the right to the protection of the law in the exercise of the right to liberty. 'Liberty and security are

categorize the compulsion exercised by an investigator under the Securities and Futures Commission over an interviewee as an "arrest" or "detention"' was probably correct. The investigator had no power under the relevant law to physically detain an interviewee who chose to walk out in the middle of an interview. See also ICCPR 2(3) which requires the state to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the covenant.

[7] *Engel et al.* v. *Netherlands*, European Court, (1976) 1 EHRR 647.

[8] Human Rights Committee, General Comment 8 (1982). See also *Habeas Corpus in Emergency Situations*, Advisory Opinion, 30 January 1987, (1988) 27 ILM 512, where the Inter-American Court of Human Rights held that the writ of habeas corpus, guaranteed in ACHR 7(6) may not be suspended during a state of emergency.

[9] Case No.285, 15 April 1894, (1995) 2 *Bulletin on Constitutional Case-Law* 146.

[10] *Engel et al* v. *Netherlands*, European Court, (1976) 1 EHRR 647; *Guzzardi* v. *Italy*, European Court, (1980) 3 EHRR 333.

the two sides of the same coin.'[11] The right to security may, therefore, be applicable to situations other than the formal deprivation of liberty. For instance, a state may not ignore a known threat to the life of a person under its jurisdiction simply because he or she is not arrested or otherwise detained. There is an obligation to take reasonable and appropriate measures to protect such a person. In Bogota, a secondary school teacher of religion and ethics who was also an advocate of 'liberation theology' and whose social views therefore differed from those of the apostolic prefect, alleged that, on the instigation of the latter, he was subjected to persecution by the Colombian authorities. He was falsely accused of theft, received death threats, was physically attacked, and was compelled to resign from his post. A colleague was shot to death outside the teachers' residence where he lived. The Human Rights Committee held that there was an objective need for him to have been provided by the state with protective measures to guarantee his security, given the threats made against him. By failing to take appropriate measures to ensure his right to security, the state was in violation of ICCPR 9(1).[12]

### *No one shall be subjected to arbitrary arrest or detention*

The discussions during the drafting of ICCPR 9 suggest that the word 'arbitrary' was understood to mean 'unjust', or incompatible with the principles of justice or with the dignity of the human person.[13] The

[11] J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Clarendon Press, 1987), 70.

[12] *Paez* v. *Colombia*, Communication No.195/1985, HRC 1990 Report, Annex IX.D. See also *Bwalya* v. *Zambia*, Human Rights Committee, Communication No.314/1988, 14 July 1993: a politician detained without trial for thirty-one months was released from detention but subjected thereafter to continued harassment and intimidation; *Bahamonde* v. *Equatorial Guinea*, Human Rights Committee, Communication No.468/1991, 20 October 1993: a former civil servant was, because of his outspoken views on the regime in place, subjected to varying degrees of discrimination, intimidation and persecution by the prime minister, a provincial governor, and the minister of external relations; *Mojica* v. *Dominican Republic*, Human Rights Committee, Communication No.449/1991, HRC 1994 Report, Annex IX.W: a dock worker received death threats from certain military officers in the weeks prior to his disappearance; *Tshishimbi* v. *Zaire*, Human Rights Committee, Communication No.542/1993, HRC 1996 Report, Annex VIII.Q: the military adviser to the prime minister was abducted in a situation where the prime minister, his cabinet and his special advisers were subjected to constant surveillance and at times harassment and bullying from the special presidential security division loyal to the president. Cf. *X* v. *Ireland*, Application 6040/73, (1973) 44 *Collection of Decisions* 121, where the European Commission held that a state was not under a positive obligation to give personal protection to an individual by providing him with the continued protection of personal bodyguards.

[13] UN documents A/2929, chapter VI, sections 29,30,31; A/4045, section 49.

term is broader than 'against the law', and includes elements of inappropriateness, injustice[14] and lack of predictability and due process of law. The Inter-American Court of Human Rights has interpreted ACHR 7(3) to refer to arrest or imprisonment for reasons and by methods which, although classified as legal, are 'unreasonable, unforeseeable or lacking in proportionality'.[15] The substantive and procedural requirements in ICCPR 9, ECHR 5 and ACHR 7, which are examined in this chapter, are all designed to prevent an individual from being subjected to arbitrary arrest or detention. Indeed, the underlying purpose of these articles is the protection against arbitrariness.[16] However, they do not appear to be exhaustive.

The UN Working Group on Arbitrary Detention considers that detention is arbitrary if it falls within one or more of the following categories:
*Category I:* When detention manifestly cannot be justified on any legal basis. One example is continued detention after the sentence has been served or despite an amnesty act applicable to the person in question.
*Category II:* When detention is the result of judicial proceedings consequent upon, or a sentence arising from, the exercise by an individual of the rights and freedoms proclaimed in UDHR 7 (equality before the law and the equal protection of the law), 13 (freedom of movement), 14 (right to seek asylum), 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 20 (freedom of peaceful assembly and association) and 21 (right to participate in public life); or, in the case of a state party, the rights and freedoms recognized in ICCPR 12 (freedom of movement), 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 21 (right of peaceful assembly), 22 (freedom of association), 25 (right to participate in public life), 26 (equality before the law and the equal protection of the law), and 27 (right of minorities to enjoy their own culture, to profess and practise their own religion, and to use their own religion).
*Category III:* When the complete or partial infringement of international standards relating to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character.[17]

[14] *A* v. *Australia*, Human Rights Committee, Communication No.560/1993, HRC 1997 Report, Annex VI.L.
[15] *Gangaram Panday Case*, 21 January 1994.
[16] *Perks* v. *United Kingdom*, European Court, (1999) 30 EHRR 33 at 66.
[17] For the application of these principles, see the Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2000/4/Add.1 (1999), E/CN.4/1999/63/Add.1 (1998), E/CN.4/1998/44/Add.1 (1997), etc.

The Human Rights Committee has also held that to require a convicted prisoner to remain in custody after she has served her prison sentence constitutes arbitrary detention.[18] Similarly, the European Court has agreed that failure to comply promptly with a court order directing the release of a person held in custody results in such person being arbitrarily detained. An American national living in Paris was arrested by the French police on 1 August 1988 and charged with fraud. He appealed against his detention and, on 4 August at 9.00 am, the Paris Court of Appeal ordered that he be 'released forthwith if he was not detained on other grounds'. That decision was immediately enforceable since no appeal was lodged against it. But he was not released. Meanwhile, at 5.30 pm on that day, an investigating judge in Geneva faxed to the Paris public prosecutor's office a request for his provisional arrest with a view to extradition. It was accompanied by an international warrant issued by the Swiss judge for his arrest on charges of fraud. The same request was transmitted through INTERPOL on the next day and through diplomatic channels on 16 August. The Paris public prosecutor ordered the provisional arrest, and at 8.00 pm he was placed in detention with a view to extradition. The European Court observed that some delay in executing a decision ordering the release of a detainee was understandable. But when a person remained in detention for eleven hours after the court had directed that he be released 'forthwith', without that decision being notified to him or any move being made to commence its execution, his detention was arbitrary.[19]

An arrest which is unlawful is, of course, arbitrary. Where a woman and her two children were arrested in Brazil by Uruguayan agents with the connivance of Brazilian police officers, and after being detained in their apartment for a week, were driven to the Uruguayan border from where they were then forcibly abducted into Uruguayan territory, the act of abduction constituted an arbitrary arrest and detention by the Uruguayan authorities.[20] Where an arrest is made in order to achieve

[18] *Massiotti* v. *Uruguay*, Human Rights Committee, Communication No.R.6/25/1978, HRC 1982 Report, Annex XVIII; *Jijon* v. *Ecuador*, Human Rights Committee, Communication No.277/1988, HRC 1992 Report, Annex IX.I.

[19] *Quinn* v. *France*, European Court, (1995) 21 EHRR 529

[20] *Casariego* v. *Uruguay*, Human Rights Committee, Communication No.56/1979, HRC 1981 Report, Annex XX. For a similar case from Zimbabwe, see *Makomberedze* v. *Minister of State (Security)* [1987] LRC (Const) 504. See also *Jaona* v. *Madagascar*, Human Rights Committee, Communication No.132/1982, HRC 1985 Report, Annex IX; *Mpaka-Nsusu* v. *Zaire*, Human

an unlawful purpose, the resulting detention is arbitrary. In Cyprus, a person was arrested and detained on suspicion of possessing explosive substances. The Supreme Court found, however, that the arrest was resorted to in order to place him in such a position of disadvantage as to make it easier for the police to obtain from him handwriting specimens which were needed for the purpose of investigating the offence of forgery in respect of which he was later convicted and sentenced. The arrest and detention were arbitrary and therefore inconsistent with article 11 of the Constitution of Cyprus.[21] The authority that arrests a person, keeps him under detention, or investigates the case, may exercise only the powers granted to him under the law, and the exercise of these powers is subject to recourse to a judicial or other authority.[22]

The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest.[23] In particular, the unacknowledged detention of an individual is a most grave violation of ECHR 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For that reason, the authorities are required to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.[24]

Detention is arbitrary if it is ordered without an objective assessment of its necessity. A person charged with murder was brought before a Jamaican magistrate who had already committed a co-accused for trial. Not being minded to hold another preliminary examination, the magistrate remanded the accused person in custody and instructed the clerk of the court to contact the director of public prosecutions for him to take

Rights Committee, Communication No.157/1983, HRC 1986 Report, Annex VIII.D; *Kanana* v. *Zaire*, Human Rights Committee, Communication No.366/1989, HRC 1994 Report, Annex IX.J.

[21] *Parpas* v. *Republic of Cyprus* (1988) 2 CLR 5.

[22] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 9. *Human Rights: a Compilation of International Instruments* vol. I (First Part) (United Nations, New York, 1993), 265. Also cited as ST/HR/I/Rev.4 (vol. I, Part I).

[23] *Velasquez Rodriguez Case*, Inter-American Court of Human Rights, 29 July 1988; *Godinez Cruz Case*, Inter-American Court of Human Rights, 20 January 1989.

[24] *Kurt* v. *Turkey*, European Court, (1998) 27 EHRR 373.

such action as he might be advised. The Court of Appeal held that this was a plain and straightforward case of arbitrary detention in violation of article 15(1) of the Constitution of Jamaica.[25] Similarly, detention ordered in bad faith, or through neglect to apply the relevant law correctly, is arbitrary.[26]

The prohibition of arbitrary detention requires that remand in custody pursuant to lawful arrest must not only be lawful, but also reasonable and necessary in all the circumstances. The element of proportionality also becomes relevant in this context.[27] A Dutch solicitor was arrested on suspicion of having been an accessory to the offences of forgery, and the intentional filing of false income tax returns. Following his refusal to waive his professional obligation to secrecy (although released from that obligation by his client), he was detained for over nine weeks. The Human Rights Committee noted that the reason for the detention was his continuing insistence on maintaining confidentiality. Since the solicitor was not obliged to assist the state in mounting a case against himself or against his client, and in the absence of any of the factors that would have rendered remand in custody reasonable and necessary, the detention was 'arbitrary'.[28]

If there are no criteria, express or implied, which govern the exercise of a discretion, detention resulting from the exercise of such discretion is arbitrary. The Supreme Court of Canada examined the complaint of a motorist who had been stopped at random in a spot check by police. There had been nothing unusual about his driving. The spot check was a routine police exercise for the purpose of checking licences, insurance, mechanical fitness of cars and sobriety of drivers, with the only guideline being that at least one marked police vehicle be engaged in spot check duty. There were no criteria, standards, guidelines or procedures to determine which vehicles should be stopped. It was in the discretion of the police officer. The court held that the random stopping of the motorist, although of a relatively brief duration, resulted in his being 'detained'. The police officer assumed control over the movement of the motorist by a demand or direction that might have significant legal

[25] *Graham* v. *Attorney-General of Jamaica* [1990] LRC (Const) 384.

[26] *Benham* v. *United Kingdom*, European Court, (1996) 22 EHRR 293.

[27] *A* v. *Australia*, Human Rights Committee, Communication No.560/1993, HRC 1997 Report, Annex VI.L.

[28] V*an Alphen* v. *Netherlands*, Communication No.305/1988, HRC 1990 Report, Annex IX.M. See also *Mukong* v. *Cameroon*, Human Rights Committee, Communication No.458/1991, HRC 1994 Report, Annex IX.AA.

consequence, and penal liability attached for refusal to comply with such demand or direction. Although the stop check procedure had statutory authority and lawful purposes, the selection of drivers to be stopped and subjected to that procedure was in the absolute discretion of the police officer. Accordingly, the motorist was 'arbitrarily detained'.[29]

The Human Rights Committee has observed that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the competent authority can provide appropriate justification. For example, in the case of an asylum seeker, the fact of illegal entry into a country may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.[30]

### *No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law*

The meaning of this sentence is regulated by that immediately preceding it, namely, that no one shall be subjected to arbitrary arrest or detention.[31] Therefore, the criterion of legality implicit in this sentence is subject to the further test of lack of arbitrariness.[32]

### Deprived of his liberty

In order to determine whether a person has been 'deprived of his liberty', the starting point is his concrete situation, and account has to be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.[33] Mere restrictions on

[29] *R* v. *Hufsky* [1988] 1 SCR 621. The court held, however, that in view of the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which could not be detected by the mere observation of driving, the limit imposed by section 189a(1) of the Highway Traffic Act on the right not to be arbitrarily detained was a reasonable one that was demonstrably justified in a free and democratic society, within the meaning of section 1 of the Charter.

[30] *A* v. *Australia*, Communication No.560/1993, HRC 1997 Report, Annex VI.L.

[31] UN document A/2929, chapter VI, section 29.

[32] UN documents A/2929, chapter VI, section 32; A/4045, section 46.

[33] *Engel et al* v. *Netherlands*, European Court, (1976) 1 EHRR 647; *Guzzardi* v. *Italy*, European Court, (1980) 3 EHRR 333.

the liberty of movement must be distinguished. The difference between 'deprivation' of and 'restriction' upon liberty is one of degree or intensity, and not one of nature or substance. Confinement of asylum seekers to the international zone of an airport, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable a state to prevent unlawful immigration while complying with its obligations under relevant international instruments. Holding of asylum seekers for excessive periods of time could turn what would otherwise be a mere restriction into a deprivation of liberty. When holding asylum seekers, account should be taken of the fact that they are not criminals, and of their need to have speedy access to the procedure for determining refugee status. Accordingly, where such persons were held for fifteen days before having contact with a lawyer, and it was seventeen days before their case was reviewed by a court, ECHR 5 was breached. The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty.[34]

Where two children, who were found by a teacher of their school in possession of fountain pens belonging to fellow pupils, were taken by a police patrol in a police car to police headquarters and questioned, and then made to wait in an unlocked room before being brought home, the European Commission held they had not been deprived of their liberty.[35] But where a passenger travelling in a bus was required by a police officer to accompany him to the police station, and in fact did so, he was deprived of his liberty. He was no longer free to proceed with his journey in the bus. It was not necessary that there should have been any actual use of force; the threat of force used to procure his submission was sufficient. He did not go to the police station voluntarily.[36]

The difference between 'deprivation' and 'restriction' was also considered in a case concerning a person who was arrested on kidnapping charges and detained before his trial for sixteen months on a small part of the island of Asinara, close to Sardinia. The island as a whole covered about fifty sq.km., and the part to which he was restricted was about two and a half sq.km. in area, and consisted mainly of the buildings of a former medical establishment which were in a state of disrepair or

[34] *Amuur* v. *France*, European Court, (1992) 22 EHRR 533.

[35] *Sargin* v. *Germany*, (1981) 4 EHRR 276. Cf. *X* v. *Austria*, European Commission, Application 8278/78, (1979) 18 *Decisions & Reports* 154; *X* v. *Sweden*, European Commission, Application 7376/76, (1976) 7 *Decisions & Reports* 123.

[36] *Namasivayam* v. *Gunawardena*, Supreme Court of Sri Lanka, [1989] 1 Sri LR 394.

even dilapidation, a *carabinieri* station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen. The remainder of the island was occupied by a prison. Social contact was confined to his near family, his fellow 'residents', and the supervisory staff. Supervision was carried out strictly and on an almost constant basis. He was not able to leave his dwelling between 10 pm and 7 am without giving prior notification to the authorities in due time. He had to report to the authorities twice a day and inform them of the name and number of his contact whenever he wished to use the telephone. He needed the consent of the authorities for each of his trips to Sardinia and the mainland, trips which were rare and made under the strict supervision of the *carabinieri*. He was liable to punishment by 'arrest' if he failed to comply with any of his obligations. The European Court held the detention constituted a deprivation of liberty. While it was not possible to refer to any one of the circumstances of his detention as amounting to a state of 'deprivation of liberty', cumulatively they had that effect. In certain respects, the detention resembled detention in an open prison or committal to a disciplinary unit in the army.[37]

A measure which would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. This is particularly so where the measure is one that does not deviate from the normal conditions of life within the armed forces. Accordingly, no deprivation of liberty results from 'light arrest' (confinement within the camp while on duty and during off-duty hours) or 'aggravated arrest' (confinement during off-duty hours in a specially designated place). But 'strict arrest' which entailed solitary confinement in a cell during the entire period of the punishment, and 'committal to a disciplinary cell' which involved detention in a special unit intended for persons sentenced under the criminal law (including nights in solitary confinement in a cell), constituted deprivation.[38] A different approach, however, was taken by the Constitutional Court of Spain which held that a period during which a

[37] *Guzzardi* v. *Italy*, European Court, (1980) 3 EHRR 333. See also European Commission, (1978) 8 *Decisions & Reports* 185; (1978) 20 *Yearbook* 462 Under Italian law, persons suspected of belonging to the Mafia could be placed under special supervision by order of court for three years.

[38] *Engel et al* v. *Netherlands*, European Court, (1976) 1 EHRR 647. See also European Commission, 44 *Collection of Decisions* 9.

person is detained in the so-called 'mitigated prison regime' should be included in calculating the maximum period of detention on remand. This is the inevitable conclusion if account is taken not of the differences between mitigated prison and detention on remand, but of the ways in which both of them differ from the state of freedom. Although the two differ with respect to their rigour, since in the case of professional soldiers mitigated prison means that they remain in their homes and go to work and attend religious worship, from a constitutional standpoint what is important is not so much the differences between a mitigated and a full detention on remand regime as the differences between the former and the state of freedom. From this standpoint, mitigated prison represents not a restriction on, but a deprivation of, liberty.[39]

Any measure depriving a person of his liberty must be in accordance with the domestic law of the state where the deprivation of liberty takes place. Accordingly, a person who is on the territory of a state may only be arrested according to the law of that state. An arrest made by the authorities of one state on the territory of another, without the prior consent of the latter, involves not only state responsibility vis-à-vis the other state, but also affects that person's right to security. Where there is collusion between a state official and a private individual for the purpose of securing the return against his will of a person living abroad, without the consent of his state of residence, the state concerned incurs responsibility for the acts of the private individual who de facto acts on its behalf. Such circumstances may render the arrest and detention unlawful within the meaning of ECHR 5.[40]

### On such grounds and in accordance with such procedures as are established by law

Where the 'lawfulness' of detention is in issue, including whether 'a procedure prescribed by law' has been followed, the international and regional human rights instruments refer essentially to national law and lay down the obligation to conform to the substantive and procedural rules

[39] Case No.56/1997, 17 March 1997, (1997) 1 *Bulletin on Constitutional Case-Law* 103.

[40] *Stocke* v. *Germany*, European Commission, (1989) 13 EHRR 126. See also European Court, (1991) 13 EHRR 839.

of national law, but they also require in addition that any deprivation of liberty should be in keeping with the purpose of the relevant articles, namely to protect the individual from arbitrariness. The European Court has observed that in laying down that any deprivation of liberty must be effected 'in accordance with a procedure prescribed by law', ECHR 5(1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions 'in accordance with the law' and 'prescribed by law' in ECHR 8(2) to 11(2), they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the articles of the ECHR. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorizes deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.[41]

When ICCPR 9 was being drafted, it was suggested that the grounds on which deprivation of liberty might be justified ought to be specified. It was argued that that would make the article more precise and also avoid difficulties of interpretation. On the other hand, it was doubted whether any such enumeration could be complete, or acceptable to all countries. In fact, the grounds proposed for inclusion ranged from twelve to about forty. The view was also expressed that even if such a list were agreed upon, its inclusion might not be desirable: the covenant should be a catalogue not of restrictions but of rights.[42] ECHR 5, however, enumerates the grounds on which a person may lawfully be deprived of his liberty.[43] It is an exhaustive list which must be interpreted

[41] *Amuur* v. *France* (1992) 22 EHRR 533. The court held that none of the French laws applicable to asylum seekers allowed the ordinary courts to review the conditions under which they were held, or to impose a limit on the length of detention, or to provide legal, humanitarian or social assistance, and as such did not sufficiently guarantee their liberty.

[42] UN documents A/2929, chapter VI, section 28; A/4045, section 44.

[43] These grounds have generally been adopted in several national constitutions. See the Constitutions of Antigua and Barbuda 1981, section 5; the Commonwealth of the Bahamas 1973, section 19; Barbados 1966, section 13; Belize 1981, section 5; Botswana 1966, section 5; the Commonwealth of Dominica 1978, section 3; Fiji 1970, section 5; the Republic of

strictly;[44] only a narrow interpretation of these exceptions is consistent with the aim of the provision, namely to ensure that no one is arbitrarily deprived of his or her liberty.[45] However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one subparagraph of ECHR 5(1)[46] enumerated below:

**the lawful detention of a person after conviction by a competent court.** The word 'conviction' is understood as signifying both a 'finding of guilt' after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty. The word 'after' does not mean that the 'detention' must follow the 'conviction' in point of time: the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the 'conviction'. Detention will in principle be lawful if it is carried out pursuant to a court order.[47] A subsequent finding that the court erred in law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention.[48] But where a former prime minister of Bulgaria was detained on suspicion of having misappropriated public funds as a member of the Bulgarian government, the European Court was not persuaded that the conduct for which he was prosecuted constituted a criminal offence under Bulgarian law at the relevant time. None of the provisions of the criminal code relied on to justify the detention specified or even implied that anyone could

Gambia 1970, section 15; the Republic of Ghana 1979, section 21; Grenada 1973, section 3; Guyana 1966, section 5; Jamaica 1962, section 15; Kenya 1969, section 72; Kiribati 1979, section 5; Lesotho 1966, section 6; the Republic of Malta 1964, section 35; Mauritius 1964, section 5; Nauru 1968, section 5; the Federation of Nigeria 1960, section 20, and of the Federal Republic of Nigeria 1979, section 32; Papua New Guinea 1975, section 42; Saint Christopher and Nevis 1983, section 5; Saint Lucia 1978, section 3; Saint Vincent and the Grenadines 1979, section 3; Seychelles 1976, section 14; Sierra Leone 1971, section 3, and of the Republic of Sierra Leone 1978, section 7; Solomon Islands 1978, section 5; the Kingdom of Swaziland 1968, section 5; Tuvalu 1978, section 5; Uganda 1966, section 10; Zambia 1964, section 15; and of Zimbabwe 1979, section 13.

44 *Loukanov* v. *Bulgaria*, European Court, (1997) 24 EHRR 121, at 138.

45 *K-F* v. *Germany*, European Court, (1997) 26 EHRR 390.

46 *Eriksen* v. *Norway*, European Court, (1997) 29 EHRR 328.

47 *Van Droogenbroeck* v. *Belgium*, European Court, (1982) 4 EHRR 443.

48 *Tsirlis and Kouloumpas* v. *Greece*, European Court, (1997) 25 EHRR 198.

incur criminal liability by taking part in the collective decisions in question. No evidence had been adduced to show that such decisions were unlawful or that they were taken in excess of powers. Accordingly, the deprivation of liberty did not constitute 'lawful detention'.[49]

Where the law provides that a recidivist may be sentenced by the court to serve a specified term of imprisonment and then be 'placed at the government's disposal' for a specified period, the execution of the latter could take different forms ranging from remaining at liberty under supervision to detention at the discretion of the minister of justice. The exercise by the minister of his power to order the continued detention of a habitual offender is inseparable from the conviction of the offender by a competent court. But the minister does not enjoy an unlimited power in making his decision. Within the bounds laid down by the law, he must assess the degree of danger presented by the individual concerned and the short- or medium-term prospects of reintegrating him into society. However, with the passage of time the link between his decisions not to release or to re-detain and the initial judgment gradually becomes less strong. The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary.[50] The same principles apply to a prisoner serving a sentence of life imprisonment. Except in the event of a free pardon or his sentence being commuted, whether he is inside or outside prison on licence, his liberty is, by virtue of the judgment of the court, at the discretion of the executive for the rest of his life.[51]

**the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.** The 'lawful order of a court' includes an injunction, an order compelling the attendance of a witness, and an

[49] *Loukanov* v. *Bulgaria* (1997) 24 EHRR 121.

[50] *Van Droogenbroeck* v. *Belgium*, European Court, (1982) 4 EHRR 443; *Eriksen* v. *Norway*, European Court (1997) 29 EHRR 328.

[51] *Weeks* v. *United Kingdom*, European Court, (1987) 10 EHRR 292.

order relating to the custody of children or access to them.[52] Another example is an order to submit to a blood test.[53]

The 'obligation prescribed by law' must be specific and concrete, and may not necessarily arise from a court order. Detention is authorized only to 'secure the fulfilment' of the obligation. It follows that, at the very least, there must be an unfulfilled obligation incumbent on the person concerned, and the arrest and detention must be for the purpose of securing its fulfilment and not, for instance, punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention ceases to exist. But the mere fact that an unfulfilled obligation is incumbent on a person is not enough to justify detention in order to secure its fulfilment. The person concerned must normally have had a prior opportunity to fulfil the 'specific and concrete' obligation incumbent on him and have failed, without proper excuse, to do so before it can be said in good faith that his detention is 'in order to secure the fulfilment' of the obligation.[54] Where a person was committed to prison for six days for his failure to pay a sum of UKP 150 due in respect of a community charge (poll tax), it having been established that non-payment was due to his wilful refusal or culpable neglect, the European Court held that the purpose of detention was to secure fulfilment of the obligation to pay the community charge owed by him and was therefore compatible with ECHR 5(1)(b).[55]

There may be limited circumstances of a pressing nature which warrant detention in order to secure fulfilment of an obligation even where a prior opportunity to do so has not been afforded. For instance, three persons were arrested by the police when they arrived at Liverpool from Ireland and were detained for forty-five hours for 'examination' under the Prevention of Terrorism Order 1976. Whilst they were detained, they were searched, questioned and photographed and had their fingerprints taken. The obligation imposed on these persons to submit to examination was a specific and concrete obligation that arose only in limited circumstances, namely in the context of passage over a clear geographical or political boundary; the purpose of the examination was limited and

[52] See Fawcett, *Application of the European Convention*, 82.

[53] *X* v. *Austria*, European Commission, Application 8278/78, (1980) 18 *Decisions & Reports* 154.

[54] *McVeigh, O'Neill and Evans* v. *United Kingdom*, European Commission, (1981) 5 EHRR 71.

[55] *Perks* v. *United Kingdom* (1999) 30 EHRR 33.

directed towards an end of evident public importance in the context of a serious and continuing threat from organized terrorism; and the United Kingdom authorities were in principle entitled to resort to detention to secure its fulfilment.[56]

**the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.** The court must first determine whether the arrest and detention were 'lawful', including whether they were effected 'in accordance with a procedure prescribed by law'.[57]

Deprivation of liberty is permitted on this ground only in connection with criminal proceedings,[58] and only for the purpose of bringing the person before the competent legal authority.[59] But the European Court has observed that in order to justify detention on this ground it is not necessary that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody. Where a person was arrested by a constable on reasonable suspicion of being 'a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism', and was released after four days and six hours without having been charged with any offence or brought before a magistrate, the court held that the fact that an arrested person is neither charged nor brought before a court did not necessarily mean that his arrest and subsequent detention

[56] *McVeigh, O'Neill and Evans* v. *United Kingdom*, European Commission, (1981) 5 EHRR 71. The Prevention of Terrorism (Temporary Provisions) Act 1976 provided that any person arriving in or seeking to leave the United Kingdom may be examined to determine whether he had been involved in terrorism. Under the Prevention of Terrorism Order the examining officer was authorized to detain a person for up to seven days without any warrant or arrest or detention. Cf. dissenting opinion of Mr Trechsel that it would be 'dangerous' to extend the permission to arrest and detain 'to other limited circumstances of a pressing nature'.

[57] *K-F* v. *Germany*, European Court, (1997) 26 EHRR 390.

[58] *Ciulla* v. *Italy*, European Court, (1989) 13 EHRR 346. An order made under the 'preventive' procedure provided for by an Italian law directed against organized crime, could not be equated with pre-trial detention.

[59] See *Lawless* v. *Ireland*, European Court, (1961) 1 EHRR 15. This article 'plainly entails the obligation to bring everyone arrested and detained in any of the circumstances contemplated . . . before a judge for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits'.

were not based on a reasonable suspicion of commission of an offence. The existence of the purpose must be considered independently of its achievement. But judges Farinha, Walsh and Salcedo dissented. In their view, it was not permitted to arrest and detain a person for interrogation in the hope that something would turn up in the course of the interrogation which would justify the bringing of a charge. The presumption of innocence protected the individual against arbitrary interference by the state with his right to liberty. The undoubted fact that an arrest is inspired by the legitimate aim of protecting the community as a whole from terrorism is not sufficient. The purpose of the arrest must be to bring the person arrested before the competent legal authority on reasonable suspicion of having committed a specified offence or offences.[60]

The reasonableness of the suspicion on which the arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention. Having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence. However, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage in the process of criminal investigation.[61] A reasonable suspicion may be founded only on matters within the arresting officer's knowledge or on statements made by other persons in a way which justifies him giving them credit.[62]

Is a 'genuine' or 'bona fide' suspicion sufficient when a constable arrests without warrant 'any person whom he suspects of being a terrorist'. Where a person was interrogated at a police station in Northern Ireland, but no charges were served on him, nor was he brought before a judge, and was released after forty-four hours in detention, the European Court recognized that terrorist crime fell into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged

[60] *Brogan* v. *United Kingdom* (1988) 11 EHRR 117. See also *Murray* v. *United Kingdom*, European Court, (1994) 19 EHRR 193 where an arrested person was neither charged nor brought before a court but was released after an interview lasting a little longer than an hour. The court held that it did not necessarily mean that the purpose of her arrest and detention was not for the purpose of bringing her before the competent legal authority 'since the existence of such a purpose must be considered independently of its achievement'.

[61] *K-F* v. *Germany*, European Court, (1997) 26 EHRR 390.

[62] *Elasinghe* v. *Wijewickrema*, Supreme Court of Sri Lanka, [1993] 1 Sri LR 163.

to act with the utmost urgency in following up information, particularly information from secret sources. The police may frequently arrest a suspected terrorist on the basis of information which is reliable but which cannot, without placing in jeopardy the source of the information, be revealed to the suspect or disclosed in court to support a charge. In view of the difficulties inherent in the investigation and prosecution of terrorist-type offences, the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied to conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard is impaired. While the arrest and detention of a person may be based on a bona fide suspicion that he is a terrorist, and he is questioned during his detention about specific terrorist acts of which he is suspected, the fact that he has previous convictions for acts of terrorism cannot form the sole basis of a suspicion justifying his arrest some seven years later, and is therefore insufficient to support the conclusion that there was 'reasonable suspicion'.[63]

This provision may not be invoked to justify re-detention or continued detention of a person who has served a sentence after conviction of a specified criminal offence where there is suspicion that he might commit a further similar offence. However, the position is different when a person is detained with a view to determining whether he should be subjected, after expiry of the maximum period prescribed by a court, to a further period of security detention imposed following conviction for a criminal offence.[64]

**the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.** The first ground of detention is for 'educational supervision', but the confinement of a juvenile in a remand prison is not necessarily prohibited, even if it is not in itself such as to provide for the person's 'educational supervision'. It may be a means of ensuring that the person concerned is placed under 'educational supervision'. The placement does not necessarily have to be an immediate

[63] *Fox Campbell and Hartley* v. *United Kingdom* (1990) 13 EHRR 157.
[64] *Eriksen* v. *Norway*, European Court, (1997) 29 EHRR 328.

one. An interim custody measure may be used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose. Accordingly, placing a minor on nine separate occasions in a remand prison on the orders of a juvenile court with a view to being committed to a suitable institution was incompatible with the requirements of this paragraph. In the absence of appropriate separate institutional facilities, the detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim.[65]

The second ground of detention is designed to enable public authorities to intervene for the protection of children who have not committed any offence, but need to be removed from harmful surroundings.[66] This paragraph is applicable only to minors. Therefore, it is necessary to refer to national law to determine the age at which a person ceases to be a minor.

**the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants.** Deprivation of liberty on this ground must fulfil three conditions: it must result from a procedure prescribed by law, be based on a legal provision, and satisfy one of the relevant material criteria cited therein.[67] The reason why these categories of persons, some of whom are socially maladjusted, may be deprived of their liberty is not only because they may be considered to be injurious to public health or occasionally dangerous for public safety, but also because their own interests may necessitate their detention.[68] But the propriety of including vagrants within this category has been questioned. In Papua New Guinea, the Supreme Court examined the Vagrancy Act, which provided for the arrest and the exclusion from the town for up to six months of persons found in towns reasonably suspected of having no or insufficient

[65] *Bouamar* v. *Belgium*, European Court, (1987) 11 EHRR 1.
[66] Fawcett, *Application of the European Convention*, 90, by reference to *travaux préparatoires.*
[67] *X* v. *United Kingdom*, European Commission, Application 6998/75, (1980) 8 *Decisions & Reports* 106; (1980) 20 *Yearbook* 294
[68] *Guzzardi* v. *Italy*, European Court, (1980) 3 EHRR 333.

lawful means of support. Kidu CJ observed that under the existing law to be poor was neither a criminal offence nor a basis for a civil cause of action. But the Vagrancy Act, which was meant to be used to remove unemployed trouble makers from towns, clearly applied to innocent poor people who through no fault of their own were poor. Barnett J added that the Act provided for exclusion orders for all those who had the misfortune to have insufficient lawful means of support, regardless of their previous employment record or standing in the community where they had been residing. 'Under the guise of removing potential and actual criminals this Act provides a dragnet which can pull in righteous and rascal, young and old alike. It can separate families and break up homes.'[69]

The term 'persons of unsound mind' is not defined because it is not one that can be given a definitive interpretation. It is a term whose meaning is continually evolving as research in psychiatry progresses, and an increasing flexibility in treatment develops. The European Court has required three minimum conditions to be satisfied for 'the lawful detention of a person of unsound mind': first, except in an emergency, the person must be reliably shown to be of 'unsound mind', i.e. a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement will depend upon the persistence of the disorder.[70] The detention of a person as a mental health patient will only be 'lawful' if effected in a hospital, clinic or other appropriate institution authorized for that purpose.[71]

The termination of the confinement of an individual who has previously been found by a court to be of unsound mind and to present a danger to society is a matter that concerns, as well as the individual, the community in which he will live if released. Accordingly, the responsible authority is entitled to proceed with caution in considering whether to

[69] *Re Vagrancy Act*, Supreme Court Reference No.1 of 1986, [1988] PNGLR 1. The court held the Vagrancy Act to be inconsistent with section 42 of the constitution since 'vagrancy' was not one of the enumerated grounds on which a person might be deprived of his liberty.

[70] *Winterwerp* v. *Netherlands*, European Court, (1979) 2 EHRR 387. See also *X* v. *United Kingdom,* European Court, (1981) 4 EHRR 188; *Luberti* v. *Italy*, European Court, (1984) 6 EHRR 440; *Johnson* v. *United Kingdom*, European Court, (1997) 27 EHRR 296.

[71] *Ashingdane* v. *United Kingdom*, European Court, (1985) 7 EHRR 528.

terminate the confinement, even if the medical evidence pointed to his recovery.[72] It does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released. According to the European Court, such a rigid approach to the interpretation of that condition would place an unacceptable degree of constraint on the responsible authority's exercise of judgment to determine in particular cases and on the basis of all the relevant circumstances whether the interests of the patient and the community into which he would be released would in fact be best served by this course of action. The court also observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science.[73]

A responsible authority is entitled to exercise a similar discretion in deciding whether in the light of all the relevant circumstances and the interests at stake it would be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from the mental disorder which led to his confinement. The European Court thought that authority should be able to retain some measure of supervision over the progress of the person once he is released into the community and to that end make his discharge subject to conditions. The court did not exclude the possibility that the imposition of a particular condition may in certain circumstances justify a deferral of discharge from detention having regard to the nature of the condition and to the reasons for imposing it. However, the court emphasized that it is of paramount importance that appropriate safeguards are in place so as to ensure that any deferral of discharge is consonant with the purpose of ECHR 5(1) and with the aim of the restriction in sub-paragraph (e) and, in particular, that discharge is not unreasonably delayed.[74]

**the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.** The detention of a proposed deportee is justified only if it is related to the deportation

[72] *Luberti* v. *Italy*, European Court, (1984) 6 EHRR 440.
[73] *Johnson* v. *United Kingdom*, European Court, (1997) 27 EHRR 296. [74] *Ibid.*

proceedings and is for no other purpose. But it is not a condition for the detention of a proposed deportee that a deportation order is actually in force against him. It suffices that 'action is being taken against him with a view to deportation'.[75] In respect of a person detained with a view to extradition, detention will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified.[76] Detention may be authorized only by a competent court; an examining magistrate in Switzerland who normally directs criminal inquiries and orders remand in custody does not present the characteristics and guarantees of an independent and impartial court.[77]

The European Court is of the view that ECHR 5(1)(f) does not require that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example, to prevent him committing an offence or fleeing. In this respect ECHR 5(1)(f) provides a different level of protection from ECHR 5(1)(c). Indeed, all that is required is that 'action is being taken with a view to deportation'. It is therefore immaterial, for the purposes of ECHR 5(1)(f), whether the underlying decision to expel can be justified under the law. But it is necessary to determine whether the duration of the deportation proceedings is excessive.[78] The Constitutional Court of Spain, however, has taken a different view. It held that in deciding whether to detain a foreigner who is the subject of expulsion proceedings, a court must take account, inter alia, of the circumstances surrounding the reason for the expulsion and the likelihood of his or her absconding. The court added

[75] *Caprino* v. *United Kingdom*, European Commission, Application 6871/75, Decision on Admissibility: (1978) 12 *Decisions and Reports* 14.

[76] *Quinn* v. *France*, European Court, (1995) 21 EHRR 529. On the detention of a foreigner during proceedings for his expulsion, see Decision of the Constitutional Court of Spain, 19 June 1995, No.96/1995, *Boletin Oficial del Estado* of 24 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 210: The decision to place a foreigner who is the subject of expulsion proceedings in detention must be taken by a court. Reasons for the detention must be given, the rights of the defence must be respected, and account must be taken, inter alia, of the circumstances surrounding the reason for the expulsion, the legal and personal situation of the foreigner, the likelihood of his absconding, and any other matters considered relevant to the decision by the court, given that foreigners may be detained only in exceptional circumstances and that their freedom must be respected unless the loss of that freedom is considered indispensable for precautionary or preventive purposes.

[77] *Diallo* v. *Bern Canton Immigration Police*, Case No.2A.86/1995, 28 March 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 217.

[78] *Chahal* v. *United Kingdom*, European Court, (1996) 23 EHRR 413.

that foreigners may be detained only in exceptional circumstances and that their freedom must be respected unless the loss of that freedom is considered indispensable for precautionary or preventive purposes.[79] This decision appears to be consistent with the prerequisite of a 'lawful arrest or detention' and with the principle that this exception be strictly construed.

When an Italian national who had been convicted in Italy *in absentia* of serious crimes and sentenced to life imprisonment was arrested in France, the Italian authorities sought his extradition. Their application was rejected by a French court on the ground that the procedure followed in the trial was incompatible with French *ordre public*. This ruling was final and binding on the French government. However, late one evening, about five months later, the applicant was accosted on a street by three plain-clothes policemen who forced him into an unmarked car, handcuffed him, and drove him to a police station where he was served with a deportation order made more than a month earlier by the French minister of the interior. Thereafter, without first being ordered to leave France for a country of his choice or being allowed to inform his wife or his lawyer, he was forced into another unmarked car, still handcuffed, between two police officers, and driven to Switzerland. At a police station in Geneva he was taken into custody by the Swiss police who informed him that his extradition was requested by Italy. After a Swiss court had rejected his objection, the applicant was extradited to Italy where he was immediately committed to prison to serve his life sentence. Viewing the circumstances as a whole, the European Court held that the deprivation of the applicant's liberty amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of the French court on Italy's request for extradition, and was not 'detention' necessary in the ordinary course of 'action . . . taken with a view to deportation'.[80]

### *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him*

This requirement contemplates a two-stage notification process: at the moment of arrest, a person must be told the reason why he is being

[79] Case No.96/1995, 19 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 210.
[80] *Bozano* v. *France*, European Court, (1986) 9 EHRR 297.

taken into custody; within a short period of time, the person must be informed of the charges against him. He must also be made aware of his right to legal counsel.[81] In order for this notification to be effective, it must be in a language which the person understands. Hence, where the person to be taken into custody is not fluent in the language of the country, the authorities should make a translator promptly available to notify that person of his rights and the charges against him. A written translation should be provided.[82] 'Reasons' which are to be furnished to the arrested person at the time of his arrest, are distinguished from 'charges' which are of a more exact and serious nature. A proposal made when ICCPR 9 was being drafted that the charges should be written and incorporated in a document issued by the authorized person, in order to prevent the detention of persons on vague, questionable or non-existent grounds, was supported in principle. But the inclusion in this article of such a detailed procedural provision was not favoured. There was no opposition in principle to another proposal that the reasons and charges be furnished to the arrested person 'in a language which he understands', but it was felt that the amendment was implicit in the existing text, and that, in any case, the covenant provided that its articles were to be applied without any discrimination.[83]

The purpose of informing the person arrested in simple, non-technical language he can understand of the essential legal and factual grounds for his arrest, is to enable him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority at the earliest opportunity,[84] or judge the lawfulness of the measure and take steps to challenge it if he sees fit, thus availing himself of the right to take proceedings before a court.[85] This right 'is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it'.[86] When an arrest is made pursuant to a warrant,

[81] Principles on Detention, Principle 13, note 22.

[82] Centre for Human Rights, *Human Rights and Pre-trial Detention*, Professional Training Series No. 3 (New York: United Nations, 1994), 11.

[83] UN documents A/2929, chapter VI, section 34; A/4045, sections 50, 53, 54.

[84] *Mallawarachchi* v. *Seneviratne*, Supreme Court of Sri Lanka, [1992] 1 Sri LR 181.

[85] *X* v. *United Kingdom*, European Commission, Application 6998/75: (1980) 8 *Decisions & Reports* 106 See also *Fox et al.* v. *United Kingdom*, European Court, (1990) 13 EHRR 157.

[86] *R* v. *Evans*, Supreme Court of Canada, [1991] 1 SCR 869, per McLachlin J. See also *Mallawarachchi* v. *Seneviratne*, Supreme Court of Sri Lanka, [1992] 1 Sri LR 181: the person arrested is not bound to submit and may resist arrest if he is not duly informed of the reason for his arrest.

the reasons for the arrest are set out in writing in the warrant. An arrest without warrant is only lawful if the type of information which would have been contained in the warrant is conveyed orally.[87] If a police officer were to arrest a person without a warrant on a mere 'unexpressed suspicion' that a particular cognizable offence has been committed, he may be guilty of assault or wrongful confinement.[88] But when the arrested person was 'fully aware' of the reasons for which he was detained, as he had surrendered to the police, ICCPR 9(2) was not violated if the police officer in charge of the investigation proceeded immediately to caution him.[89]

A typical case of failure to observe this requirement was that of a Zairean who was arrested when three agents of the *Centre National de Documentation* armed with a search warrant, came to his house to carry out a search for no apparent reason. They seized documents, cinematographic films and magnetic tapes. Following the search, though without any warrant of arrest or summons, they requested him to accompany them to the centre to provide further information. Once there, he was introduced to one of the directors who, without any further proceedings, ordered him to be kept in detention. While in detention, he was kept in a cell, locked in from morning to night, and deprived of all contact with his family. His detention continued for over eight months until his release following an amnesty pronounced by the president of the republic. The Human Rights Committee held, *inter alia*, that because he was not informed, at the time of his arrest, of the reasons for his arrest and of any charges against him, ICCPR 9(2) had been violated.[90]

When a person is arrested, he is immediately 'detained'. 'Arrest' is therefore the initial step of depriving a person of his liberty, and 'detention' is the means by which his liberty is continually deprived for a period. In other words, deprivation of liberty commences upon 'arrest' and continues during 'detention'. However, a person may be detained

[87] *R* v. *Evans*, Supreme Court of Canada, [1991] 1 SCR 869, per Sopinka J.

[88] *Corea* v. *The Queen*, Supreme Court of Ceylon, 55 NLR 457. See also *Maharaj* v. *Attorney-General of Trinidad and Tobago* [1977] 1 All ER 411: where a barrister was committed to prison for contempt of court, the failure of the judge to inform him of the specific nature of the contempt charged before committing him to prison constituted deprivation of liberty without due process of law.

[89] *Stephens* v. *Jamaica*, Human Rights Committee, Communication No.373/1989, HRC 1996 Report, Annex VIII.A.

[90] *Philibert* v. *Zaire*, Communication No.90/1981, HRC 1983 Report, Annex XIX. The committee also found violations of Articles 9(1), 9(3), 9(4) and 10(1).

(i.e. deprived totally of his personal liberty) without being arrested in the criminal sense. For instance, a person may be quarantined without being arrested in order to prevent the spread of disease; a person may be detained in a hospital if he is suffering from an infectious disease; or a person who is unlawfully in the country may be detained until he leaves the country. In all such cases, the person detained must be informed of the reasons for his detention.[91] A psychiatric patient who was in a hospital in the Netherlands on a voluntary basis learnt, when she was placed in isolation, that ten days previously, on the application of her husband, a judge had authorized her compulsory confinement in the same hospital for a period of six months. She was therefore no longer free to leave when she wished. The European Court held that neither the manner in which she was informed of the measures depriving her of her liberty, nor the time it took to communicate that information to her, corresponded to the requirements of ECHR 2.[92]

A person must be adequately informed of the facts and legal authority relied on to deprive him of his liberty; or 'sufficiently', as the Human Rights Committee has described it. The bare indication of the legal basis for the arrest, for example, that a person was being arrested under a particular section of a law on suspicion of being a terrorist, is insufficient.[93] On the other hand, ICCPR 9(2) does not imply a right to a full documentation of the case, since this article, unlike ICCPR 14(3)(a), does not require information to be given in 'detail'.[94] Where a former Uruguayan trade-union official who was arrested in Montevideo by officers who appeared to belong to the navy but did not identify themselves or produce any judicial warrant, was informed that he was being arrested under the 'prompt security measures' without any indication of the substance of the complaint against him, the Human Rights Committee held that ICCPR 9(2) had been violated because he was not sufficiently informed of the reasons for his arrest.[95]

The right to be informed of the reasons occurs on the initial arrest. If a person is rearrested after a significant period of conditional release,

[91] *The State* v. *Songke Mai*, Supreme Court of Papua New Guinea, [1988] PNGLR 56.

[92] *Van der Leer* v. *Netherlands*, European Court, (1990) 12 EHRR 567.

[93] *Fox, Campbell and Hartley* v. *United Kingdom*, European Court, (1990) 13 EHRR 157; European Commission, 4 May 1989. See also *X* v. *United Kingdom*, European Court, (1981) 4 EHRR 188.

[94] *G, S and M* v. Austria, European Commission, Application 9614/81, (1983) 34 *Decisions & Reports* 119.

[95] *Caldas* v. *Uruguay*, Communication No.43/1979, HRC 1983 Report, Annex XVIII.

the obligation to inform him of the reasons is reactivated. The amount of detail and type of information to be disclosed to an arrested person may depend on the circumstances of the particular case. For example, it may be justifiable in the case of certain persons of unsound mind to withhold information from the patient himself, if he is obviously unable to receive or understand it or where there may be serious reasons to believe that the patient might react in a dangerous way or that the information would run contrary to the aim of detention by gravely distressing the patient with negative results for future therapy. However, if the patient is incapable of receiving proper information, the relevant details must be given to those persons who represent his interests such as a lawyer or guardian. Because of the particular difficulties posed by certain mental health patients, it may not be the role of police officers, who are charged with the delicate task of arresting a patient, to inform him of the detailed reasons of arrest or recall, as they are not qualified to assess the patient's condition and his ability to understand the position. The responsibility of informing the patient or his representatives will, in such circumstances, fall on the medical officers concerned. This obligation has to be discharged promptly, i.e. at the latest, on arrival at the hospital.[96]

## Preventive detention

The provisions of ICCPR 9(2) are also applicable to so-called preventive detention. Preventive detention is not a punitive but a precautionary measure. The ostensible object is not to punish a person for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, and no charge is formulated. The justification for such detention is suspicion or reasonable probability. In this sense it is an anticipatory action.[97] In such cases, the detaining authority

[96] *X* v. *United Kingdom*, European Commission, Application 6998/75, (1980) 8 *Decisions & Reports* 106.

[97] See *Dariusz* v. *Union of India*, Supreme Court of India, [1990] LRC (Const) 744, per Saikia J. See also the definition of 'administrative detention' adopted in the Report on the Practice of Administrative Detention submitted to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities by Louis Joinet, UN document E/CN.4/Sub.2/1990/29: 'Detention is considered an "administrative detention" if *de jure* and/or *de facto*, it has been ordered by the executive and the power of decision rests solely with the administrative or ministerial authority, even if a remedy *a posterior* does exist in the courts against such a decision. The courts are then responsible only for considering the lawfulness of this decision and/or its proper enforcement, but not for taking the decision itself'.

is usually required, as soon as practicable after the detention, to communicate to the detainee the grounds on which the order of detention has been made, and afford the detainee the earliest opportunity of making a representation against that order.[98] The detaining authority must then consider the representation as soon as possible. The Human Rights Committee has held that where it took state authorities almost one month to inform a detainee of the reasons for his arrest, and the detainee was not brought promptly before a judge or other officer authorized by law to exercise judicial power, ICCPR 9(2) and 9(3) were violated.[99]

Where the 'grounds upon which he is detained' are required to be furnished to a detainee subjected to preventive detention, grounds which are vague, roving or exploratory are insufficient.[100] They have to be 'clear, precise, pertinent and not vague'.[101] The grounds must be given with sufficient particularity in the circumstances of the case to enable an adequate representation to be made. The detainee must be furnished with sufficient information to enable him to know what is alleged against him and to make a meaningful representation.[102] In India, Bhagwati J stressed that the 'grounds' mean 'all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which, therefore, the order of detention is based'.[103] In another case, Chandrachud CJ observed that a detainee has the right to receive 'every material particular without which a full and effective representation cannot be made'. If the order of detention refers to or relies upon any document, statement or other material, copies thereof

[98] *Khudiram Das* v. *State of West Bengal*, Supreme Court of India, AIR 1975 SC 550: 'These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security.'

[99] *Kalenga* v. *Zambia*, Communication No.326/1988, 27 July 1993.

[100] *Herbert* v. *Phillips and Sealey*, Court of Appeal of the West Indies Associated States on appeal from St.Christopher, Nevis and Anguilla, (1967) 10 WIR 435: The grounds furnished were that the detainee had recently been concerned in acts prejudicial to the public safety and public order, and that by reason thereof it was necessary to exercise control over him. See also *Paweni* v. *Minister of State Security of Zimbabwe*, Supreme Court of Zimbabwe, [1985] LRC (Const) 612.

[101] *Rahman* v. *Secretary, Ministry of Home Affairs*, Supreme Court of Bangladesh [2000] 2 LRC 1.

[102] *Kapwepwe and Kaenga* v. *The People*, Supreme Court of Zimbabwe, (1972) ZR 248, per Baron DCJ.

[103] *Khudiram Das* v. *State of West Bengal*, Supreme Court of India, AIR 1975 SC 550, (1975) 2 SCR 832.

must be supplied to the detainee.[104] In Zambia, Magnus J thought that the grounds 'must be at least particularised as they would have to be in a pleading in an ordinary action'.[105] In Zimbabwe, Dumbutshena CJ noted that while it was not required of the detaining authority to supply the detainee with the name of its informant, 'the basic facts and the material particulars which form the foundation or basis for the detention must be supplied to the detainee because they form together the grounds upon which the detention order is based'.[106] In Jamaica, where the Emergency Powers Regulations 1976 required the Minister to furnish 'the necessary particulars', the Supreme Court agreed with a detainee who was alleged to have been associated in the illegal issuing of firearms to unauthorized persons, that the names of these persons were 'necessary particulars'.[107]

'Grounds' which have been held to be insufficient include the following:

(a) You are a person who has acted or is likely to act in a manner prejudicial to the public safety and maintenance of public order'.[108]
(b) 'As a leading member of the trade union movement you have consistently pursued the role of an agitator and have sabotaged not only good relations in the labour field but also the labour policy of the government by threatening illegal strikes in essential services thus

[104] *State of Punjab* v. *Talwandi*, Supreme Court of India, [1985] LRC (Const) 600. Holding that sufficient particulars had been furnished in that case, Chandrachud CJ observed: 'The first ground of detention with which we are concerned in this appeal, mentions each and every one of the material particulars which the respondent was entitled to know in order to be able to make a full and effective representation against the order of detention. That ground mentions the place, date and time of the alleged meeting. It describes the occasion on which the meeting was held, that is, the "Shadeedi Conference". It mentions the approximate number of persons who were present at the meeting. Finally, it mentions with particularity the various statements made by the respondent in his speech. These particulars mentioned in the grounds of detention comprise the entire gamut of fact which it was necessary for the respondent to know in order to make a well-informed representation.' See also two other decisions of the Supreme Court of India: *Ichhu Devi Choraria* v. *Union of India* (1981) 1 SCR 640; *Bhawarlal Ganshmalji* v. *State of Tamil Nadu* AIR 1979 SC 541.

[105] *Attorney-General of Zambia* v. *Chipango*, Supreme Court of Zambia, (1971) ZR 1.

[106] *Minister of Home Affairs* v. *Austin* [1987] LRC (Const) 567. See also *Bull* v. *Attorney-General, Supreme Court of Zimbabwe* (1986), (3) SA 886 (ZS).

[107] *R* v. *Minister of National Security, ex parte Grange*, Full Court of the Supreme Court of Jamaica, (1976) 24 WIR 513, at 524, per Wilkie J: '"Necessary particulars" must include all information in the possession of the Minister which warranted the Minister in making the detention order and which would facilitate the detainee in preparing and formulating the detainee's case as an answer to each and every allegation made against the detainee.'

[108] *Uganda* v. *Commissioner of Prisons, ex parte Matovu*, High Court of Uganda [1966] EA 514.

adversely affecting the economy of the country and thereby the security of the Republic'.[109]

(c) 'You have engaged yourself in activities and utterances which are dangerous to the good government of Kenya and its institutions and in the interests of the preservation of public security your detention has become necessary'.[110]

(d) 1. That you are a South African espionage agent.
2. That you passed intelligence information to South Africa which is to the detriment of Zimbabwe's security.
3. That you are a threat to the security of Zimbabwe.'[111]

(e) 'That you, John Reynolds, during the year 1967, both within and outside of the state, encouraged civil disobedience throughout the state, thereby endangering the peace, public safety and public order of the state'.[112]

In the Judicial Committee of the Privy Council, in regard to the grounds served on John Reynolds referred to above, Lord Salmon observed that it was difficult to imagine anything more vague and ambiguous or less informative than the words of that notice.

> 'It was indeed a mockery to put it forward as specifying in detail the grounds on which the plaintiff was being detained. It seems plain to their Lordships that the irresistible inference to be drawn from this notice is that there were no grounds, far less any justifiable grounds, for detaining the plaintiff. Had there been any such grounds they would surely have been set out in the notice.'

In his view, the fact that no grounds of any kind had been put forward to justify the detention order raised an irresistible presumption that no such grounds had ever existed. Accordingly the Privy Council had no doubt that the detention order was invalid and that the plaintiff was unlawfully detained.[113]

[109] *Ooko* v. *The Republic of Kenya* (HCCC No.1159 of 1966).

[110] *Republic of Kenya* v. *Commissioner of Prisons, ex parte Wachira* [1985] LRC (Const) 624. Simpson CJ described this as a 'stereotype statement' which 'merely informs them that they have engaged themselves in activities and utterances which are dangerous to the good government of Kenya. No indication is given of the nature of these activities or utterances'.

[111] *Minister of Home Affairs* v. *Austin* [1987] LRC (Const) 567.

[112] *Attorney-General of St Christopher, Nevis and Anguilla* v. *Reynolds* [1979] 3 All ER 129.

[113] Cf. *Republic of Kenya* v. *Commissioner of Prisons, ex parte Wachira* [1985] LRC (Const) 624, where the High Court of Kenya held that insufficiency of details in furnishing the grounds

The Zambian Constitution permitted executive detention for not more than fourteen days at a time, with grounds for such detention being required to be served 'as soon as is reasonably practicable'. Where upon the expiry of fourteen days a person in detention was served an order of revocation and a new order of detention, with a minimal fraction of time elapsing between the handing over of the two orders, there was no interruption in law since the detention was by the same detaining authority and for the same reason. The revocation and further detention were coterminous. Accordingly, the detainee was in continuous physical detention, being neither in law nor in fact at liberty for any fractional period of time at all. He had, therefore, been in detention for a period exceeding fourteen days before the grounds for detention were served. His continued detention was therefore unlawful.[114]

### *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*

This unconditional obligation is designed to provide persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty. The object is to require provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with this requirement. The judicial officer before whom the arrested person appears is enjoined to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons. In other words, the judicial officer is required to consider the merits of the detention. The matters which he must examine go beyond the lawfulness of detention. The review required, being intended to establish whether the deprivation of the individual's liberty is justified, must be sufficiently wide to encompass the various circumstances militating for and against detention.[115]

did not render detention invalid, since the object of the requirement was to enable the detainee to know what was being alleged against him.

[114] *Re Thomas James Cain*, High Court of Zambia, (1974) ZR 71.

[115] *TW* v. *Malta*, European Court, (1999) 29 EHRR 185.

There are, therefore, three elements. First, the judicial control must be prompt. Secondly, it must be automatic. It cannot depend on a previous application by the detained person. This requirement must be distinguished from the separate right which an arrested person enjoys to institute proceedings to have the lawfulness of his or her detention reviewed by a court. Compliance with this requirement cannot be ensured by making that remedy available. The purpose here is to protect the individual from arbitrary detention by subjecting the act of deprivation of liberty to independent judicial scrutiny. Prompt judicial review of detention is also an important safeguard against ill-treatment of the individual taken into custody. Moreover, arrested persons who have been subjected to such treatment might be incapable of lodging an application asking the judge to review their detention. The same could hold true for other vulnerable categories of arrested persons, such as the mentally weak or those who do not speak the language of the judicial officer. Thirdly, the judicial officer must himself or herself hear the detained person before taking the appropriate decision.[116]

This requirement also extends to administrative detention. Where a statute empowered the executive to recall a prisoner whose sentence had been suspended or remitted but, while authorizing his arrest in such a case without warrant, required his remand by a court to serve the unexpired portion of his sentence, the Supreme Court of Ceylon held that where such a person had been arrested but not so remanded, his detention in prison was unlawful, and his escape from prison could not constitute the offence of escaping from lawful custody. The requirement of remand is not a mere formality; the person arrested might be able to show cause against it.[117] A law which authorized the police to summon citizens by a writ stating the reason for the summons, and to take them by force to a police station if they failed to respond to the summons, was struck down by the Constitutional Court of 'The former Yugoslav Republic of Macedonia' on the ground that a citizen may be detained only in cases determined by law and on the basis of a court decision for his or her detention.[118]

[116] *Ibid.* See also *McGoff* v. *Sweden*, European Commission, (1983) 6 EHRR 101.
[117] *Kolugala* v. *Superintendent of Prisons* (1961) 66 NLR 412.
[118] Case No.U.59/96, 25 December 1996, (1997) 1 *Bulletin on Constitutional Case-Law* 111.

The obligation to subject detention to prompt judicial control exists even when the detention occurs on the high seas. Where the Spanish customs service boarded a ship sailing under the Panamanian flag and placed several persons in custody, the Constitutional Court of Spain held that a judicial body must decide whether or not the detention in custody should extend beyond seventy-two hours. The significance and purpose of the constitutional requirement was not that persons in custody should be brought physically before a court but rather that after a specified period of time had elapsed they should no longer be under the supervision of the authorities that had made the arrest but should be placed under the supervision and subject to the decisions of the relevant judicial body.[119]

## Promptly

Any assessment of 'promptness' has to be made in the light of the object and purpose of this requirement, which is to protect the individual against arbitrary interference by the state with his right to liberty. Judicial control is intended to minimize the risk of arbitrariness. The degree of flexibility in interpreting and applying the notion of 'promptness' is therefore very limited.[120] While promptness may be assessed in each case according to its special features, the significance to be attached to those features cannot be taken to the point of impairing the very essence of the right that is guaranteed; that is, the point of effectively negativing the state's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

The word 'promptly' in ICCPR 9(3) is distinguishable from the less strict requirements of 'reasonable time' in the same article, and from 'undue delay' in Article 14. 'Promptly' implies a much shorter period of time; a delay not exceeding a few days.[121] Where there were no grounds

[119] Case No.21/1997, 10 February 1997, (1997) 1 *Bulletin on Constitutional Case-Law* 98.

[120] *TW* v. *Malta*, European Court, (1999) 29 EHRR 185.

[121] Human Rights Committee, General Comment 8 (1982). See also *Augustine Eda* v. *The Commissioner of Police*, Federal Court of Appeal of Nigeria, [1982] 3 NCLR 219: The Constitution of the Federal Republic of Nigeria, article 32, requires any person who is arrested or detained to be brought before a court of law 'within a reasonable time', and proceeds to define this phrase to mean, in the case of an arrest or detention in any place where there is a court within a radius of forty kilometres, a period of one day; and in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.

for a person's arrest, the Supreme Court of Sri Lanka held that an overnight detention in a police station was unreasonable. The relevant law required that an accused person should be brought before a magistrate without 'unnecessary delay', and that such a person should not be detained without a warrant 'for a longer period than under all the circumstances of the case is reasonable'. In failing to produce the arrested person before a magistrate soon after the arrest, the police had failed to act in accordance with procedure established by law.[122]

Where the 'arrest' is a step in the criminal process, i.e. an arrest made with an intention to bring the person within the machinery of the criminal law, the person so detained cannot be held for any purpose other than for exigencies of travel and practical considerations, such as the unavailability of a court or judicial officer. 'Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished'.[123] Accordingly, a delay of five days is unacceptable.[124]

The European Court has accepted that, subject to the existence of adequate safeguards, the context of terrorism had the effect of prolonging the period during which the authorities might keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer. But the difficulties of judicial control over decisions to arrest and detain suspected terrorists did not justify dispensing altogether with 'prompt' judicial control. Accordingly, even a period of four days and six hours spent in police custody fell outside the permitted constraints as to time. To attach importance to the special features of a case and to justify a long period of detention without appearance before a judge is an unacceptably wide interpretation of the plain meaning of the word 'promptly'. Such an interpretation will import into this requirement a serious weakening of a procedural guarantee to the detriment of the individual and will entail consequences impairing the very essence of the right protected by this provision.[125] In respect of the military, where three conscripts who refused on conscientious grounds to obey

[122] *Banda* v. *Gunaratne* [1996] 3 LRC 508.

[123] *The State* v. *Songke Mai*, Supreme Court of Papua New Guinea, [1988] PNGLR 56, per Los J.

[124] *Jijon* v. *Ecuador*, Human Rights Committee, Communication No.277/1988, HRC 1992 Report, Annex IX.I; *Stephens* v. *Jamaica*, Human Rights Committee, Communication No.373/1989, HRC 1995 Report, Annex VIII.A (delay of eight days).

[125] *Brogan et al* v. *United Kingdom*, European Court, (1988) 11 EHRR 117.

orders given to them were arrested and held in custody for seven, eleven and six days respectively without being brought before a judge, the European Court held the required 'promptness' was not satisfied.[126] Nor was a delay of five days sufficently 'prompt' in the case of a conscript placed in detention on remand during military manoeuvres.[127]

No breach of this requirement can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible.

### Judge or other officer authorized to exercise judicial power

Since ICCPR 9(3) leaves a choice between two categories of authorities: a 'judge' or 'other officer authorized by law to exercise judicial power', it is implicit in such a choice that these categories are not identical. Nevertheless, the 'other officer' must have some of the attributes of a 'judge' and offer guarantees befitting the 'judicial power' conferred on him by law, that is to say, he must satisfy certain conditions each of which constitutes a guarantee for the person arrested:

(a) an institutional guarantee: he must be independent of the executive and of the parties;
(b) a procedural guarantee: he must be obliged to himself hear the individual brought before him; and
(c) a substantive guarantee: he must be obliged to review the circumstances militating for or against detention; to decide, by reference to legal criteria, whether there are reasons to justify detention; and to order release if there are no such reasons.[128]

It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.[129] The European Court has held that

[126] *De Jong, Baljet and Van den Brink* v. *Netherlands* (1984) 8 EHRR 20. See also *McGoff* v. *Sweden*, European Court, (1984) 8 EHRR 246 (fifteen days not consistent with required 'promptness'); *McLawrence* v. *Jamaica*, Human Rights Committee, Communication No.702/1996, HRC 1997 Report, Annex VI.V (delay of one week in a capital case incompatible).

[127] *Koster* v. *Netherlands*, European Court, (1991) 14 EHRR 396.

[128] *Schiesser* v. *Switzerland*, European Court, (1979) 2 EHRR 417.

[129] *Kulomin* v. *Hungary*, Human Rights Committee, Communication No.521/1992, HRC 1996 Report, Annex VIII.L.

the following did not satisfy these conditions: an *auditeur-militair* in the Netherlands[130] or in Belgium[131] (since he is liable to act in one and the same case as prosecuting authority after the case had been sent for trial by a court martial); an *officier-commissaris*[132] in the Netherlands (since he is not authorized by law to decide on the justification for the detention and to order release if there is none); an advisory committee on internment in Northern Ireland or a magistrate in Malta (since it/he did not have the power to order release);[133] a district attorney in Switzerland, or a public prosecutor in Italy (since he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority).[134] The Human Rights Committee considered that the chief public prosecutor of Hungary, who was elected by, and responsible to, parliament, could not be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of Article 9(3).[135]

### *and shall be entitled to trial within a reasonable time or to release*

Within a 'reasonable time' in ICCPR 9(3) is distinguishable from 'undue delay' in ICCPR 14, the former being interpreted more restrictively than the latter. Detention imposes a greater infringement upon an individual's freedom than having a criminal case pending against him. The period of detention covered by the requirement of a 'reasonable time' begins with the accused person's arrest. The word 'trial' refers

[130] *De Jong, Baljet and Van Den Brink* v. *Netherlands* (1984) 8 EHRR 20; *Van der Sluijs, Zuiderveld and Klappe* v. *Netherlands* (1984) 13 EHRR 461.

[131] *Pauwels* v. *Belgium* (1988) 11 EHRR 238.

[132] *Duinhof and Duijf* v. *Netherlands* (1984) 13 EHRR 478; *Van de Sluijs, Zuiderveld and Klappe* v. *Netherlands* (1984) 13 EHRR 461.

[133] *Ireland* v. *United Kingdom* (1978) 2 EHRR 25; *TW* v. *Malta* (1999) 29 EHRR 185.

[134] *Huber* v. *Switzerland*, 23 October 1990, overruling *Schiesser* v. *Switzerland* (1979) 2 EHRR 417. See also *Brincat* v. *Italy* (1992) 16 EHRR 591. See also *Diallo* v. *Bern Canton Immigration, Police and Examining Judge*, Federal Tribunal of Switzerland, 28 March 1995, Case No.2A.86/1995, *Arrêts du Tribunal Fédéral, 121 11 53*, (1995) 2 *Bulletin on Constitutional Case-Law* 217: an examining judge required to decide on the detention of an alien with a view to deportation is neither a 'judicial authority' nor a 'court of law' since he normally directs criminal inquiries and orders to remain in custody.

[135] *Kulomin* v. *Hungary*, Human Rights Committee, Communication No.521/1992, HRC 1996 Report, Annex VIII.L.

to the whole of the proceedings before the court, not merely to its commencement. The words 'entitled to trial' are not to be equated with 'entitled to be brought to trial'. However, the end of the period of detention with which this requirement is concerned is the day on which the charge is determined by a court of first instance, and not the day on which a conviction becomes final.[136] A delay will not be reasonable if detention is due to the slowness of the investigations, or to the lapse of time which occurs either between the end of the investigation and the service of the indictment or between them and the commencement of the trial, or to the length of the trial.[137] Pre-trial detention should be an exception and as short as possible.[138] Neither the lack of adequate budgetary appropriations for the administration of criminal justice, nor the fact that investigations into a criminal case are, in essence, carried out by way of written proceedings, justifies unreasonable delay in the adjudication of a criminal case.[139]

What constitutes 'reasonable time' is a matter of assessment in each particular case. Two principal questions must be examined when deciding upon the reasonableness of the period of detention on remand. First, whether there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Second, assuming that relevant and sufficient circumstances do exist for not releasing the accused person pending trial, whether the authorities have conducted the case in a manner which has unreasonably prolonged the detention

[136] *Wemhoff* v. *Germany*, European Court, (1968) 1 EHRR 55. See also *Shalto* v. *Trinidad & Tobago*, Human Rights Committee, Communication No.447/1991, HRC 1995 Report, Annex X.C, where a delay of almost four years between the judgment of the court of appeal and the beginning of the retrial, a period during which the accused was kept in detention, was deemed incompatible with ICCPR 9(3).

[137] *Wemhoff* v. *Germany*, European Court, (1968) 1 EHRR 55. See also *Neumeister* v. *Austria*, European Court, (1968) 1 EHRR 91; *Stogmuller* v. *Austria*, European Court, (1969) 1 EHRR 155; and *Matznetter* v. *Austria*, European Court, (1969) 1 EHRR 198. Cf. *Noordhally* v. *Attorney-General of Mauritius* [1987] LRC (Const) 599 where the Supreme Court of Mauritius held that the words 'if any person . . . is not tried within a reasonable time' did not refer to the date on which the case was heard on its merits but to the time at which the prosecution was ready to lay a formal information against the prisoner and have the case heard at once if necessary.

[138] Human Rights Committee, General Comment 8 (1982).

[139] *Fillastre* v. *Bolivia*, Human Rights Committee, Communication No.336/1988, HRC 1992 Report, Annex IX.N. See also *Kone* v. *Senegal*, Human Rights Committee, Communication No.386/1989, HRC 1995 Report, Annex X.A.

on remand, thus imposing on the accused person a greater sacrifice than could reasonably be expected of a person presumed to be innocent.[140] As a general rule, an accused person cannot be held responsible for any prolongation of the proceedings while under detention merely because he avails himself of rights to which he is entitled. But the behaviour of a detained person may be relevant to the question whether the period of detention is 'reasonable'. Where a person has availed himself excessively, if not abusively, of certain legal possibilities, and that behaviour has extended the period spent in detention in a manner foreseeable to him and his counsel, a court may hold that he has not been detained beyond reasonable time pending trial.[141]

*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 judgment*

Detention before trial may be resorted to only where it is lawful, reasonable and necessary; or, as the Constitutional Court of Spain has observed, 'exceptionally, subsidiarily, provisionally and proportionally'.[142] Pre-trial detention is the exception, and bail should be granted except where it is necessary 'to prevent flight, interference with evidence, or the recurrence of crime';[143] or 'where the person concerned constitutes

[140] *Wemhoff* v. *Germany*, European Court, (1968) 1 EHRR 55; *Scott* v. *Spain*, European Court, (1996) 24 EHRR 391.

[141] *Levy* v. *Germany*, European Commission, 9 July 1975.

[142] Case No.66/1997, 7 April 1997, (1997) 1 *Bulletin on Constitutional Case-Law* 104. See Case No.128/1995, 26 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 214, where the Constitutional Court of Spain explained that 'the decision to detain someone on remand must be subject to strict necessity and respect for the principle of subsidiarity, which implies not only that the measure is effective but also that other less coercive measures will be ineffective. Furthermore, the measure must be temporary, in that it must be reviewed if circumstances change, and must be proportionate: there must be provision for a maximum, and the seriousness of the offence to which it is applicable or which it is designed to prevent must be specified. Lastly, detention on remand must meet the need to avert certain risks important for the purpose of the trial and, where applicable, the enforcement of the judgment and the risk of recidivism.' The court stressed that detention on remand must not on any account be used for punitive purposes or to anticipate a sentence or even to help with investigations.

[143] *Van Alphen* v. *Netherlands*, Human Rights Committee, Communication No.305/1988, HRC 1990 Report, Annex IX.M.

a clear and serious threat to society which cannot be contained in any other manner'.[144] The seriousness of a crime or the need for continued investigation, considered alone, do not justify pre-trial detention.[145] The fact that a person is a foreigner does not of itself imply that he may be held in detention pending trial; the mere conjecture that a foreigner might leave the jurisdiction if released on bail does not justify an exception to the rule.[146]

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of continued detention, but after a certain lapse of time it no longer suffices. The court must then establish whether there are other grounds to justify the deprivation of liberty. Where such grounds are 'relevant' and 'sufficient', the court must ascertain whether the competent authorities have displayed 'special diligence' in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect. Where the case of the person arrested is not complex and could have been dealt with more speedily, but forms part of an extremely complicated investigation, the diligence that the competent authorities must show is diligence in relation to the whole investigation. But the existence of a strong suspicion of the involvement of the person in serious offences, whilst constituting a relevant factor, cannot alone justify a long period of detention.[147] The Constitutional Court of the Czech Republic has held that extension of custody must meet more stringent requirements than the original imposition of custody; 'serious reasons' must be shown why it has not been possible to bring the proceedings to a conclusion.[148]

[144] *Schweizer* v. *Uruguay*, Human Rights Committee, Communication No.66/1980, HRC 1983 Report, Annex VIII.

[145] *Bolanos* v. *Ecuador*, Human Rights Committee, Communication No.238/1987, HRC 1989 Report, Annex X.1.

[146] *Hill* v. *Spain*, Human Rights Committee, Communication No.526/1993, HRC 1997 Report, Annex VI.B.

[147] *Kemmache* v. *France*, European Court, (1991) 14 EHRR 520. See also *Toth* v. *Austria*, European Court, (1991) 14 EHRR 551; *Mansur* v. *Turkey*, European Court, (1995) 20 EHRR 535; *Yagci & Sargin* v. *Turkey,* European Court, (1995) 20 EHRR 505; *Scott* v. *Spain*, European Court (1996) 24 EHRR 391; *Van der Tang* v. *Spain*, European Court, (1993) 22 EHRR 363.

[148] Case No.US 337/1997, 13 November 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 369.

Grounds that have been urged for continued detention include:

(a) The danger of repetition of the offence, provided such danger is a plausible one and the measure appropriate, in the light of the circumstances of the case and, in particular, the past history and the personality of the person concerned.[149] As a general rule, to deny bail on the ground that a person might commit other offences while at liberty pending trial violates the presumption of innocence.[150]
(b) The seriousness of the alleged offence and the existence of serious indications of the guilt of the person concerned, although this alone cannot justify a long period of pre-trial detention.[151]
(c) The danger of absconding. This cannot be gauged solely on the basis of the severity of the sentence risked. While the severity of the sentence which a person may expect in the event of conviction may legitimately be regarded as a factor encouraging him to abscond, the possibility of a severe sentence alone is not sufficient. When the only remaining reason for continued detention is the fear that a person may abscond and thereby avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance.[152] But other relevant factors may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial.[153] For example, regard may be had to the character of the person involved, his morals, home, occupation, assets, family ties, the

[149] *Clooth* v. *Belgium,* European Court, (1991) 14 EHRR 717.
[150] *The People* v. *O'Callaghan*, Supreme Court of Ireland, (1966) IR 501; *Director of Public Prosecutions* v. *Ryan*, Supreme Court of Ireland, No.111/155, (1988) 31 *Yearbook* 309.
[151] *Tomasi* v. *France*, European Court, (1992) 15 EHRR 1.
[152] *Wemhoff* v. *Germany*, European Court, (1968) 1 EHRR 55. See also *B* v. *Austria,* European Court, (1990) 13 EHRR 20 (two years and four months not unreasonable); *Toth* v. *Austria,* European Court, (1991) 14 EHRR 551 (two years and one month unreasonable); *Clooth* v. *Belgium*, European Court, (1991) 14 EHRR 717 (three years and two months unreasonable); *Tomasi* v. *France*, European Court, (1992) 15 EHRR 1 (five years and seven months unreasonable); *W* v. *Switzerland*, European Court, (1993) 17 EHRR 60 (four years and three days not unreasonable).
[153] *Toth* v. *Austria,* European Court, (1991) 14 EHRR 551; *Tomasi* v. *France*, European Court, (1992) 15 EHRR 1; *Letellier* v. *France*, European Court, (1991) 14 EHRR 83; *Mansur* v. *Turkey*, European Court, (1995) 20 EHRR 525; *Yagci & Sargin* v. *Turkey*, European Court, (1995) 20 EHRR 505.

lack of well-established links in the country and his international contacts,[154] which give reason to suppose that the consequences and hazards of flight seem to him to be a lesser evil than continued imprisonment.[155] The Federal Court of Switzerland has observed it is insufficient to prove that a person could in fact get away in order to establish a danger of absconding. The possibility that a suspect may escape prosecution by absconding exists potentially in all criminal proceedings. There must therefore be a certain probability that he will escape serving his sentence by absconding.[156] A court should also take into account, in considering whether to renew detention on remand, any circumstances reducing the danger of the person absconding that might have emerged over time.[157]

(d) The protection of public order.[158] By reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account to the extent that domestic law recognizes the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that a person's release will actually disturb public order. In addition, detention will continue to be legitimate only if public order remains actually threatened.[159]

(e) The risk of pressure being brought to bear on the witnesses.[160]

(f) The risk of collusion between the co-accused.[161]

[154] *W* v. *Switzerland*, European Court, (1993) 17 EHRR 60.

[155] *Stogmuller* v. *Austria*, European Court, (1969) 1 EHRR 198. See also *Schertenlieb* v. *Switzerland*, European Commission, (1979) 17 *Decisions & Reports* 180.

[156] Federal Court of Switzerland, Decision of 3 November 1976: (1976) 20 *Yearbook* 801.

[157] Decision of the Constitutional Court of Spain, 26 July 1995, Case No.128/1995, *Boletin Oficial del Estado* of 22 August 1995, (1995) *2 Bulletin on Constitutional Case-Law* 214.

[158] *Tomasi* v. *France*, European Court, (1992) 15 EHRR 1.

[159] *Letellier* v. *France*, European Court, (1991) 14 EHRR 83 (conditions were not satisfied in a case which concerned an alleged contract murder). See also *Kemmache* v. *France*, European Court, (1991) 14 EHRR 520 (conditions not satisfied in a case which related to a charge of importing counterfeit money).

[160] *Tomasi* v. *France*, European Court, (1992) 15 EHRR 1.

[161] *Tomasi* v. *France*, European Court, (1992) 15 EHRR 1; *W* v. *Switzerland*, European Court, (1993) 17 EHRR 60.

The 'guarantees' referred to here are not necessarily those of a purely financial character,[162] but they must be sufficient to neutralize the ground for detention.[163] The object of bail is not to make good the damage done but to secure the appearance of the accused person for trial. The accused ought to be deterred from absconding by the prospect of losing or not being repaid the amount of the bail. The amount of bail, however, must not be unrealistic and should be fixed with regard to the resources and circumstances of the person concerned.[164]

The Constitution of Kenya, section 72(5), provided that if an arrested or detained person is not tried within a reasonable time, 'he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial'. Section 123(3) of the Criminal Procedure Code, however, provided that 'The High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence, direct that a person be admitted to bail or that bail required by a subordinate court or police officer be reduced'. The effect of this section was that where, for example, a person was accused of robbery with violence, bail could not be granted even if he was not tried within a reasonable time. The Supreme Court held that section 123(3) was inconsistent with the constitution and was accordingly void to the extent that that was so. The words 'save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence' were deleted.[165] Similarly, in Mauritius, section 46(2) of the Dangerous Drugs Act, which provided that 'No person who is charged with an offence under sections 28, 30 or 33 shall be admitted to bail' was held to be void and of no effect in view of its inconsistency with a similar constitutional provision.[166]

But a South African law which provided a compendium of criteria that had to be taken into account by a court when considering whether

[162] UN document A/2929, chapter VI, section 38.
[163] Federal Court of Switzerland, Decision of 3 November 1976, 20 *Yearbook* 801.
[164] Federal Court of Switzerland, Decision of 3 November 1976, 20 *Yearbook* 801.
[165] *Ngui* v. *Republic of Kenya*, Supreme Court of Kenya, [1986] LRC (Const) 308. See also *Director of Public Prosecutions* v. *Daudi Pete*, Court of Appeal of Tanzania, (1993) 13 CLB 512.
[166] *Noordhally* v. *Attorney-General*, Supreme Court of Mauritius, [1987] LRC (Const) 599.

it was in the interests of justice to detain or release an accused person was upheld by the Constitutional Court of that country. Their effect was to point judicial officers towards categories of factual findings that could ground a conclusion that bail should be refused. Such guidelines did not represent interference by the legislature in the exercise of the adjudicative function of the judiciary, but were a proper exercise by the legislature of its functions, including the power and responsibility to afford the judiciary guidance where such was regarded as necessary. Furthermore, the inclusion of a vague hold-all provision which allowed 'any other factor' to be taken into account when deciding whether the 'interests of justice' required that bail should be granted, indicated that a court could look beyond the factors listed in the law and ultimately make its own evaluation.[167]

*Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful*

The purpose of this requirement is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected. An arrested or detained person is therefore entitled to a review hearing upon the procedural and substantive conditions which are essential for the 'lawfulness' of his deprivation of liberty. This means that such a person should have available to him a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in the relevant law, but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention. These conditions are usually met in the practice of courts in relation to the remedy of habeas corpus.[168] However, the existence of a

[167] *The State* v. *Dlamini* [2000] 2 LRC 239.

[168] *Brogan et al* v. *United Kingdom*, European Court, (1988) 11 EHRR 117. In the Commission on Human Rights, the words 'in the nature of habeas corpus' which appeared in earlier drafts of ICCPR 9(4) were deleted in order to enable each state to provide a remedy appropriate to its own legal system: UN document A/2929, chapter VI, section 35. Cf. *Chahal* v. *United Kingdom* (1996) 23 EHRR 413, where the European Court held that, in the circumstances of that case, the proceedings for habeas corpus did not satisfy the requirements of

remedy must be sufficiently certain, failing which it will lack the required accessibility and effectiveness. The lack of precedents may indicate the uncertainty of a particular remedy.[169] The Human Rights Committee has emphasized the importance of the review being, in its effects, real and not merely formal. The stipulation that the court must have the power to order release 'if the detention is not lawful', means that the court must be empowered to order release if the detention is incompatible with the requirements in ICCPR 9(1) or in other provisions of the covenant.[170]

The arrested or detained person is entitled to a court decision on the lawfulness of his detention 'without delay'. Where a Spanish citizen sought asylum in Finland and was placed in detention under the Finnish Aliens Act which provided him with a right to request review of his detention by the Minister of Interior after seven days, the Human Rights Committee held the detention to be in violation of ICCPR 9(4) because the detainee was not allowed to take proceedings and obtain a court decision 'without delay'.[171]

In order for this requirement to achieve its purpose, which is to obtain a judicial declaration of the lawfulness of the detention, it is necessary that the detained person be provided with access to a competent judge or tribunal with jurisdiction over him.[172] In Madagascar, a French national who was a practising attorney was arrested at his law office by the Malagasy political police, who took him to a basement cell in the Malagasy political prison and kept him in incommunicado detention for three days when he was notified of an expulsion order against him issued on that same day by the minister of the interior. At that time he was taken under guard to his home where he had two hours to pack his belongings. He was deported on the same evening to France. The

ECHR 5(4). See also *Aerts* v. *Belgium*, European Court, (1998) 29 EHRR 50: an application for an injunction satisfied the requirements of ECHR 5(4) in respect of a person suffering from a mental disorder.

169 *Sakik et al* v. *Turkey*, European Court, (1997) 26 EHRR 662.

170 *A* v. *Australia*, Communication No.560/1993, HRC 1997 Report, Annex VI.L.

171 *Torres* v. *Finland*, Communication No.291/1988, HRC 1990 Report, Annex IX.K.

172 *Habeas Corpus in Emergency Situations*, Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987, (1988) 27 ILM 512. The court noted that habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret, and in protecting him against torture or other cruel, inhuman or degrading punishment or treatment. See also *Suarez Rosero Case*, Inter-American Court, Judgment, 12 November 1997.

Human Rights Committee held, *inter alia*, that ICCPR 9(4) was violated in the sense that, during his detention preceding expulsion, he was unable to challenge his arrest.[173] In Portugal, the Constitutional Court has directed that, in order to exercise the right of seeking a review of the lawfulness of detention, accused persons and their defence counsel be informed of the contents of the investigation 'file'.[174]

The scope of the obligation imposed on a state by this requirement is not necessarily the same in all circumstances and as regards every category of persons deprived of their liberty. For instance, in the case of a person suffering from a mental disorder, it is often impossible to determine in advance the period for which detention will prove necessary, and the validity of continued confinement will depend upon the persistence of the disorder. The very nature of such deprivation of liberty requires a review of lawfulness to be available at reasonable intervals.[175] Accordingly, a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, particularly where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the 'lawfulness' of his detention, whether the detention was ordered by a civil or criminal court or by some other authority.[176]

The principles referred to above also apply to the detention of a recidivist or habitual offender who is placed at the government's disposal;[177] to a person who, having been given an indeterminate life sentence, is released on licence and later recalled in prison;[178] and to the detention for security reasons of a person with an underdeveloped or permanently impaired mental capacity.[179] They are also applicable to a person on whom

[173] *Hammel* v. *Madagascar*, Communication No.155/1983, HRC 1987 Report, Annex VIII.A

[174] Case No.121/1997, 19 February 1997, (1997) 1 *Bulletin on Constitutional Case-Law* 75.

[175] *Winterwerp* v. *Netherlands*, European Court, (1979) 2 EHRR 387. See also *Luberti* v. *Italy*, European Court, (1984) 6 EHRR 440.

[176] *X* v. *United Kingdom*, European Court, (1981) 4 EHRR 188. The remedy of habeas corpus is not sufficient for a continuing confinement of a person suffering from a mental disorder since it does not allow the required determination of both the substantive justification and the formal legality of such confinement. See also *Perez* v. *France*, European Court, (1995) 22 EHRR 153.

[177] *Van Droogenbroeck* v. *Belgium*, European Court, (1982) 4 EHRR 443.

[178] *Weeks* v. *United Kingdom*, European Court, (1987) 10 EHRR 292.

[179] *E* v. *Norway*, European Court, (1990) 17 EHRR 30.

a discretionary life sentence is imposed. Such a sentence comprises a punitive element or 'tariff' (a period of detention considered necessary to meet the requirements of retribution and deterrence) and a security element (a measure developed to deal with mentally unstable and dangerous offenders). In such a case the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at this phase in the execution of a sentence, a person is entitled to take proceedings to have the lawfulness of his continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.[180]

A mandatory sentence of detention 'during Her Majesty's pleasure' imposed in Britain on a person under the age of eighteen years convicted of murder, has the effect of rendering such person 'liable to be detained in such place and under such conditions as the Secretary of State may direct'. A person so detained has a 'tariff' set in relation to the period of imprisonment he should serve to satisfy the requirements of retribution and deterrence. After the expiry of the tariff, the prisoner becomes eligible for release on licence. The European Court has held that detention following the expiry of the tariff is comparable to a discretionary life sentence. Therefore, the decisive ground for the continued detention of the offender is his dangerousness to society. This is a characteristic susceptible to change with the passage of time, having regard to any developments in the young offender's personality and attitude as he grows older. Accordingly, he is entitled to take proceedings to have these issues decided by a court at reasonable intervals as well as to have the lawfulness of any re-detention determined by a court.[181]

A court review of the lawfulness of detention must include the possibility of ordering release; it is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of ICCPR 9(4) is that such review is, in its effects, real and not merely formal. By stipulating that

[180] *Thynne, Wilson and Gunnell* v. *United Kingdom*, European Court, (1990) 13 EHRR 666.
[181] *Singh* v. *United Kingdom*, European Court, 21 February 1996; *Hussain* v. *United Kingdom*, European Court, (1996) 22 EHRR 1.

the court must have the power to order release 'if the detention is not lawful', ICCPR 9(4) requires that the court be empowered to order release if the detention is incompatible with the requirements in ICCPR 9(1) or in other provisions of the covenant. This conclusion is supported by ICCPR 9(5) which obviously governs the granting of compensation for detention that is 'unlawful' either under the terms of domestic law or within the meaning of the covenant. Therefore, the Australian Migration Act which limited the court review to a formal assessment of the self-evident fact that an asylum seeker was a 'designated person' within the meaning of that Act, whereupon the court ceased to have any jurisdiction over such person, was in violation of ICCPR 9(4).[182]

A person, whether at liberty or in detention, enjoys this right. For instance, a prisoner who is released on licence is in a state of 'liberty', but the freedom enjoyed by him is more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen. If he is subsequently recalled to prison, he is being removed from an actual state of liberty, albeit one enjoyed in law as a privilege and not as of right, to a state of custody.[183] This remedy may be invoked by a person to determine the lawfulness of his detention even after he is finally released from all restraints.[184]

### Court

In this context, the word 'court' is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the state.[185] But in order to constitute a 'court', an authority must be independent of the executive and of the parties to the case, and also provide the fundamental guarantees of judicial procedure.[186] It is essential that the person concerned be present at an oral hearing, where he has the opportunity to be heard either in person or through a lawyer, and the possibility of calling and questioning

[182] *A* v. *Australia*, Human Rights Committee, Communication No.560/1993, HRC 1997 Report, Annex VI.L.
[183] *Weeks* v. *United Kingdom*, European Court, (1987) 10 EHRR 293.
[184] Decision of 26 September 1991, Supreme Court of Austria, 7 Ob 585/91.
[185] *X* v. *United Kingdom*, European Court, (1981) 4 EHRR 188.
[186] *De Wilde, Ooms and Versyp* v. *Belgium*, European Court, (1971) 1 EHRR 373.

witnesses.[187] Also required is the benefit of an adversarial procedure.[188] Where the procedure fails to ensure equality of arms, it is not truly adversarial.[189]

A court must be distinguished from a tribunal which is essentially advisory in nature. For example, a recidivist's board is not a court for this purpose since it does not afford to detainees who appear before it the guarantees of judicial procedure, and is not competent either to determine the 'lawfulness' of the detention of the individuals concerned, or to order the release of such of them whose deprivation of liberty it may consider unlawful.[190] Similarly, a parole board, while being an independent and impartial body, lacks the required power of decision, being limited to an advisory role when reviewing the possible release on licence of a detained person serving a sentence of life imprisonment. While, on the one hand, it may override the minister's decision to recall in prison, the procedure cannot be regarded as judicial in character, the person affected not being entitled to full disclosure of the adverse material which the board has in its possession.[191] A juvenile court is undoubtedly a 'court' from the organizational point of view, but since the hearing is conducted in the absence of the applicant's lawyers, it does not satisfy the requirements of ECHR 9(4).[192]

[187] *Singh* v. *United Kingdom*, European Court, 21 February 1996; *Hussain* v. *United Kingdom*, European Court, (1996) 22 EHRR 1: It is not an answer to these requirements that the offender might have been able to obtain an oral hearing by instituting proceedings for judicial review. ECHR 5(4) which corresponds to ICCPR 9(4) presupposes the existence of a procedure in conformity with its requirements without the necessity of instituting separate legal proceedings in order to bring it about. See *Winterwerp* v. *Netherlands*, European Court, (1979) 2 EHRR 387: while mental illness may entail restricting or modifying the manner of exercise of his right, it cannot justify impairing the very exercise of the right. Indeed, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves. See also *Megyeri* v. *Germany,* European Court, 12 May 1992: (1992) 15 EHRR 585.

[188] *Sanchez-Reisse* v. *Switzerland*, European Court, (1986) 9 EHRR 71.

[189] *Lamy* v. *Belgium*, European Court, (1989) 15 EHRR 529. See also *Toth* v. *Austria*, European Court, (1991) 14 EHRR 551; *Kampanis* v. *Greece*, European Court, (1995) 21 EHRR 43.

[190] *Van Droogenbroeck* v. *Belgium*, European Court, (1982) 4 EHRR 443.

[191] *Weeks* v. *United Kingdom*, European Court, (1987) 10 EHRR 293; *Singh* v. *United Kingdom*, European Court, 21 February 1996; *Hussain* v. *United Kingdom*, European Court, (1996) 22 EHRR 1.

[192] *Bouamar* v. *Belgium*, European Court, (1987) 11 EHRR 1.

A right of appeal to a minister does not satisfy the requirements of ICCPR 9(4). A Spanish political activist who resided in France travelled to Finland and requested asylum. He was arrested by the security police under the provisions of the Aliens Act, his request for asylum was refused and he was extradited to Spain. Between his arrest and his extradition, he was held in detention either under the provisions of the Aliens Act or the Finnish law on the Extradition of Criminals. The Human Rights Committee held that the right of appeal provided under the Alien's Act to the ministry of the interior, while providing for some measure of protection and review of the legality of detention, did not satisfy the requirements of ICCPR 9(4). What is envisaged is that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. On the other hand, the review at two-week intervals by the Helsinki City Court of detention under the Extradition Act satisfied the requirements of the article.[193]

### without delay

A delay of seven days, eleven days and six days respectively, in providing access to a court in the case of three military conscripts who were arrested and detained for having refused on conscientious grounds to obey orders given to them, did not satisfy the requirement of a 'speedy' review.[194] This was so even when regard was had to the exigencies of military life and military justice.

### lawfulness

The 'lawfulness' of an arrest or detention has to be determined in the light not only of domestic law but also of the general principles embodied in the relevant international or regional human rights instruments.[195] The notion of 'lawfulness' does not refer solely to the obligation to conform to the substantive and procedural rules of domestic law; it requires in addition that any deprivation of liberty should be in keeping with the purpose of ICCPR 9, ECHR 5 or ACHR 7, as the case may be.[196] If 'lawfulness' is limited merely to compliance with domestic law, it will be possible for the state to pass a domestic law validating a

[193] *Torres* v. *Finland*, Communication No.291/1988, HRC 1990 Report, Annex IX.K.

[194] *De Jong, Baljet and Van den Brink* v. *Netherlands*, European Court, (1984) 8 EHRR 20. See also *E* v. *Norway*, European Court, (1990) 17 EHRR 30; *Koendjbiharie* v. *Netherlands*, European Court, (1990) 13 EHRR 820.

[195] *Weeks* v. *United Kingdom*, European Court, (1987) 10 EHRR 293.

[196] *Chahal* v. *United Kingdom*, European Court, (1996) 23 EHRR 413.

particular category of detentions, and a detained person falling within that category would be effectively deprived of his or her right under the relevant article. Pointing out that ICCPR 9(4) embodies a human right, P.N. Bhagwati observed in the Human Rights Committee that that right should be interpreted broadly and expansively. Accordingly, what is required is that a court be empowered to order release 'if the detention is not lawful', that is, the detention is arbitrary or incompatible with the requirements in ICCPR((1) or with any other provisions of the covenant.[197]

*Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation*

A right to compensation is conditioned on a breach of one of the provisions of the relevant article. A 'fault' (*Verschulden*) on the part of state authorities is not essential; it is the objective breach of the provisions of this article, or wrongful conduct (*Fehlverhalten*) which establishes a right to compensation.[198] The Judicial Committee of the Privy Council has sought to distinguish an error of substantive law made by a judge resulting in wrongful imprisonment. Such an error, not amounting to a denial of due process of law, does not constitute a ground for redress for the contravention of the constitutional right not to be deprived of liberty except by due process of law.[199]

Compensation for deprivation of liberty includes any loss of earnings consequent to imprisonment and recompense for the inconvenience and distress suffered during incarceration.[200] Real compensation and not mere damages (Entschädigung) must be awarded.[201]

[197] *A* v. *Australia*, Communication No.560/1993, HRC 1997 Report, Annex VI.L.

[198] Decision of 31 January 1965, Bundesgerichtshof, Germany, (1966) *Neue Juristische Wochenschrift* 1021. See also Decision of 10 January 1966, Bundesgerichtshof, Germany, (1966) *Neue Juristische Wochenschrift* 925, (1966) 9 *Yearbook* 766; Decision of 31 January 1966, Bundesgerichtshof, Germany, (1966) *Neue Juristische Wochenschrift* 1023, (1966) 9 *Yearbook* 782.

[199] *Chokolingo* v. *Attorney-General of Trinidad and Tobago*, Judicial Committee of the Privy Council, (1980) 32 WIR 354.

[200] *Maharaj* v. *Attorney-General of Trinidad and Tobago (No.2)* [1978] 2 All ER 670; *Huber* v. *Austria,* European Commission, (1976) 6 *Decisions & Reports* 65.

[201] Decision of 31 January 1965, BG, Germany (1966) *Neue Juristische Wochenschrift* 1021. See also Decision of 10 January 1966, BG, Germany (1966 *Neue Juristische Wochenschrift* 925; (1966) 9 *Yearbook* 766); Decision of 31 January 1966, BG, Germany (1966) *Neue Juristische Wochenschrift* 1023; (1966) 9 *Yearbook* 782).

*No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation*

The obligation concerned must arise out of contract.

This prohibition does not cover an offence committed through the non-fulfilment of an obligation of public interest which is imposed by statute or court order, such as the payment of a maintenance allowance. It covers, however, the payment of debts, the performance of services or the delivery of goods. A proposal to add the words 'unless he is guilty of fraud' at the end of ICCPR 11 was not accepted at the drafting stage because the words 'merely on the grounds of inability' made it sufficiently clear that all cases of fraud were excluded from the scope of this article.[202]

[202] UN document A/2929, chapter VI, sections 45, 46, 47.

# 14

# The rights of prisoners

## Texts

### *International instruments*

#### International Covenant on Civil and Political Rights (ICCPR)

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.

### *Regional instruments*

#### American Convention on Human Rights (ACHR)

5 (1) Every person has the right to have his physical, mental and moral integrity respected.

(2) . . . All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

(3) Punishment shall not be extended to any person other than the criminal.

(4) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
(5) Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
(6) Punishment consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

*Related texts:*

Vienna Convention on Consular Relations 1963, Article 36(1) (19 March 1967).

Convention on the Rights of the Child 1990, Articles 37, 40.

Standard Minimum Rules for the Treatment of Prisoners, ('Standard Minimum Rules') adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1955, and approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

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, UNGA resolution 37/194 of 18 December 1982.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'). UNGA resolution 40/33 of 29 November 1985.

The European Prison Rules 1987.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA resolution 43/173 of 9 December 1988.

Basic Principles for the Treatment of Prisoners, UNGA resolution 45/111 of 14 December 1990.

United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Rules'), UNGA resolution 45/112 of 14 December 1990.

United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ('United Nations Rules'), UNGA resolution 45/113 of 14 December 1990.

United Nations Standard Minimum Rules for Non-Custodial Measures ('Tokyo Rules'), UNGA resolution 45/110 of 14 December 1990.

Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, UNGA resolution 45/119 of 14 December 1990.

## Comment

ICCPR 10 and ACHR 5 contain specific provisions relating to detention. These require that all persons deprived of their liberty be treated with respect for the inherent dignity of the human person. Both require that accused persons be segregated from convicted persons, and that the former be treated in a manner appropriate to their status. Juveniles (or 'minors' in the case of ACHR 5) must be separated from adults and brought to trial as speedily as possible (before 'specialized tribunals' in ACHR 5). Both instruments require the essential aim of the penitentiary system to be the reformation and social rehabilitation (or 'social readaptation') of convicted prisoners. ACHR 5 alone states that punishment shall not be extended to any person other than the criminal, a principle which is more appropriately embodied in the concept of 'cruel, inhuman or degrading punishment'.

When ICCPR 10 was being drafted, the consensus of opinion was that while a person deprived of his liberty is not exactly in the same position as any other person, and that in exceptional circumstances he might be subjected to special treatment, he should not be regarded as 'unworthy' merely because he has been convicted of an offence since the basic aim is his reformation and rehabilitation. Such a person is entitled to respect for his physical and moral dignity, to material conditions and treatment befitting that dignity, and to sympathy and kindness.[1]

The Standard Minimum Rules for the Treatment of Prisoners, which were first adopted in 1955, set out in greater detail the minimum conditions which are accepted as suitable in the treatment of prisoners, including those under arrest or awaiting trial, or arrested and imprisoned without charge. While the Rules are not referred to in ICCPR 10 (or ACHR 5), they are intended to be taken into account in its application, with nothing in that article prejudicing the application of the

[1] UN document A/4045, section 79.

Rules.[2] Apart from the Standard Minimum Rules, the relevant United Nations standards applicable today to the treatment of prisoners include the Code of Conduct for Law Enforcement Officials (1978), the Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).[3]

## Interpretation

*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

This requirement applies to any one deprived of liberty under the laws and authority of the state, whether such person is held in a prison, hospital – particularly a psychiatric hospital – detention camp, correctional institution, or elsewhere. This is a fundamental rule. Consequently, the obligation to apply this rule is not conditional on the availability of material resources. It must be applied 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. This requirement complements the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. Persons deprived of liberty may not be subjected to such treatment or punishment, including medical or scientific experimentation, or to any hardship or constraint other than that resulting from the deprivation of liberty. Respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons. Persons deprived of their liberty enjoy all the recognized rights, subject to the restrictions that are unavoidable in a closed environment.[4]

The Supreme Court of Zimbabwe has 'emphatically recognized' that while prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices which in their judgment are needed to preserve internal order and discipline, and to

[2] UN document A/4045, section 84.
[3] Human Rights Committee, General Comment 21 (1992).
[4] Human Rights Committee, General Comment 21 (1992).

maintain institutional security, it none the less remains the continuing responsibility of courts to enforce the constitutional rights of all prisoners. Gubbay CJ explained that 'the view no longer holds firm in this jurisdiction, and in many others, that by reason of his crime a prisoner sheds all basic rights at the prison gate. Rather he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication; or those inconsistent with the legitimate penological objectives of the corrections system'.[5] Earlier, the High Court of Ireland had formulated the following test for the exercise by prisoners of otherwise guaranteed constitutional rights: 'When the state lawfully exercises its power to deprive a citizen of his constitutional right to liberty, one of the consequences is a deprivation of the right to exercise many other constitutionally protected rights. Those that may still be exercised are those which do not depend on the continuance of his personal liberty and which are compatible with the reasonable requirements of the place in which he is imprisoned; or, to put it in another way, which do not impose unreasonable demands upon it.'[6]

The inroads which incarceration necessarily makes upon prisoners' personal rights and liberties are very considerable. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. Their contact with the outside world is limited and regulated. They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress.[7] In South Africa, Hoexter JA emphasized the need to 'negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations'.[8]

[5] *Conjwayo* v. *Minister of Justice, Legal and Parliamentary Affairs*, [1991] 1 ZLR 105; *Woods* v. *Minister of Justice, Legal and Parliamentary Affairs* [1994] 1 LRC 359; *Blanchard* v. *Minister of Justice, Legal and Parliamentary Affairs* [2000] 1 LRC 671.

[6] *Kearney* v. *Ireland* (1987) ILRM 52; (1987) 30 *Yearbook* 292.

[7] *August* v. *Electoral Commission*, Constitutional Court of South Africa, [2000] 1 LRC 608, per Sachs J.

[8] *Minister of Justice* v. *Hofmeyr*, 1993 (3) SA 131 (a), at 141.

In many countries, voting disabilities are imposed on certain categories of prisoners. For instance, in France, certain crimes carry automatic forfeiture of political rights; in Greece, trial courts are permitted to order such forfeiture on a case by case basis; in Germany, prisoners convicted of offences which target the integrity of the German state or its democratic order forfeit the right to vote. A more common trend is to specify that the length of sentence being served shall determine the forfeiture of the right. In Sri Lanka, it is six months, in Canada two years, in New Zealand three years, and in Australia five years. In the United Kingdom and Japan, all persons serving sentences are excluded, while in Denmark, Ireland, Israel, Sweden and Switzerland, all prisoners can vote. In South Africa, where the constitution conferred the right of every adult citizen to vote in elections for every legislative body in unqualified terms, and parliament had not passed any law limiting that right, the Constitutional Court held that prisoners retained the right to vote.[9]

Among the requirements in the Standard Minimum Rules for the Treatment of Prisoners are minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. These are minimum requirements which should always be observed, even if budgetary considerations may make compliance with these obligations difficult.[10] Accordingly, the Human Rights Committee has held that ICCPR 10(1) is violated when a prisoner is held incommunicado for any length of time;[11] is beaten by prison

[9] *August* v. *Electoral Commission* [2000] 1 LRC 608. See also *O'Brien* v. *Skinner* 414 US 524 (1973), where the United States Supreme Court held that prisoners were not disabled from voting except by reason of not being able physically – in the very literal sense – to go to the polls on election day or to make the appropriate registration in advance by mail. Marshall J noted that it was the state which was both physically preventing the prisoners from going to the polls and denying them alternative means of casting their ballots.

[10] *Mukong* v.*Cameroon*, Human Rights Committee, Communication No.458/1991, HRC 1994 Report, Annex IX.AA.

[11] *Caldas* v. *Uruguay*, Communication No.43/1979, HRC 1983 Report, Annex XVIII. See also *Casariego* v. *Uruguay*, Communication No.56/1979, HRC 1981 Report, Annex XX; *Sendic* v. *Uruguay*, Communication No.R.14/63, 28 October 1981; *Altesor* v. *Uruguay*, Communication No.10/1977, HRC 1982 Report, Annex IX; *Machado* v. *Uruguay*, Communication No. 83/1981, HRC 1984 Report, Annex VII; *Romero* v. *Uruguay*, Communication No.85/1981, HRC 1984 Report, Annex IX; *Conteris* v. *Uruguay*, Communication No.139/1983, HRC 1985 Report, Annex XI; *Voituret* v. *Uruguay*, Communication No.109/1981, HRC 1984 Report, Annex X; *Muteba* v. *Zaire*, Communication No.124/1982, HRC 1984 Report, Annex XIII; *Espinoza de Polay* v. *Peru*, Communication No.577/1994, HRC 1998 Report, Annex XI.F.

warders;[12] is shackled and blind-folded;[13] is displayed to the press in a cage;[14] is refused medical attention;[15] is subjected to ridicule;[16] is denied reading facilities and is not allowed to listen to the radio;[17] is required to sleep on a wet concrete floor,[18] or to share a mattress;[19] is confined to his cell for an inordinately long period each day;[20] is confined in a special cell, together with a mentally disturbed prisoner;[21] is confined in a cell which is overcrowded and unhygenic;[22] is kept in a cell in which the electric lights are kept continuously on;[23] or which is unlit for twenty-three and a half hours a day.[24] To prepare prison food in unsanitary conditions;[25] to place restrictions on a prisoner's correspondence

[12] *Solorzano* v. *Venezuela*, Communication No.156/1983, HRC 1986 Report, Annex VIII.C; *Bailey* v. *Jamaica*, Communication No.334/1988, 31 March 1993; *Soogrim* v. *Trinidad and Tobago*, Communication No.363/1989, 8 April 1993; *Thomas* v. *Jamaica,* Communication No.321/1988, HRC 1994 Report, Annex IX.A; *Hylton* v. *Jamaica*, Communication No.407/1990, HRC 1994 Report, Annex IX.M; *Francis* v. *Jamaica*, Communication No.606/1994, HRC 1995 Report, Annex X.N; *Stephens* v. *Jamaica*, Communication No.373/1989, HRC 1996 Report, Annex VIII.A; *Reynolds* v. *Jamaica*, Communication No.587/1994, HRC 1997 Report, Annex VI.O; *Walker* v. *Jamaica*, Communication No.639/1995, HRC 1997 Report, Annex VII.R; *Daley* v. *Jamaica*, Communication No.750/1997, HRC 1998 Report, Annex VII.R.

[13] *Jijon* v. *Ecuador*, Communication No.277/1988, HRC 1992 Report, Annex IX.I.

[14] *Espinoza de Polay* v. *Peru*, Communication No.577/1994, 6 November 1997, HRC 1998 Report, Annex XI.F.

[15] *Mpandanjila* v. *Zaire*, Communication No.138/1983, HRC 1986 Report, Annex VIII.A; *Kalenga* v. *Zambia*, Communication No.326/1988, 27 July 1993; *Lewis* v. *Jamaica*, Communication No.527/1993, HRC 1996 Report, Annex VIII.N.

[16] *Francis* v. *Jamaica,* Communication No.606/1994, HRC 1995 Report, Annex X.N.

[17] *Nieto* v. *Uruguay*, Communication No. 92/1981, HRC 1983 Report, Annex XX.

[18] *Shaw* v. *Jamaica*, Communication No.704/1996, HRC 1998 Report, Annex XI.S.

[19] *Yasseen and Thomas* v. *Guyana*, Communication No.676/1996, HRC 1998 Report, Annex XI.R.

[20] *Cabreira* v. *Uruguay*, Communication No.105/1981, HRC 1983 Report, Annex XXI; *Parkanyi* v. *Hungary*, Communication No.410/1990, HRC 1992 Report, Annex IX.Q.

[21] *Wolf* v. *Panama*, Communication No.289/1988, HRC 1992 Report, Annex IX.K.

[22] *Massiotti* v. *Uruguay*, Communication No.R.6/25/1978, HRC 1982 Report, Annex XVIII; *Griffin* v. *Spain*, Communication No.493/1992, HRC 1995 Report, Annex VIII.G; *Adams* v. *Jamaica*, Communication No.607/1994, HRC 1997 Report, Annex X.P; *Whyte* v. *Jamaica*, Communication No.732/1997, HRC 1998 Report, Annex XI.V; *McTaggart* v. *Jamaica*, Communication No.749/1997, HRC 1998 Report, Annex XI.Y; *Perkins* v. *Jamaica*, Communication No.733/1997, 30 July 1998.

[23] *Lluberas* v. *Uruguay*, Communication No.123/1982, HRC 1984 Report, Annex XII.

[24] *Espinoza de Polay* v. *Peru*, Communication No.577/1994, HRC 1998 Report, Annex XI.F; *Finn* v. *Jamaica*, Communication No.617/1995, HRC 1998 Report, Annex XI.K; *Deidrick* v. *Jamaica*, Communication No.619/1995, HRC 1998 Report, Annex XI.L; *Yasseen and Thomas* v. *Guyana*, Communication No.676/1996, HRC 1996 Report, Annex XI.R; *McLeod* v. *Jamaica*, Communication No.734/1997, HRC 1997 Report, Annex XI.X.

[25] *Matthews* v. *Trinidad and Tobago*, Communication No.569/1993, HRC 1998 Report, Annex XI.E.

with his family;[26] or to convey to a prisoner that the prerogative of mercy would not be exercised and his early release denied because he has complained of violations of his human rights, also infringes ICCPR 10(1).[27]

*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.*

Prisoners awaiting trial are unconvicted persons and are therefore presumed to be innocent of any wrongdoing. The purpose of their detention is merely to bring them to trial. Sufficient security must assure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff. Punishment, deterrence or retribution in such a context are out of harmony with the presumption of innocence. Indeed, it has been well established since the days of Blackstone that a prisoner awaiting trial must be treated with all of the consideration that the need for confinement will allow: 'But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only.'[28]

The segregation of accused persons from convicted persons is required in order to emphasize their status as unconvicted persons who enjoy the right to be presumed innocent.[29] A proposal made when ICCPR 10 was being drafted that accused persons shall 'normally' be segregated from convicted persons was rejected on the ground that that formulation might unduly weaken the article. Some members of the Third Committee even objected to the phrase 'save in exceptional circumstances', fearing that these words might open the door to unjustified abuses and practices.[30] The Human Rights Committee has held that while convicted and unconvicted persons must be kept in separate quarters, they need not be kept in separate buildings. Arrangements whereby convicted persons

[26] *Espinoza de Polay* v. *Peru*, Communication No.577/1994, HRC 1998 Report, Annex XI.F.
[27] *Pinto* v. *Trinidad and Tobago*, Communication No.512/1992, HRC 1996 Report, Annex VIII.J.
[28] 4 *Commentaries* 300, cited by Gubbay CJ in *Blanchard* v. *Minister of Justice, Legal and Parliamentary Affairs*, Supreme Court of Zimbabwe, [2000] 1 LRC 671.
[29] Human Rights Committee, General Comment 21 (1992). See *Griffin* v. *Spain*, Human Rights Committee, Communication No.493/1992, HRC 1995 Report, Annex VIII.G.
[30] UN document A/4045, section 80.

are regularly brought into contact with unconvicted persons, as when convicted persons perform chores in the area where unconvicted persons are held, do not violate this ICCPR 10(2), 'provided that contacts between the two classes of prisoners are kept strictly to a minimum necessary for the performance of those tasks'.[31]

The individual cells occupied by unconvicted prisoners must remain unlocked and open during the day (in this case, between the hours of 0700 and 1600), every day of the week, including Saturdays, Sundays and public holidays, thereby affording them freedom of movement and communication within the cell block in which they are detained. The continuous lighting of their cells is 'irrational' and appears to be directed at 'exacerbating the effect of the condition of confinement by making it as uncomfortable and severe as possible'. Accordingly, the Supreme Court of Zimbabwe directed that electric lights in each cell be switched off between the hours of 2200 and 0600; a torch could be used effectively by the warder to check upon the presence of the occupants in their cells at night.[32]

Prisoners awaiting trial are entitled to use and wear their own clothing at all times. 'The reason is obvious. An awaiting trial prisoner is presumed innocent. Hence, he should not be forced to wear clothing which imparts the appearance of guilt. To create a situation in which an awaiting trial prisoner is by virtue of prison garb physically indistinguishable from prisoners who have been convicted is to debase and humiliate him in his own eyes, and lower him in the estimation of others. It connotes treatment which is calculated to, or in all probability will, adversely affect the status of the recipient.'[33] While prisoners awaiting trial are also entitled to receive every day, from sources outside the prison, as much food as they require, it is not appropriate for a court to direct that the food supplied should not first be tasted by the person delivering it. The power to examine food and the method employed is an administrative procedure that a court ought not to interfere with. To do so would amount to an unnecessary intrusion into the sphere of those charged with and trained in the running of penal institutions.[34]

[31] *Pinkney* v. *Canada*, Communication No.R.7/27/1978, HRC 1982 Report, Annex VII.

[32] *Blanchard* v. *Minister of Justice, Legal and Parliamentary Affairs*, Supreme Court of Zimbabwe, [2000] 1 LRC 671.

[33] Per Gubbay CJ in *Blanchard* v. *Minister of Justice, Legal and Parliamentary Affairs*, Supreme Court of Zimbabwe, [2000] 1 LRC 671, at 681.

[34] *Ibid.*

*Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*

This requirement seeks to ensure that, on moral and physical grounds, juveniles are separated from adults.[35] Although it does not indicate any limits of juvenile age, the Human Rights Committee has noted that ICCPR 6(5) suggests that all persons under the age of eighteen should be treated as juveniles.

*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*

This requirement does not go as far as to state that the sole purpose of the penitentiary system should be the reformation and social rehabilitation of prisoners, as some representatives on the Third Committee wished ICCPR 10 to do in keeping with what they described as the contemporary trend and modern idea of the basic purpose of the detention of offenders. In that sense, it does not disregard the deterrent aspect of punishment.[36] But the Human Rights Committee has stressed that no penitentiary system should be only retributory. It should essentially seek the reformation and social rehabilitation of the prisoner. Relevant measures may include teaching, education and re-education, vocational guidance and training, work programmes inside as well as outside the penitentiary establishment, and assistance after release.[37]

*Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

This provision was included on the proposal of the representative of Ceylon who argued that although the covenant could not provide for detailed measures, it should embody provisions covering the special needs of juvenile offenders in regard to such matters as the conditions and duration of their provisional detention, their segregation from adults and

[35] UN document A/4045, sections 82, 83. This paragraph was included on the proposal of Ceylon.
[36] UN document A/4045, section 81.
[37] Human Rights Committee, General Comment 21 (1992).

particularly from convicted persons, and the nature of the treatment to be accorded to them. The latter should conform to accepted principles of correctional treatment for juveniles and be adapted to the individual nature of each offender. The requirement is formulated in broad terms leaving each state to adopt appropriate definitions, detailed measures and programmes corresponding to their needs.[38]

Treatment appropriate to their age and legal status in so far as conditions of detention are concerned include shorter working hours and contact with relatives. Other standards applicable to the treatment of juveniles are set out in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules.[39]

[38] UN document A/4045, section 82.
[39] Human Rights Committee, General Comment 21 (1992).

# 15

# The right to freedom of movement

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

9. No one shall be subjected to arbitrary . . . exile.
13. (1) Everyone has the right to freedom of movement and residence within the borders of each state.
    (2) Everyone has the right to leave any country, including his own, and to return to his country.
14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
    (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

#### International Covenant on Civil and Political Rights (ICCPR)

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.
13. An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision

reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

## *Regional instruments*

### American Declaration of the Rights and Duties of Man (ADRD)

8. Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.
27. Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

### European Convention for the Protection of Human Rights and Fundamental Freedoms. Protocol 4. (ECHR P4)

2. (1) Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
   (2) Everyone shall be free to leave any country, including his own.
   (3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
   (4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.
3. (1) No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national.
   (2) No one shall be deprived of the right to enter the territory of the state of which he is a national.
4. Collective expulsion of aliens is prohibited.

## American Convention on Human Rights (ACHR)

22. (1) Every person lawfully in the territory of a state party shall have the right to move about in it and to reside in it subject to the provisions of the law.
    (2) Every person has the right to leave the country freely, including his own.
    (3) The exercise of the foregoing rights may be restricted only pursuant to a law, to the extent indispensable in a democratic society in order to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
    (4) The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
    (5) No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
    (6) An alien lawfully in the territory of a state party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
    (7) Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political or related common crimes.
    (8) In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
    (9) The collective expulsion of aliens is prohibited.

## African Charter on Human and Peoples' Rights (AfCHPR)

12. (1) Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.
    (2) Every individual shall have the right to leave any country, including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.

(3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
(4) A non-national legally admitted in a territory of a state party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law.
(5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

*Related texts:*

Convention Relating to the Status of Refugees 1951, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under UNGA resolution 429 (V) of 14 December 1950 (22 April 1954).

Statute of the Office of the United Nations High Commissioner for Refugees, UNGA resolution 428 (V) of 14 December 1950.

Convention Relating to the Status of Stateless Persons 1954, adopted by a Conference of Plenipotentiaries convened by ECOSOC resolution 526 A (XVII) of 26 April 1954 (6 June 1960).

Protocol Relating to the Status of Refugees 1966, approved by ECOSOC resolution 1186 (XLI) of 18 November 1966 and noted by UNGA resolution 2198 (XXI) of 16 December 1966 (4 October 1967).

Convention on the Reduction of Statelessness 1961, adopted by a Conference of Plenipotentiaries convened in pursuance of UNGA resolution 896 (IX) of 4 December 1954 (13 December 1975).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 3.

International Convention on the Protection of All Migrant Workers and Members of Their Families, 1990.

ILO Migration for Employment Convention 1949, No.97 and Recommendation No.86.

European Social Charter 1961.

Declaration on Territorial Asylum, UNGA resolution 2312 (XXII) of 14 December 1967.

The Uppsala Declaration on the Right to Leave and the Right to Return, adopted by the International Colloquium held in Uppsala, Sweden, 1972.

Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, UNGA resolution 40/144 of 13 December 1985.

The Strasbourg Declaration on the Right to Leave and Return, adopted at a meeting of experts convened by the International Institute of Human Rights in Strasbourg, France, 1986.

Draft United Nations Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country, 1991.

The Convention Governing Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 10 September 1969.

The Cartagena Declaration on Refugees 1984.

## Comment

Socrates, in his dialogue with Crito, spoke of personal liberty. He regarded the right of everyone to leave his country as an attribute of personal liberty: 'We further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he please and take his goods with him. None of our laws will forbid him, or interfere with him. Anyone who does not like us and the city, and who wants to emigrate to a colony or to any other city may go where he likes, retaining his property.[1] In ancient India, the freedom of movement was a part of its traditional culture which upheld the dignity of man and saw in him the embodiment of the Divine. Bhagwati J explained:

> The Vedic seers knew no limitations either in the locomotion of the human body or in the flight of lands in pursuit of trade and business or in search of knowledge or with a view to shedding on others the light of knowledge imparted to them by their ancient sages and seers. India expanded her borders: her ships crossed the ocean and the fine superfluity of her wealth brimmed over to the East as well as to the West. Her cultural messengers and envoys spread her arts and epics

[1] Plato, *Dialogues*, cited by Krishna Iyer J in *Maneka Gandhi* v. *The Union of India*, Supreme Court of India, [1978] 2 SCR 621 at 715.

> in South East Asia and her religious conquered China and Japan and other Far Eastern countries and spread westward as far as Palestine and Alexandria. Even at the end of the last and the beginning of the present century, our people sailed across the seas to settle down in African countries. Freedom of movement at home and abroad is a part of our heritage.[2]

Indeed, in the days of Kautilya (321–296 BC) there was in India a superintendent of passports 'to issue passes at the rate of a marsha a pass'.[3] In 1215, the right to freedom of movement was legally recognized in the Magna Carta in the following terms: 'It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the law of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above.'[4]

The freedom of movement comprises four distinct rights: (1) the right to freedom of movement within a territory; (2) the right to choose a residence within a territory;[5] (3) the right to leave any country, including one's own; and (4) the right to enter one's own country. The state must ensure that these rights are protected not only from public but also from private interference. In the case of a woman, this obligation to protect requires, for example, that the right to move freely and to choose her residence must not be subject, by law or practice, to the decision of any other person, including a relative.[6] The right to seek and to enjoy asylum from persecution is a necessary consequence of the right to leave one's own country. Both ECHR P4 3 and ACHR 22(5) expressly prohibit the

[2] *Maneka Gandhi* v. *The Union of India*, Supreme Court of India, [1978] 2 SCR 621 at 698.

[3] Referred to by Krishna Iyer J in *Maneka Gandhi* v. *Union of India*, Supreme Court of India, [1978] 2 SCR 621 at 714, 721. He added: 'Travel makes liberty worthwhile. Life is a terrestrial opportunity for unfolding personality, rising to higher states, moving to fresh woods and reaching out to reality which makes our earthly journey a true fulfilment – not a tale told by an idiot full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth.'

[4] Article 42, 6 *Halsbury's Statutes* (3rd edn) 401.

[5] This right implies protection against arbitrary displacement. On this aspect, see Francis M. Deng, *Internally Displaced Persons: Compilation and Analysis of Legal Norms* (New York: United Nations, 1998); *Human Rights and Population Transfer,* Final Report of the Special Rapporteur, Mr Al-Khasawneh, UN document E/CN.4/Sub.2/1997/23 of 27 June 1997.

[6] Human Rights Committee, General Comment 27 (1999).

expulsion of a national, but a proposal that ICCPR 12 should include a provision prohibiting arbitrary exile, based on UDHR 9, was criticized on the ground that a liberal and democratic society should not permit exile and, therefore, no such provision was included.[7]

As a general rule, no distinction is drawn between citizens and aliens or between different categories of aliens in respect of the enjoyment of this right.[8] A state is obliged to ensure fundamental rights (with the exception of those which are expressly or necessarily applicable only to citizens) to all individuals within its territory and subject to its jurisdiction, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.[9] However, unlike a citizen, an alien may be expelled from the territory of a state. But ICCPR 13, ACHR 22(6) and AfCHPR 12(4) recognize the right of an alien lawfully in the territory of a state not to be expelled therefrom except in pursuance of 'a decision reached in accordance with law'. ICCPR 13 proceeds to prescribe some of the elements of such procedure, namely, the right to submit reasons against the expulsion, and the right to have the case reviewed by, and be represented for that purpose before, the competent authority or other designated person.[10] In the application of ICCPR 13, a state may not discriminate between different categories of aliens.[11] ECHR P4 4 and ACHR 22(9) prohibit the collective (or 'mass' in the case of AfCHPR 12(5)) expulsion of aliens.[12] ICCPR 13 does not contain a similar prohibition, but its purpose and effect is clearly to prevent arbitrary expulsions. This is confirmed by the provisions concerning reasons and review.[13]

[7] UN document A/2929, chapter VI, sections 58, 59. In support of the proposal it was explained that, while in most countries exile no longer existed as a penalty, in some circumstances it might be more humane to exile a person rather than to inflict on him more severe punishment, such as detention in a concentration camp or complete deprivation of liberty.

[8] Human Rights Committee, General Comment 15 (1986).

[9] See UDHR 2(1), ICESCR 2 (but see Art. 2(3) which enables developing countries to determine, with due regard to human rights and their economy, to what extent they would guarantee the economic rights to non-nationals), ICCPR 2, ECHR 1, ACHR 1, and AfCHPR 1.

[10] ICCPR 13 is based on Article 32 of the Convention Relating to the Status of Refugees. See UN document A/2929, chapter VI, section 64.

[11] Human Rights Committee, General Comment 15 (1986).

[12] See also Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live 1985, Article 7: Individual or collective expulsion of aliens lawfully in the territory of a state on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.

[13] Human Rights Committee, General Comment 15 (1986).

The Human Rights Committee has described the freedom of movement as 'an indispensable condition for the free development of a person'.[14] It interacts with several other fundamental rights. For example, the right to a fair trial enables an individual who is denied the exercise of this right to resort to an independent and impartial tribunal instead of having to depend on the discretion of a subordinate official. The right to change one's nationality presupposes the right to leave one's country, while the guarantee against arbitrary deprivation of one's nationality ensures return to one's own country. The right to property facilitates the exercise of this right, while the freedom to seek, receive and impart information, regardless of frontiers, enables the free circulation of ideas, an important constituent of the freedom of movement.[15] As Douglas J observed, 'Like the right of assembly and the right of association, it often makes all other rights meaningful – knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person'.[16]

[14] Human Rights Committee, General Comment 27 (1999).

[15] See Volodymyr Boutkevitch, *Freedom of Movement*, a working paper prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1997/22 of 29 July 1997.

[16] Per Douglas J in *Aptheker* v. *Secretary of State*, United States Supreme Court, 378 US 500 (1964) at 520. An American commentator has described the social values of the freedom of movement thus: 'Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life – marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home. (Chafee, *Three Human Rights in the Constitution of 1787* (1956), 171, quoted by Douglas J in *Kent* v. *Dulles* 357 US 116 (1958), at 126). See also The International Commission of Jurists, *Declaration of Bangalore 1965*: The freedom of movement of the individual within or in leaving his own country, in travelling to other countries and in entering his own country is a vital human liberty, whether such movement is for the purpose of recreation, education, trade or employment, or to escape from an environment in which his other liberties are suppressed or threatened. Moreover, in an inter-dependent world requiring an ever-growing measure of international understanding, individual contacts between peoples and the removal of all unjustifiable restraints on their movement is a very necessary feature.

## Interpretation

### *The right to liberty of movement within the territory of a state*

Everyone lawfully within the territory of a state enjoys, within that territory, the right to move freely. In principle, the citizens of a state are always lawfully within the territory of that state. The question whether an alien is 'lawfully' within the territory of a state is a matter governed by domestic law, which may subject the entry of an alien to the territory of a state to restrictions, provided they are in compliance with the state's international obligations.[17] The Human Rights Committee has held that an alien who enters a state lawfully, but whose status is regularized, must be considered to be lawfully within the territory.[18] Once a person is lawfully within a state, any restrictions on his or her right to freedom of movement, and any treatment different from that accorded to nationals, have to be justified on one or more of the prescribed grounds.[19]

The right to move freely relates to the whole of the territory of a state, including all parts of a federal state. The enjoyment of this right may not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.[20] Where two Zairian citizens who were members of an opposition political group were subjected administratively first to internal banishment, and then confined to their respective native villages for a period of over one year, the Human Rights Committee held that on each occasion they had been deprived of their freedom of movement within the territory of their state.[21] Similarly

[17] Human Rights Committee, General Comment 27 (1999).

[18] *Celepli* v. *Sweden*, Communication No.456/1991, 18 July 1994, HRC 1994 Report, Annex IX.Z.

[19] Human Rights Committee, General Comment 27 (1999).

[20] Human Rights Committee, General Comment 27 (1999). However, ECHR P4 2(4) and ACHR 22(4) permit restrictions to be imposed by law in 'particular areas' (or 'designated zones') in the 'public interest'. See *Paramanathan* v. *Germany*, European Commission, (1986) 10 EHRR 123; (1986) 51 *Decisions & Reports* 237; Where an application for provisional admission to Germany was subjected to the condition that it extended only to the city of Heilbronn, the applicant's lawful stay within the territory was thereby geographically limited.

[21] *Birindwa and Tshisekedi* v. *Zaire*, Communication Nos.241 and 242/1987, HRC 1990 Report, Annex IX.I. See also *Mpandanjila* v. *Zaire*, Communication No.138/1983, HRC 1986 Report, Annex VIII.A; *Mpaka-Nsusu* v. *Zaire*, Communication No.157/1983, HRC 1986 Report, Annex VIII.D.

deprived was a Togolese who was denied, by presidential order, the right to enter his native town.[22]

A citizen who chooses to exercise this right and is, therefore, temporarily away from his or her permanent or principal place of residence, does not thereby lose the right to be registered on the electoral roll of the constituency in which such residence is situated. Where a law of the Republic of North Ossetia authorized the central electoral commission not to register on the electoral roll citizens who did not reside in the territory of the republic and were located outside its frontiers, regardless of the reasons for their absence, the Constitutional Court of Russia held that such law infringed their freedom of movement. The absence of citizens at the time of registration may not be used as a reason for refusing to register them on the electoral roll of the relevant constituency.[23]

A restriction on the use of a particular vehicle may infringe this right. A regulation made by the council of ministers in Cyprus restricted the circulation of private motor vehicles, depending on whether their registration numbers were even or odd, to alternate weekends. This regulation was incompatible with 'the right to move freely throughout the territory of the Republic', guaranteed by article 13(1) of the Constitution, since public transport was inadequate at weekends, few citizens could afford to own two motor cars or to use taxis, and the distances could not reasonably be covered on foot.[24] But in Gibraltar, rules made under the Port Ordinance which prohibited the operation of 'fast launches' during curfew hours, 10 pm to 7 am, when there were no customs officers on duty, were upheld. The rules were not inconsistent with section 13 of the Constitution of Gibraltar which guaranteed 'the right to move freely throughout Gibraltar' since they affected the movement of launches but not the owners. Those who were inconvenienced could still use another kind of vessel. Moreover, the rules were necessary in the interests of public order since they were designed to assist the Gibraltarian and Spanish authorities in their battle against drug-runners.[25] The earlier Cyprus decision was not considered in this case.

[22] *Ackla* v. *Togo*, Human Rights Committee, Communication No.505/1992, HRC 1996 Report, Annex VIII.I.

[23] Decision of the Constitutional Court of Russia, 24 November 1995, *Rossiyskaya Gazeta*, 05.12.1995, (1995) *Bulletin on Constitutional Case-Law* 343.

[24] *Elia* v. *The Police*, Supreme Court of Cyprus, (1980) 2 CLR 118; (1980) 1 *Commonwealth Law Bulletin* 65.

[25] *Vinet* v. *Cortes*, Supreme Court of Gibraltar, [1988] LRC (Const) 486.

A classification which serves to penalize the exercise of the right to move freely within the territory of a country is a violation of this right. In the United States, a District of Columbia statute which classified indigent families in a state into two categories – those who had resided a year or more in the state and were thus eligible for welfare assistance, and those who had resided less than a year in the state and were thus ineligible for assistance – was held to be in violation of a person's basic constitutional right to travel freely from one state to another. The Supreme Court explained that while the one-year waiting period device was well suited to discourage the influx of poor families in need of assistance, an indigent who desired to migrate, resettle, find a new job, and start a new life, would doubtless hesitate if he knew that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence when his need might be most acute. The purpose of inhibiting migration by needy persons into the state was constitutionally impermissible.[26] A similar conclusion was reached where a Tennessee statute provided for the closure of its voter registration books thirty days before an election, but required residence in the state for one year and in the county for three months as a prerequisite for registration to vote. The durational residence requirement for voting operated to penalize those persons, and only those persons, who had exercised their constitutional right of interstate migration.[27]

The impact of surveillance on the exercise of this right was the subject of judicial inquiry in India. Does the placing of a person under surveillance restrict his right 'to move freely throughout the territory of India', guaranteed by article 19(1)(d) of the Constitution? The majority view in the Supreme Court was that the right to 'move' meant nothing more than a right of locomotion, and that in the context the adverb 'freely' was an indication that the freedom to move is without restriction

[26] *Shapiro* v. *Thompson*, 394 US 618 (1969). There is no reference to the right to freedom of movement in the American Bill of Rights 1791. However, in a series of judgments beginning in the nineteenth century, the United States Supreme Court has held that freedom to travel throughout the United States, which includes the freedom to enter and abide in any state in the Union, is one of the rights and privileges of national citizenship, and that freedom to travel abroad is an attribute of 'personal liberty' which is guaranteed to every person in the Fifth and Fourteenth Amendments. See *Kent* v. *Dulles* 357 US 116 (1958); *Aptheker* v. *Secretary of State* 378 US 500 (1964); *Zemel* v. *Rusk* 381 US 1 (1965); *United States* v. *Guest* 383 US 745 (1966); *Griffin* v. *Breckenridge* 403 US 88 (1971); *Dunn* v. *Blumstein* 405 US 330 (1972).

[27] *Dunn* v. *Blumstein* 405 US 330 (1972).

and is absolute, i.e. freedom to move wherever one likes, whenever one likes and however one likes, subject to any valid law. By a knock at the door or by a man being roused from his sleep, his locomotion was not impeded or prejudiced in any manner. Rejecting a submission that the knowledge or apprehension of police surveillance might induce a psychological inhibition against his movements, the majority held that the freedom guaranteed had reference to something tangible and physical, and not to the imponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion. The minority view emphasized that surveillance conveyed the idea of supervision and close observance. The person under surveillance was not permitted to go about unwatched. Subha Rao J explained the significance: 'Mere movement unobstructed by physical restriction cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of automation.' He asked how a movement under the scrutinizing gaze of the policeman could be described as a free movement? 'The whole country is his jail. The freedom of movement therefore must be a movement in a free country, i.e. in a country where he can do whatever he likes, speak to whomever he likes, meet people of his own choice without any apprehension, subject of course to the law of social control.' A person under the shadow of surveillance is certainly deprived of his freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce endangers inhibitions in him and he cannot act freely as he would like to.[28] In view of subsequent pronouncements by the court adopting a more liberal approach to interpretation, the minority view of Subha Rao J may now be regarded as a correct statement of the Indian law.[29]

[28] *Kharak Singh* v. *The State of Uttar Pradesh* [1964] 1 SCR 332.

[29] See *Cooper* v. *The Union of India* [1971] 1 SCR 512; *Maneka Gandhi* v. *The Union of India* [1978] 2 SCR 621. In *R* v. *Wise* (1992) 133 NR 161, where the Supreme Court of Canada, by a majority of four to three, held that evidence obtained through the electronic monitoring of a vehicle was admissible in a prosecution for mischief, La Forest J in his dissenting opinion found it 'absolutely outrageous' that 'in a free society the police or other agents of the state should have it within their power, at their sole discretion and on the basis of mere suspicion,

The Constitution of the Solomon Islands, while containing no express provision protecting the right to leave the Solomon Islands, guaranteed the 'right to move freely throughout Solomon Islands'. That right was infringed when the chairman of its timber corporation, who had been prohibited for a period from leaving the Solomon Islands by order of the minister for police and justice, was prevented from boarding an aircraft to leave the Solomon Islands. The 'right to move freely throughout Solomon Islands' includes a right to board a vessel or aircraft which will cross part of Solomon Islands to reach the frontiers and cross them.[30]

The unstructured random stopping by the police of members of the public is an infringement of their freedom of movement. In Zimbabwe, section 10(1)(c) of the National Registration Act made it an offence for anyone registered thereunder to be found 'without his identity document on his person' unless specifically exempted; the ability of a person to verify his identity by other means was no defence. The effect of this provision was to permit the random stopping of persons to ascertain whether they were carrying identity documents, and that conferred an entirely arbitrary discretion on police officers. Such random stopping, however brief, amounted to detention and was, therefore, an interference with the right to freedom of movement.[31]

Does the right to move freely throughout a country encompass the right of locomotion along the highway? The Court of Appeal of Guyana has held that it does not. The right of locomotion along the highway, i.e. the right to pass and repass along a highway together with the incidental right of short stoppages, is conceptually and qualitatively of a different nature from the right to move freely about the country.[32] Public streets,

to attach a beeper on a person's car that permits them to follow his or her movements night and day for extended periods'. See also *Raimondo* v. *Italy*, European Court, (1994) 18 EHRR 237.

[30] *Jamakana* v. *Attorney General of Solomon Islands*, Supreme Court of the Solomon Islands, [1985] LRC (Const) 569, per Daly CJ.

[31] *Elliott* v. *Commissioner of Police*, Supreme Court of Zimbabwe, [1997] 3 LRC 15: A lawyer was stopped by police officers while on his way to a lunch-time fitness class. When the police demanded to see his identity document he gave his name and occupation and explained that he had left his identity document behind in his office for he feared it might be stolen from the changing rooms while he was exercising. He was arrested and taken to the police station, where a senior officer accepted his reasons for not having the identity document on him and released him without charge. See also *R* v. *Hufsky*, Supreme Court of Canada, (1988) 1 SCR 621.

[32] *Ramson* v. *Barker* (1982) 33 WIR 183. See also, *Saghir Ahmed* v. *The State of Uttar Pradesh*, Supreme Court of India, [1955] 1 SCR 707; *United States* v. *Guest*, United States Supreme

by their nomenclature and definition, are meant for the use of the general public; they are not laid to facilitate the carrying on of private business.[33] But the right of a hawker to transact business while going from place to place has been recognized for a long period. If properly regulated according to the exigencies of the circumstances, the small traders on the sidewalks can contribute to the comfort and convenience of the general public by making available ordinary articles of every day use for a comparatively low price.[34]

### *The freedom to choose a residence within the territory of a state*

Any person lawfully within the territory of a state may choose where he wishes to live. The right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.[35] This right was successfully invoked in a German court by a Turkish national residing in Berlin for employment purposes when, for the first time since his entry into Germany nearly fifteen years previously, his indefinite residence permit issued under the Aliens Act by the commissioner of police was stamped: 'Not authorised to take up residence in the districts of Kreuzberg, Tiergarten or Wedding'.[36] An Indian citizen successfully contended that section 7 of the Influx from Pakistan (Control) Act 1949, under which his removal from his own country could be ordered by the government if he returned from a visit to Pakistan with no permit or without a valid permit, was in conflict with his right 'to reside and settle in any

Court, 383 US 745 (1966); *Griffin* v. *Breckenridge*, United States Supreme Court, 403 US 88 (1971).

[33] *Bombay Hawkers' Union* v. *Bombay Municipal Corporation*, Supreme Court of India, [1985] 3 SCC 528.

[34] *Sodan Singh* v. *New Delhi Municipal Corporation*, Supreme Court of India, [1989] 4 SCC 155. See also *Saudan Singh* v. *New Delhi Municipal Corporation*, Supreme Court of India, [1993] 4 LRC 204: Every citizen has the right to the use of a public street, including the right to trade thereon, subject to any restrictions reasonably imposed by the state. The right to trade on the street does not, however, extend to a citizen occupying or squatting on any specific pitch but merely permits a citizen to hawk on street pavements by moving continually from one place to another.

[35] Human Rights Committee, General Comment 27 (1999).

[36] Berlin Administrative Court (VwG Berlin), Decision of 26 August 1977, (1978) *Neue Juristische Wochenschrift* 68; (1977) 21 *Yearbook* 747.

part of the territory of India' guaranteed by article 19(1)(e) of the Constitution.[37]

The right to choose a residence within the territory of one's state of nationality is not affected by temporary absence from home. Accordingly, the Housing Code of the Republic of Belarus which provided that in the event of the temporary absence of a tenant and the members of his family, living accommodation would be reserved only for a specified period (in this case, six months), was inconsistent with this right. The Constitutional Court of Belarus also noted that housing legislation recognizes sub-tenants, and enables a tenant to entrust other persons – by granting them a power of attorney – to continue his or her rights under the contract of tenancy.[38] A tenant will not lose the right to retain his place of residence even if his absence is due to the enforcement of a prison sentence imposed by a court. The right to choose a residence is not subject to a time limit.[39]

The refusal by the authorities to grant a foreign national who was married to a Zimbabwan citizen a permit to work and reside in Zimbabwe on the ground that he had 'no scarce skill to offer the country' infringed the right of the Zimbabwan citizen to move freely throughout, and to reside in any part of, Zimbabwe (section 22 of the Constitution). Gubbay CJ explained that although there was no constitutional provision which equated directly to ICCPR 17, section 11 which guaranteed every person 'protection for the privacy of his home', taken in conjunction with section 22, and the whole interpreted generously and purposively so as to eschew the 'austerity of tabulated legalism', led to the conclusion that to prohibit husbands from residing in Zimbabwe and so disable them from living with their wives in the country of which they are citizens and to which they owe allegiance, was in effect to undermine and devalue the protection of freedom of movement accorded to each of the wives as a member of a family unit.[40] In a later case,[41] Gubbay CJ observed that the word 'reside' is ambiguous.

[37] *Ebrahim Vazir Mawat* v. *Bombay*, Supreme Court of India, [1954] SCR 933.

[38] Decision No.J-38/96 of the Constitutional Court of Belarus, 25 June 1996, (1996) *Bulletin on Constitutional Case-Law* 178.

[39] Decision of the Constitutional Court of Russia, 23 June 1995, *Rossiyskaya Gazeta*, 04.07.95, (1995) 2 *Bulletin on Constitutional Case-Law* 191.

[40] *Rattigan* v. *Chief Immigration Officer*, Supreme Court of Zimbabwe, [1994] 1 LRC 343.

[41] *Salem* v. *Chief Immigration Officer*, Supreme Court of Zimbabwe, [1994] 1 LRC 354. In this case, the court held that, in the absence of a stated suspicion that the marriage was one

> It may have a variety of meanings in accordance with the intent and object in which it appears. To ascribe it the strict meaning of the place where an individual eats and sleeps after the work of the day is done, would be to diminish the guaranteed right of the citizen wife who, through such causes as old age, poverty, illiteracy, redundancy, physical or mental disability, is unable sufficiently to provide for her alien husband and children in Zimbabwe. And so in order to secure and maintain the marital relationship she is left no option but to depart with her husband to a country where he is in a position to assume the role and responsibility of breadwinner. Put otherwise, to impart the normally narrow meaning to 'the right to reside in any part of Zimbabwe' would be to differentiate between the affluent wife, who is not dependent upon the support of her husband for herself and her children, and she who is impoverished or destitute, and partly or wholly dependent upon him.

### *The freedom to leave any country*

Everyone is free to leave any country, including his own.[42] The freedom to leave the territory of a state may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. It covers both travel abroad and departure for permanent emigration. Similarly, the right of the individual to determine the state of destination is part of the legal guarantee. Since this right is not restricted to persons lawfully within the territory of a state, an alien being legally expelled from the country is also entitled to elect the state of destination, subject to the agreement of that state.[43] The right to leave any country,

of convenience, an immigration officer may not insist that the husband should leave the country pending consideration of his application for a residence permit. The court directed that the alien husband be issued, within thirty days, such written authority as was necessary to enable him to remain in Zimbabwe on the same standing as any other alien who was a permanent resident, and be accorded the same rights as were enjoyed by all permanent residents, including the right to engage in employment or other gainful activity in any part of Zimbabwe and that no restriction be imposed on that right. (The principle of extending this right to an alien was based on the need to avoid undermining the right of a citizen to live in the country as a member of a family unit: see *Ruwodo NO* v. *Minister of Home Affairs*, Supreme Court of Zimbabwe, [1995] 2 LRC 86.)

[42] A foreigner is entitled to seek the diplomatic assistance of his own country in order to ensure the enjoyment of this right. See Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45, Article 12.

[43] Human Rights Committee, General Comment 27 (1999).

including one's own, does not, of course, guarantee an unrestricted right to travel from one country to another. In particular, it does not entitle a person to enter a country other than his own.[44] However, UDHR 14, ADRD 27, ACHR 22(7) and AfCHPR 12(3) recognize the right of a person to leave his country in order to seek and to enjoy in another country asylum from persecution.[45]

## Passport

In order to enable the individual to exercise the freedom to leave any country, including his own, obligations are imposed both on the state of residence and on the state of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country includes the right to obtain the necessary travel documents.[46] The issue of a passport is normally incumbent on the state of nationality of the individual. The fact that a citizen is resident abroad, or being resident abroad has obtained travel documents from another state, does not relieve the state of nationality of the obligation to issue a passport. In such a case, obligations are imposed both on

[44] *Nunez* v. *Uruguay*, Communication No.108/1981, HRC 1983 Report, Annex XXIII.

[45] This right does not belong to a person who is being prosecuted for a non-political crime or for acts contrary to the purposes and principles of the United Nations. See Right to seek asylum at 459–461.

[46] Human Rights Committee, General Comment 27 (1999). In his study on 'The right of everyone to leave any country, including his own, and to return to his country', prepared for the Commission on Human Rights in 1988 (UN document E/CN.4/Sub.2/1988/35, paragraph 66), C.L.C. Mubanga-Chipoya explains the origin of the passport: 'Passports were introduced in the European countries in the sixteenth century first as a licence given by military authorities to a soldier to go on furlough. In the eighteenth century, the term was used for documents issued to aliens by the sovereign of the territory in which the document was effective. In that time, a passport was required also for internal movement within the country. At the beginning of the nineteenth century, the passport was considered as written permission given by a belligerent to aliens, allowing them to travel in his territory or in the territory occupied by him. During the French Revolution passports were first abolished in accordance with the proclamation of the freedom of movement, but later reintroduced as a restriction of the right to leave the country. Since that time, passports have been issued by the authorities of a country to their nationals travelling abroad.' In 1835, the United States Supreme Court described the character of a passport thus: 'It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.' (*Urtetiqui* v. *D'Arcy* (US) 9 Pet 692, 699, 9 L ed 276, 279, cited by Douglas J in *Kent* v. *Dulles* 357 US 116 (1958), at 121.)

the state of residence and on the state of nationality.[47] The refusal by a state to issue a passport or prolong its validity for a national residing abroad may deprive such person of the right to leave the country of residence and to travel elsewhere. It is no justification for the state to claim that its national would be able to return to its territory without a passport.[48]

The holding of a passport is not a privilege. In the High Court of Zambia, Musumali J explained why. 'It is not a privilege because he/she has a right of movement enshrined in the Constitution (article 24). In order to travel outside the country a Zambian citizen needs a valid Zambian passport or a travel document. Just as they do not need to get permission from the authorities to travel from one part of the country to another, so they do not need to get permission to travel outside the country. Since they cannot travel outside the country without passports, they are entitled to have them, unless legal restrictions attaching to the freedom of movement imposed by the constitution validly apply.'[49] In the United Kingdom, where a passport is still issued in the exercise of prerogative power, the High Court has jurisdiction to inquire whether a passport has been wrongly refused. O'Connor LJ observed that the exercise of the prerogative in respect of the issue of passports 'is an area where common sense tells one that, if for some reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it'. It follows, therefore, that reasons for refusal ought to be given.[50]

[47] *Waksman* v. *Uruguay*, Human Rights Committee, Communication No.31/1978, HRC 1980 Report, Annex VII; *Martins* v. *Uruguay*, Human Rights Committee, Communication No.57/1979, HRC 1982 Report, Annex XIII; *Lichtensztejn* v. *Uruguay*, Human Rights Committee, Communication No.77/1980, HRC 1983 Report, Annex XIV; *Montero* v. *Uruguay*, Human Rights Committee, Communication No.106/1981, HRC 1983 Report, Annex XVII.

[48] Human Rights Committee, General Comment 27 (1999). See also *Vidal Martins* v. *Uruguay*, Communication No.57/1979, 23 March 1982, HRC, *Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions)* (UN document CCPR/C/OP/I) p. 122.

[49] *Nawakwi* v. *Attorney-Genera of Zambia* [1993] 3 LRC 231. See also *Nyirong* v. *Attorney-General of Zambia* [1993] 3 LRC 256, where the Supreme Court of Zambia observed that a right for a Zambian citizen to enter Zambia presupposed a right for such citizen to have left Zambia in the first place, and consequently such right could only be withheld or taken away on the grounds set out in the constitution.

[50] *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, Court of Appeal of the United Kingdom, [1989] LRC (Const) 966. Cf. *Re Application by Mwau* [1985] LRC (Const) 444, where the High Court of Kenya held that, in the absence of any statutory authority for the issue and withdrawal of passports in Kenya, such issue is the prerogative of the President, exercisable by the responsible Minister in his discretion, and therefore

In India, in the absence of a law regulating the issue of passports, the refusal of a passport by the executive, acting in its discretion, constitutes a violation of the citizen's right to leave his country.[51] In Ceylon (Sri Lanka), where the constitution did not guarantee the right to freedom of movement, and where passports were issued under the Immigrants and Emigrants Act, in the absolute discretion of the prescribed authority, T.S. Fernando J observed that 'the right to freedom of movement is an important right of a citizen, and our courts may not be found unwilling on a proper occasion and in appropriate proceedings to consider whether executive discretion can be equated to executive whim or caprice'.[52]

Any legal rules or administrative measures which adversely affect the right to leave, in particular, a person's own country, need to be assessed for conformity with the exercise of this right. So too with measures that impose sanctions on international carriers which bring to the territory of a state persons without required documents, where those measures affect the right to leave another country.[53] An individual who holds a valid passport may not be required to ask his or her government for special permission to travel, or to explain or justify the reasons for the journey. An attempt in Ceylon to impose such restrictions on the freedom to travel was effectively stifled by the Supreme Court of that country. In 1964, the immigration authorities insisted on 'clearance' from the ministry of defence and external affairs before a person holding a valid passport, the necessary visas, and a ticket could be permitted to leave the country. The general secretary of the United Nations Association of Ceylon applied for 'clearance' to visit Kuala Lumpur to attend a meeting of his association's parent body, and was notified that the clearance required could not be granted. He appealed to the Supreme Court which insisted that this 'illegal requirement' should be withdrawn forthwith.[54]

A passport may not be withheld from a citizen because of his beliefs and associations. It was so held by the Supreme Court of the United

not subject to judicial review. Since the High Court of Kenya was purporting to follow the English law, this decision may now be regarded as incorrect.

[51] *Satwant Singh Sawhney* v. *Ramarathnam*, Supreme Court of India, [1967] 3 SCR 525.

[52] *In Re Ratnagopal*, Supreme Court of Ceylon, (1968) 70 NLR 409.

[53] Human Rights Committee, General Comment 27 (1999).

[54] *Aseerwatham* v. *Permanent Secretary, Ministry of Defence and External Affairs*, (1964) 6 *Journal of the International Commission of Jurists* 319. See also *Gooneratne* v. *Permanent Secretary, Ministry of Defence and External Affairs*, (1964) 6 *Journal of the International Commission of Jurists* 320.

States when an American citizen who wished to visit the United Kingdom and to attend a meeting of the World Council of Peace in Finland was denied a passport by the secretary of state, acting under the Passport Act 1929, on the grounds that: (a) he was a communist, and (b) he had had 'a consistent and prolonged adherence to the communist party line'.[55] In a later case, the same court held that section 6 of the Subversive Activities Control Act, which forbade members of communist organizations 'to apply for, use, or attempt to use, a passport', too broadly and indiscriminately restricted a citizen's right to travel. Goldberg J noted that the prohibition of section 6 applied regardless of the purposes for which an individual wished to travel. 'As a result, if a notified member of a registered organization were to apply for a passport to visit a relative in Ireland, or to read rare books in the Bodleian Library of Oxford University, the applicant would be guilty of a crime; whereas, if he were to travel to Canada or Latin America to carry on criminal activities directed against the United States, he could do so free from the prohibitive reach of section 6.[56]

The following principles relating to the issue of passports have been formulated by the United Nations:

1. Everyone has the right to obtain such travel or other documents as may be necessary to leave any country or to enter one's own country. No one shall be denied such documents or permits.
2. Such documents shall be issued free of charge.
3. No state shall refuse to issue such document or shall otherwise impede the exercise of the right to leave on the grounds of an applicant's inability to present authorization to enter another country.
4. Procedures for the issuance of such documents shall be expeditious and shall not be unreasonably lengthy or burdensome.
5. Everyone filing an application for such document shall be entitled to obtain promptly a duly certified receipt for the application filed. Decisions regarding issuance of such documents shall be taken within a reasonable period of time specified by law. The applicant shall

[55] *Kent* v. *Dulles* 357 US 116 (1958).

[56] *Aptheker* v. *Secretary of State* 378 US 500 (1964). In a concurring judgment, Douglas J observed that 'Being a communist certainly is not a crime; and while travelling may increase the likelihood of illegal events happening, so does being alive'. In the absence of war, there was no way in which a citizen could be prevented from travelling within or without the country, unless there was power to detain him. In such an event, the illegal act can of course be punished; but the right remains sacrosanct.

be promptly informed in writing of any decision denying, withdrawing, cancelling or postponing issuance of such document; the specific reasons therefor; the facts upon which the decision is based; and the administrative or other remedies available to appeal the decision.

6. The right to appeal to higher administrative or judicial authority shall be provided in all instances in which the right to leave or enter is denied. The appellant shall have a full opportunity to present the grounds for the appeal, to be represented by counsel of his or her choice, and to challenge the validity of any fact upon which a denial or restriction has been founded. The results of any appeal, specifying the reasons for the decision, shall be communicated promptly in writing to the appellant.[57]

The Strasbourg Declaration on the Right to Leave and Return contains other principles relevant to the exercise of this right.[58] For example, a person or members of his or her family may not be subjected to any sanction, penalty, reprisal or harassment for seeking to exercise or for exercising the right to leave a country, such as acts which adversely affect, *inter alia*, employment, housing, residence status, or social, economic or education benefits. A person may not be required to renounce his or her nationality in order to leave a country, or be deprived of his or her nationality for seeking to exercise or for exercising this right. A person may not be denied the right to leave a country on the ground that that person wished to renounce or has renounced his or her nationality.[59] No fees or taxes may be imposed for seeking to exercise or exercising the right to leave a country, with the exception of nominal fees related to travel documents. No deposit or other security may be required to ensure the

[57] Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45 of 28 August 1991.

[58] This Declaration was formulated at a three-day meeting of international lawyers and other experts which was convened by the International Institute of Human Rights in Strasbourg, France, in November 1986. The meeting was attended by thirty participants from Costa Rica, Egypt, the Federal Republic of Germany, France, Morocco, the Netherlands, Sweden, Switzerland, the United Kingdom, the United States and Zambia. For the text of the Declaration, see Hurst Hannum, 'The Strasbourg Declaration on the Right to Leave and Return' [1987] 81 *The American Journal of International Law* 432 or UN document E/CN.4/Sub.2/1988/35/Add.1 of 15 June 1988, 19.

[59] Article 3. See also Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45, Articles 5 and 6.

repatriation or return of any national. Currency or economic controls may not be used as a means of preventing any national from leaving his country. Any national prevented from leaving his country because of non-compliance with obligations towards the state, or towards another person, shall be allowed to make reasonable arrangements for satisfying these obligations.[60] Any person leaving a country shall be entitled to take out of that country: (1) his or her personal property, including household effects and property connected with the exercise of his profession or skill; (2) All other property or the proceeds thereof, subject only to the satisfaction of legal monetary obligations, such as maintenance obligations to family members, and to general controls imposed by law to safeguard the national economy, provided that such controls do not have the effect of denying the exercise of the right. Property or the proceeds thereof which cannot be taken out of the country shall remain in the possession of the departing owner, who shall be free to dispose of such property or proceeds within the country.[61]

### Restrictions on passports

May the geographic validity of a passport be limited? The constitutionally protected right to travel within a country does not mean unrestricted access to areas ravaged by flood, fire or pestilence. The same may be true of international travel. For example, a theatre of war may be too dangerous for travel. When an American citizen complained that his application to have his passport validated for tourist travel to Cuba had been denied, the question was raised whether the secretary of state had the authority to impose area restrictions on travel. Warren CJ, expressing the majority opinion, held that in the light of administrative practice before the enactment of the Passport Act, the answer should be in the affirmative. However, Goldberg J (who with Douglas and Black JJ dissented) found no indication in the legislative history either at the time the Passport Act was originally passed in 1856 or when it was re-enacted, that it was meant to serve any purpose other than that of centralizing

[60] Article 4(g). See also Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45, Article 8.

[61] Article 5. See also Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45, Article 9.

the authority to issue passports in the hands of the secretary of state so as to eliminate abuses in their issuance. Therefore, in his view, the authority to make rules, granted by the statute to the executive extended only to the promulgation of rules designed to carry out this statutory purpose. Douglas J observed that the only so-called danger present was the communist regime in Cuba. 'The First Amendment presupposes a mature people, not afraid of ideas. The First Amendment leaves no room for the official, whether truculent or benign, to say nay or yea because the ideas offend or please him or because he believes some political objective is served by keeping the citizen at home or letting him go. Yet that is just what the court's decision today allows to happen. We have here no congressional determination that Cuba is an area from which our national security demands that Americans be excluded. Nor do we have a congressional authorization of the executive to make such a determination according to standards fixed by Congress. Rather we have only the claim that Congress has painted with such a "broad brush" that the state department can ban travel to Cuba simply because it is pleased to do so.' He emphasized that the ability to understand the pluralistic world, filled with clashing ideologies, was a prerequisite of citizenship.[62]

The same question was raised again, but in a different context. Acquitting several defendants who had been charged under the Immigration and Nationality Act 1952 with recruiting and arranging the travel to Cuba of American citizens whose passports, although otherwise valid, were not specifically validated for travel to that country, the Supreme Court unanimously held that area restrictions upon the use of an otherwise valid passport were not criminally enforceable. Fortas J referred to the proceedings of the Senate Foreign Relations Committee where the department of state had been asked some years previously what was meant when a passport was stamped: 'not valid to go to country X'. The answer was that it 'means that if the bearer enters country X he cannot be assured of the protection of the United States . . . [but it] does not mean that if the bearer travels to country X he will be violating the criminal law'. Similarly, in hearings before another Senate committee,

[62] *Zemel* v. *Rusk* 381 US 1 (1965). Douglas J added: 'The world, however, is filled with communist thought; and communist regimes are on more than one continent. They are part of the world spectrum; and if we are to know them and understand them, we must mingle with them. Keeping alive intellectual intercourse between opposing groups has always been important and perhaps never more important than now.'

a department official had explained that when a passport was marked 'invalid' for travel to stated countries, this meant that 'this government is not sponsoring the entry of the individual into those countries and does not give him permission to go in there under the protection of this government'.[63]

An order impounding a passport must be made quasi-judicially. The rules of natural justice would, in the circumstances, be applicable in the exercise of that power. The Supreme Court of India has held that the *audi alteram partem* rule must be regarded as incorporated in the passport law by necessary implication, since any procedure which dealt with the modalities of regulating, restricting, or even rejecting a fundamental right has to be fair, not 'arbitrary, freakish or bizarre'. In that case, the passport of the daughter-in-law of the former prime minister was impounded on the ground that her presence was likely to be required in connection with the proceedings of a commission of inquiry. Bhagwati J held that the passport authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, an opportunity of hearing, remedial in aim, should be given to her so that she may present her case and controvert that of the passport authority and point out why her passport should not be impounded and the order impounding it recalled. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving such opportunity to the person concerned can and should be read by implication into the Passports Act 1967. 'If such a provision were held to be incorporated in the Passports Act 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness.'[64]

## Right to seek asylum

The original draft of UDHR 14 provided that a person had the right to seek 'and be granted' in other countries asylum from persecution. The phrase 'and be granted' was later dropped in preference to 'and to

[63] *United States* v. *Laub* 385 US 475 (1967).
[64] *Maneka Gandhi* v. *The Union of India* [1978] SCR 312.

enjoy', for the reason that the grant of asylum is a unilateral act of a state in the exercise of its sovereignty.[65] Although ACHR 22(7) retained the words 'and be granted', it specified that such grant shall be 'in accordance with the legislation of the state and international conventions'. Similar qualifications were included in ADRD 27 and AfCHPR 12(3), which recognized the right to 'receive asylum' and to 'obtain asylum' respectively. When examining the right to freedom of movement, the Commission on Human Rights discussed several proposals relating to the right of asylum. It attempted to define categories of persons for whom it was suggested that asylum should be provided. These discussions were inconclusive. In the Third Committee it was argued that an article without any reference to the right of asylum would be seriously deficient. However, no agreement was reached, and it was suggested that a separate article might be formulated on the right of asylum. This was not done.[66] However, ICCPR 12(2) states that 'Everyone shall be free to leave his country, including his own'. The exercise of that right will enable a person to seek asylum in another country.[67]

Although the right to 'be granted' asylum is not explicitly recognized, a state is not entirely free to act as it pleases. Two principles, which now appear to have assumed the character of rules of customary international law, inhibit state action. They are (a) the principle of non-refoulement which stipulates that a state may not expel or return (*refouler*) a refugee

[65] The Declaration on Territorial Asylum stresses that the grant of asylum by a state 'is a peaceful and humanitarian act' and that, as such, 'it cannot be regarded as unfriendly by any other state'. It adds that asylum granted by a state in the exercise of its sovereignty 'shall be respected by all other states'.

[66] UN documents A/2929, chapter VI, sections 65–9; A/4299, section 27.

[67] For guidance in determining whether a person seeking asylum in a foreign country could be recognized as a refugee, see Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: United Nations, 1988), UN document HCR/IP/4/Eng.Rev.1. A refugee is defined in the Convention Relating to the Status of Refugees 1951, Article 1A(2), as amended by the Protocol Relating to the Status of Refugees 1967, as 'a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. For expanded definitions adopted in Africa and Latin America, see Convention Governing Specific Aspects of Refugee Problems in Africa 1969, and Cartagena Declaration on Refugees 1984, part III, paragraph 3, respectively.

in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened;[68] and (b) the principle that a state may not impose any penalty on a refugee on account of his illegal entry or presence, if he has come directly from a territory where his life or freedom was threatened, and has presented himself without delay to the authorities and shows good cause for his illegal entry or presence.[69]

*The [right to freedom of movement and residence and the right to leave any country] 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 Covenant.*

The international human rights instruments provide for exceptional circumstances in which the right to freedom of movement and residence within the borders of a state and the right to leave any country including one's own may be restricted. ICCPR 12(3) authorizes the state to restrict these rights only to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others. ECHR, P4 2(3) and ACHR 22(3) add two further interests to be protected: public safety and the prevention of crime, while AfCHPR substitutes 'law and order' for public order, and makes no reference to 'the rights and freedoms of others'.[70]

[68] This principle is expressed in both the 1951 Convention Relating to the Status of Refugees (Article 33) and in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3).

[69] Convention Relating to the Status of Refugees, Article 31.

[70] During the drafting of this article, it was recognized that freedom of movement and free choice of residence were subject to certain legitimate restrictions. Opinions differed on the scope of permissible limitations. Long lists of exceptions were included in earlier drafts of the article, but later a more general formula which aimed at giving protection to the individual while safeguarding the interests of the state was sought. It was also considered desirable that the limitation clause in this article should be similar to those in Articles 18, 19, 20 and 21 (UN document A/2929, chapter VI, sections 51, 56). At one stage of the discussion it was argued that, in view of the difficulty of preparing an acceptable exhaustive list of restrictions, and since any general wording might be so broad as to render the article of little practical value, the best course would be to delete this article from the Covenant. It was contended that freedom of movement was not a fundamental, but rather a secondary right. Against this it was argued, notably by India, that freedom of movement constituted an important human

## Provided by law

To be permissible, a restriction must be provided by law; i.e. the law itself has to establish the conditions under which the rights may be limited. Restrictions which are not provided for in the law would violate the guaranteed rights. Where a Guyanese university lecturer who had been charged with arson and acquitted was prevented from leaving the country on the ground that the prosecution had appealed against the acquittal, the Supreme Court of Guyana held that since the constitution guaranteed 'the right to leave Guyana', the act of preventing him from doing so was unconstitutional. The freedom of movement cannot be subjected to any restraint that does not admit of legal justification. A person who has been acquitted is free and is under no obligation to be present at the appeal; nor does he require permission of the court to leave the country.[71]

By 'law' is meant a law in the formal sense, i.e. an act of parliament. Where a city council enacted a regulation to forbid persons under sixteen years of age from staying in public places from 11 pm until 6 am, unaccompanied by an adult, the Supreme Court of Estonia invalidated the regulation which, though a legal act, was not made under legislation which empowered such restrictions to be imposed.[72] A frontier regularization fee to be collected at border controls from persons leaving the territory of the Russian Federation, which had been prescribed by the Law on National Frontiers of the Russian Federation, was, in substance, a tax and was valid. However, since the legislation did not contain other elements related to the imposition of this tax, such as the amount to be

right and one which was an essential element of the right to personal liberty. It had been included in the UDHR and should find its place in the Covenant. Moreover, the fact that it had often been denied in recent times made its inclusion imperative (UN document A/2929, chapter VI, section 52). Finally, the British proposal to delete this article was rejected in the Commission on Human Rights by nine votes to three, with two abstentions (UN document E/CN.4/SR.151, section 44).

[71] *Roopnarine* v. *Barker*, Supreme Court of Guyana, (1981) 30 WIR 181, per Persaud J. Cf. *Re Application by Robert Sookrajh* (1969) 14 WIR 257, where the Supreme Court of Guyana held that a person who was committed to stand trial at assizes on an indictable charge and was admitted to bail, was not entitled to leave the country. Article 14 of the Constitution, while guaranteeing 'the right to leave Guyana' permitted the imposition of restrictions 'for the purpose of ensuring that he appears before a court at a later date for trial for such a criminal offence' and 'to secure the fulfilment of any obligations imposed on that person by law'.

[72] Decision No.3-4-1-3-97 of the Supreme Court of Estonia, 6 October 1997, *Riigi Teataja* 1997, no.74, article 1268, (1997) *Bulletin on Constitutional Case-Law* 377.

collected and the collection procedure, the government had no authority to collect it.[73]

The Human Rights Committee has stressed that in adopting laws providing for restrictions permitted by ICCPR 12(3), states should always be guided by the principle that the restrictions must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[74]

### Necessary in a democratic society

ICCPR 12(3) requires further that every such restriction be 'necessary in a democratic society' for the protection of the specified purposes and also be consistent with all other rights recognized in that covenant. ECHR, P4 2(3) states that any restriction must be 'in accordance with law' and 'necessary in a democratic society', while ACHR 22(3) only permits a restriction which is 'pursuant to a law, to the extent indispensable in a democratic society' in order to achieve the prescribed purposes. Therefore, it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. A state must ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.[75]

The Human Rights Committee has, in its general comment, noted, as a major source of concern, 'the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individual to move freely, to leave a country, including their own, and to take

[73] Decision of the Constitutional Court of Russia, 11 November 1997, *Rossiyskaya Gazeta*, 18.11.97, (1997) *Bulletin on Constitutional Case-Law* 416.
[74] Human Rights Committee, General Comment 27 (1999).
[75] Human Rights Committee, General Comment 27 (1999).

up residence'. Regarding the right to movement within a country, the committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals. These rules and practices include, *inter alia*, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the state of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country.[76]

### Consistent with other rights recognized in the Covenant

The application of the restrictions permissible under ICCPR 12(3) needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of ICCPR 12 if the rights enshrined in paragraphs 1 and 2 were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In examining state reports, the committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of ICCPR 12.[77]

[76] Human Rights Committee, General Comment 27 (1999).
[77] Human Rights Committee, General Comment 27 (1999).

## National security

The test that should be applied in a case of conflict between the individual freedom of movement and considerations of state security was considered by the Supreme Court of Israel when it examined an order under the Emergency Regulations (Foreign Travel) 1948 prohibiting an Israeli lawyer of Arab origin from travelling abroad for a period of twelve months. It was argued that there was ground for genuine and serious apprehension that his travel abroad might injure state security, because it was likely to have been used for maintaining prohibited contacts with leaders of the Palestine Liberation Organization (PLO) and for bringing into Israel money intended to finance the PLO's activities. Upholding the prohibition, Bach J observed that an apprehension justifying a prohibition of departure from the state must be based on an assessment according to which a real danger exists that the person's travel abroad might cause substantial harm to state security. If defined in a negative sense, the expression of 'serious apprehension' means that a slight, marginal, remote or theoretical apprehension does not justify the issuance of an order under Regulation 6, prohibiting departure from the state. The judge emphasized that a prohibition on travel abroad would be illegitimate if made solely on the ground that the citizen's activity abroad is inconsistent with 'national or political aspirations of the government or of the majority of the nation'.[78]

The Human Rights Committee has observed that the requirements of proportionality would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of 'state secrets', or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minority communities.[79]

## Public order (ordre public)

'Public order' is something more than ordinary maintenance of law and order. It is synonymous with public peace, safety and tranquillity, an

[78] *Dahar* v. *Minister of the Interior*, H.C.448/85, 40(2) *Piskei Din* (Reports of the Israel Supreme Court) 701.

[79] Human Rights Committee, General Comment 27 (1999).

absence of public disorder. The test for determining whether an act affects public order or law and order is to ask whether it leads to the disturbance of the life of the community; or whether it affects merely an individual, leaving tranquillity of society undisturbed. It is a question of degree and the extent of the reach of the act upon society. Thus, communal disturbances, the creation of internal strife or rebellion and strikes promoted with the sole aim of causing unrest in the labour force, are obvious instances of acts impacting against public order. In short, public order implies an absence of violence and an orderly state of affairs in which people can pursue their normal avocation of life. Against that understanding of the term 'public order', the Supreme Court of Zimbabwe declined to accept that the breach of a law which permits persons to be stopped arbitrarily and arrested if not carrying an identity document had any potential effect upon the maintenance of public order in the country.[80]

Where a person who had previously been placed by a German court under guardianship owing to dipsomania, and later arrested for begging and confined to a labour institution, complained that owing to his detention and his being placed under guardianship, he was not in a position to exercise his profession as a sailor, or to leave the country which was indispensable to him, the European Commission held that the restrictions imposed on him were for the maintenance of 'ordre public'. The notion of 'ordre public' was explicitly included in the European Convention to cover such cases as that of the applicant.[81]

### Public safety / prevention of crime

Extradition, which constitutes a violation of the freedom of movement, may be justified on the basis that the objectives underlying extradition are pressing and substantial and sufficiently important for the 'prevention of crime' or to protect 'public safety' or, indeed, 'public order'.[82]

[80] *Elliott* v. *Commissioner of Police* [1997] 3 LRC 15.

[81] *X* v. *Germany*, Application 3962/69, (1970) 32 *Collection of Decisions* 68.

[82] Extradition must be distinguished from expulsion. The former means the transfer of a person from one jurisdiction to another for the purpose of his standing trial or for the execution of a sentence imposed on him. The latter is the execution of an order to leave the country; it means that a person is obliged permanently to leave the territory of the state of which he is a national without being left the possibility of returning later. See *X* v. *Austria and Germany*, European Commission, Application 6189/73, (1974) 46 *Collection of*

The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. The objectives of extradition go beyond that of suppressing crime *simpliciter*, and include bringing fugitives to justice for the proper determination of their guilt or innocence in a proper hearing.[83] The sentence of a court imposing a ban on an offender from entering a particular sports stadium and requiring him to register at the police station of his home town during half-time of every match played in that stadium by a named football club (which was intended to monitor the offenders' compliance with the ban) was necessary in order to prevent a repetition of the criminal offences of which he had been convicted, and did not, therefore, infringe ECHR P4 2.[84]

## Public health

Public health may be invoked when there is a serious threat to the health of the population or to individual members of the community.[85] It is aimed at preventing disease or injury as well as providing care for the sick and the injured. It may be invoked to impose restrictions on access to water supplies and to contaminated areas, and also to impose density limitations to prevent health and sanitary problems.[86] The constitution of the World Health Organization authorizes its major policy-making body, the World Health Assembly, to adopt sanitary and quarantine requirements which would bind member states. Under this authority, the WHO has adopted the International Health Regulations which, with respect to four diseases: cholera, plague, yellow fever and smallpox, require the health authority for a port or airport or for the area in which

*Decisions* 214; *Bruckmann* v. *Germany*, European Commission, (1974) 46 *Collection of Decisions* 202.

[83] *United States of America* v. *Cotroni*, Supreme Court of Canada, [1989] 1 SCR 1469.

[84] Decision of the Supreme Court of Netherlands in Case No.102.428, 14 May 1996, *Delikt en Delinkwent 1996*, 305, (1996) 2 *Bulletin on Constitutional Case-Law* 246.

[85] Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45, Article 6.

[86] C.L.C. Mubanga-Chipoya, *The Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, UN document E/CN.4/Sub.2/1988/35, paragraph 267.

a frontier post is situated to take all practicable measures: (a) to prevent the departure of any infected person or suspect; (b) to prevent the introduction on board a ship, an aircraft, a train, a road vehicle, other means of transport, or container, of possible agents of infection or vectors of a disease subject to the regulations. This restriction is by definition temporary.[87]

### Public morals

Public morals may be invoked when it is essential to the maintenance of respect for the fundamental moral values of the community.[88] An example of a measure in this area is Article 17 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which stipulates that 'in connection with immigration and emigration [parties undertake] to adopt or maintain such measures as are required . . . to check traffic in persons of either sex for the purpose of prostitution'.

### Rights and freedoms of others

A restriction based on 'the rights and freedoms of others' does not imply that relatives (except for parents with respect to unemancipated minors), employers or other persons may prevent, by withholding their consent, the departure of any person seeking to leave a country.[89] Nor is it intended to be used by the government to protect itself and its officials from criticism by restricting the freedom of movement of a person who might criticize home policy abroad. But it has been suggested that the right to leave may be restricted if a person has failed to pay maintenance

[87] The International Health Regulations were adopted by the Twenty-second World Health Assembly on 25 July 1969, and amended in 1973 and 1981. See Leonard J Nelson III, 'International Travel Restrictions and the AIDS Epidemic', (1987) 81 *The American Journal of International Law* 230; C.L.C. Mubanga-Chipoya, *The Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, UN document E/CN.4/Sub.2/1988/35, paragraph 268.

[88] Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45, Article 6.

[89] The Strasbourg Declaration on the Right to Leave and Return 1986, Article 4(f); Draft UN Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country: UN document E/CN.4/Sub.2/1991/45, Article 6.

of a child or wife, and has not provided sufficient guarantees of such payment.[90]

### *Expulsion of aliens*

#### An alien lawfully in the territory of a State Party

An alien is any individual who is not a national of the state in which he or she is present.[91] A person has no right to enter or reside in the territory of a state other than his or her own. It is in principle a matter for each state to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy protection even in relation to entry or residence; for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[92] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. Where an alien is in transit, general conditions may be imposed on him.[93] Laws and regulations relating to the entry of aliens and the terms and conditions of their stay must be compatible with the international legal obligations of the state, including those in the field of human rights.[94]

Aliens whose residence in a country is stable and lawful are entitled, like nationals, to lead a normal family life. Serious breaches of the right to respect for the private life of aliens and nationals alike may prejudice their individual freedom. When applying for renewal of the residence permit for a further term of years, an alien may invoke the fact of having been lawfully present for a substantial period on the territory of the country. This stability of residence is likely to have created numerous ties between the alien and the host country. Accordingly, the Constitutional

[90] C.L.C. Mubanga-Chipoya, *The Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, UN document E/CN.4/Sub.2/1988/35, paragraph 275.

[91] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live 1985, Article 1. They can generally be divided into several categories: migrant workers, documented and undocumented aliens, and individuals who have lost their nationality. See David Weissbrodt, *The Rights of Non-Citizens*, a working paper submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1999/7 of 31 May 1999.

[92] Human Rights Committee, General Comment 15 (1986).

[93] Human Rights Committee, General Comment 15 (1986).

[94] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live 1985, Article 2.

Council of France invalidated a new provision of law denying automatic renewal of the residence permit where 'the alien's presence poses a threat to public order'. The council noted that existing law already provided that an alien holding a residence permit may be expelled at any time in the event of a serious threat to public order.[95]

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 the prescribed manner and on the prescribed grounds. Since such restrictions must, *inter alia*, be consistent with the other recognized rights, a state cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country.[96] The right not to be expelled except in pursuance of a decision reached in accordance with law is enjoyed only by those aliens who are lawfully in the territory of a state. In determining the scope of this protection, national law concerning the requirements for entry and stay will need to be considered. Illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not within its scope. But if the legality of an alien's entry or stay is in dispute, any decision on that matter leading to his expulsion or deportation will also need to be reached in accordance with law.[97]

### may be expelled therefrom

ICCPR 13 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 deprivation of liberty (Articles 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law may apply. Normally an alien who is expelled must be allowed to leave for any country that agrees to take him.[98] An alien is free at any time to communicate with the consulate or diplomatic mission of the state of which he or she is a national or, with the consulate or diplomatic mission of any other state

[95] Decision No.97–389 of the Constitutional Council of France, 22 April 1997, *Journal officiel de la République francaise – lois et décrets*, 25.04.1997, 6271, (1997) 1 *Bulletin on Constitutional Case-Law* 38.

[96] Human Rights Committee, General Comment 15 (1986).

[97] Human Rights Committee, General Comment 15 (1986).

[98] Human Rights Committee, General Comment 15 (1986).

entrusted with the protection of the interests of the state of which he or she is a national.[99]

only in pursuance of a decision reached in accordance with law

The grounds for the expulsion of an alien must have a legal basis, and the procedure leading to expulsion must be prescribed by law.[100] A separate decision must, therefore, be reached in respect of each alien, thereby invalidating collective or mass expulsions.[101] The reference to 'law' in this context is to the domestic law of the state concerned, though of course the relevant provisions of domestic law must in themselves be compatible with the provisions of relevant human rights instruments. Though directly regulating only procedure, ICCPR 13 requires compliance with both the substantive and the procedural requirements of the law.[102]

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.[103] In Sweden, the Aliens Act of 1954 provided that an alien may be expelled 'if there is reason to assume that he belongs to, or works for, a terrorist organization or group', and if 'there is a danger, considering what is known about his previous activities or otherwise, that he will participate in Sweden' in a terrorist act. Anna Maroufidou was a Greek citizen who sought asylum in Sweden and was granted a residence permit in 1976. On 4 April 1977 she was arrested on suspicion of being involved in a terrorist plot to abduct a former member of the Swedish government. The central immigration authority applied for her expulsion from Sweden on the ground that there was reason to believe that she belonged to, or worked for, a terrorist organization or group, and that there was a danger that she would participate in Sweden in a terrorist act of the kind referred to in the Aliens Act. A lawyer was appointed to represent her in the proceedings under the Act. On 5 May 1977 the Swedish government decided to expel her and the decision was immediately executed. The Human Rights Committee held that in reaching the decision to expel her, the Swedish authorities had

[99] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live 1985, Article 10.

[100] UN document A/2929, chapter VI, section 63.

[101] Human Rights Committee, General Comment 15 (1986).

[102] *Maroufidou* v. *Sweden*, Human Rights Committee, Communication No.58/1979, HRC 1981 Report, Annex XVII.

[103] Human Rights Committee, General Comment 15 (1986).

interpreted and applied the relevant provisions of Swedish law in good faith and in a reasonable manner and consequently that the decision was made 'in accordance with law'.[104]

In contrast, when Pierre Giry, a French citizen residing in Saint-Barthélémy in the Antilles, who had arrived in the Dominican Republic and stayed there for two days, went to the airport to buy a ticket to return home, he was arrested by two uniformed agents who took him to the police office at the airport, where he was searched. After two hours and forty minutes he was taken out by a back door leading directly to the runway and forced to board a plane bound for Puerto Rico. Upon his arrival in Puerto Rico he was arrested, charged, and convicted of conspiracy to import cocaine into the United States, and of the use of a communication facility, the telephone, to commit the crime of conspiracy. He was sentenced to twenty-eight years' imprisonment and fined $250,000. The Human Rights Committee observed that whether the action taken by the Dominican government was termed extradition or expulsion, the provisions of ICCPR 13 applied. Although the state had invoked the exception based on national security, there was no evidence of the text of the decision to remove Giry from Dominican territory or that the decision to do so was reached 'in accordance with law'. Accordingly, since Giry was not afforded an opportunity to submit the reasons against his expulsion or to have his case reviewed by the competent authority, ICCPR 13 was violated.[105]

and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority

The rights of an alien to submit reasons against his expulsion, to have his case reviewed by the competent authority, and to be represented for

[104] *Maroufidou* v. *Sweden*, Human Rights Committee, Communication No.58/1979, HRC 1981 Report, Annex XVII. A terrorist organization or group was defined as 'an organization or group which, considering what is known about its activities, can be expected to use violence, threat or force outside its home country for political purposes and, in this connection, to commit such acts in Sweden'.

[105] *Giry* v. *Dominican Republic*, Communication No.193/1985, HRC 1990 Report, Annex IX.C.

that purpose, may only be departed from when 'compelling reasons of national security' so require.[106] In Madagascar, a French national who had been a practising attorney for nineteen years, was arrested at his law office by the political police, and held incommunicado in a basement cell in the political prison for three days when he was notified of an expulsion order issued on that day by the minister of the interior. He was then taken under guard to his home where he had two hours to pack his belongings. He was deported on the same evening to France. A subsequent application by him to have the expulsion order revoked was rejected by the Supreme Court of Madagascar on the ground that he had made 'use both of his status as a corresponding member of Amnesty International and as a barrister', to discredit Madagascar. The Human Rights Committee found no compelling reasons of national security to deprive him of an effective remedy to challenge his expulsion.[107]

All relevant facts and circumstances must be taken into account in their entirety whenever the expulsion of an alien is under consideration. In Finland, where a foreigner who had been staying in the country without a visa or a residence permit was ordered by the ministry of the interior to be deported, the Supreme Administrative Court found that doctors' statements according to which he had been hospitalized in Finland at least on ten occasions because of severe depression, and had been having thoughts of committing suicide and was therefore in need of repeated periods of treatment, were facts which should have, but had not, been taken into consideration. Accordingly, the court held that deportation would be 'inhuman'. Under the circumstances, the court ruled that there were not sufficient grounds to deport him from the country, and that to do so would violate his rights.[108]

[106] Human Rights Committee, General Comment 15 (1986).

[107] *Hammel* v. *Madagascar*, Communication No.155/1983, HRC 1987 Report, Annex VIII.A. The committee noted with concern that, based on information provided by the state, the decision to expel Hammel appeared to have been linked to the fact that he had represented persons before the committee. Were that to be the case, the committee observed it would be both untenable and incompatible with the spirit of the Covenant and the Optional Protocol thereto, if states parties to these instruments were to take exception to anyone acting as legal counsel for persons placing their communications before the committee for consideration under the Optional Protocol.

[108] Decision No.2743 of the Supreme Administrative Court of Finland, Fourth Chamber, 27 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 154.

### *The freedom to enter one's own country*

The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside it (for example, if that country is the person's state of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.[109]

The right to enter one's own country is a right enjoyed by a person who is abroad. Accordingly, in the case of a citizen who is in the territory of a foreign state, the state of nationality has a positive obligation to take all such measures as may be necessary to enable the citizen to exercise his right of entry, since constitutionally recognized rights are guaranteed within the jurisdiction of the state, and not merely within its own territory. In the case of a person who is detained abroad, this positive obligation requires the state of nationality to deal with the state in which the citizen is detained with a view to securing the enjoyment of this right, since no citizen on his or her own can act with equal legal status with the governmental authorities of a foreign state. Where no such action was taken by the state of nationality, this right was infringed.[110]

[109] Human Rights Committee, General Comment 27 (1999). When ICCPR 12(4) was being drafted it was pointed out in the Commission on Human Rights that there were states in which the right to return was governed, not by rules of nationality or citizenship, but by the concept of a permanent home. The early drafts dealt only with the right of nationals to 'enter' their country, and was focused on persons such as those born abroad who had never been to the country of their own nationality. Such a formula was not satisfactory for a state which granted the right of 'return' to persons who were not nationals but who had established their home in the country. A compromise was reached, based on UDHR 13(2), by replacing the reference to 'country of which he is a national' by the words 'his own country'. The right to 'enter' the country was retained: UN document A/2929, chapter VI, section 60.

[110] Decision No.11 US 8/96 of the Constitutional Court of the Slovak Republic, 4 September 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 403. The petitioner was found in a small town in Austria in the vicinity of the Slovak border. He was taken into custody by the Austrian authorities on suspicion of having committed a crime in Germany. He was detained in Austria for five months until an Austrian court refused to extradite him to Germany. Following this judgment, he returned to Slovakia. During his stay in Austria, he addressed the Slovak ministry of foreign affairs, ministry of justice, and the attorney general, requesting help, but no action was taken by any of these bodies.

In respect of the exercise of this right, ICCPR 12(4) does not distinguish between nationals and aliens.[111] Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The scope of 'his own country' is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, i.e. nationality acquired at birth or by conferral. It embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another entity, whose nationality is being denied them. The language of ICCPR 13(4), moreover, permits a broader interpretation that might embrace other categories of long-term residents, including, but not limited to, stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country.[112] However, the Human Rights Committee was unwilling to include within this category a person who had lived in a country for most of his life but had never applied for nationality. In their view, an individual who chooses not to 'acquire all the rights and assume all the obligations that nationality entails' will be deemed to have opted to remain an alien in that country.[113] An exception might only arise

[111] Both ECHR P4 2 and ACHR 22(5) limit the exercise of this right to nationals.

[112] Human Rights Committee, General Comment 27 (1999).

[113] *Stewart* v. *Canada*, Human Rights Committee, Communication No.538/1993, HRC 1997 Report, Annex VI.G. Cf. the dissenting opinion of Elizabeth Evatt, Cecilia Medina Quiroga, Francisco José Aguilar Urbina and P.N. Bhagwati who considered that strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it should be considered in determining whether that territory could be regarded as 'his own country'. They argued that the narrow view of ICCPR 12(4) which the majority preferred appeared not to have considered the *raison d'être* of its formulation. Individuals cannot be deprived of the right to enter 'their own country' because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or, put in general terms, with the web of relationships that form his or her social environment. Accordingly, while a person's 'own country' would certainly include the country of nationality, there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. A person may have several nationalities, and yet have only the slightest or no actual connections of home and family with one

in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality.[114]

While both ECHR P4 3(2) and ACHR 22(5) recognize the freedom to enter the territory of one's state as absolute and not subject to any restrictions, ICCPR 12(4) states that no one shall be 'arbitrarily' deprived of the exercise of that right.[115] The reference to the concept of arbitrariness in ICCPR 12(4) is intended to emphasize that it applies to all state action, legislative, administrative and judicial; it guarantees 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. There are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A state must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.[116]

The right to enter a country is as much a prospective as a present right. The deprivation of that right can occur whether or not there has been any actual refusal of entry. If a state is under an obligation to allow entry of a person, it is prohibited from deporting that person. Therefore, ICCPR 12(4) protects an individual against arbitrary deportation from his own country.[117] Nadine Plumbley, a woman not of Cyprus origin, married

or more of the states in question. The words 'his own country' on the face of it invite consideration of such matters as long-standing residence, close personal and family ties, and intentions to remain (as well as the absence of such ties elsewhere). Where a person is not a citizen of the country in question, the connections would need to be strong to support a finding that it is his 'own country'. Nevertheless, it is open to an alien to show that there are such well-established ties with a state that he or she is entitled to claim the protection of ICCPR 12(4).

[114] *Canepa* v. *Canada*, Human Rights Committee, Communication No.558/1993, HRC 1997 Report, Annex VI.K.

[115] Note that AfCHPR 12(2) alone subjects this right to the same restrictions as the freedom to leave.

[116] Human Rights Committee, General Comment 27 (1999). This clause was extensively debated in the Third Committee where some members were of the view that the right which is recognized should not be subjected to any restrictions whatsoever. The general consensus, however, was that the right is not absolute, but that it should not be made subject to the same kind of restrictions as the other rights defined in this article. It was thought inconceivable, for example, that a state should prohibit one of its own nationals from entering its territory for reasons of health or morality. It was finally agreed to formulate the paragraph thus: 'No one shall be arbitrarily deprived of the right to enter his own country'; the word 'arbitrarily' being adopted by twenty-nine votes to twenty with twenty abstentions. See UN document A/4299, section 7.

[117] *Stewart* v. *Canada*, Human Rights Committee, Communication No.538/1993, HRC 1997 Report, Annex VI.G.

a Cypriot in 1966. Out of this marriage a child was born in 1967. The marriage was subsequently dissolved, but she continued to live in the country. In 1980 she married another Cypriot, and in 1982 she applied for and was registered as a citizen of Cyprus. In 1985 she left for the United Kingdom, but a year later decided to return to Cyprus. However, she was informed by the immigration authorities that she would be refused entry into Cyprus on grounds of public interest. Noting that she continued to be a citizen of Cyprus, as she had neither renounced her Cypriot nationality, nor been deprived of it by order of the Council of Ministers, the Supreme Court of Cyprus held that no citizen could be banished or excluded from the Republic under any circumstances.[118]

[118] *Plumbley* v. *The Republic of Cyprus* (1987) 3 CLR 2036.

# 16

# The right to a fair trial

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

#### International Covenant on Civil and Political Rights (ICCPR)

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 interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment 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.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

26. (2) Every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws . . .

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

6. (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

### American Convention on Human Rights (ACHR)

8. (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.
(5) Criminal procedure shall be public, except in so far as may be necessary to protect the interests of justice.

### African Charter on Human and Peoples' Rights (AfCHPR)

7. (1) Every individual shall have the right to have his cause heard. This comprises:
(d) the right to be tried within a reasonable time by an impartial court or tribunal.

26. States Parties to the present Charter have the duty to guarantee the independence of the courts . . .

*Related texts:*

Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1985, and endorsed by UNGA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1990.

Draft United Nations Body of Principles on the Right to a Fair Trial and to a Remedy 1994.

## Comment

The importance of this right in the protection of human rights is underscored by the fact that the implementation of all the other rights depends upon the proper administration of justice.

ICCPR 14(1) recognizes that 'all persons' are 'equal' before the courts and tribunals, and proceeds to guarantee a 'fair and public hearing' in the determination of any 'criminal charge' or of 'rights and obligations in a suit at law' by a 'competent, independent and impartial' tribunal 'established by law'. ECHR 6(1) is in similar terms except that it refers to 'civil rights and obligations',[1] omits the word 'competent' with reference to the tribunal, but requires a hearing 'within a reasonable time'. ACHR 8(1) recognizes the right to a hearing with 'due guarantees'[2] by a tribunal 'previously' established by law, and defines rights and obligations to include not only civil but also those of a 'labour, fiscal or any other nature'. AfCHPR 7(1) simply refers to every individual's right to have 'his cause' heard by an 'impartial' tribunal, but elsewhere (AfCHPR 26) requires the state to 'guarantee the independence of the courts'.

Exceptions to the principle of a 'public hearing' are permitted by ICCPR 14(1) and ECHR 8(1) for reasons of (or, in the case of the latter, in the interests of) morals, public order, or national security in a democratic society, or when required in the interests (or, in the case of the latter, 'protection') of the 'private lives of the parties' (ECHR adds: 'interests of juveniles') or 'to the extent strictly necessary in the opinion of the court in special circumstances when publicity would prejudice the interests of justice'. ACHR 8(5), having required only that 'criminal

[1] The same expression *ses droits et obligations civiles* is used in the French versions of both ICCPR 14(1) and ECHR 6(1). Under French law, *droits civils* refers to rights under civil law as distinct from public law and penal law.

[2] The expression 'due guarantees' means that in respect of the determination of rights and obligations of a civil, labour, fiscal or any other nature, the individual has the right to the fair hearing provided for in criminal cases. See *Paniagua Morales Case*, Inter-American Court of Human Rights, Judgment of 8 March 1998, paragraph 149.

procedure' shall be public, permits an exception 'in so far as may be necessary to protect the interests of justice'. ECHR 6(1) requires judgment to be 'pronounced publicly', while ICCPR 14(1) states that a judgment 'shall be made public' except in respect of specified domestic matters.

While ICCPR 14(1), ECHR 6(1) and ACHR 8(1) contain the general requirements for a fair trial, ICCPR 14(2), 14(7) and 15, ECHR 6(2) and 6(3), and ACHR 8(2) to 8(5) and 9 and 10 respectively contain the special guarantees applicable to criminal proceedings, whether at first instance or on appeal.

The rights relating to a fair trial apply to all courts and tribunals which determine criminal charges or rights and obligations in a suit at law, whether ordinary or specialized. It applies, therefore, to military or special courts as well. While the reason for the establishment of such courts is to enable exceptional procedures to be applied, trial by such courts must nevertheless take place under conditions which genuinely afford all the stipulated guarantees. If a state decides in circumstances of a public emergency to derogate from the normal procedures, it has to ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and that the other specified conditions are respected.[3]

## Interpretation

### *The right of access to a court*

Is the right to a fair trial guaranteed only in respect of legal proceedings which are already pending, or does it, in addition, secure a right of access to a court for every person who wishes to commence an action to have his rights or obligations determined? If the right extends only to the conduct of an action which has already been initiated before a court, a state can do away with its courts, or transfer their jurisdiction to other bodies which do not possess the minimum attributes of a judicial tribunal. It is inconceivable that international human rights instruments should prescribe in detail the procedural guarantees afforded to parties in a pending proceeding without protecting that which alone makes it possible for them to benefit from such guarantees. The fair, public and expeditious characteristics of a judicial proceeding are of no value at all

[3] Human Rights Committee, General Comment 13 (1984).

if there is no judicial proceeding. Accordingly, the right to a fair trial embodies the 'right to a court', of which the right to institute proceedings, i.e. the right of access, constitutes one aspect, while the guarantees relating to the organization and composition of the court, and the conduct of the proceedings, constitute the other. 'In sum, the whole makes up the right to a fair hearing.'[4]

The right of access to a court is not absolute, although the Queen's Bench Division in the United Kingdom has described the right of access to a court being 'as near to an absolute right as any which can be envisaged'.[5] But any limitations that are applied must not restrict or reduce the right of access in such a way or to such an extent that the very essence of the right is impaired. A limitation will, therefore, be compatible with this right only if it (a) pursues a legitimate aim and (b) if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[6]

Rules that limit the time during which litigation may be launched are common in many legal systems. They serve several important purposes, namely to ensure legal certainty and finality, to protect potential defendants from stale claims which might be difficult to counter, and to prevent the injustice which might arise if courts were required to decide upon events which had taken place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time. In many states, the period is calculated from the date of the accrual of the cause of action, while in other jurisdictions time only begins to run from the date when the material facts in the case

[4] *Golder* v. *United Kingdom*, European Court, (1975) 1 EHRR 524. The court was referring to ECHR 6(1). Golder had been convicted of robbery with violence and sentenced to fifteen years, imprisonment. While serving his sentence in prison, a riot took place in which he played no part. But he was mistakenly identified by a prison officer as having been actively concerned in the riot. Consequently, he was segregated for two weeks and then charged with assaulting a prison officer. Although the charge did not succeed, Golder feared that his prison record would show that he was suspected of participation in the riot and that that would affect his chances of release on parole. He sought permission to consult a solicitor for the purpose of instituting an action against the prison officer who had wrongly accused him. Permission was refused by the Home Secretary. Golder alleged that this refusal constituted a violation of ECHR 6(1). See also *Le Compte, Van Leuven and De Meyere* v. *Belgium*, European Court, (1981) 4 EHRR 1.

[5] *R* v. *Lord Chancellor, ex parte Witham* [1997] 3 LRC 349.

[6] *Ashingdane* v. *United Kingdom*, European Court, (1985) 7 EHRR 528; *Fayed* v. *United Kingdom*, European Court, (1994) 18 EHRR 393; *Lithgow* v. *United Kingdom*, European Court, (1986) 8 EHRR 329.

were known, or ought to have been known, to the plaintiff.[7] However, each limitation must be scrutinized to ensure that its own particular range and terms are compatible with the right which everyone enjoys to have his or her justiciable claims settled by a court of law. What counts is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. The consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterizing the class of case in question, to a real and fair one. Accordingly, a provision in the South African Defence Act 1957 that no civil action shall be capable of being instituted against the state or any person in respect of anything done or omitted to be done in pursuance of that Act 'if a period of six months has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof', was neither reasonable or justifiable, and was therefore constitutionally invalid.[8]

A rule that requires an accused to apply for and obtain leave before pursuing an appeal does not infringe his right of access to a court, particularly where if leave is refused, a petition procedure allows the accused to approach a higher court for a reassessment of the issues.[9] But a requirement that a person convicted by a lower court who was still in prison had to obtain a judge's certificate before being allowed to pursue an appeal to a higher court operated to restrict that person's full access to the appeal court. In contrast to an application for leave to appeal, there was no statutory framework in place for an application for a judge's certificate to ensure that the judge in question would carry out an adequate reappraisal of each case to enable him to make an informed decision. Applications for a judge's certificate were usually drafted by the appellant in person; the scheme was unsystematic and haphazard in practice and exposed the applicant to the vagaries of the individual

[7] *Stubbings* v. *United Kingdom*, European Court, (1996) 23 EHRR 213.

[8] *Mohlomi* v. *Minister of Defence*, Constitutional Court of South Africa, [1997] 2 LRC 274. See also *Perez de Rada Cavanilles* v. *Spain*, European Court, (1998) 29 EHRR 109: Neither the rules nor their application should prevent litigants from making use of an available remedy. Where an application to have a settlement agreement declared void was declared inadmissible as being out of time, the particularly strict application of a procedural rule had deprived the applicant of the right of access to a court.

[9] *State* v. *Rens*, Constitutional Court of South Africa, [1996] 2 LRC 164.

judge, some of whom sought out the record of the case while others relied merely on the magistrate's account of the trial. Judges who did not read the record had no means of knowing whether the evidence substantiated the findings made by that court or whether there were any procedural irregularities that might have marred the trial. There was therefore a danger that appeals which deserved to be heard might be stifled because their merits never attracted judicial attention.[10]

The assessment of whether the deposit of security raises an unacceptable barrier to a person's access to court should be based on the total sum required as security.[11] Where, in the United Kingdom, the Lord Chancellor, acting under the Supreme Court Act, prescribed a fee of UKP 120 for issuing a writ for claims limited to UKP 10,000 or less, and a fee of UKP 500 for issuing a writ where no monetary limit was specified, repealing previous provisions which relieved litigants in person who were in receipt of income support from the obligation to pay fees and permitted the Lord Chancellor to reduce or remit the fee in any particular case on grounds of undue financial hardship in exceptional circumstances, the Queen's Bench Division held that the effect of the new order was to bar absolutely many persons from seeking justice from the courts, and was therefore ultra vires and unlawful.[12] Similarly, an order requiring the deposit of security in a sum of 80,000 FF before a person who had lodged a civil-party application against two gendarmes could proceed, deprived him of recourse to a court.[13] But where a requirement under the Stamp Act for the payment of stamp duty and court fees upon the filing of certain documents in court proceedings could not be said to be 'manifestly excessive' and therefore unreasonable, the right of access to the court is not hindered.[14]

A provision that no civil proceedings may be instituted against the government without the previous consent of the Attorney-General violates the right to unimpeded access to the court to have one's grievances heard and determined.[15] Similarly, where under a Greek royal decree, the

[10] *State* v. *Ntuli*, Constitutional Court of South Africa, [1996] 2 LRC 151. See also *Beserglik* v. *Minister of Trade and Tourism*, Constitutional Court of South Africa, 14 May 1996.

[11] Decision of the Supreme Court of the Netherlands, 31 January 1995, Case No.237–94 t/m 252–94, (1996) *Bulletin on Constitutional Case-Law* 60.

[12] *R* v. *Lord Chancellor, ex parte Witham* [1997] 3 LRC 349.

[13] *Ait-Mouhoub* v. *France*, European Court, (1998) 30 EHRR 382.

[14] *Bahamas Entertainment Ltd* v. *Koll*, Supreme Court of The Bahamas, [1996] 2 LRC 45.

[15] *Pumbun et al* v. *Attorney-General*, Supreme Court of Tanzania, [1993] 2 LRC 317: Section 6 of the Government Proceedings Act 1967. Three persons who desired to sue the government

Technical Chamber of Greece – Techniko Epimelitirio Ellados (TEE) – alone had the capacity to institute proceedings for the recovery of fees payable to engineers in respect of work done by them, a consultant engineer who had a dispute with two public corporations and a private individual in regard to the amount of fees owed to him for a number of projects which he had designed, argued that the royal decree deprived him of his right of access to a court since it meant he was dependent on the intervention of a third party. It was not possible for him to pursue the legal proceedings at the time and in the manner he considered to be the most appropriate, to have the benefit of the assistance of counsel of his choice, to ensure the action was well 'targeted', or to institute subsidiary actions and to claim compensation. He was able to participate in person in the proceedings only for the purpose of supporting the TEE's arguments and he did not, therefore, have effective control of the proceedings. The European Court held that, in the circumstances, the very essence of the 'right to a court' was impaired.[16] A provision in the Labour Code of Georgia which stipulated that certain categories of civil servants were to have their labour disputes settled by their superiors and not by the court prevented them from exercising their right to court.[17]

Immunity (parliamentary or diplomatic) may be grounds on which a court may decline to pronounce on the merits of a claim, effectively denying the right of access to a court.[18] However, parliamentary immunity

in the High Court for trespass and assault, were unable to do so because consent was denied by the Attorney-General. Cf. *Sofekun* v. *Akinyemi*, Supreme Court of Nigeria, [1981] 1 NCLR 135 : Once a person is accused of a criminal offence, he must be tried in a court of law. Where the Public Service Commission Regulations had the effect of making it unnecessary to take a public officer in the state public service who had been accused of a criminal offence to a court of law, and provided instead for him to be tried by an investigating panel with a view to dismissal, such regulations were ultra vires section 22(2) of the Constitution which recognized the right of a person charged with a criminal offence to 'a fair hearing within a reasonable time by a court'; Decision of the Constitutional Court of Poland, 8 April 1997, Case No.K 14/96, (1997) *Bulletin on Constitutional Case Law* 72: a law which prohibited officers of the state security office from appealing against dismissal because of the 'important interests of service' is contrary to the constitutional principle of access to the courts.

[16] *Philis* v. *Greece*, European Court, (1991) 13 EHRR 741. See also European Commission, (1990) 13 EHRR 741, at 753–63.

[17] Decision of the Constitutional Court of Georgia, 2/3-13, 5 December 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 354.

[18] For diplomatic immunity, see Decision of the Constitutional Court of Spain, 29 August 1995, Case No.140/1995, *Boletin Oficial del Estado*, no.246 of 14 October 1995, 51–63, (1995) 3 *Bulletin on Constitutional Case-Law* 368–70.

must be strictly interpreted. 'The courts should not allow themselves to feel intimidated by the institutional weight of popular representatives or feel hindered by the impact of their decisions on the composition of the assembly.'[19] An exclusionary rule developed by the House of Lords which granted the police immunity from civil suit for their acts and omissions in the context of the investigation and suppression of crime, was based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardized by the constant risk of exposure to tortious liability for policy and operational decisions. However, the European Court observed that the application of this rule without further inquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases. Accordingly, the application of the exclusionary rule constitutes a disproportionate restriction on the right of access to a court.[20]

A court may deny jurisdiction (e.g. *ratione materiae* or *ratione loci*), or impose conditions for the exercise of this right by infants, persons of unsound mind, and bankrupts. But even such restrictions must not be unreasonable.[21] Where the Roman Catholic Church of the Virgin Mary in Canea, Greece, which had a dispute with two neighbours who had allegedly demolished one of the church's surrounding walls, was prevented from instituting legal action on the ground that it had not acquired, and therefore did not possess, legal personality under Greek law, the European Court observed that the court had not only penalized the failure to comply with a simple formality necessary for the protection

[19] Decision of the Constitutional Court of Spain, 22 December 1997, *Boletin Oficial del Estado*, no.63 of 14.03.1997, 24–31, (1997) *Bulletin on Constitutional Case-Law* 99.

[20] *Osman* v. *United Kingdom*, European Court, (1998) 29 EHRR 245.

[21] *Jaundoo* v. *Attorney-General of Guyana*, Privy Council on appeal from the Supreme Court of Guyana, (1971) 16 WIR 141. Where the law recognizes a right to 'apply to the High Court for redress' for a contravention of fundamental rights, an applicant may use any form of procedure by which such court can be approached to invoke the exercise of its powers. The clear intention of the law that a person who alleges that his fundamental rights are threatened should have unhindered access to the court may not be defeated by any failure of the legislature or the rule-making authority to make specific provision as to how that access is to be gained.

of public order, but had also imposed a real restriction on the church preventing it on this particular occasion and for the future from having any dispute relating to its property rights determined by the courts.[22]

The law may prescribe procedural requirements and require the use of prescribed forms, but such laws must not be applied so as to hinder or deny access to court.[23] If the pleadings filed by a party contain an obvious error, the correction of which would cure the failure to meet procedural requirements, and if it would not require any procedural steps on the part of the court (such as the taking of evidence) to observe this obvious error, the party to the proceeding must be given the opportunity to correct the error. Not to do so would be to 'exalt formalism', and the result would be 'a sophisticated justification for a manifest injustice'.[24] Where an appeal filed by a convicted person on points of law was declared inadmissible on the ground that, under general principles of criminal procedure a convicted person who has not complied with a warrant for his arrest is not entitled to act through a representative in order to lodge an appeal on points of law, the European Court noted that the ruling compels an appellant to subject himself in advance to the deprivation of liberty resulting from an impugned decision, although that decision cannot be considered final until the appeal has been decided or the time limit for lodging an appeal has expired. This impairs the very essence of the right of appeal, by imposing a disproportionate burden on an appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the court of appeal and the exercise of the defence on the other. While ECHR 6(1) does not compel a state to set up a court of appeal, a state which does institute such a court is required to ensure that persons amenable to the law shall enjoy before that court the fundamental guarantees contained in ECHR 6. Accordingly, the applicant had suffered an excessive restriction of his right of access to a court.[25]

[22] *Canea Catholic Church* v. *Greece*, European Court, (1997) 27 EHRR 521.

[23] *Golder* v. *United Kingdom*, European Commission, 1 June 1973. See also *Miloslavsky* v. *United Kingdom,* European Court, (1995) 20 EHRR 442: a security for costs order did not impair the essence of the right of access to the court of appeal.

[24] Decision of the Constitutional Court of the Czech Republic, III.US 127/96, 11 July 1996, (1996) 2 *Bulletin on Constitutional Case-Law* 199.

[25] *Omar* v. *France*, European Court, (1998) 29 EHRR 210. See also *Poitrimol* v. *France*, European Court, (1994)18 EHRR 130.

The right of access to a court may not be made ineffective by economic obstacles. While ICCPR 14(1) does not expressly require a state to provide legal aid outside the context of a criminal trial, it does create an obligation for a state to ensure to all persons equal access to courts and tribunals. Where a person under sentence of death had no possibility to present a motion in the constitutional court in person, and where the subject of the constitutional motion was the constitutionality of his execution, i.e. directly affected his life, the state should have taken measures to allow him access to the court through the provision of legal aid.[26] Similarly, if a wife seeking a judicial separation is prevented from instituting proceedings before a High Court by the prohibitive cost of litigation, the fact that she is free to go before that court without the assistance of a lawyer is not conclusive of the matter since she will be at a disadvantage if her husband is represented by a lawyer and she is not. Moreover, it is not realistic to suppose that in such litigation an applicant can effectively conduct her own case, even with the assistance which the judge traditionally affords to a party acting in person. In addition to involving complicated points of law, such litigation may necessitate proof of a matrimonial offence such as adultery, unnatural practices or cruelty. To establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. Moreover, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court. Accordingly, the possibility to appear in person before the High Court does not provide a potential litigant with an effective right of access.[27] A state has a free choice of the means to be used towards guaranteeing to litigants an effective right of access to the courts. The institution of a legal aid scheme constitutes one of those means, but there are others.[28]

[26] *Allan Henry* v. *Trinidad and Tobago*, Human Rights Committee, Communication No.752/1997, HRC 1999 Report, Annex IX.DD.

[27] *Airey* v. *Ireland*, European Court, (1979) 2 EHRR 305: In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, may meet the requirements of ECHR 6(1). There may be occasions when such a possibility secures adequate access but much must depend on the particular circumstances. Other means that might be used to guarantee an effective right of access to the courts include the institution of a legal aid scheme and a simplification of procedure.

[28] *Andronicou and Constantinou* v. *Cyprus*, European Court, (1997) 25 EHRR 491. See also Decision of the Constitutional Court of Portugal, 338/95, 22 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 186: The denial of legal aid to an alien who wishes to appeal against a ministerial decision rejecting his request for asylum (in a country whose constitution

The 'right to a court' in respect of criminal matters is also subject to implied limitations, two examples of which are a decision not to prosecute and an order for discontinuance of the proceedings. But where a Belgian butcher was alleged to have committed an offence of selling meat at an illegal profit, and was ordered by the public prosecutor to close his shop provisionally either until judgment was given in the intended criminal prosecution against him or until he paid an agreed fine by way of settlement, and he paid the fine under protest, the provisional closure of his shop had tainted with constraint his agreement to the friendly settlement against him. Accordingly, his waiver of a fair trial was also tainted by constraint. The European Court observed that in a democratic society too great an importance was attached to the 'right to a court' for its benefit to be forfeited solely by reason of the fact that an individual was a party to a settlement reached in the course of a procedure ancillary to court proceedings. He had the right to a fair trial before 'an independent and impartial tribunal established by law', incorporating a 'hearing', followed by 'determination of the criminal charge against him'.[29] A general prohibition on privileged contact between prisoners and their lawyers prior to the commencement of litigation, which is not dependent on specific security considerations, impinges too broadly on the right of access to court.[30]

The Constitutional Court of Spain has observed that while the constitution enshrines the legality principle in terms of the right to be convicted or sentenced only for acts or omissions provided for in law, there is no 'inverse legality principle', i.e. a fundamental right of a victim to secure the criminal conviction of another person who may or may not have violated his fundamental rights.[31] But the Inter-American Court of Human Rights considers that ACHR 8(1) must be given a broad interpretation based on both the letter and the spirit of this provision. Thus interpreted, ACHR 8(1) recognizes the right of a disappeared person's relatives to have his disappearance and death effectively investigated by

guarantees the right of asylum for specified categories of aliens) strikes at the core of the right of access to a court in that it discriminates against persons in a situation of financial need.

[29] *De Weer* v. *Belgium*, (1980) 2 EHRR 439.

[30] *Campbell and Fell* v. *United Kingdom*, European Commission, (1982) 5 EHRR 207.

[31] Decision of the Constitutional Court of Spain, 10 March 1997, Decision 41/1997, *Boletin Oficial del Estado*, no.87 of 11.04.1997, 3–9, (1997) 1 *Bulletin on Constitutional Case-Law* 102.

state authorities, with a view to those responsible being prosecuted and punished; and a right to be compensated for damages and injuries sustained by them.[32] Similarly, while ICCPR 14(1) does not provide a right for individuals to require that the state criminally prosecute another person, a state is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances and violations of the right to life, and prosecute criminally, try and punish those held responsible for such violations. That duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified.[33]

Decisions taken by administrative authorities which do not themselves satisfy the requirements of this article must be subject to subsequent control by a judicial body that has full jurisdiction. These include the power to quash in all respects, on questions of fact and law, the decision of the administrative authority.[34] A compulsory system of arbitration is incompatible with the right to a court. A Spanish law provided that, in the absence of express agreement to the contrary by the parties, any dispute arising under a contract for transport by land should be decided by arbitration where the amount at issue did not exceed 500,000 pesetas. The Constitutional Court observed that arbitration was, in effect, an equivalent judicial procedure which allowed the parties to achieve the same objectives as they could obtain in the civil courts. However, the requirement that the consent of the opposing party be obtained in order to avoid arbitration and have the matter determined by the courts, subordinated the exercise of the right to a court to the consent of the other party. Although it did not prevent access to courts for the resolution of a dispute, it made such access conditional upon an express agreement to the contrary, which meant that the exercise of the fundamental right was made conditional upon the agreement or consent of the other party being obtained.[35]

[32] *Blake Case*, Inter-American Court of Human Rights, Judgment of 24 January 1998.

[33] *Nydia Erika Bautista de Arellana* v. *Colombia*, Human Rights Committee, Communication No.563/1993, HRC 1996 Report, Annex VIII.S.

[34] *Pramstaller* v. *Austria*, European Court, 23 October 1995: the Administrative Court in Austria lacks that power and cannot, therefore, be regarded as a 'tribunal'. See also *Gradinger* v. *Austria*, European Court, 23 October 1995; *Umlauft* v. *Austria*, European Court, (1995) 22 EHRR 76; *Pfarrmeier* v. *Austria*, European Court, (1995) 22 EHRR 175; *Palaoro* v. *Austria*, European Court, 23 October 1995; *Schmautzer* v. *Austria*, European Court, (1995) 21 EHRR 511.

[35] Decision of the Constitutional Court of Spain, 23 November 1995, Case No.174/1995, *Boletin Oficial del Estado*, no.310 of 28 December 1995, 38–44, (1995) 3 *Bulletin on Constitutional Case-Law* 373.

An indemnity law that purports to deem legal and constitutional a previously performed illegal act and prohibits an aggrieved person taking any action before any court to determine the legality of such act means in effect that the legality or otherwise of such act will not be justiciable. Such legislation is, therefore, incompatible with the right to a court.[36] A distinction, however, is drawn between the act of a state covering up its own crimes by granting itself immunity, and the decision of a state in transition from a long period of authoritarian and abusive rule, taken with a view to assisting such transition. In the latter case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the past abuses. An example of this form of amnesty is the Promotion of National Unity and Reconciliation Act 1995 of South Africa, which provided that a person who had been granted amnesty under that Act could no longer be held civilly or criminally liable for an act in relation to which he had been granted amnesty. The Constitutional Court of South Africa observed that a far-reaching amnesty was essential in order to encourage those responsible for acts which would ordinarily be categorized as invasions of human rights to admit fully to their actions without fear of punishment or substantial civil claims for damages. The amnesty did not operate to immunize wrongdoers without the victims or their relatives having the compensatory benefit of discovering the truth, since it specifically provided that amnesty would be granted only where there was full disclosure of the relevant facts. The fundamental objective was a transition to a new democratic order committed to reconciliation between the people and the reconstruction of society. For that to be achieved, it was necessary for the limited resources of the state to be deployed in such a way as to benefit the community as a whole (e.g. by investing in education, housing and health care), rather than being diverted into settling the civil claims of individuals who had suffered at the hands of the state, however justified those claims might be.[37]

[36] *Attorney-General of St Christopher, Nevis and Anguilla* v. *Reynolds*, Court of Appeal of Grenada and West Indies Associated States, (1977) 24 WIR 552. This case concerned an Indemnity Act that purported to validate detention during a state of emergency.

[37] *AZAPO* v. *President of South Africa*, Constitutional Court of South Africa, [1997] 4 LRC 40. For a brilliant exposition of the rationale for this amnesty, see judgment of Mahomed D-P, at 51–4.

What is guaranteed is not a right that is theoretical or illusory, but one that is practical and effective. A court must, therefore, examine for itself the facts which are crucial for the determination of the dispute before it. Where the owner of a building situated in an area in which the soil had been determined by the municipality to be polluted, challenged the consequent order to reduce the rent of the building, the district court held that serious health or environmental risk was 'necessarily implied' by the provincial executive's decision that further soil clearing measures were required. The European Court held that by not itself assessing the relevance of soil pollution to the case before it, the court had deprived itself of jurisdiction to examine facts which were crucial for the determination of the dispute. In these circumstances, the applicant could not be considered to have had access to a tribunal invested with sufficient jurisdiction to decide the case before it.[38] The mere repetition of a published court decision and the application of its reasoning to an inapposite case results in the court's failure to ascertain the circumstances which are relevant for judgment in the matter under consideration, and therefore constitutes a violation of the right to a court.[39] So would a decision taken by a court which was not competent to hear the case.[40]

The right to a court will also be illusory if the legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It is inconceivable that the right to a fair trial should guarantee proceedings that are fair, public and expeditious, without ensuring the implementation of a judicial decision rendered in such proceedings. The execution of a judgment given by a court, therefore, has to be regarded as an integral part of the 'trial'.[41] The right to the effective enforcement of the judgment of a court means that, however complex the case and whatever the difficulties in resolving it, the court must use all objectively feasible and appropriate means to ensure its enjoyment. A key element of this right is that a judgment should be respected and, if necessary, vigorously

[38] *Terra Woningen BV* v. *Netherlands*, European Court, (1996) 24 EHRR 456.

[39] Decision of the Constitutional Court of the Czech Republic, IV.US 205/97, 20 November 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 370.

[40] Decision of the Constitutional Court of the Czech Republic, III.US 232/95, 22 February 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 22.

[41] *Hornsby* v. *Greece*, European Court, (1997) 24 EHRR 250. See also *Matos E Silva, Lda* v. *Portugal*, European Court, (1996), 24 EHRR 573: The fact that proceedings are taking a long time does not concern access to a tribunal. The difficulties encountered thus relate to conduct of proceedings, not to access.

applied in the event of any obstruction by a third party. When the dismissal of a chauffeur employed at the embassy of Equatorial Guinea in Madrid was declared null and void by the labour court, but he was not re-employed, he instituted an action for compensation, whereupon the embassy declared itself temporarily insolvent. The Constitutional Court of Spain held that one of the methods through which the judgment can be enforced is by ordering the ministries of economic affairs and finance in Spain to withhold the sum involved from any loans, aid or subsidies that had not yet been paid to the government of Equatorial Guinea. Another is by directing the ministry of foreign affairs to take appropriate action against the embassy in accordance with international law governing diplomatic relations, or even against the country itself, with regard to economic relations.[42] The right to have the precise terms of a judgment executed is a right that is different from, but closely associated with, the right to have the judgment executed without unreasonable delay.[43]

### *All persons shall be equal before the courts and tribunals*

The right of every individual to a fair trial is recognized without any distinction whatsoever as regards race, colour, sex, language, religion, political or other convictions, national or social origin, means, status, or other circumstances. This principle was applied in respect of a Peruvian law under which a married woman was not entitled to sue in respect of property owned by her, only the husband being entitled to represent matrimonial property before the courts. That law denied women equality before the courts.[44] It was also applied in respect of section 6 of the Government Proceedings Act of Tanzania which required prior consent in writing of the Attorney-General for an action to be commenced against the government. In Zanzibar, however, no such consent was necessary, only a month's notice being required to sue the government. Inasmuch as section 6 imposed a restriction based on which court

[42] Decision of the Constitutional Court of Spain, 18/1997, 10 February 1997, *Boletin Oficial del Estado*, no.63 of 14.03.97, 5–13, (1997) 1 *Bulletin on Constitutional Case-Law* 96.

[43] Decision of the Constitutional Court of Spain, 39/1995, 13 February 1995, *Supplement to the Boletin Oficial del Estado*, no.66 of 18.03.95, (1996) 1 *Bulletin on Constitutional Case-Law* 90.

[44] *Avellanal* v. *Peru*, Human Rights Committee, Communication No.202/1986, HRC 1989 Report, Annex X.C.

in the United Republic of Tanzania one went to to seek a remedy against the same government, it infringed the right to equality before the law.[45]

The principle of equality before the courts does not require identical procedures to be followed in respect of appeals from or to different tiers of courts. If all persons appealing from or to a particular court are subject to the same procedures, the requirement of equality is met. The Constitutional Court of South Africa observed that there was no cogent reason why superior courts must follow procedures identical to those applicable in the lower courts. While both categories of accused persons are entitled to a fair trial, it is quite rational that different procedures be followed in the different courts given the different circumstances. Accordingly, the requirement to apply for leave to appeal in the case of one but not the other does not violate the principle of equality.[46] But a requirement for a judge's certificate before an unrepresented convict could pursue an appeal violates the guarantee of equality. Although differentiation does not amount *per se* to unequal treatment in the constitutional sense, the requirement of such a certificate from those who were unrepresented and serving sentences of imprisonment, which group of persons laboured under the greatest disadvantage in managing their appeals, in contrast to the other group who were legally represented or who, whether represented or not, were not in prison, infringed the principle.[47]

The principle of equality of access to the law upholds the equalization of the parties' means of access. This may require the provision of legal aid to parties of limited financial means.[48]

### *determination of any criminal charge*

To determine whether an offence qualifies as 'criminal', the European Court has specified three criteria to be taken into account. First, the classification of the proceedings under national law, i.e. does it belong, in the legal system of the state, to criminal law? This factor is of relative weight and serves only as a starting point. Second, the nature of the

[45] *Pumbun et al* v. *Attorney-General*, Supreme Court of Tanzania, [1993] 2 LRC 317.

[46] *State* v. *Rens*, Constitutional Court of South Africa, [1996] 2 LRC 164. The requirement to apply for leave to appeal in the case of one and not the other is, therefore, not unconstitutional.

[47] *State* v. *Ntuli*, Constitutional Court of South Africa, [1996] 2 LRC 151.

[48] Decision of the Federal Constitutional Court of Germany, 10 April 1997, 1 BvR 79/97, (1997) 1 *Bulletin on Constitutional Case-Law* 41.

proceedings. This criterion carries more weight. Third, the nature and degree of severity of the penalty.[49] A problem may arise where an act or omission is both a criminal offence and a disciplinary offence. Is a public authority entitled to deal with such act by way of disciplinary proceedings and thereby deny an individual the benefit of this right? The European Court has applied the same criteria for the purpose of determining whether a charge treated by the state as disciplinary nevertheless had the character of a criminal charge.[50] However, for that purpose, the second and third factors are of greater weight.[51] An accusation may constitute a criminal charge although the offence is not classified as criminal under national law. It is the nature of the charge, therefore, that ultimately determines whether an act is criminal or disciplinary.

These principles have been applied to determine whether what was described as a 'regulatory offence' fell within the ambit of the criminal law. While certain forms of conduct may be decriminalized, such as road traffic offences, a state may not, by classifying an offence as 'regulatory' instead of criminal, exclude the operation of ECHR 6(1).[52] An offence against prison rules is a criminal charge since a disciplinary sanction imposed on a prisoner, who is already restricted by the application of

[49] *Benham* v. *United Kingdom*, European Court, (1996) 22 EHRR 293. See also *Ozturk* v. *Germany,* European Court, (1994) 6 EHRR 409; *Demicoli* v. *Malta*, European Court, (1991) 14 EHRR 47. *AP, MP and TP* v. *Switzerland*, European Court, (1997) 26 EHRR 541; *Ravnsborg* v. *Sweden*, European Court, (1994) 18 EHRR 38.

[50] *Engel et al.* v. *Netherlands* (1976) 1 EHRR 647. These criteria which were first applied in respect of military service have since been applied to determine whether a prison disciplinary charge fell within the 'criminal' sphere: see *Kiss* v. *United Kingdom*, European Commission, (1976) 7 *Decisions & Reports* 55; *Campbell and Fell* v. *United Kingdom*, European Commission, (1982) 5 EHRR 207, European Court, (1984) 7 EHRR 165.

[51] *Ozturk* v. *Germany* (1984) 6 EHRR 409.

[52] *Ozturk* v. *Germany* (1984) 6 EHRR 409; *Lutz* v. *Germany* (1987) 10 EHRR 182. In *Pramstaller* v. *Austria*, European Court, 23 October 1995, this test was applied to the administrative sphere. The Lienz district authority (*Bezirkshauptmannschaft*) served a 'sentence order' on a builder, alleging that he had carried out certain building works without planning permission. He was ordered to pay a fine with imprisonment in default of payment. It was held that the offence of which he was accused could be classified as 'criminal'. Similar decisions were reached in respect of 'sentence orders' for violation of the Motor Traffic Act: *Gradinger* v. *Austria*, European Court, 23 October 1995 (a fine with imprisonment in default, for driving under the influence of alcohol); *Umlauft* v. *Austria*, European Court, (1995) 22 EHRR 76 (a fine with imprisonment in default, for refusing to submit to a breath test); *Palaoro* v. *Austria*, European Court, 23 October 1995 (a fine with imprisonment in default, for two speeding offences); *Schmautzer* v. *Austria*, European Court, (1995) 21 EHRR 511 (a fine with imprisonment in default, for not wearing a safety belt).

a penalty, is a severe restriction on his freedom.[53] The imposition of a pecuniary penalty for disrupting court proceedings does not constitute 'criminal' proceedings,[54] but the suspension of a driving licence is a decision as to the merits of a criminal charge.[55]

Applying the same criteria, proceedings for breach of parliamentary privilege against the editor of a political satirical periodical for the alleged defamation of a member of the House of Representatives of Malta were considered to be 'criminal' in nature. While breach of parliamentary privilege was not formally classified as a crime in Malta, it consisted of a number of offences ranging from an insult or disrespect to the Speaker during the sitting of the House to assaults on members or officers of the House. The former related to the inner regulation and smooth functioning of the institution and could be regarded as a matter of internal discipline, while the latter overlapped on conduct condemned as criminal. In the view of the European Court, defamatory libel was criminal rather than disciplinary in nature in that context, particularly since it concerned publication outside the House by someone unconnected with the House. As regards the severity of the penalty, the editor ran the risk of a fine and imprisonment. What was at stake was thus sufficiently important to warrant classifying the offence with which the editor was charged as criminal.[56]

'Criminal charge' is an autonomous concept. The term has a 'substantive' rather than a 'formal' meaning. Therefore, a court must look behind appearances and investigate the realities of the procedure in question. A complaint of inflicting bodily harm was made against an Austrian accountant, and the police were instructed by the public prosecutor to investigate whether a punishable offence had been committed. In the course of these investigations, the accountant denied the allegations and denounced the complaint as being knowingly false. He offered the names of witnesses, but the police did not question them. The district court, at

[53] Decision of the Constitutional Court of Spain, Case No.143/1995, *Boletin Oficial del Estado*, No.269 of 10 November 1995, 10–14, (1995) 3 *Bulletin on Constitutional Case-Law* 370.

[54] *Putz* v. *Austria*, European Court, 22 February 1996. Cf. dissenting opinion of Judges De Meyer and Jungwiert.

[55] *T* v. *Administrative Law Appeals Board of the Canton of Sankt Gallen*, Decision of the Federal Tribunal of Switzerland, 11 January 1995, Case No.6A.78/1994, *Arrêts du Tribunal Fédéral*, 121 II 22, summarized in (1995) 2 *Bulletin on Constitutional Case-Law* 216.

[56] *Demicoli* v. *Malta*, European Court, (1991) 14 EHRR 47; European Commission, 15 March 1990. See also *Weber* v. *Switzerland*, European Court, (1990) 12 EHRR 548.

the request of the public prosecutor, terminated the proceedings without a hearing on the grounds that the degree of guilt was slight, the act had had only trifling consequences, and punishment was not necessary as a deterrent. No right of appeal lay against such a decision, except on behalf of the public prosecutor. In the circumstances, there were a combination of factors that demonstrated that at the relevant time there was a 'criminal charge' against the accountant.[57] The Human Rights Committee has held the 'reclassification procedure' in Jamaica where a single judge determines whether the offence charged is 'capital' or 'non-capital' and then proceeds to set the length of a non-parole period, to form an essential part of the determination of a criminal charge.[58]

The 'charge' is the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.[59] Where a Belgian butcher was alleged to have committed an offence of selling meat at an illegal profit, and the public prosecutor ordered the provisional closure of his shop either until judgment was given in the intended criminal prosecution against him or until he paid an agreed fine by way of settlement, and the butcher paid the fine under protest, the notification of the provisional closure of his shop and the terms on which it would be re-opened constituted a 'criminal charge'.[60] But where commissioners of customs and excise at London's Heathrow airport, acting under the Customs and Excise Act, seized an aircraft after it had discharged cargo including a container which, when opened, was found to contain 331 kilograms of cannabis resin, and later delivered the aircraft back to the owner on payment of a penalty, the matters complained of did not involve the determination of a 'criminal charge'. The absence of a criminal charge or a provision which was 'criminal' in nature and the lack of involvement of the criminal courts, taken together

[57] *Adolf* v. *Austria*, European Court, (1982) 4 EHRR 313.

[58] *Gallimore* v. *Jamaica*, Human Rights Committee, Communication No.680/1996, HRC 1999 Report, Annex XI.U; *Bailey* v. *Jamaica*, Human Rights Committee, Communication No.709/1996, HRC 1999 Report, Annex XI.W.

[59] *Eckle* v. *Germany*, European Court, (1982) 5 EHRR 1; *Foti* v. *Italy*, European Court, (1983) 5 EHRR 313; *Smyth* v. *Ushewokunze*, Supreme Court of Zimbabwe, [1998] 4 LRC 120. This does not imply that ECHR 6(1) has no application to pre-trial proceedings. See *Tejedor Garcia* v. *Spain*, European Court, (1997) 26 EHRR 440: Where a preliminary enquiry concerning a person had commenced in respect of offences arising out of an incident, after which he had been cautioned by police and brought before an investigating judge who examined the allegations made against him, the court held that he had been the subject of a criminal charge.

[60] *De Weer* v. *Belgium*, European Court, (1980) 2 EHRR 439.

with the fact that there was no threat of any criminal proceedings in the event of non-compliance, were sufficient to distinguish the latter case from the former.[61]

### *rights and obligations in a suit at law*

The term 'civil rights and obligations' in ECHR 6(1) is given an autonomous interpretation,[62] and covers all proceedings the result of which is decisive for private rights and obligations. There must be a dispute (*contestation*) over a 'right' which can be said, at least on arguable grounds, to be recognized under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question.[63] Applying these principles, the Strasbourg institutions have found ECHR 6(1) to be applicable to proceedings relating to the payment of a salary;[64] the termination of employment;[65] the right to a pension and the amount of the entitlement;[66] entitlement to health insurance benefits;[67] compensation claims from statutory or public authorities;[68] a dispute concerning

[61] *Air Canada* v. *United Kingdom*, European Court, (1995) 20 EHRR 150.

[62] *Benthem* v. *Netherlands*, European Court, (1984) 6 EHRR 283; *Deumeland* v. *Germany*, European Court, (1984) 7 EHRR 409.

[63] *Zander* v. *Sweden*, European Court, (1993) 18 EHRR 175; *Kerojarvi* v. *Finland*, European Court, 19 July 1995; *Acquaviva* v. *France*, European Court, 21 November 1995.

[64] *Maillard* v. *France*, European Court, (1998) 27 EHRR 232: but disputes concerning the recruitment, careers and termination of service of civil servants are, as a general rule, outside the scope of ECHR 6(1). See also *Huber* v. *France*, European Court, (1998) 26 EHRR 457.

[65] *Zand* v. *Austria*, European Commission, (1978) 15 Decisions & Reports 70; *Buchholz* v. *Germany*, European Court, (1981) 3 EHRR 597. See also *Ma Wan Farming Ltd* v. *Chief Executive in Council*, Court of Appeal of the Hong Kong SAR, [1998] 1 HKLRD 514: the dispute might arise due to an expropriation or confiscation of land, or due to planning laws.

[66] *Pauger* v. *Austria*, European Court, (1997) 25 EHRR 105; *Submann* v. *Germany*, European Court, (1966) 25 EHRR 64. Cf. Decision of the Constitutional Court of Austria, B1030/94, V 126/94, 25 September 1995, (1996) 1 *Bulletin on Constitutional Case-Law* 5: a decision awarding a pension is *not* part of the 'hard core of civil rights'.

[67] *Feldbrugge* v. *Netherlands*, European Court, (1986) 8 EHRR 425; *Salesi* v. *Italy*, European Court, (1993) 26 EHRR 187; *Schuler-Zgraggen* v. *Switzerland*, European Court, (1993) 16 EHRR 405; *Kerojarvi* v. *Finland*, European Court, 19 July 1995.

[68] *Zimmerman and Steiner* v. *Switzerland*, European Court, (1983) 6 EHRR 17; *Adler* v. *Switzerland*, European Commission, (1985) 46 *Decisions & Reports* 368; *Lithgow* v. *United*

contributions under a social security scheme as distinct from entitlement to benefits under such scheme;[69] divorce, custody and access to children;[70] the confinement of an individual in a mental hospital;[71] the question of the ownership of patent rights;[72] the right of shareholders to participate in decisions concerning the value of their shares;[73] the right to carry on a commercial activity, including the practice of a profession;[74] a question before the Bar Council concerning enrolment on the list of pupil advocates;[75] a decision by local or public authorities affecting property rights;[76] proceedings before a planning inspector to challenge a planning enforcement notice;[77] the right to recover a sum awarded by an arbitrator;[78] libel;[79] the adjudication of bankruptcy;[80] and a clearly defined statutory right, such as the right not to be discriminated against

*Kingdom*, European Court, (1986) 8 EHRR 329; *Axen* v. *Germany*, European Court, (1983) 6 EHRR 195; *Beaumartin* v. *France*, European Court, (1994) 19 EHRR 485; *Gustavson* v. *Sweden*, European Court, (1997) 25 EHRR 623.

[69] *Schouten and Meldrun* v. *Netherlands*, European Court, 9 December 1994: (1994) 19 EHRR 432.

[70] *H* v. *United Kingdom*, European Court, (1987) 10 EHRR 95; *Bock* v. *Germany*, European Court, (1989) 12 EHRR 247.

[71] *Winterwerp* v. *Netherlands (No. 2)*, European Court, (1981) 4 EHRR 228.

[72] *X* v. *Switzerland*, European Commission, Application 8000/77 (1978) 13 *Decisions & Reports* 81; *British–American Tobacco Co Ltd* v. *Netherlands*, European Court, 20 November 1995.

[73] *Paftis* v. *Greece*, European Court, (1998) 27 EHRR 566.

[74] *König* v. *Germany*, European Court, (1978) 2 EHRR 170; *Kaplan* v. *United Kingdom*, European Commission, (1980) 21 *Decisions & Reports* 5; *Le Compte, Van Leuven and De Meyere* v. *Belgium*, European Court, (1981) 4 EHRR 1; *Albert and Le Compte* v. *Belgium*, European Court, (1983) 5 EHRR 533; *Diennet* v. *France*, European Court, (1995) 21 EHRR 554; *B* v. *Committee for the Monitoring of Solicitors of the Canton of Grisons*, Federal Court of Switzerland, 25 May 1997, *Arrêts du Tribunal fédéral*, 123 1 87, (1997) 2 *Bulletin on Constitutional Case-Law* 274.

[75] *De Moor* v. *Belgium*, European Court, 23 June 1994.

[76] *Ringeisen* v. *Austria*, European Court, (1971) 1 EHRR 455; *Adler* v. *Switzerland*, European Commission, (1983) 32 *Decisions & Reports* 228; *Erkner and Hofauer* v. *Austria*, European Court, (1987) 9 EHRR 464; *Ettl* v. *Austria*, European Court, (1987) 10 EHRR 255; *Marcuard* v. *Hausamman et al.*, Federal Court of Switzerland, 27 September 1996, *Arrêts du Tribunal fédéral*, 122 1 294, (1996) *Bulletin on Constitutional Case-Law* 432 (the question whether it is mandatory when drawing up a land-use plan to classify certain areas as building zones).

[77] *Zander* v. *Sweden*, European Court, (1993) 18 EHRR 175; *Bryan* v. *United Kingdom*, European Court, (1995) 21 EHRR 342.

[78] *Stran Greek Refineries and Stratis Andreasis* v. *Greece*, European Court, (1994) 19 EHRR 293.

[79] *Isop* v. *Austria*, European Commission, (1962) 5 *Yearbook* 108; *Golder* v. *United Kingdom*, European Court, (1975) 1 EHRR 524; *Miloslavsky* v. *United Kingdom*, European Court, (1995) 20 EHRR 442.

[80] *X* v. *Belgium*, European Commission, (1981) 24 *Decisions & Reports* 198.

on grounds of religious belief or political opinion.[81] The determination of a tax assessment is not regarded, in relation to the taxpayer or the person obliged to make the declaration at source, as the determination of a civil obligation.[82] Concern has been expressed that certain areas of public administration which impact on private law relationships have been considered to fall within the scope of ECHR 6(1). If ECHR 6(1) is widely applied to administrative acts, it may be found necessary to interpret some of the guarantees in that article, for instance those relating to publicity, in a restrictive manner which, in turn, will reduce the value of those guarantees in their traditional field of application.[83]

A matter may concern a person's 'rights' even if he is not a party to pending proceedings. Where a property owner wished to challenge the granting of a refuse-dumping permit to a company on adjacent land on the ground that refuse containing cyanide had been left on the dump, thereby polluting drinking-water, it was held that the property owner, although a third party, could arguably maintain that he was entitled to protection against the water in his well being polluted. Accordingly, an appeal lodged by him against the decision to grant the permit would involve a 'determination' of his 'rights'.[84]

The concept of a 'suit at law' 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 on the particular forum which the legal system provides for the right to be adjudicated upon.[85] A 'suit at law' includes proceedings leading to the dissolution of a labour contract;[86] the regulation of the activities of professional bodies and the scrutiny of such regulations by the courts.[87]

[81] *Tinnelly & Sons Ltd* v. *United Kingdom*, European Court, (1998) 27 EHRR 249. See also *Aerts* v. *Belgium*, European Court, (1998) 29 EHRR 50: the right to liberty.

[82] Decision of the Supreme Court of the Netherlands, 31541, 25 June 1997, *Beslissingen in Belastingzaken* 1997, 276, (1997) 2 *Bulletin on Constitutional Case-Law* 230.

[83] *Benthem* v. *Netherlands*, European Commission, (1983) 6 EHRR 282; *Deumeland* v. *Germany*, European Commission, (1984) 7 EHRR 409.

[84] *Zander* v. *Sweden*, European Court, (1993) 18 EHRR 175.

[85] *Y.L.* v. *Canada*, Human Rights Committee, Communication No.112/1981, HRC 1986 Report, Annex IX.A.

[86] *Van Meurs* v. *Netherlands*, Human Rights Committee, Communication No.215/1986, HRC 1990 Report, Annex IX.F.

[87] *J.L.* v. *Australia*, Human Rights Committee, Communication No.491/1992, HRC 1992 Report, Annex X.EE. According to the Draft UN Body of Principles on the Right to a Fair Trial and a Remedy, UN document E/CN.4/Sub.2/1994/24 of 3 June 1994, rights and obligations

*everyone shall be entitled to a fair and public hearing*

## fair hearing

The requirements inherent in the concept of a 'fair hearing' are not necessarily the same in cases concerning the determination of rights and obligations in a suit at law as in cases concerning the determination of a criminal charge. There is greater latitude when dealing with civil cases concerning civil rights and obligations than when dealing with criminal cases.[88] Indeed, the requirements for a 'fair hearing' in respect of the determination of a criminal charge elaborated in international and regional instruments[89] are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing.[90] The right to a fair hearing embraces a concept of 'substantive fairness' broader than these minimum requirements.[91] For example, a judge's instructions to the jury must meet particularly high standards as to their thoroughness and impartiality in a case in which sentence of death may be pronounced on the accused.[92] In a trial by jury, it is important that all jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict.[93] But whether the proceedings be criminal or civil in nature, the broader concept of a fair trial includes not only the obligation of

may also be determined in proceedings involving such matters as bankruptcy, commitment to a mental institution, compensation claims against domestic authorities, contractual rights and obligations, drivers' licences, family-related issues, health insurance benefits, land consolidation issues, property rights, and scope and ownership of patents, as well as other proceedings in which a person has the right to appear and present evidence.

88 *Société Levage Prestations* v. *France*, European Court, (1996) 24 EHRR 351.

89 See ICCPR 14(2) to 14(7) and 15; ECHR 6(2) and 6(3); ACHR 8(2) to 8(5) and 9 and 10.

90 Human Rights Committee, General Comment 13 (1984). See also *De Weer* v. *Belgium*, European Court, (1980) 2 EHRR 439; *Artico* v. *Italy*, European Court, (1980) 3 EHRR 1; *Jespers* v. *Belgium*, European Commission, (1981) 5 EHRR 305; *Berbera, Messegue and Jabardo* v. *Spain*, European Court, (1988) 11 EHRR 360 (the belated transfer of the accused persons to Madrid for their trial, the unexpected change in the court's membership immediately before the opening of the hearing, the brevity of the trial, and the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the accused persons' presence and in public, meant that the proceedings taken as a whole did not satisfy the requirement of a fair and public hearing); *Kwame Apata* v. *Roberts*, Court of Appeal of Guyana, (1981) 29 WIR 69.

91 *State* v. *Zuma*, Constitutional Court of South Africa, [1995] 1 LRC 145.

92 *Pinto* v. *Trinidad and Tobago*, Human Rights Committee, Communication No.232/1987, HRC 1990 Report, Annex IX.H.

93 *Collins* v. *Jamaica*, Human Rights Committee, Communication No.240/1987, HRC 1992 Report, Annex IX.C.

independence and impartiality on the part of judicial authorities, but also respect for the principles of adversarial proceedings, of equality of arms, and of expeditious proceedings.[94]

The Supreme Court of Zimbabwe has held that a broad and creative interpretation of the right to a fair trial embraces not only the impartiality of the court but also the absolute impartiality of the prosecutor whose function forms an indispensable part of the judicial process and whose conduct reflects on the impartiality or otherwise of the court. Gubbay CJ noted that a prosecutor has to dedicate himself to the achievement of justice and pursue that aim impartially. He has to conduct the case against the accused with due regard to the traditional precepts of candour and absolute fairness. Since he represents the state, the community at large and the interests of justice in general, the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner. Like Caesar's wife, the prosecutor must be above any trace of suspicion. As a 'minister of the truth' he has a special duty to see that the truth emerges in court. He must produce all relevant evidence to the court and ensure, as best he can, the veracity of such evidence. He must state the facts dispassionately. If he knows of a point in favour of the accused, he must bring it out. If he knows of a credible witness who can speak of facts which go to show the innocence of the accused, he must himself call that witness if the accused is unrepresented; and if represented, tender the witness to the defence. If his own witness substantially departs from his proof, he must, unless there is special and cogent reason to the contrary, draw the attention of the court to the discrepancy, or reveal the seriously contradictory passage in the statements to the defending practitioner.[95]

[94] *Fei* v. *Colombia,* Human Rights Committee, Communication No.514/1992, HRC 1995 Report, Annex X.J. The Draft UN Body of Principles on the Right to a Fair Trial and a Remedy identifies the following requirements for a fair hearing, whether the legal proceedings be civil, criminal, administrative or military in nature. A party shall have the right to: (a) adequate notice of the nature and purpose of the proceedings; (b) be afforded an adequate opportunity to prepare a case; (c) present arguments and evidence, and meet opposing arguments and evidence, either in writing, orally or by both means; (d) consult and be represented by counsel or other qualified persons of his or her choice during all stages of the proceedings; (e) consult an interpreter during all stages of the proceedings, if he or she cannot understand or speak the language used in the court or tribunal; (f) have his or her rights or obligations affected only by a decision based solely on evidence known to parties to public proceedings; (g) have his or her rights or obligations affected only by a decision rendered without undue delay and as to which the parties are provided adequate notice thereof and the reasons therefor; (h) appeal decisions to a higher administrative authority, a judicial tribunal, or both.

[95] *Smyth* v. *Ushewokunze*, Supreme Court of Zimbabwe, [1998] 4 LRC 120. The court interdicted the prosecutor from taking any further part in the preparation, or presentation at

The principle of adversarial proceedings means that each party to a criminal or civil trial must have the opportunity not only to make known any evidence needed for his claim to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.[96] Where judgment is given in favour of one party before the expiration of the deadline for the submission of the other party's defence statement, this principle is not respected.[97] Adversarial proceedings also imply the observance of the principles of natural justice.[98] Therefore, the impartiality of the court is an important aspect of the right to a fair trial. A judge must not harbour preconceptions about the matter placed before him, and must

the trial, of the charges against the accused on the ground that, by making unsubstantiated allegations in his request for remand, and by failing to correct allegations before the magistrate which he knew were untrue and which aggravated the seriousness of the charges, his behaviour had fallen far short of the customary standards of fairness and detachment demanded of a prosecutor. See also *Boodram* v. *Attorney General*, Privy Council on appeal from the Court of Appeal of Trinidad, [1996] 2 LRC 196: By virtue of his position both as a participant in the criminal process and as the officer of state with authority and means to prosecute contemners, the Director of Public Prosecutions (DPP) owes a heavy responsibility towards the court, the defendants brought before it, and the community at large to play his part in keeping 'the springs of justice undefiled'. Alertness on his part to guard against any serious risk that trial by jury will develop into trial by media is an important function of his office. It would not necessarily exonerate the DPP from any obligation in this regard that the subject of adverse pre-trial media coverage might himself have been able personally to take proceedings against the offending newspapers and broadcasters.

[96] *Mantovanelli* v. *France*, European Court, (1997) 24 EHRR 370 (not afforded real opportunity to comment effectively on an expert medical report); *Lobo Machado* v. *Portugal*, European Court, (1997) 23 EHRR 79 (not provided with a copy of the written opinion submitted to court by the Attorney-General's department, nor provided an opportunity to reply to it before judgment). See also *Werner* v. *Austria*, European Court, (1997) 26 EHRR 310.

[97] *Fei* v. *Colombia*, Human Rights Committee, Communication No.514/1992, 4 April 1995. See also *Brandstetter* v. *Austria*, European Court, (1991) 15 EHRR 378 (no copy of the submissions of the prosecutor was sent to the accused, nor was he informed of their having been filed). See also the similar cases of *Borgers* v. *Belgium*, European Court, (1991) 15 EHRR 92, and *Ruiz-Mateos* v. *Spain*, European Court, (1993) 16 EHRR 505; *Kerojarvi* v. *Finland*, European Court, 19 July 1995; *Vermuelen* v. *Belgium*, European Court, 20 February 1996 (failure to make material documents available to a party); *Niderost and Huber* v. *Switzerland*, European Court, (1997) 25 EHRR 709 (not given an opportunity to comment on the observations of the cantonal court submitted to the Federal Court in a matter where the cantonal court's decision was challenged); *De Haes and Gijsels* v. *Belgium*, European Court, (1997) 25 EHRR 1 (outright rejection of an application to produce a document).

[98] *Hermoza* v. *Peru*, Human Rights Committee, Communication No.203/1986, HRC 1989 Report, Annex X.D., individual opinion of Joseph A.L. Cooray, Vojin Dimitrijevic and Rajsoomar Lallah. In this case, an ex-police sergeant complained that he was not accorded a hearing either by the administrative authorities which were responsible for the decision to suspend him and, later, to discharge him, or by the Supreme Court, when it reversed an earlier decision favourable to him.

not act in a way that promotes the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who should have been disqualified cannot normally be considered to be fair.[99] Another important aspect of natural justice is the concept of *audi alteram partem* which is breached, for example, not only when a hearing is held in the absence of a party, but also when a party is present through the proceedings but is not heard before an order that adversely affects his interests is made;[100] when a litigant appearing in person is not permitted by the court to make an opening or closing speech or to make any submissions on the law;[101] or when an appeal court required to re-evaluate the evidence submitted at the trial and determine whether a procedural flaw had affected the verdict of the trial court, fails to conduct oral proceedings.[102] Implicit in the observance of natural justice is a reasoned judgment.[103] This cannot, however, be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision.[104] The adoption of a

[99] *Karttunen* v. *Finland*, Human Rights Committee, Communication No.387/1989, 23 October 1992. See also *Okoduwa* v. *The State*, Supreme Court of Nigeria, [1990] LRC (Const) 337: A judge is entitled to ask questions by way of clarification of issues. But where he constantly interferes and virtually takes over the role of the prosecution and uses the results of his own questioning to arrive at the conclusions in his judgment, the judge becomes accuser, witness and judge at the same time, and the accused does not receive a fair trial.

[100] *Lazarus Atano* v. *Attorney-General*, Supreme Court of Nigeria, [1988] 2 NWLR 201; *Ekbatari* v. *Sweden*, European Court, (1988) 13 EHRR 504; *Fredin* v. *Sweden* (No.2), European Court, 23 February 1994; *Holland* v. *Minister of the Public Service, Labour and Social Welfare*, Supreme Court of Zimbabwe, [1998] 1 LRC 78. The *ex parte* nature of appellate proceedings breach the right to a fair hearing. While there may be justification for denying this right when making a provisional order, notably because there is a risk that the purpose of the order will otherwise be defeated, the right to a hearing must be strictly observed in the case of final appeals, even if the appeal is limited to a question of law: Decision of the Constitutional Court of Liechtenstein, Case N.StGH 1997/2, StGH 1997/6, 5 September 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 395.

[101] *Hurnam* v. *Paratian*, Privy Council on appeal from the Court of Civil Appeal of Mauritius, [1998] 3 LRC 36.

[102] *Karttunen* v. *Finland*, Human Rights Committee, Communication No.387/1989, 23 October 1992.

[103] *Firestone Tyre and Rubber Co Ltd and International Synthetic Rubber Co Ltd* v. *United Kingdom*, European Commission, Application 5460/72, (1973) 43 *Collection of Decisions* 99.

[104] *Van de Hurk* v. *Netherlands*, European Court, 19 April 1994; *Balani* v. *Spain*, European Court, 9 December 1994; *Torija* v. *Spain*, European Court, 9 December 1994; *Helle* v.

written judgment cannot of itself be equated with its 'availability' to an appellant or his counsel. There should be reasonably efficient administrative channels through which they may request and obtain relevant court documents.[105]

The principle of procedural equality of parties – or what is generally called the 'equality of arms' – is an inherent element of a fair trial.[106] This principle is violated when a trial judge refuses to grant an adjournment to enable an accused person to obtain legal representation, several adjournments having already been granted when prosecution witnesses were unavailable or not ready;[107] when the prosecuting authority is heard in a matter relating to detention on remand in the absence of the defendant or his legal representative;[108] when an accused is denied access to his case file in the police court registry, and is therefore unable to prepare an adequate defence;[109] when the court fails to control the hostile atmosphere and pressure created by the public in the courtroom which makes it impossible for defence counsel to properly cross-examine witnesses and present his defence;[110] when a non-resident alien is not permitted by the state to participate in person in court proceedings to which he is a party;[111] or when a convicted prisoner is informed of the date of the hearing of his appeal after it has taken place.[112] Acts by the state which create public bias against an accused also violate this principle. Where the government authorities solicited evidence by placing advertisements in newspapers with photographs of the accused persons, thereby implying that they were guilty of the crimes charged, the state had jeopardized

*Finland*, European Court, (1997) 26 EHRR 159; *Georgiadis* v. *Greece*, European Court, (1997) 24 EHRR 606.

[105] *M.F.* v. *Jamaica*, Human Rights Committee, Communication No.233/1987, HRC 1992 Report, Annex X.A.

[106] *Kouphs* v. *The Republic*, Supreme Court of Cyprus, (1977) 11 JSC 1860; *Morael* v. *France*, Human Rights Committee, Communication No.207/1986, HRC 1989 Report, Annex X.E.

[107] *Robinson* v. *Jamaica*, Human Rights Committee, Communication No.223/1987, HRC 1989 Report, Annex X.H. See also *The State* v. *Fitzpatrick Darrell*, Court of Appeal of Guyana, (1976) 24 WIR 211: refusal to allow the recall of a witness.

[108] *Neumeister* v. *Austria,* European Court, (1968) 1 EHRR 91; *Kampanis* v. *Greece*, European Court, (1995) 21 EHRR 43.

[109] *Foucher* v. *France*, European Court, (1997) 25 EHRR 234.

[110] *Gridin* v. *Russian Federation*, Human Rights Committee, Communication No.770/1997, HRC 2000 Report, Annex IX.O.

[111] *Zouhair Ben Said* v. *Norway*, Human Rights Committee, Communication No.767/1997, 20 March 2000.

[112] *Alrick Thomas* v. *Jamaica*, Human Rights Committee, Communication No.272/1988, HRC 1992 Report, Annex IX.G.

the right to a procedurally fair hearing.[113] Similarly, televising incriminating confessions made by accused persons before a final verdict is rendered 'leads public opinion to prejudge the guilt' of the accused, and seriously violates the 'fundamental dictates of due process'.[114]

It is a requirement of fairness in criminal proceedings that the prosecution disclose to the defence all material evidence in its possession for or against the accused.[115] However, this is not an absolute requirement. Competing interests, such as national security, the protection of witnesses, secrecy in respect of methods of investigation, the fundamental rights of another individual, or an important public interest, may be invoked by the prosecution to resist a claim for access to any particular document, and must be weighed against the rights of the accused. But even where the prosecution satisfies the court that the denial of access was justifiable, the court retains a discretion to allow access to such document by the accused. While only such measures restricting the rights of the defence which are strictly necessary are permissible, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[116]

The detention of a witness with a view to obtaining his testimony is an exceptional measure which must be regulated by strict criteria in law and in practice. Where a ten-year-old boy testifying for the prosecution in the trial of his father for the murder of his mother declined to answer any questions on the ground that he had not seen his father do anything, was threatened by the judge with detention if he refused to answer and was in fact detained overnight at police headquarters, and the same scenario was repeated, whereupon the boy broke down and testified against his father, the Human Rights Committee held that special circumstances

[113] Inter-American Commission, Nicaragua Report, 1981, page 81.

[114] Inter-American Commission, Nicaragua Report, 1981, page 106.

[115] *Edwards* v. *United Kingdom*, European Court, (1992) 15 EHRR 417. See also *Machado* v. *Portugal*, European Court, 20 February 1996: Where a party to civil litigation was not given a copy of a written opinion submitted to the court by the Attorney-General and, therefore, did not have an opportunity of replying to it before judgment, his right to adversarial proceedings was infringed.

[116] *Shabalala* v. *Attorney General of the Transvaal*, Constitutional Court of South Africa, [1996] 1 LRC 207; *State* v. *Scholtz*, Supreme Court of Namibia, [1997] 1 LRC 67; *Molapo* v. *Director of Public Prosecutions*, High Court of Lesotho, [1998] 2 LRC 146; *Republic* v. *Georges*, Constitutional Court of The Seychelles, [1999] 4 LRC 146; *Rowe and Davis* v. *United Kingdom*, European Court, (2000) 30 EHRR 1; *Jasper* v. *United Kingdom*, European Court, (2000) 30 EHRR 441.

did not exist to justify his detention, and that in the light of his retraction, serious questions arose about possible intimidation and about the reliability of the testimony obtained under these circumstances, thereby violating the right to a fair trial.[117] When the prosecution entered a *nolle prosequi* plea after a defendant charged with murder pleaded guilty to a charge of manslaughter and the plea was accepted by the prosecution and the trial was adjourned at the request of the defence in order to call character witnesses in mitigation, the institution immediately thereafter of a fresh prosecution on exactly the same charge of murder was incompatible with the requirements of a fair trial.[118]

In litigation involving private parties, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent,[119] and to be represented by counsel for that purpose.[120] While the right to free legal aid in civil cases is not expressly guaranteed, its denial may, in certain circumstances, infringe the principle of 'equality of arms' and constitute a violation of the right to a fair hearing.[121] Procedural equality may not be violated by provision for the use of *one* official court language. Nor does the requirement of a fair hearing mandate a state to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. It is only if the parties or the witnesses have difficulty in understanding, or in expressing themselves in the court language, that the services of an interpreter should be made available. If the court is certain that a party is sufficiently proficient in the court's

[117] *John Campbell* v. *Jamaica*, Communication No.307/1988, 24 March 1993. See also the individual opinion of Bertil Wennergren.

[118] *Richards* v. *Jamaica*, Human Rights Committee, Communication No.535/1993, HRC 1997 Report, Annex VI.F.

[119] *Dombo Beheer BV* v. *Netherlands*, European Court, 27 October 1993: (1993) 18 EHRR 213. See also *Stran Greek Refineries and Stratis Andreadis* v. *Greece*, European Court, (1994) 19 EHRR 293: The notion of a fair trial precludes any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. In this case, the state intervened in a decisive manner, by enacting new legislation to ensure that the outcome, which was imminent, of proceedings to which it was a party, was favourable to it.

[120] *Ntukidem* v. *Oko*, Supreme Court of Nigeria, [1989] LRC (Const) 395.

[121] *X* v. *Germany*, European Commission, Application 2857/66, (1969) 29 *Collection of Decisions* 15; *X* v. *Switzerland*, European Commission, Application 6958/75, (1975) 3 *Decisions & Reports* 155. Cf. *Airey* v. *Ireland*, European Court, (1979) 2 EHRR 305.

language, it is not required to ascertain whether it would be preferable for him to express himself in a language other than the court language.[122]

The principle of expeditious proceedings requires that justice be rendered without undue delay,[123] a requirement which was not met, for instance, when a court order requiring a defendant to grant his ex-wife access to their children remained 'under investigation' for over thirty months since it was filed.[124] A 'chronic overload' does not justify the non-observance of this principle.[125]

## Public hearing

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. The holding of court hearings in public protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of a fair trial.[126] Apart from the exceptional circumstances in which the press and the public may be excluded from all or part of a trial, a hearing must be open to the public in general, including members of the press, and may not, for instance, be limited only to a particular category of person. Even in cases in which the public is excluded from the trial, the judgment must, with certain strictly defined exceptions, be made public.[127]

[122] *Guesdon* v. *France*, Human Rights Committee, Communication No.219/1986, HRC 1990 Report, Annex IX.G; *Cadoret* v. *France*, Human Rights Committee, Communication No.221/1987, HRC 1991 Report, Annex IX.A.

[123] *Hermoza* v. *Peru*, Human Rights Committee, Communication No.203/1986, HRC 1989 Report, Annex X.D; *Bolanos* v. *Ecuador*, Human Rights Committee, Communication No.238/1987, HRC 1989 Report, Annex X.I.

[124] *Fei* v. *Colombia*, Human Rights Committee, Communication No.514/1992, HRC 1995 Report, Annex X.J.

[125] *Pammel* v. *Germany*, European Court, (1997) 26 EHRR 100.

[126] *Diennet* v. *France*, European Court, (1995) 21 EHRR 554; *Werner* v. *Austria*, European Court, (1997) 26 EHRR 310. See *Richmond Newspapers Inc* v. *Commonwealth of Virginia*, United States Supreme Court, 448 US 555 (1980), per Brennan J: 'Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.'

[127] See Human Rights Committee, General Comment 13 (1984); *De Moor* v. *Belgium*, European Court, 23 June 1994 (consideration by the Bar Council of an application for enrolment on the list of pupil advocates); UN document A/2929, chapter VI, section 78.

The duty to hold a public hearing is imposed upon the state and is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish. The courts must make information on time and venue of the oral hearings available to the public and provide adequate facilities for the attendance of interested members of the public, within reasonable limits. Failure to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.[128]

Whether or not a trial has been held in public is a question that must be determined objectively on a consideration of all the circumstances. In Canada, the trial of an undefended divorce action took place in the judges' law library, neither the judge nor counsel being robed. The law library was not one of the regular courts, but when the judge, who was attended by the assistant clerk of the court and by an official shorthand writer, was about to take his seat, and before doing so, he announced that he was sitting in open court. The only other persons present throughout the proceedings were the petitioner and his two witnesses. While the door to the library was kept open, it led to an inner corridor at the end of which there was a double swing door in the wall of a public corridor. The swing of that door was always fixed and the other unfastened, but on the fixed swing there was a brass plate bearing the word 'Private' in black letters. At the end of the proceedings a decree nisi was pronounced and was subsequently made absolute. In an action for the rescission of the decree nisi and absolute by the respondent on the ground that the proceedings in the law library had not constituted a trial in open court, the Privy Council held that although the actual exclusion of the public resulted only from the word 'Private' on the outer door, the judge on the

[128] *Van Meurs* v. *Netherlands*, Human Rights Committee, Communication No.215/1986, HRC 1990 Report, Annex IX.F. Cf. *Re George Weekes*, High Court of Trinidad and Tobago, (1972) 21 WIR 526: Where certain members of the public were prevented at one time or another from entering the court by unidentified members of the police service, even though there was ample room to accommodate them and it was their desire to enter, the exclusion of a member or members of the public cannot of itself render a court not an open court and cause it not to be properly constituted so as to vitiate its proceedings; *Helmers* v. *Sweden*, European Court, (1991) 15 EHRR 285: Provided a public hearing had been held at first instance, the absence of such a hearing before a second or third instance might be justified by the special features of the proceedings at issue. See also *Andersson* v. *Sweden*, European Court, (1991) 15 EHRR 218; *Fejde* v. *Sweden*, European Court, 29 October 1991.

occasion of the divorce trial, albeit unconsciously, was denying his court to the public in breach of their right to be present. Lord Blanesburgh explained that while it was in evidence that the word 'Private' on the outer door did not in fact deter or hinder entry to the inner courtyard by practitioners, there remained the serious question whether the swing doors with 'Private' marked upon one of them were not as effective a bar to the access to the library by an ordinary member of the public finding himself in the public corridor, as would be a door actually locked.[129]

When at the commencement of a trial in a court in Jamaica, counsel asked the magistrate to disqualify himself on the ground that he would be sitting as a judge in his own cause, the magistrate invited counsel to state in chambers the basis of his submission. The record of the proceedings disclosed that the court then adjourned to chambers; that in chambers, 'Court rules that case will proceed'; and then, 'Court resumes'. The Privy Council held that the expression 'proceedings of [the] court' in section 20(3) of the Constitution of Jamaica ('All proceedings of every court . . . shall be held in public') covered what had occurred in this case in chambers since a ruling had been made there.[130]

It was a cardinal principle of criminal procedure that once a jury had retired there was to be no secret communication between the jury and anyone, not even the judge. Any communication between the judge and the jury had to take place in open court in the presence of the entire jury, both counsel and the appellant. It was therefore a material irregularity for the judge to discuss the proposed verdicts of the jury with the foreman of the jury in his chambers. The law regarding the practice to be adopted when a judge received a note from the jury who had retired to consider their verdict was well established. If the communication raised something unconnected with the trial, for example, a request that some message be sent to a relative of one of the jurors, it could simply be dealt with without any reference to counsel and without bringing the

[129] *McPherson* v. *McPherson*, Privy Council on appeal from the Supreme Court of Canada, [1936] AC 177.

[130] *McBean* v. *R*, Privy Council on appeal from the Court of Appeal of Jamaica, (1976) 33 WIR 230. However, Viscount Dilhorne cautioned that 'where it is suggested that counsel should see the judge in his private room or counsel ask to see the judge in his private room and he sees them, it by no means follows that what occurs there is to be regarded as proceedings of the court. There may be many occasions on which counsel wish to see a judge privately, and on many occasions it may be desirable that that should be done.'

jury back to court. In almost every other case a judge should state in open court the nature and content of the communication which he had received from the jury and, if he considered it helpful so to do, seek the assistance of counsel. That assistance would normally be sought before the jury was asked to return to court, and then, when the jury returned, the judge would deal with their communication. The reason for those procedures was to ensure that there was no suspicion of any private or secret communication between the court and the jury and to enable the judge to give proper and accurate assistance to the jury upon any matter of law or fact which was troubling them.[131]

The Human Rights Committee has held that trials conducted in Peru by special tribunals established under anti-terrorist legislation, composed of anonymous judges who are allowed to cover their faces, violated ICCPR 6(1). The very nature of the system of trial by 'faceless judges' in a remote prison is predicated on the exclusion of the public from the proceedings. The system also fails to guarantee another cardinal aspect of a fair trial, namely that the tribunal be, and be seen to be, independent and impartial, since it is ad hoc and may well comprise serving members of the armed services.[132] The right to a public hearing includes an entitlement to an 'oral hearing'.[133] All the evidence must normally be produced at a public hearing, in the presence of the accused, who must be given an adequate and proper opportunity to challenge and question any witness against him. Where the life, liberty or security of a witness may be at stake, criminal proceedings may be so organized that those interests are not unjustifiably imperilled. But the interests of the defence must also be balanced against those of witnesses or victims called to testify. For example, the protection of a child witness and the rights of an accused to a fair trial may be achieved by permitting such witness to testify in more congenial surroundings and out of sight of the accused.[134] While the use of an anonymous witness is not under all circumstances incompatible with ECHR 6(1), the European Court has

[131] *Ramstead* v. *R*, Privy Council, on appeal from the Court of Appeal of New Zealand, [1998] 4 LRC 497.

[132] *Polay Campos* v. *Peru*, Human Rights Committee, Communication No.577/1994, HRC 1998 Report, Annex XI.F. See also *Castillo Petruzzi Case*, Inter-American Court of Human Rights, Judgment of 30 May 1999.

[133] *Fischer* v. *Austria*, European Court, (1995) 20 EHRR 349.

[134] *Klink* v. *Regional Court Magistrate NO*, Supreme Court of South Africa (South-Eastern Cape Local Division), [1996] 3 LRC 667.

held that a conviction should not be based either solely or to a decisive extent on such testimony.[135]

### Exceptions to a public hearing

Exceptions to a public hearing must be narrowly construed.[136] In respect of each exception, the tribunal must determine whether, and to what extent, the public interest in open proceedings is substantially outweighed by the rationale for the exception.[137] The press and public may be excluded from all or part of a trial for reasons of:

(a) morals, i.e. where the testimony will have a corrupting or intimidating influence on the observers or participants. Moral grounds for excluding the public may be asserted primarily in the trial of cases involving sexual offences.
(b) public order (ordre public),[138] i.e. on the ground of a grave threat to public order.[139]
(c) national security, i.e. when the hearings involve state defence secrets.
(d) when the interests of the private lives of the parties so require, i.e. hearings relating to family issues such as divorce and guardianship, and juvenile proceedings involving sexual offences, in so far as public

[135] *Van Mechelen* v. *Netherlands*, European Court, (1997) 25 EHRR 647. In a prosecution for attempted manslaughter and robbery, the judge arranged the hearings in such a way that he, a registrar and the police officers who were testifying were in one room, while the defendants, their lawyers and the advocate-general were in another, the two rooms being connected by a sound link. Not only was the defence unaware of the identity of the witnesses, but they were also prevented from observing their demeanour under direct questioning, and thus from testing their reliability.

[136] Decision of 23 September 1992, Court of Appeal of Finland, Report No.1698, 592/31, Electronic database FHOT "FINLEX" (Finnish Ministry of Justice).

[137] See the Draft UN Body of Principles on the Right to a Fair Trial and a Remedy, UN document E/CN.4/Sub.2/1994/24 of 3 June 1994.

[138] On the inclusion of this term, see UN document A/4299, section 55.

[139] *Campbell and Fell* v. *United Kingdom*, European Court, (1984) 7 EHRR 165: To require disciplinary proceedings concerning convicted prisoners to be held in public would impose a disproportionate burden on the authorities of the state. They are habitually held within the prison precincts and the difficulties over admitting the public to those precincts are obvious. If they were held outside, similar problems would arise as regards the prisoner's transportation to and attendance at the hearing. There are, therefore, sufficient reasons of public order and security justifying the exclusion of the press and public from the proceedings of the Board of Visitors of the prison. But see *Engel et al* v. *Netherlands*, European Court, (1976) 1 EHRR 647, where it was held that this right was violated when hearings in the presence of the parties had taken place *in camera* in accordance with the established practice of the Supreme Military Court in disciplinary proceedings.

proceedings would constitute a clearly unwarranted invasion of personal privacy.[140]

(e) to the extent strictly necessary in the opinion of the court or tribunal in special circumstances where publicity would prejudice the interests of justice.[141] Parties to a suit do not have a 'right' to have such suit tried in camera, even for the protection of their private lives.[142]

### *within a reasonable time*

In applying ECHR 6(1), the European Court has determined the reasonableness of the length of civil proceedings by reference to the complexity of the case, the conduct of the applicant, and the conduct of the administrative and judicial authorities.[143]

### *by a competent, independent and impartial tribunal established by law*

The principles of independence and impartiality seek to achieve a twofold objective. First, to ensure that a person is tried by a tribunal that is not

[140] See UN document A/2929, chapter VI, section 81. When, during the drafting of this article, the use of the words 'the interest of the private lives of the parties' was being discussed, reference was made to proceedings involving matrimonial disputes or the guardianship of children and to the requirements of the interests of juveniles. See *Diennet* v. *France*, European Court, (1995) 21 EHRR 554. The need to protect professional confidentiality and the private lives of patients may justify holding disciplinary proceedings relating to a medical practitioner in camera.

[141] When the inclusion of the words 'or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice' was under consideration, reference was made to the desirability, in some instances, of keeping the subject-matter of litigation secret, for instance where secret industrial processes were involved, and to the special position of legally incapable persons and first offenders. See UN document A/2929, chapter VI, section 80. Cf. *Scott* v. *Scott* [1913] AC 417, per Earl of Halsbury: 'Every court of justice is open to every subject of the king.'

[142] Bundesgerichtshof, Germany, Decision of 2 July 1969, 1969 *Neue Juristische Wochenschrift* 2107.

[143] *A* v. *Denmark*, European Court, (1996) 22 EHRR 458. See also *X* v. *France*, European Court, (1991) 14 EHRR 483: Where a person suffering from an incurable disease institutes proceedings against the state for compensation, the competent administrative and judicial authorities are under a positive obligation to act with exceptional diligence; *Capuano* v. *Italy*, European Court, (1987) 13 EHRR 271: a four-year delay before the appeal court is excessive; *Baraona* v. *Portugal*, European Court, (1987) 13 EHRR 329: In an action for damages against the state, neither the complexity of the case nor the applicant's conduct had any marked influence on the length of the proceedings (six years) which resulted mainly from the way the relevant authorities conducted the case; *Moreira* v. *Portugal*, European Court, (1988) 13 EHRR 519: The excessive length (two-year delay in obtaining three medical examinations from the Institute of Forensic Medicine) was essentially due to the conduct of the competent authorities.

biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute. Second, to maintain the integrity of the judicial system by preventing any reasonable apprehension of bias.[144] The system of secret justice – through 'faceless judges' – constitutes a flagrant violation *per se* of the right to be judged by a competent, independent and impartial tribunal. The right to know who is judging and to be able to determine the judge's subjective competence, i.e. whether there are any grounds for challenging or removing the judge, is a basic guarantee.[145]

### competent

The use of the word 'competent' before 'independent and impartial tribunal' was intended to ensure that all persons should be tried in courts whose jurisdiction had been previously established by law, and arbitrary action so avoided.[146] The term 'competent' had in mind the legal notions of competence *ratione materiae*, *ratione personae*, and *ratione loci*.[147]

### independent

This term refers to the independence of the courts from the executive and the legislature and from the parties.[148] In order to establish whether

[144] *R* v. *Genereux*, Supreme Court of Canada, (1992) 133 NR 241, per Lamer CJ. See *Valente* v. *The Queen* Supreme Court of Canada, [1985] 2 SCR 673: The concepts of 'independence' and 'impartiality' are very closely related yet are separate and distinct. 'Impartiality' refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' connotes absence of bias, actual or perceived. The word 'independent' reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees. See also Human Rights Committee, General Comment 13 (1984). In *R* v. *Lippe*, Supreme Court of Canada, [1991] 2 SCR 114, Lamer CJ pointed out that while an independent tribunal must be both independent from government and independent from the parties to the litigation, the concept of 'government' refers not only to the executive or legislative branches but also to any person or body which can exert pressure on the judiciary through authority under the state, including any person or body within the judiciary which has been granted some authority over other judges.

[145] *Carlos Florentino Molero Coca et al* v. *Peru*, Inter-American Commission, Report No.49/2000, Case II.182, 13 April 2000, *Annual Report 1999*, p. 1226.

[146] UN document A/2929, chapter VI, section 77.

[147] UN document A/4299, section 52.

[148] See International Commission of Jurists, 'The Declaration of Delhi 1959' (1959) 2(1) Spring-Summer *Journal of the International Commission of Jurists* 7–18; *Piersack* v. *Belgium*,

a body can be considered 'independent', regard is usually had, *inter alia*, to the manner of appointment of its members and to their terms of office, to the existence of guarantees against outside pressures, and to the question whether the body presents an appearance of independence.[149] In Hungary, the practice whereby the Minister of Justice awarded, or recommended the award of, honours to judges for their judicial activity, was held to violate the principle of judicial independence. The discretional recognition of the judges' judicial work by a representative of the executive branch, without the substantial participation of the judicial branch, jeopardized the independence of the judiciary.[150] In Lithuania, the payment of 'premium' (i.e. a particular incentive) to judges in connection with the administration of justice was held to be incompatible with the principle of judicial independence.[151]

The Supreme Court of Canada has articulated three 'essential conditions' for judicial independence.[152] They are

(a) *Security of tenure*: This condition can be satisfied in a number of ways. What is essential is that the decision-maker be removable only for cause. In other words, the essence of security of tenure is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.[153]

European Commission, 13 May 1981. Shimon Shetreet has argued that, while historically the independence of the judiciary was endangered by parliaments and monarchs, in modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary also be secured from business or corporate interests. Therefore, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglements likely to affect, or rather be seen to affect, him in the exercise of his judicial functions. See Shimon Shetreet, *Judges on Trial: a Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland Publishing Co., 1976), 17.

149 *Langborger* v. *Sweden*, European Court, (1989) 12 EHRR 416; *Bryan* v. *United Kingdom*, European Court, (1995) 21 EHRR 342.

150 Decision of the Constitutional Court of Hungary, 18 October 1994, Case No.45/1994, *Magyar Kozlony*, No.103/1994, (1994) 3 *Bulletin on Constitutional Case-Law* 240.

151 Decision of the Constitutional Court of Lithuania, 6 December 1995, Case No.3/1995, *Valstybes zinios*, 101-2264 of 13 December 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 323.

152 *Valente* v. *The Queen* [1985] 2 SCR 673.

153 The principle of judicial irremovability of judges creates stability on the bench. If a judge is to be removed, then such removal must be done in strict accordance with the procedure

(b) *Financial security*: The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence. Within the limits of this requirement, however, governments must retain the authority to design specific plans of remuneration that are appropriate to different types of tribunals. Consequently, a variety of schemes may equally satisfy the requirement of financial security, provided that the essence of the condition is protected.

(c) *Institutional independence*: This condition is institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function. It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the constitution.[154]

established in the constitution, as a safeguard of the democratic system of government and the rule of law. The principle is based on the very special nature of the function of the courts and to guarantee the independence of the judiciary vis-à-vis the other branches of government and political–electoral changes. See Inter-American Commission, Report No.103/1997 (Argentina), paragraph 41; *Walter Humberto Vasquez Vejarano* v. *Peru*, Inter-American Commission, 13 April 2000, *Annual Report 1999*, p. 1200.

[154] In *The Queen* v. *Liyanage* (1962) 64 NLR 313, the Supreme Court of Ceylon held that a law which empowered the Minister of Justice to nominate judges to try a particular case was ultra vires. See also *Senadhira* v. *Bribery Commissioner*, Supreme Court of Ceylon, (1961) 63 NLR 313. In proceedings before the French Conseil d'Etat, the question arose whether under an international treaty, the Franco-Moroccan Protocol relating to the financial consequences of the nationalization of French citizens' assets in Morocco, a natural person was entitled to compensation. Declaring that the interpretation of international treaties fell outside the scope of its judicial functions, the tribunal sought the opinion of the minister for foreign affairs. The minister replied that the Protocol 'was not intended to cover natural persons holding shares in companies', and the tribunal gave judgment accordingly. The European Court noted that the tribunal had, in this instance, referred to a representative of the executive for a solution to a legal problem before it. Moreover, the minister's involvement, which was decisive for the outcome of the legal proceedings, was not open to challenge by the parties. Accordingly, the court held that the case had not been heard by an independent tribunal with full jurisdiction: *Beaumartin* v. *France*, (1994) 19 EHRR 485.

It is important that a tribunal should be perceived as independent, and that the test for independence should include that perception. It is a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.[155] Where the members of a tribunal include a person who is in a subordinate position, in terms of his duties and the organization of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Accordingly, the appointment as an acting judge of the High Court of a member of the staff of the director of public prosecutions is in contravention of the state's duty to guarantee the independence of the courts. Independence is not a state of being left alone for a day or three months; it is something more secure and more permanent than that.[156] But legislation in Quebec which provided for municipal courts to be presided over by part-time judges who were permitted to simultaneously remain active in private practice was acceptable. The fact that judges were part-time did not in itself raise a reasonable apprehension of bias on an institutional level, although certain activities or professions in which they engaged might be incompatible with their duties as judges and raise such a bias. While the occupation of practising law gave rise to a reasonable apprehension of bias in a substantial number of cases and was therefore *per se* incompatible with the functions of a judge, a careful consideration of the legislative safeguards in place, including judicial immunity, the oath sworn by judges, and the code of ethics to which they were subject, showed that the risk of bias had been minimized.[157]

[155] *Valente* v. *The Queen*, Supreme Court of Canada, [1985] 2 SCR 673.

[156] *Law Society of Lesotho* v. *Prime Minister of Lesotho*, Court of Appeal of Lesotho, [1986] LRC (Const) 481, per Schutz P. See also *Attorney General* v. *Per-Hendrik Nielsen*, Supreme Court of Denmark, 18 April 1994, Case No.II 395/1993, (1994) 1 *Bulletin of Constitutional Case-Law* 18, where it was held that judicial independence was compromised when criminal proceedings were conducted by an acting judge who was at the same time serving in the ministry of justice and dealing with the police, the prosecution, and the granting of leave to appeal in criminal proceedings.

[157] *R* v. *Lippe*, Supreme Court of Canada, [1991] 2 SCR 114. The court thought that with full knowledge of the Quebec municipal court system, including all of its safeguards, a reasonably well-informed person should not have had an apprehension of bias in a substantial number of cases. It had been argued that the structure of the system would give rise to many conflicts of interest. The part-time municipal court judges could be pressured by a variety of parties. Clients could pressure them to make decisions favouring or prejudicing a particular individual or position. A conflict of interest could arise if

In Scotland, a temporary sheriff appointed for a term of one year, over whom the Lord Advocate exercises a power of recall, is not an 'independent and impartial tribunal' competent to adjudicate on a constitutional issue.[158]

An individual who wishes to challenge the independence of a tribunal need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent.[159] Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, the test for independence is whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation.[160]

a lawyer involved in a negotiation with the judge's firm had to appear before the judge. Pressure could also be exerted on the judge by government. If the judge's firm was pursuing a particular government contract, the judge may feel pressured to decide a constitutional issue a certain way.

[158] *Stars* v. *Procurator Fiscal*, High Court of Judiciary of Scotland, 11 November 1999: [2000] 1 LRC 718.

[159] *R* v. *Genereux* (1992) 133 NR 241, per Lamer CJ. In this case, the question arose whether a general court martial was an independent and impartial tribunal. The Supreme Court of Canada observed that the question was not whether the general court martial actually had acted in a manner that might be characterized as independent and impartial. The appropriate question was whether the tribunal, from the objective standpoint of a reasonable and informed person, would be perceived as enjoying the essential conditions of independence. The court held that the general court martial did not enjoy sufficient security of tenure; its judge advocate and members did not enjoy sufficient financial security; and the constitution and structure of the general court martial did not meet the minimum requirements of section 11(d). See also *Nystrom* v. *Belgium*, European Commission, Application 11504/85, (1988) 58 *Decisions & Reports* 48. (Neither the composition of the Appeals Council of the Belgian Medical Association (five doctors and four lawyers, one of whom presides), nor the manner in which the doctors are appointed, justify the accusation that the body is partial; *Versteele* v. *Belgium*, European Commission, Application 12458/86, (1989) 59 *Decisions & Reports* 113 (the Disciplinary Appeals Board of Belgian Bar Associations (four lawyers sitting in their personal capacity and a judge who presides) does not raise any doubt as to their independence and impartiality).

[160] *R* v. *Valente*, Supreme Court of Canada, [1985] 2 SCR 673.

## impartial

The requirement of impartiality incorporates the fundamental principle that a person may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First, it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome, then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. This principle was applied in England in 1852 to disqualify the Lord Chancellor who had given judgment in favour of a canal company in which he was a substantial shareholder, although it was not supposed that the judge was, in the remotest degree, influenced by the interest he had in the company.[161] More recently, the House of Lords extended the application of that principle to cases where the interest of the judge in the subject-matter of the proceedings arises from his strong commitment to some cause or belief or his association with a person or body involved in the proceeding, and where the judge's decision would lead to the promotion of such cause.[162]

The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial. This is not a case of the judge himself benefiting, but of providing a benefit for another by failing to be impartial.[163]

[161] *Dimes* v. *Proprietors of Grand Junction Canal*, House of Lords, United Kingdom, (1852) 3 HL Cas. 759.

[162] *R* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2)*, House of Lords, United Kingdom, [1999] 1 LRC 1. In proceedings to which Amnesty International was an intervenient, the House of Lords upheld, by a majority of three to two, a provisional warrant for the arrest of the former head of state of Chile, with a view to his extradition to stand trial for crimes against humanity. It was subsequently discovered that one of the majority judges, Lord Hoffman, was a director and chairperson of Amnesty International Charity Ltd, which had been incorporated to carry out Amnesty International's charitable purposes. It was not alleged that he was in fact biased. The court held that, although not guilty of bias of any kind, he was automatically disqualified from hearing the appeal.

[163] *R* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2)*, House of Lords, United Kingdom, [1999] 1 LRC 1, per Lord Browne-Wilkinson. But see *R* v. *S*, Supreme Court of Canada, [1997] 3 SCR 484: The requirement of neutrality does not require a judge to discount his or her life experiences. Social context can be used to assist in determining an issue of credibility. Whether the use of references to social context is

Different formulae have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from 'a high probability' of bias to 'a real likelihood', 'a substantial possibility', and 'a reasonable suspicion' of bias. In England, the test currently applied is 'whether, having regard to [the relevant] circumstances, there was a real danger of bias on the part of the [decision-maker], in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration'.[164] In Australia, however, the High Court had developed a different test, namely, 'whether a fair-minded lay observer might have reasonably apprehended that the judge did not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide'. Kirby J explained that this test took into account the exposition of international human rights law which supported a vigilant approach to the possibility that the parties or public might entertain a reasonable apprehension that an adjudicator might not be impartial. It differed from the test applied in England in that it found its rationale in the principle that justice must be done and be seen to be done. The hypothetical reasonable observer of the judge's conduct was postulated in order to emphasize that the test was objective, was founded in the need for public confidence in the judiciary, and was not based purely upon the assessment by other judges of the capacity or performance of a colleague. It recognized the 'growing inclination of parties and members of the public to regard with scepticism the assertion that judges, by their training and experience, brought detached minds to their tasks'.[165]

appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts.

[164] *R* v. *Gough* [1993] 3 LRC 612; [1993] 2 All ER 724. See also *Locabail (UK)* v. *Bayfield Properties Ltd*, Court of Appeal, United Kingdom, [2000] 3 LRC 482.

[165] *Johnson* v. *Johnson*, High Court of Australia, [2000] 5 LRC 223. See *Abiola* v.*Federation of the Republic of Nigeria*, Supreme Court of Nigeria, [1995] 3 LRC 468: An applicant for bail sought to disqualify eight justices from hearing the matter on the ground of prejudice since these justices had commenced defamation proceedings against a newspaper company of which the applicant was chairman, chief executive, publisher and principal shareholder. The court (which included two of these justices, Bello CJ and Uwais JSC) held that a reasonable person would think it likely or probable that there would be a real likelihood of bias by the justices. It was reasonable to infer that the justices suing for libel had grievances against the applicant and that it was likely or probable that there would be a real likelihood of bias on the part of such justices if they heard and determined the applicant's case. See also *Omoniyi* v. *Central Schools Board*, Court of Appeal, Nigeria, [1988] 4 NWLR 448; *Akoh* v. *Abuh*, Supreme Court of Nigeria, [1988] 3 NWLR 696.

The European Court has explained that there are two aspects to the requirement of impartiality. First, the tribunal must be subjectively impartial, i.e. no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, i.e. it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[166] Under this test, it must be determined whether, irrespective of the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect, even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including an accused person. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. In deciding whether in a criminal case there is legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.[167]

These principles were applied to a court martial, where the proceedings involved the determination of charges of a criminal nature. A single officer (the 'convening officer') was responsible for the convening of the court martial, the appointment of all participants in the court martial, and the confirmation of the sentence. Examining the question whether the members of the court martial were sufficiently independent of the convening officer and whether the organization of the trial offered adequate guarantees of impartiality, the court noted that all the members of the court martial were subordinate in rank to him, and he had the power, in prescribed circumstances, to dissolve the court martial either before or during the trial. Observing that in order to maintain confidence in the independence of the court, appearances may be of importance, the court noted that since all the members of the court martial fell within the chain of command of the convening officer, the applicant's doubts about the tribunal's independence and impartiality could be objectively justified. The court also found it significant that the convening officer also acted as 'confirming officer', so that the decision of the court martial was not effective until ratified by him, and he had the power to vary

[166] *Gregory* v. *United Kingdom*, European Court, (1997) 25 EHRR 577.
[167] *Castillo Algar* v. *Spain*, European Court, (1998) 30 EHRR 827.

the sentence. This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' required by ECHR 6(1). These flaws in the court-martial system were not remedied by the presence of safeguards. Nor could the defects be corrected by any subsequent review proceedings.[168]

Where a judge had previously taken part in proceedings in a subordinate court which gave him a knowledge of the case prior to the trial, and where this knowledge necessarily related to the charges against the accused and the evaluation of those charges and of his character, his appointment to preside over the trial was incompatible with the requirement of impartiality.[169] Similarly, where the president of the assize court had been involved in the investigation of the case on three occasions as senior deputy public prosecutor, that fact alone was sufficient to establish that he did not offer all the requisite guarantees of impartiality.[170] But the mere fact that a judge was once a member of the public

[168] *Findlay* v. *United Kingdom*, (1997) 24 EHRR 221. See also *Coyne* v. *United Kingdom*, European Court, 24 September 1997; *Moore and Gordon* v. *United Kingdom*, European Court, (1999) 29 EHRR 728; Decision of the Constitutional Court of Spain, No.7/1997, 14 January 1997, *Boletin Oficial del Estado*, no.39 of 14.02.97, 25–9, (1997) 1 *Bulletin on Constitutional Case-Law* 96. Cf. *Sekoati* v. *President of the Court Martial*, [2000] 4 LRC 511, where the Court of Appeal of Lesotho held that while a court-martial had to be independent, it was in the sense and to the degree appropriate to its inherent nature as a military, not civilian, court.

[169] *Collins* v. *Jamaica*, Human Rights Committee, Communication No.240/1987, HRC 1992 Report, Annex IX.C; *De Haan* v. *Netherlands*, European Court, (1997) 26 EHRR 417. Cf. Decision of the Supreme Court of the Netherlands, 8824, 21 March 1997, *Rechtspraak van de Week* 1997, 67, (1997) *Bulletin on Constitutional Case-Law* 223 (the fact that a judge has previously sat on the bench of the division of a court that has given judgment and has previously heard witnesses in his capacity of examining magistrate, does not detract from his impartiality); Decision of the Supreme Court of Cyprus, 1912, 29 November 1994, (1996) 1 *Bulletin on Constitutional Case-Law* 147 (a previous judgment and the expression of views by a judge does not necessarily prejudge his opinion on constitutional and legal matters in a later judgment, especially in the case of judges of the supreme court, and it is not an impediment for the same judge to try a case between the same or other litigants in which the same legal point is raised). For a similar view, see *Berry* v. *Director of Public Prosecutions*, Privy Council on appeal from the Court of Appeal of Jamaica, [1996] 3 LRC 697.

[170] *Piersack* v. *Belgium*, European Commission, 13 May 1981. For others who did not offer the requisite guarantees, see *De Cubber* v. *Belgium*, European Court, (1984) 7 EHRR 236: successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case; *Hauschildt* v. *Denmark*, European Court, (1989) 12 EHRR 266: a trial judge who had made pre-trial detention orders based on a 'particularly

prosecutor's department is not a reason for fearing that he lacks impartiality.[171]

There is a functional relationship between independence and impartiality, the former being essentially a precondition for the latter.[172] Sometimes it appears difficult to dissociate the question of impartiality from that of independence. Where an application by a tenant for the conclusion of a new lease agreement with a fixed rent and no negotiation clause came before the Housing and Tenancy Court composed of two professional judges and two lay assessors nominated respectively by the Swedish Federation of Property Owners and the National Tenants' Union and then appointed by the government, the European Court held that the applicant could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the court's composition, was liable to be upset when the court came to decide his own claim. The fact that the court also included two professional judges, whose independence and impartiality were not in question, made no difference in this respect.[173]

## Tribunal

The word 'tribunal' is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the judicial machinery of the country. But the fact that a body exercises judicial functions does not constitute it a 'tribunal'. The use of the term 'tribunal' is warranted only from an organ which satisfies a series of further requirements, such as independence of the executive and of the parties to the case, duration of its members' term of office, and guarantees afforded by its procedure.[174] A power to give a binding decision which may not be altered by a

confirmed suspicion' that the accused had committed the crime. Cf. *Sainte-Marie* v. *France*, European Court, (1992) 16 EHHR 116; *Saraiva de Carvalho* v. *Portugal,* European Court, 22 April 1994; *Bulut* v. *Austria*, European Court, 22 February 1996; *Procola* v. *Luxembourg*, European Court, 28 September 1995: four of the five members of the judicial committee of the Conseil d'Etat had previously scrutinized in their advisory capacity the lawfulness of the same regulation.

171 *Piersack* v. *Belgium*, European Court, (1982) 5 EHRR 169.

172 *Bramelid and Malmstrom* v. *Sweden*, European Commission, (1986) 8 EHRR 45.

173 *Langborger* v. *Sweden*, (1989) 12 EHRR 416; European Commission, (1987) 12 EHRR 120. See also *Holm* v. *Sweden*, European Court, 25 November 1993.

174 *Le Compte, Van Leuven and De Meyere* v. *Belgium*, European Court, (1981) 4 EHRR 1: Although half of the members of the Appeal Council of the *Ordre des Médecins* were medical practitioners, the presence of judges making up half the membership, including the

non-judicial authority to the detriment of an individual party is inherent in the notion of 'tribunal'.[175] Accordingly, a Board of Visitors of a prison, when carrying out its adjudicatory tasks,[176] a Real Property Transactions Authority whose function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner,[177] and the Council of the *Ordre des avocats* when dealing with an application for restoration to the roll,[178] are 'tribunals'.[179]

The jury forms part of a 'tribunal'. Accordingly, the principles concerning the independence and impartiality of tribunals apply to jurors. This means that an accused must be permitted to challenge potential jurors when there is a realistic potential or possibility that some among the jury pool may harbour prejudices that deprive them of their impartiality.[180]

chairman, provided a sufficient assurance of impartiality; *Pace* v. *Prime Minister*, Constitutional Court of Malta, 3 December 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 402: An Appeals Board established under the Controlled Companies (Procedure for Liquidation) Act satisfied these requirements. It is, *inter alia*, competent to make legally binding decisions, subject to an appeal to the Court of Appeal on a question of law.

[175] *Benthem* v. *Netherlands*, European Court, (1985) 8 EHRR 1 (the Administrative Litigation Division of the Council of State merely tenders advice which has no binding force); *Van de Hurk* v. *Netherlands*, European Court, 19 April 1994 (the power given to the minister partially or completely to deprive a judgment of the Industrial Appeals Tribunal of its effect to the detriment of an individual party removed one of the basic attributes of the tribunal, in violation of the article).

[176] *Campbell and Fell* v. *United Kingdom*, European Court, (1984) 7 EHRR 165.

[177] *Sramek* v. *Austria*, European Court, (1984) 7 EHRR 351.

[178] *H* v. *Belgium*, European Court, (1987) 10 EHRR 339.

[179] See also *Bramelid and Malmstrom* v. *Sweden*, European Commission, (1986) 8 EHRR 45 (arbitrators chosen in the circumstances of that case did not constitute an independent and impartial tribunal); Decision of the Court of Arbitration, Belgium, 49/97, 14 July 1997, *Moniteur Belge* of 30.09.1997, (1997) 1 *Bulletin on Constitutional Case-Law* 161 (the Court of Arbitration is obliged to respect the general principle that judges must be both subjectively and objectively impartial); *Obermeier* v. *Austria,* European Court, (1990) 13 EHRR 290 (neither the Disabled Persons Board nor the Administrative Court were independent tribunals since they lacked 'full jurisdiction').

[180] *R* v. *Williams*, Supreme Court of Canada, [1998] 4 LRC 183: The right to challenge for cause 'remains an essential filament in the web of protections the law has woven to protect the constitutional right to have one's guilt or innocence determined by an impartial jury', per McLachlin J. The court upheld the right of an accused to question potential jurors for racial bias. See also *Remli* v. *France*, European Court, (1996) 22 EHRR 253: ECHR 6(1) was breached when the assize court failed to examine evidence submitted to it that a juror had made a racist remark on the ground that it was 'not able to take note of events alleged to have occurred outside its presence'. Cf. *Gregory* v. *United Kingdom*, European Court, (1997) 25 EHRR 577, and *Boodram* v. *State*, Court of Appeal of Trinidad and Tobago,

established by law

This requirement seeks to ensure that the organization of justice in a democratic society is regulated by an act of parliament and does not depend on the discretion of the executive.[181]

*Any judgment 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.*

Depositing the judgment in the court registry, with written notification of the operative provisions being given to the parties, but not pronounced in open court, is a sufficient compliance with this requirement. Anyone may consult it or obtain a copy of it on application to the court registry.[182] The principles governing the holding of hearings in public

[1998] 4 LRC 585, where the view was expressed that jurors could be relied upon to obey instructions to disregard irrelevant matters. See also *Pullar* v. *United Kingdom*, European Court, (1996) 22 EHRR 391, where the court recognized that the fact that one of the jurors was employed by the firm in which a prosecution witness was a partner might give rise to anxiety on the part of the accused. However, the view taken by the accused was not conclusive; what is decisive is whether his doubts can be held to be objectively justified.

[181] *Piersack* v. *Belgium*, European Commission, 13 May 1981.

[182] *Preto* v. *Italy*, European Court, (1983) 6 EHRR 182; *Axen* v. *Germany*, European Court, (1983) 6 EHRR 195. Note that Article 6(1) of the European Convention requires the judgment to be 'pronounced publicly'. But cf. *Sutter* v. *Switzerland*, European Court (1984) 6 EHRR 272, where Judges Cremona, Ganshof van der Meersch, Walsh and MacDonald, in their dissenting opinion, emphasized the particular importance of the accessibility of the judgment to the general public, and observed that if the basic underlying concept of public scrutability is to be a reality, a restricted access to judgments such as existed in the case of the decisions of the Military Court of Cassation, i.e. restricted only to persons who could establish an interest to the satisfaction of a court official, falls short of what is required by Article 6(1). Public knowledge of court decisions cannot be secured by confining that knowledge to a limited class of persons. Neither the annual roneotyping of the judgments of the Military Court of Cassation after appreciable delay nor the subsequent publication of some of those judgments in printed form in volumes covering a number of years (in the present case the judgment was published only after an interval of some six years) is sufficient to comply with the requirements of that provision. Furthermore, even such publication is not required by law but depends solely on voluntary initiatives. See *Campbell and Fell* v. *United Kingdom*, European Court, (1984) 7 EHRR 165; *De Moor* v. *Belgium*, European Court, 23 June 1994: failure to make public the decision of the Board of Visitors of a prison, or of the Bar Council on an application for enrolment on the list of pupil advocates, is a violation of Article 6(1).

also apply to the public delivery of judgments and have the same purpose, namely a fair trial. In each case, the form of publicity to be given to the 'judgment' must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of ECHR 6(1).[183]

[183] *Werner* v. *Austria*, European Court, (1997) 26 EHRR 310.

# 17

# The rights of accused persons

## Texts

### *International instruments*

#### Universal Declaration on Human Rights (UDHR)

11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed.

#### International Covenant on Civil and Political Rights (ICCPR)

14. (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.

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 recognized by the community of nations.

## *Regional instruments*

### American Declaration of the Rights and Duties of Man (ADRD)

26. (1) Every accused person is presumed to be innocent until proved guilty.

### European Convention on Human Rights and Fundamental Freedoms (ECHR)

6. (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

7. (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.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

## ECHR Protocol No. 7 (ECHR P7)

2. (1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
   (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.
3. 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 or the practice of the state concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
4. (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.
   (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
   (3) No derogation from this article shall be made under Article 15 of the Convention.

## American Convention on Human Rights (ACHR)

8. (2) Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
   (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

(b) prior notification in detail to the accused of the charges against him;
(c) adequate time and means for the preparation of his defence;
(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
(f) the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
(g) the right not to be compelled to be a witness against himself or to plead guilty; and
(h) the right to appeal the judgment to a higher court.

(3) A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
(4) An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

9. No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

10. Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

## African Charter on Human and People's Rights (AfCHPR)

7. (1) Every individual shall have the right to have his cause heard. This comprises:
(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal

(2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

*Related texts:*

Code of Conduct for Law Enforcement Officials, UNGA resolution 34/169 of 17 December 1979.

Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1990.

Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1990.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), UNGA resolution 40/33 of 29 November 1985.

Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA resolution 40/34 of 29 November 1985.

Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1985, and endorsed in UNGA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Model Treaty on the Transfer of Proceedings in Criminal Matters, UNGA resolution 45/118 of 14 December 1990.

Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.

Draft Statute for an International Criminal Court, submitted to the United Nations General Assembly by the International Law Commission.

## Comment

The guarantees laid down in ICCPR 14 (2) to (7) and 15, ECHR 6(2) and (3) and 7, ECHR P7, 2, 3 and 4, and ACHR 8(2) to (4), 8 and 10,

represent specific applications, in respect of criminal proceedings, of the general principle of a fair trial stated in paragraph (1) of ICCPR 14, ECHR 6 and ACHR 8 respectively.[1] The object and purpose of these guarantees is to ensure that no one is subjected to arbitrary prosecution, conviction or punishment.[2] They apply at all stages of a defendant's criminal proceedings, including the preliminary process, if one exists, to his committal for trial, and at all stages of the trial itself.[3] To safeguard them, judges have authority to consider an allegation of violation made at any stage of the proceedings.[4]

The rights of accused persons recognized in these provisions are:

1. to be presumed innocent until proved guilty according to law;
2. to be informed promptly and in detail ('prior notification' in ACHR) in a language which he understands of the nature and cause of the charge ('accusation' in ECHR) against him;
3. to have adequate time and facilities ('means' in ACHR) for the preparation of his defence;
4. to communicate ('freely and privately' in ACHR) with ('his counsel' in ACHR) counsel of his own choosing (ICCPR);[5]
5. to be tried without undue delay ('within a reasonable time' in ECHR and ACHR);
6. to be tried in his presence (only in ICCPR);
7. to defend himself in person or through legal assistance of his own choosing;
8. to be informed of his right to be tried in his presence, and to defend himself in person or through a lawyer of his own choosing (only in ICCPR);

[1] *Pakelli* v. *Germany*, European Court, (1983) 6 EHRR 1. See also *Judicial Guarantees in States of Emergency*, Inter-American Commission, Advisory Opinion OC-9/87, 6 October 1987: ACHR 8 recognizes the concept of 'due processes of law'.

[2] *C.R.* v. *United Kingdom*, European Court, (1995) 21 EHRR 363.

[3] *McKenzie et al* v. *Jamaica*, Inter-American Commission, Report No.41/2000, 13 April 2000, *Annual Report 1999*, p. 918.

[4] Human Rights Committee, General Comment 13 (1984).

[5] Although ECHR 6(3) does not contain a similar provision, paragraphs (c) and (d) which guarantee to everyone charged with a criminal offence the right 'to defend himself in person' and 'to examine or have examined witnesses' will have no meaning if the person concerned is not present. The object and purpose of ECHR 6 taken as a whole show that a person charged with an offence is entitled to take part in the hearing. See *Zana* v. *Turkey*, European Court, (1997) 27 EHRR 667.

9. to have legal assistance assigned to him, in any case when the interests of justice so require, and without payment by him ('to be given it free' in ECHR) in any such case if he does not have sufficient means to pay for it ('the inalienable right to be assisted by counsel provided by the state, paid or not as domestic law provides' in ACHR);
10. to examine or have examined, the witnesses against him ('present in court' in ACHR);
11. to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
12. to have the free assistance ('to be assisted without charge' in ACHR) of an interpreter ('or translator' in ACHR) if he cannot understand or speak the language used in court;
13. not to be compelled to testify against himself or to confess guilt ('a confession of guilt by the accused shall be valid only if it is made without coercion of any kind' in ACHR);[6]
14. to his conviction and sentence being reviewed by a tribunal according to law ('right to appeal the judgment to a higher court' in ACHR);
15. not liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted;
16. not to 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 ('under the applicable law' in ACHR), at the time when it was committed;
17. not to have imposed upon him a heavier penalty than the one that was applicable at the time when the criminal offence was committed;
18. to be compensated according to law in the event ('he has been sentenced by a final judgment through a miscarriage of justice' in ACHR) of his conviction being reversed or his being pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, unless the non-disclosure of the unknown fact in time is wholly or partly attributable to him (ICCPR and ECHR).

ICCPR alone requires special procedures for juveniles.

[6] Although not specifically mentioned in ECHR 6, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair trial under that article: *Saunders* v. *United Kingdom*, European Court, (1996) 23 EHRR 313.

## Interpretation

*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

### The presumption of innocence

The 'right to be presumed innocent' means that the prosecution has the ultimate burden of establishing guilt. If, at the conclusion of the case, there is any reasonable doubt on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit of any reasonable doubt.[7] This is a rule of English common law which has been expressed by Lord Sankey in the following terms:[8]

> Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

The presumption of innocence contains three fundamental components: the onus of proof lies with the prosecution; the standard of proof is beyond reasonable doubt; and the method of proof must accord with fairness.[9] The purpose of the presumption of innocence is to minimize the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of a trial.[10]

### Other statutory presumptions of law and fact

The Human Rights Committee has emphasized that no guilt can be presumed until the charge has been proved beyond all reasonable doubt.[11]

[7] *Queen* v. *Appleby*, Supreme Court of Canada [1972] SCR 303.
[8] *Woolmington* v. *DPP*, House of Lords, United Kingdom, [1935] AC 462.
[9] *R* v. *Oakes*, Supreme Court of Canada, [1987] LRC (Const) 477, at 489.
[10] *State* v. *Manamela*, Constitutional Court of South Africa, [2000] 5 LRC 65.
[11] Human Rights Committee, General Comment 13 (1984).

But in many legal systems the operation of presumptions of law or fact have been considered necessary for the effective administration of criminal justice. For instance, the law may require a conclusion adverse to an accused person to be drawn until the contrary is proved by him. Or, upon proof of one fact (the 'basic fact') a conclusion may be required to be drawn that another fact (the 'presumed fact') adverse to the accused exists. The pre-eminent position accorded to the presumption of innocence means that these presumptions of law or fact require to be confined within reasonable and appropriate limits.[12] In no circumstances should an accused person be required to do more than to raise a reasonable doubt as to his guilt. Accordingly, a presumption which relieves the prosecution of part of its burden of proving all the elements of a criminal charge, so that a conviction could result despite the existence of a reasonable doubt as to an accused person's guilt, is in breach of the presumption of innocence.

The jurisprudence relating to other statutory presumptions of law or fact do not suggest a common formula that could be applied to determine whether they conflict with the presumption of innocence. Some national constitutions permit 'reasonable and justifiable' limitations to be placed by law on the presumption of innocence,[13] while others, including the international and regional human rights instruments, do not. Nevertheless, the European Court[14] and some national jurisdictions appear to suggest that the degree of flexibility which is normally assumed to be implicit in a provision of general application is also permitted in respect of the presumption of innocence. The Privy Council, in an appeal from Hong Kong, observed that this 'implicit flexibility' allows a balance to be drawn between the interest of the person charged and the state in 'situations where it is clearly sensible and reasonable that deviations

[12] See *Salabiaku* v. *France*, European Court, (1988) 13 EHRR 379; *Senis* v. *France*, European Commission, Application 11423/85, (1989) 59 *Decisions & Reports* 50.

[13] See Section 36(1) of the Constitution of the Republic of South Africa 1996: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.' Section 1 of the Canadian Charter of Rights and Freedoms 1982 provides that the rights are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

[14] See *Salabiaku* v. *France*, European Court, (1988) 13 EHRR 379: these presumptions of law or fact require to be confined 'within reasonable and appropriate limits'.

should be allowed from the strict application of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt'.[15] Regulatory statutes dealing with licensed activity in the public domain, the handling of hazardous products, and the supervision of dangerous activities which frequently impose duties on responsible persons and then require them to prove that they have fulfilled their responsibilities, are examples. Others include presumptions relating to the existence or authenticity of public documents or licences where practicalities and common sense dictate that, bearing in mind the reduced risk of error involved, it would be disproportionately onerous for the prosecution to be obliged to discharge its normal burden. Traffic regulations provide a further example, such as when a statute presumes that the owner of the car is the person who parked it illegally.[16]

In Canada, adopting the two-stage test required by the Canadian Charter of Rights and Freedoms, the Supreme Court held that the presumption of sanity ('Every one shall, until the contrary is proved, be presumed to be and to have been sane'[17]), which placed the onus on a defendant to prove insanity as a defence to murder, infringed the presumption of innocence,[18] but was a 'reasonable' limitation 'demonstrably justified in a free and democratic society'.[19] Lamer J described the reasoning to be followed in such cases: (1) The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. (2) Assuming that a sufficiently important objective has been established, the means chosen to

[15] *Attorney General* v. *Lee Kwong-kut*, Privy Council on appeal from the Court of Appeal of Hong Kong, (1993) 1 HKPLR 72.

[16] *State* v. *Manamela*, Constitutional Court of South Africa, [2000] 5 LRC 65, at 83.

[17] Criminal Code of Canada, s.16(4).

[18] If an accused is found to have been insane at the time of the offence, he will not be found guilty; the 'fact' of insanity precludes a verdict of guilty. Whether the claim of insanity is characterized as a denial of *mens rea*, an excusing defence or, more generally, as an exemption based on criminal incapacity, the fact remains that sanity is essential for guilt. The presumption allows a fact which is essential for guilt to be presumed, rather than proven by the prosecution beyond a reasonable doubt. Moreover, it requires an accused to disprove sanity (or prove insanity) on a balance of probabilities, thereby permitting a conviction despite the existence of a reasonable doubt in the mind of the judge of fact as to the guilt of the accused.

[19] For the reasons for the shifting of the burden in the case of the defence of insanity, see *Bratty* v. *Attorney General for Northern Ireland* [1961] 3 All ER 523, at 531, per Viscount Kilmuir LC.

achieve the objective must pass a proportionality test; that is to say they must: (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right or freedom in question as 'little as possible'; and (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.[20]

In South Africa, where the constitution also requires a two-stage process to be adopted in determining the validity of such presumptions, the Constitutional Court recognized that open and democratic societies permit the shifting of the burden of proof to the accused when it would not be disproportionately invasive of the right to silence and the presumption of innocence to do so. Referring to the five factors enumerated in the constitution, the court noted that they were not exhaustive, but were included as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential checklist. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in the country, but without losing sight of the ultimate values to be protected.[21]

The Privy Council has expressed the view that whether an exception is justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard, and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle enshrined in the presumption of innocence. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However, what will

[20] *Chaulk* v. *R*, Supreme Court of Canada, [1990] 3 SCR 1303.
[21] *State* v. *Manamela*, Constitutional Court of South Africa, [2000] 5 LRC 65.

be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[22]

In most cases, there are three potential ways in which the presumed fact may be rebutted. First, the accused may be required merely to raise a reasonable doubt. Second, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Third, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact. If the accused has a legal burden of disproving on a balance of probabilities an essential element of an offence, as the third option above would require him to do, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would result if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury or judge on a balance of probabilities that the presumed fact was untrue.[23]

### Evidentiary burden on accused person

An evidentiary burden requires an accused person to adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. If it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt. An evidentiary burden has been held to exist (a) when a consumer of electricity was charged with having unlawfully abstracted energy 'without lawful authority or excuse';[24] (b) where a penal code provision

[22] *Attorney General* v. *Lee Kwong-kut*, Privy Council on appeal from the Court of Appeal of Hong Kong, (1993) 1 HKPLR 72.

[23] *R* v. *Oakes*, Supreme Court of Canada, [1987] LRC (Const) 477.

[24] *Police* v. *Moorbannoo*, Supreme Court of Mauritius, (1972) *The Mauritius Reports* 22 (Electricity Ordinance, s. 32(1)). If he was actually authorized to do or had an excuse for doing the act charged, for instance, because as a consumer he had paid for the supply of energy or he was a person lawfully authorized to use energy without payment, or because his office or appointment allowed him to interfere with the meters and instruments in the way in which he had done, then his authority was peculiarly within his knowledge and he was rightly required to prove it. Cf. s. 32(2) which imposed a persuasive burden on the consumer: 'in any criminal proceedings against a consumer, the absence of, or interference with, any seal affixed to any meter shall be evidence of the fact of abstraction of energy

stipulated that, in a prosecution for criminal defamation, the accused will not be punished if he proves the truth of his allegation;[25] (c) where it is provided that any person found in possession of stolen goods who is unable to give a satisfactory account of such possession shall be guilty of the offence of theft;[26] (d) where it is an offence for a public officer in the course of employment to do anything contrary to or inconsistent with his duty for the purpose of showing favour or disfavour to any person, and if it is proved in any prosecution for this offence that a public officer in breach of his duty as such did anything to the favour or disfavour of any person, 'it shall be presumed, unless the contrary is proved', that he did the thing for the purpose of showing favour or disfavour, as the case may be, to that person;[27] (e) where an accused is required, once the

unless the accused proved to the satisfaction of the court that he had not been privy to the act of interference'. See also *Police* v. *Leonide*, Supreme Court of Mauritius, (1976) *The Mauritius Reports* 250: it is an offence for a person to have with him in a public place an offensive weapon without lawful authority or reasonable cause.

[25] *Lingens and Leitgens* v. *Austria*, European Court, (1981) 4 EHRR 373. The court observed that all the elements of the offence, except for the truth of the statement at issue, had to be proved in the normal way by the prosecution. This did not mean that the accused had to prove his innocence because he could only be considered as innocent if he had not committed the offence. The offence could even be committed by a true statement: what exculpated was not the objective truth of a defamatory statement, but ability to prove its truth. In that way the law intended to compel the author of such statement to make sure in advance that what was being said could also be proved as true, i.e. it imposed a particular standard of care.

[26] *Osman* v. *Attorney General*, Constitutional Court of South Africa, [1992] 2 LRC 221 (General Law Amendment Act 1955, s.36). This provision did not compel a person to do any particular thing, nor did it apply pressure on such person to make a statement. Such person always had a choice as to whether or not to provide an explanation for the possession of the goods. The language did not suggest that the inability to give a satisfactory account of possession was anything other than an element of the offence, and thus the burden of proving such element rested with the prosecution throughout the trial, the consequence of failure to give evidence depending upon the strength of the prosecution case. If the prosecution failed to discharge its onus, the accused was entitled to be acquitted. However, if the case was strong enough to warrant a conviction in the absence of any countervailing evidence by or on behalf of the accused, then such accused could not be heard to say that a conviction in such circumstances infringed his or her right to silence. At no stage did the onus of proof shift, nor did the accused ever lose the protection of the presumption of innocence.

[27] *State* v. *Chogugudza*, Supreme Court of Zimbabwe, [1996] 3 LRC 683 (Prevention of Corruption Act 1985, s. 15(2)(e)). Before the prosecution can rely on this presumptive proof, it must establish beyond a reasonable doubt the following factual premises: (i) that the accused is a public officer; (ii) that in the course of his employment and in breach of his duty; (iii) he did something which, objectively considered, showed favour or disfavour to another. This leaves proof of the *purpose* of showing favour or disfavour to the accused to discharge. It is an element that may be described as: (a) a particular fact (a state of mind), (b) a matter which he should know and can easily prove, (c) a matter difficult for the prosecution to prove. The presumption does not have the effect of requiring the accused unfairly

prosecution has established that a gambling game was played, to prove on a balance of probabilities that the game played was not one played for money or value.[28]

### Persuasive burden on accused person

It was originally considered that a persuasive burden requires an accused to prove, on a balance of probabilities, a fact which is 'essential' to the determination of his guilt or innocence.[29] The preferred view now is that a distinction between elements of the offence and other aspects of the charge is irrelevant. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of the fact as to the guilt of the accused.[30]

A persuasive burden reverses the burden of proof by removing it from the prosecution and transferring it to the accused, and is, therefore, in breach of the presumption of innocence. A provision of this nature,

to discharge a major ingredient of the offence for no reason at all. A strong suspicion will have been created on the facts proved by the prosecution from which a permissible inference could be drawn that the purpose was to show favour or disfavour. The accused is simply called upon to reveal something peculiarly within his knowledge – why he acted as he did. This is essentially an exercise in common sense.

[28] *Scagell* v. *Attorney General*, Constitutional Court of South Africa, [1997] 4 LRC 98 (Gambling Act 1965, s. 6(5)): There is no risk that the conviction of an accused person may result despite the existence of a reasonable doubt as to guilt, since the burden of proof is only placed on the accused after the prosecution has proved the existence of a gambling game, i.e. a game which is played for money or anything of value. Once the prosecution proves that a gambling game has been played, it would have established that the game was played for a stake. Should an accused person raise a reasonable doubt as to whether the game was played for stakes or not, but not establish the absence of a stake upon the preponderance of probabilities, the evidence led by the accused might well have the effect of dislodging the prosecution case that there was proof beyond reasonable doubt that a gambling game was played and so avoid conviction.

[29] See, for example, *R* v. *Oakes*, Supreme Court of Canada, (1987) LRC (Const) 477, at 496.

[30] *R* v. *Whyte*, Supreme Court of Canada, (1989) 51 DLR ($4^{th}$) 481, per Dickson CJ, approved and adopted by the Constitutional Court of South Africa in *State* v. *Coetzee* [1997] 2 LRC 593, per Langa J.

which imposes a legal burden upon the accused, could result in a person being convicted of an offence due to his failure to prove a fact on a balance of probabilities, despite the existence of a reasonable doubt in the mind of the judge as to his guilt. Cases in which it has been held that a persuasive burden had been created, usually but not necessarily by a 'reverse onus' provision, include the following:

(a) A rebuttable presumption that a confession made by an accused person to a magistrate and reduced to writing had been made by such person voluntarily. A confession by definition is an admission of all the elements of the offence charged, a full acknowledgement of guilt. In the absence of other evidence the presumption, unrebutted, stands throughout the trial. It may, therefore, happen that, given proof *aliunde* of the crime itself, a conviction may follow from an admissible confession, notwithstanding the court's reasonable doubt that it was freely and voluntarily made.[31]
(b) A provision that where it was proved that an accused had been found in possession of *dagga* exceeding 115g 'it shall be presumed, until the contrary is proved, that the accused dealt in such *dagga*'. The quantity of 115g was an arbitrary figure and it was not logical to presume that a person found in possession of that amount was more likely to be dealing in *dagga*, particularly in view of the fact that the criminalization of possession made it more likely that an ordinary user would purchase large quantities to avoid the risks associated with its purchase. There was therefore no logical connection between the fact proved and the fact presumed. Where there was any doubt that an accused was a dealer he was entitled in law to the benefit of such doubt.[32]

[31] *State* v. *Zuma*, Constitutional Court of South Africa, [1995] 1 LRC 145. For a similar decision, see *State* v. *Shikunga*, Supreme Court of Namibia, [1988] 2 LRC 82 (Criminal Procedure Act 1977, s. 217(1)(b)(ii). Mahomed CJ explained that in cases where the only material evidence against an accused consisted of a confession, this provision would operate so as to permit a conviction based on a confession even if the prosecution had been unable to establish that it had been freely and voluntarily made. A court which had a reasonable doubt as to the guilt of the accused, would in the circumstances be obliged to find the accused guilty owing to his failure to discharge the burden imposed on him on a balance of probabilities.

[32] *State* v. *Bhulwana*, *State* v. *Gwadiso*, Constitutional Court of South Africa, [1996] 1 LRC 194 (Drugs and Drug Trafficking Act 1992, s. 21(1)(a)(i)). See also *State* v. *Ntsele*, Constitutional Court of South Africa, [1998] 2 LRC 216 (Drugs and Drug Trafficking Act 1992, s. 21(1)(b): 'if it is proved (i) that *dagga* plants of the existence of which the accused was aware . . . were found . . . on cultivated land; and (ii) that the accused was . . . in charge of the said land, it shall be presumed, until the contrary is proved, that the accused dealt in such *dagga* plants'

(c) A provision that where it was proved that a prohibited article 'has at any time been on or in any premises' any person 'who at that time was on or in or in charge of or present at or occupying such premises' shall be presumed to have been in possession of that article until the contrary was proved. The effect of this provision was to relieve the prosecution of the burden of proof with regard to an essential element of the offence. The presumption was too wide in its application, becoming operative without the prosecution being required to show any connection between the accused and the prohibited article or between such accused and the place where the article was, as well as targeting any person in charge of or occupying the premises at the relevant time however remote his or her connection with the particular part thereof where the offending article was proved to have been. The application of the presumption did not depend on there being a logical or rational connection between the presumed fact and the basic facts proved, nor could it be claimed that in every case the presumed fact was something which was more likely than not to arise from the basic facts proved. Moreover, the application of the presumption imposed a heavy burden to disprove guilt on, and contained no inherent mechanism to exclude, those who were innocent but came within its reach.[33]

was in conflict with the presumption of innocence); *State* v. *Mello*, Constitutional Court of South Africa, [1999] 1 LRC 215 (Drugs and Drug Trafficking Act 1992, s. 20: 'if it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug') imposed a 'reverse onus' on an accused person to disprove an essential element of a criminal charge. See also *R* v. *Oakes*, Supreme Court of Canada, (1987) LRC (Const) 477 (Narcotic Control Act, s. 3: a presumption that an accused in possession of a narcotic shall, if he fails to establish that he was not in possession of the narcotic for the purpose of trafficking, be guilty of the offence of trafficking, imposed on the accused the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking); *R* v. *Sin Tau-ming*, Court of Appeal, Hong Kong, (1991)1 HKPLR 88 (Dangerous Drugs Ordinance, ss. 46(c) and (d)(v), 47(1)(c) and (d), and 47(3)).

[33] *State* v. *Mbatha*, *State* v. *Prinsloo*, Constitutional Court of South Africa, [1996] 2 LRC 208 (Arms and Ammunition Act 1969, s. 40(1)). Langa J explained that although the eradication of the carrying of illegal firearms was a pressing public concern calling for vigorous and concerted effort, such concern could not render the wholesale arrest of ostensibly innocent people either reasonable or justifiable in an open and democratic society based on freedom and equality. That was so notwithstanding that guilty persons might escape conviction in the absence of the presumption, because that factor had to be weighed against the danger of innocent people being convicted if the presumption were to apply and the rights of innocent persons were to be given precedence. Furthermore, in order to detect offenders and secure their convictions it was not reasonable and justifiable either to expose honest citizens to

(d) A provision that the finding at any place of certain items used or capable of being used for playing any gambling game 'shall be *prima facie* evidence that the person in charge of such place permitted the playing of a gambling game'. Although the provision merely gives rise to an evidential burden and does not impose a burden of proof on the accused, to be discharged by the production of evidence sufficient to give rise to a reasonable doubt as to guilt, its effect is extraordinarily sweeping. Any person who is in charge of a place where, for example, a pack of playing cards is found, is presumed, unless a reasonable doubt is raised, to have permitted the playing of a gambling game. Its operation could result in innocent persons, against whom there is no evidence suggestive of criminal conduct at all, being charged with an offence and required to lead evidence to assert their innocence before a court. That such persons might easily establish their innocence does not deprive the provision of its sting.[34]

(e) A provision that a director or servant of a corporate body is guilty of an offence committed by the corporate body unless it is proved that such person took no part in the commission of the offence and could not have prevented it. The fact that the accused director is required, on pain of conviction, to prove that he or she did not take part in the commission of the offence and could not have prevented others from doing so, even if it is formulated as an exception, has the same consequence as a reverse onus provision which relates to an essential element of the offence.[35]

(f) A provision that if it is proved in a criminal proceeding that a false representation had been made by an accused, the accused is deemed

such open-ended jeopardy or to impose such ill-defined responsibility on those charged with law enforcement for deciding whether or not to proceed with arrest and indictment. If restrictions were warranted by strong societal need, they should be properly focused and appropriately balanced. Furthermore, it had not been demonstrated that the object of the presumption, facilitating the conviction of offenders, could not reasonably have been achieved by other means less damaging to constitutionally entrenched rights.

[34] *Scagell* v. *Attorney General*, Constitutional Court of South Africa, [1997] 4 LRC 98 (Gambling Act 1965, s. 6(3). See also s. 6(4): 'if any policeman authorized to enter any place is wilfully prevented from, or obstructed in, entering such place, the person in charge of that place shall on being charged with permitting the playing of any gambling game, "be presumed, until the contrary is proved, to have permitted the playing of such gambling game at such place"'. The onus is placed on the accused regardless of whether he or she played any role in the obstruction of the police officer.

[35] *State* v. *Coetzee*, Constitutional Court of South Africa, [1997] 2 LRC 593 (Criminal Procedure Act, s. 332(5)).

unless the contrary was proved to have made such a representation knowing it to be false. The rationale for the provision is that it deals with matters which are peculiarly within the knowledge of the accused. Indeed, the accused is in the best position to know why he or she made a representation. While proving the state of mind of the accused in the context of a false representation may present the prosecution with more difficulties than in other cases, the function and effect of the presumption is to relieve the prosecution of the burden of proving all the elements of the offence with which the accused is charged.[36]

(g) A provision that any person who receives into his possession from any other person stolen goods, without having reasonable cause, 'proof of which shall be on such first-mentioned person' for believing at the time of such receipt that such goods are the property of the person from whom he receives them, shall be guilty of an offence. When applied to a person who had been asked to carry boxes to a taxi rank by a hawker, this provision not only places on the accused the burden of proving the requisite *mens rea* on a balance of probabilities, but also the burden of adducing evidence establishing the reasonableness of his or her subjective belief. The phrase 'proof of which shall be on such first-mentioned person' directly implicates the right to silence as well as the presumption of innocence. The inevitable effect of the phrase is that the accused is obliged to produce evidence of reasonable cause to avoid conviction even if the prosecution leads no evidence regarding reasonable cause. Moreover, the absence of evidence produced by the accused of reasonable cause in such circumstances would result not in the mere possibility of an inference of absence of reasonable cause, but in the inevitability of such a finding. In these circumstances, for the accused to remain silent is not simply to make a hard choice which increases the risk of an inference of culpability. It is to surrender to the prosecution's case and provoke the certainty of conviction. Similarly, the presumption of innocence is manifestly transgressed, since a reverse onus imposes a full legal burden on the accused.[37]

[36] *State* v. *Coetzee*, Constitutional Court of South Africa, [1997] 2 LRC 593 (Criminal Procedure Act, s. 332(5)).

[37] *State* v. *Manamela*, Constitutional Court of South Africa, [2000] 5 LRC 65 (General Law Amendment Act 1955, s. 37(1)).

(h) A provision that 'Every one who, without lawful excuse, the proof of which lies upon him, has in his possession any instrument suitable for house-breaking . . . under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for house-breaking . . . is guilty of an indictable offence'. Although the phrase 'without lawful excuse, the proof of which lies upon him' did not amount to a reverse onus clause, in that it did not presume an essential element of the offence, it nevertheless required proof by the accused of certain defences on a balance of probabilities, and made it possible for a conviction to occur despite the existence of a reasonable doubt.[38]

(i) A provision that 'evidence that a person lives with or is habitually in the company of prostitutes, or lives in a common bawdy house or house of assignment is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution'. There will be nothing parasitical in a relationship with a spouse or companion who is working, self-supporting and not dependent or relying upon the income garnered from prostitution. Neither being a prostitute nor being a spouse of a prostitute constitutes a crime. The fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on the 'avails of prostitution'.[39]

(j) The presumption that 'where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care and control of the vehicle unless he establishes that he did not enter or mount the vehicle for the

[38] *R* v. *Holmes*, Supreme Court of Canada, [1988] 1 SCR 914 (Criminal Code, s. 309(1)).

[39] *R* v. *Downey and Reynolds*, Supreme Court of Canada (1992) 136 NR 266 (Criminal Code, s. 195(2)). However, a majority of the court held that, in all the circumstances, under section 1 of the Canadian Charter of Rights and Freedoms, the infringement was 'demonstrably justified in a free and democratic society'. In *X* v. *United Kingdom*, Application 5124/71, (1972) 42 *Collection of Decisions* 135, the European Commission examined an English law which provided that 'a man who lives with or is habitually in the company of a prostitute . . . shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary'. While acknowledging that such provisions could, if widely or unreasonably worded, have the same effect as a presumption of guilt, the commission observed that 'The statutory presumption in the present case is restrictively worded. It requires the prosecution to prove that the defendant "lives with or is habitually in the company of a prostitute or . . . [that he] exercises control, direction or influence over [her] movements in a way which shows he is aiding, abetting or compelling her prostitution". Only when this has been proved is it presumed that he is knowingly living on her earnings and he is then entitled to disprove the presumption. The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible'.

purpose of setting it in motion', when applied to a person who was found in the driver's seat of an automobile, slumped over the steering wheel, with the keys in the ignition but the engine not running and was charged with having the care and control of a motor vehicle while impaired by alcohol. No evidentiary burden lies on an accused person even in respect of matters that are peculiarly or exclusively within his knowledge. That the presumption did not relate to an 'essential element' in the offence is irrelevant. The real concern of the presumption of innocence is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. Accordingly, it is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.[40]

(k) Where a criminal code provides that if the prosecution proves beyond a reasonable doubt that the accused wilfully promoted hatred against an identifiable group, the accused will escape liability if he 'establishes that the statements communicated were true'. By placing the burden of establishing the truth of the statements on the accused, the basic principle that the accused need not prove a defence has been contravened.[41]

(l) Where a person is deemed to be a rogue and vagabond if, *inter alia*, he is found within any land without giving a satisfactory explanation for his presence in such place. It was not permissible for the legislature to make a law by the effect of which an act innocent in itself, which the law does not prohibit expressly or by necessary implication, will become an offence only if not satisfactorily explained; in other words, a law by the effect of which the person charged will have the burden of proving that an innocuous act was not a wrongful act. If a person has a right to be in a place, and this right he has unless his presence is forbidden or unauthorized for some reason or other, it will be against common sense to expect him to state the basis of his right and to charge him for failing to do so. A person may be in a place

[40] *R* v. *Whyte*, Supreme Court of Canada, [1988] 2 SCR 3 (Criminal Code, s. 237).

[41] *R* v. *Keegstra*, Supreme Court of Canada [1990] 3 SCR 697, [1991] LRC (Const) 333. See also *R* v. *Andrews*, Supreme Court of Canada, [1990] 3 SCR 870, [1991] LRC (Const) 431.

for reasons which are legitimate but which he would not like to be known.[42]

A provision that a court which tries a person for an offence of being in possession of, or wilfully offering to buy, heroin, shall make a finding whether the accused person is a trafficker in drugs, a trafficker being a person in respect of whom, having regard to all the circumstances of the case against him, it can be reasonably inferred that he was engaged in trafficking in drugs, does not offend the presumption of innocence. It is nothing more than a restatement of the ordinary common law rule that, where direct evidence was not available to prove any fact to be proved, the court could find that fact established by inference from other facts which had been proved. The inference so drawn had to be a reasonable one 'having regard to all the circumstances'. The standard of proof remained, as in the case of proof by means of direct evidence, proof beyond reasonable doubt. In order to satisfy that standard the court had to be sure that the inference was the right one to draw in the circumstances.[43]

### Treatment consistent with the presumption

The presumption of innocence implies a right to be treated in accordance with this principle. For example, public authorities may not prejudge the outcome of a trial.[44] Without the accused having previously been proved guilty according to law, a judicial decision concerning him may not reflect an opinion that he is guilty.[45] Where a private

[42] *Police* v. *Fra*, Supreme Court of Mauritius, (1975) *The Mauritius Reports* 157. See also *Lecordier* v. *Lalane*, Supreme Court of Mauritius, (1979) *The Mauritius Reports* 168: Section 4(2) of the Forests, Mountain and River Reserves Act 1971, which made it unlawful to be found in possession of any wood unless the possessor could satisfactorily account for his possession is unconstitutional in that it places on a person charged the burden of proving that an innocuous act is not a wrongful act; *Police* v. *Seechurn*, Supreme Court of Mauritius, (1980) *The Mauritius Reports* 248: Section 32 of the Excise Act, which provided that a person found in possession of any excisable good (in this case, twenty-six bottles of rum) committed an offence unless he could satisfactorily account for his possession, was void. The court pointed out that 'excisable goods' were all goods on which excise duty was payable by the manufacturer, and included soft drinks, cosmetics, cigarettes and safety matches. It would be intolerable for anyone to be required to prove that he came by a bottle of aftershave lotion, a packet of cigarettes, or a litre of coca-cola in a lawful manner.

[43] *Sabapathee* v. *State*, Privy Council on appeal from the Court of Criminal Appeal of Mauritius, [1999] 4 LRC 403 (Dangerous Drugs Act 1986, s. 38(2)).

[44] Human Rights Committee, General Comment 13 (1984).

[45] *Barbera, Messegue and Jabardo* v. *Spain*, European Court, (1988) 11 EHRR 360. But see *R* v. *Corbett*, Supreme Court of Canada, [1988] 1 SCR 670: Section 12(1) of the Evidence

prosecution for criminal defamation was terminated before judgment on the ground that the statutory limitation period had expired, but the court directed that the accused should bear two-thirds of the court costs on the ground that he would in all probability have been convicted if the proceedings had not been terminated, the presumption of innocence was violated.[46] Similarly, where proceedings for a road traffic offence were discontinued after becoming time barred, but the court refused to order reimbursement of the accused's costs and expenses on the ground that on the state of the file, he would 'most probably have been convicted', the presumption of innocence was contravened. While a person 'charged with a criminal offence' had no right to reimbursement of his costs where proceedings against him were discontinued, and the refusal to reimburse accordingly did not in itself offend the presumption of innocence,[47] a decision refusing reimbursement of an accused's necessary costs and expenses following termination of proceedings might raise an issue if supporting reasoning which could not be dissociated from the operative provisions amounted in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence.[48]

Act of Canada which provides that a witness, including an accused where he chooses to testify, may be questioned as to whether he has been convicted of any offence, does not violate the presumption of innocence. The burden of proof remains upon the prosecution and the introduction of prior convictions does not create a presumption of guilt, nor does it create a presumption that the accused should not be believed. The prior convictions are simply evidence for the jury to consider, along with everything else, in assessing the credibility of the accused; Decision of 9 January 1991, Oberlandesgericht Koblenz, (1995) 2(5) *Neue Zeitschrift für Strafrecht* 253–4: An accused person was convicted and sentenced to ten months, imprisonment. After six months the remainder of the sentence was suspended and he was placed on probation for four years. During that period he was accused of another offence. Before his trial for that offence concluded, his probation was revoked. The revocation of probation before he had been convicted of another offence violated the presumption of innocence. For a similar decision, see Decision of 19 December 1990, Oberlandesgericht Koblenz, (1990) 44 (36) *Neue Juristische Wochenschrift* 2302–3.

[46] *Minelli* v. *Switzerland*, European Commission, (1983) 5 EHRR 554. See also Decision of 1 August 1988, Oberlandesgericht München, (1989) 3*Neue Zeitschrift für Strafrecht* 134–5; Decision of 26 March 1987, Bundesverfassungsgericht, (1987) 14(9) *Europäische Grundrechte Zeitschrift* 203–9.

[47] *Leutscher* v. *Netherlands*, European Court, 26 March 1996.

[48] *Lutz* v. *Germany*, European Court, (1987) 10 EHRR 182, European Commission, 18 October 1985. See also *Bolkenbockhoff* v. *Germany*, European Court, (1987) 10 EHRR 163. But one cannot deduce from the presumption of innocence a general duty of the state to compensate any accused who was not finally convicted by a competent court, for the period spent in

The presumption of innocence may be infringed not only by a judge or court, but also by other public authorities. Where, shortly after the arrest of a person, a high-ranking police officer, addressing a press conference, referred to him as one of the instigators of a murder, the European Court described the conduct as 'clearly a declaration of guilt' which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There was, therefore, a breach of the presumption of innocence.[49] Freedom of expression includes the freedom to receive and impart information. This article cannot, therefore, prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.

The presumption of innocence is applicable only to persons charged with criminal offences. Where the Bankruptcy Law established a presumption of fault on the part of managers of companies placed under judicial supervision, by requiring them to prove they had devoted all due energy and diligence to the management of the company's affairs, failing which they could be held liable for the company's losses, what was entailed was a presumption of responsibility on the part of company managers in the absence of proof of their diligence. That presumption did not relate to any charge of a criminal offence; it was a presumption relating to a system of liability for risk resulting from a person's activities.[50]

The presumption of innocence requires that criminal liability does not survive the person who has committed the criminal act.[51]

*Right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.*

The right to be informed of the charge 'promptly' requires that information be given in the manner described as soon as the individual has been formally charged with a criminal offence. It does not apply to a person

detention on remand: *X, Y & Z* v. *Austria*, European Commission, Application 7950/77, (1980) 4 EHRR 270.

[49] *Allenet de Ribemont* v. *France*, (1995) 20 EHRR 557.

[50] *Morael* v. *France*, Human Rights Committee, Communication No.207/1986, HRC 1989 Report, Annex XX.E.

[51] *AP, MP and TP* v. *Switzerland*, European Court, (1997) 26 EHRR 541.

remanded in custody pending the result of police investigations, but this right will arise when in the course of an investigation a court or a prosecutor decides to take procedural steps against a person suspected of an offence or publicly names him as such. The specific requirements 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.[52] Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. He must be informed not only of the 'cause' of the accusation, i.e. the acts which he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts.[53] Where during a trial it is intended to convict the accused of an offence more serious than the one charged, the accused must be informed, in detail, of the new charge and provided adequate facilities to prepare his defence in respect of that new charge.[54] The purpose of providing this information is to inform the accused in a manner that would allow him to prepare a defence.

The requirement that an accused person be 'informed' of the nature and cause of the charge against him means that the information must actually be received by him. A legal presumption of receipt is not sufficient.[55] The information must be given in a language which the accused person understands, and must be actually communicated to him. Where a person who was not of Italian origin and did not reside in Italy was served with an 'accusation' in Italian, and he informed the relevant judicial authorities in an unequivocal manner that because of his lack of

[52] Human Rights Committee, General Comment 13 (1984). See also *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.253/1987, HRC 1991 Report, Annex XI.D; *McLawrence* v. *Jamaica*, Human Rights Committee, Communication No.702/1996, HRC 1997 Report, Annex VI.V: The duty to inform the accused under ICCPR 14(3)(a) is more precise than that for arrested persons under ICCPR 9(2). In respect of contempt proceedings, the judge must indicate the specific nature of the contempt with which the person is being charged. Failure to do so vitiates the committal for contempt: *Maharaj* v. *Attorney General for Trinidad and Tobago* [1977] 1 All ER 411.

[53] *Pelissier and Sassi* v. *France*, European Court, (1999) 30 EHRR 715.

[54] Supreme Court of Finland, Report No.1849, R 90/878, 2 June 1992, (1992) 1–95 *Decisions of the Supreme Court* 343–6.

[55] *C* v. *Italy*, European Commission, Application 10889/84, (1988) 56 *Decisions & Reports* 40. See also *Mbenge* v. *Zaire*, Human Rights Committee, Communication No.16/1977, HRC 1983 Report, Annex X.

knowledge of Italian he had difficulty in understanding the contents of their communication, and asked them to send it to him either in his mother tongue or in one of the official languages of the United Nations, the European Court held that the judicial authorities should have taken steps to comply with his request unless they were in a position to establish that he in fact had sufficient knowledge of Italian to understand the purport of the letter notifying him of the charges brought against him.[56]

The Court of Appeal of Botswana has held that the failure of a court to read a charge to the accused in open court, to have it interpreted to him in a language which he understands, and to give him an opportunity to plead to it, renders a subsequent conviction null and void. The rationale for that conclusion was that a person could only be expected to defend himself effectively in respect of a charge of which he had been given sufficient information in a language he could understand. To hold otherwise was 'fraught with danger to the sense of justice'. That was particularly true in a country where many of the people accused of criminal offences were illiterate, unable to afford legal representation, and incapable of understanding the criminal law.[57]

The right to be informed of the nature and cause of the charge against him is the minimum requirement. In a criminal case tried on indictment, the accused are entitled, before the trial begins, to lists of all prosecution witnesses and documents; copies of all statements made by those witnesses, and by the accused, to the investigating officers, which will be produced in evidence; and copies of the documents on which the prosecution relies.[58] In South Africa it has been held that the statements in the police docket of witnesses to be called as well as of those not to be called will ordinarily be reasonably required by an accused person in order to prepare for trial. To provide summaries of witness statements is to prevent an accused person from seeing the information affecting him in the form in which it was given by the witnesses and requires him to put his faith in the ability of the prosecutor to faithfully and accurately

[56] *Brozicek* v. *Italy*, European Court, (1989) 12 EHRR 371.

[57] *Mmatli* v. *State*, Court of Appeal, Botswana, [2000] 5 LRC 15.

[58] *The Queen* v. *Liyanage*, Supreme Court of Ceylon, (1963) 65 NLR 337. See also *Macauley* v. *Attorney-General*, Supreme Court of Sierra Leone, [1968–9] ALR SL 58. On summary trials in magistrates' courts, see *Vincent* v. *R*, Privy Council on appeal from the Court of Appeal of Jamaica, [1993] 2 LRC 725: If there are no circumstances that make the disclosure of a statement undesirable, such as the need to protect the witness, then it is preferable in the interests of justice to disclose such a statement.

convey all that was material and significant in the statement. That is an unsatisfactory substitute for the information to which an accused is entitled.[59]

*Right to have adequate time and facilities for the preparation of his defence.*

This requirement applies to all the stages of a judicial proceeding. The determination of what constitutes 'adequate time' requires an assessment of the individual circumstances of each case.[60] Where an accused did not have more than half an hour for consultation with counsel prior to the trial and approximately the same amount of time for consultation during the trial, this requirement was not met.[61] Nor where after the jury was empanelled, assigned counsel had only four hours to seek an assistant and to communicate with the accused.[62] The failure of the court to grant counsel sufficient minimum time to prepare his examination of witnesses is a violation of ICCPR 14(3)(b).[63]

[59] *Nortje* v. *Attorney General of the Cape*, Supreme Court of South Africa, [1995] 2 LRC 403. See also *State* v. *Nasser*, High Court of Namibia, [1994] 3 LRC 295; *Phato* v. *Attorney General*, Supreme Court of South Africa, [1994] 3 LRC 506; *State* v. *Sefadi*, Supreme Court of South Africa, [1994] 3 LRC 277: A fair trial requires, by its very nature, equality between the contestants, subject only to the two supreme principles of criminal jurisprudence, namely, the presumption of innocence and the requirement that the guilt of the accused be proved beyond reasonable doubt. When only one of the contestants has access to the statements recorded by the police from potential witnesses, the contest can be neither equal nor fair.

[60] Human Rights Committee, General Comment 13 (1984). See also *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.253/1987, HRC 1991 Report, Annex XI.D; *Sawyers* v. *Jamaica*, Human Rights Committee, Communication No.226/1987, HRC 1991 Report, Annex XI.B.

[61] *Little* v. *Jamaica*, Human Rights Committee, Communication No.283/1988, HRC 1992 Report, Annex IX.J; *Simmonds, Gentles and Kerr* v. *Jamaica*, Human Rights Committee, Communication No.352/1989, HRC 1994 Report, Annex IX.G. Cf. *Thomas* v. *Jamaica*, Human Rights Committee, Communication No.272/1988, HRC 1992 Report, Annex IX.G: consultation on the first day of the trial, but no evidence that the court actually denied counsel adequate time for the preparation of the defence; *Wright* v. *Jamaica*, Human Rights Committee, Communication No.349/1989, HRC 1992 Report, Annex IX.O: counsel instructed on the morning of the trial, but the inadequate preparation could not be attributed to the judicial authorities since no adjournment was requested; *Douglas* v. *Jamaica*, Human Rights Committee, Communication No.352/1989, HRC 1994 Report, Annex IX.G: neither leading nor junior counsel nor the accused complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate.

[62] *Smith* v. *Jamaica*, Human Rights Committee, Communication No.282/1988, 31 March 1993.

[63] *Reid* v. *Jamaica*, Human Rights Committee, Communication No.250/1987, HRC 1990 Report, Annex IX.J.

The 'preparation' of the defence, for which adequate time and facilities must be provided, implies a necessity to take certain measures prior to the actual trial. 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.[64] It is important for the guarantee of a fair trial that the defence has the opportunity to familiarize itself with the documentary evidence against the accused. However, this does not require that an accused who does not understand the language used in court has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel.[65]

*Right to communicate with counsel of his own choosing.*

An accused has the right to communicate with his counsel in conditions which provide 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 judgment without any restrictions, influences, pressures or undue interference from any quarter.[66] It is in principle incompatible with the right to effective assistance by a lawyer to subject the defence counsel's contacts with the accused to supervision by the court.[67]

Privacy is a constituent element of the right to retain and instruct counsel without delay. It is an element which is of the essence of that right and, as such, where privacy is not accorded, regardless of any request for the same, the purported granting of the right to retain and instruct counsel amounts only to the granting of permission to engage in a conversation, the character of which is something less than an exercise of the right to retain and instruct counsel.[68] Similarly, when a detained person requests the right to converse with his counsel in private, his right

[64] Human Rights Committee, General Comment 13 (1984). See also *Can* v. *Austria*, European Commission, (1984) 7 EHRR 421.

[65] *Harward* v. *Norway*, Human Rights Committee, Communication No.451/1991, HRC 1994 Report, Annex IX.X; *Hill* v. *Spain*, Human Rights Committee, Communication No.526/1993, HRC 1997 Report, Annex VI.B.

[66] Human Rights Committee, General Comment 13 (1984). See also *Ministry of Transport* v. *Noort*, Court of Appeal, New Zealand, [1992] 3 WLR 260, at 279; *Robertson* v. *R*, Court of Appeal, New Zealand, [1997] 3 CLR 327.

[67] *Can* v. *Austria*, European Commission, (1984) 7 EHRR 421.

[68] *R* v. *Makismchuk*, Manitoba Court of Appeal, [1974] 2 WWR 668.

is denied when a police officer insists in being in a position to overhear the conversation between them.[69] Where a policeman remained in a hallway observing the accused from a distance of eight to ten feet, the fact that the policeman heard none of the conversation mattered little since he was in a position to overhear the conversation. The degree of privacy will vary with the circumstances, but in any event that privacy accorded the accused must be sufficient to permit him to communicate freely and in confidence with counsel while making a full disclosure to him.[70] However, privacy in this context does not require that the accused be alone, and out of sight of the police.[71]

The right to communicate with a lawyer applies even at the stage of the preliminary investigation into an offence by the police.[72] To deny a suspect upon his arrest of an opportunity to instruct and consult with counsel on the ground that an interview with a lawyer at that stage is likely to impede investigation is a violation of this right.[73] Detention incommunicado of a detainee for six weeks after his arrest deprives him, at a critical stage, of the possibility of communicating with counsel of his own choosing and, therefore, of one of the most important facilities for the preparation of his defence.[74] A remand prisoner must be

[69] *R* v. *Balkan*, Alberta Court of Appeal, [1973] 6 WWR 617.

[70] *R* v. *Straightnose*, Saskatchewan District Court, [1974] 2 WWR 662. See also *R* v. *Penner*, Manitoba Court of Appeal, [1973] 6 WWR 94; *R* v. *Irwin*, Manitoba Court of Appeal, [1974] 5 WWR 744; *R* v. *McGuirk*, Prince Edward Island Supreme Court, (1976) 24 CCC (2nd) 386.

[71] *R* v. *Paterson*, Ontario High Court of Justice, (1978) 39 CCC (2nd) 355.

[72] *Murray* v. *United Kingdom*, European Court, (1996) 22 EHRR 29: to restrict the right of access to a lawyer during the first forty-eight hours of police detention on the basis that the police had reasonable grounds to believe that the exercise of the right of access would, *inter alia*, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act, is a breach of ECHR 6(1) in conjunction with 6(3)(c). See also *Imbrioscia* v. *Switzerland*, European Court, (1993) 17 EHRR 441; *De Voituret* v. *Uruguay*, Human Rights Committee, Communication No.109/1981, HRC 1984 Report, Annex X: to permit a prisoner awaiting trial to speak with her lawyer only through a glass wall over the prison telephone and while guards stood at their side, violated ICCPR 14(3)(b); *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.537/1993, HRC 1996 Report, Annex VIII.O,: not permitting a person to speak to his lawyer for five days while being held in police custody violates ICCPR 14(3)(b).

[73] *Thornhill* v. *Attorney-General of Trinidad and Tobago* (1974) 27 WIR 281. Cf. Decision of the Constitutional Court of Lithuania, 18 November 1994, Case No.17/1994, *Valstybes Zinios*: 91-1789 of 25 November 1994: the confidentiality of meetings between an accused and his lawyer may be restricted only in those cases when suspicion arises that such meetings will have a negative influence on the thorough and impartial investigation of the case.

[74] *Caldas* v. *Uruguay*, Human Rights Committee, Communication No.43/1979, HRC 1983 Report, Annex XVIII.

given the right to communicate in private with his defence counsel at the initial stage of the preliminary investigations. At this stage of the proceedings, the defence counsel's functions include the control of the lawfulness of any measures taken in the course of the investigation, the identification and presentation of evidence when it is still possible to trace new relevant facts through witnesses whose memories are fresh, and providing assistance to an accused who is removed from his normal environment to make any complaints in relation to his detention concerning its justification, length and conditions.[75]

The right to communicate with a legal adviser may, in some situations, be of little value if the person is not informed of that right. Many persons may be quite ignorant that they have this constitutional right or, if they do know, may in the circumstances of their arrest be too confused to bring it to mind. Therefore, it is incumbent upon police officers to see that the arrested person is informed of his right in such a way that he understands it. He may be illiterate, deaf, or unfamiliar with the language. The mere exhibition of notices in the police station is, therefore, insufficient in itself to convey the necessary information.[76]

### *Right to be tried without undue delay.*

The right to trial without undue delay is the right to a trial which produces a final judgment and sentence, if that be the case, without undue delay.[77] This guarantee, therefore, relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered. It also includes the right to a review of conviction and sentence without undue delay. To make this right effective, a procedure must be available to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal.[78] The right does not

[75] *Can* v. *Austria*, European Commission, (1984) 7 EHRR 421.

[76] *Whiteman* v. *Attorney-General of Trinidad and Tobago* (1991) 39 WIR 397; [1991] LRC (Const) 536.

[77] See *R* v. *MacDougall*, Supreme Court of Canada, [2000] 1 LRC 390, *R* v. *Gallant*, Supreme Court of Canada, [2000] 1 LRC 412: the right to be tried within a reasonable time includes the right to be sentenced within a reasonable time.

[78] Human Rights Committee, General Comment 13 (1984). For 'undue delay' see *Fillastre* v. *Bolivia*, Human Rights Committee, Communication No.336/1988, HRC 1992 Report, Annex IX.N: trial not completed four years after indictment; *State* v. *Borarae et al*, National

depend upon the accused's request that it be observed.[79] 'Delay' connotes not simply a lapse of time but one which in the circumstances is longer than it should have been.[80]

Court of Justice of Papua New Guinea, [1984] PNGLR 99: eleven months between arrest and commencement of trial; *Musoke* v. *Uganda*, High Court of Uganda, [1972] EA 137: six months between arrest and trial for robbery; *Seerattan* v. *Trinidad and Tobago*, Human Rights Committee, Communication No. 434/1990, HRC 1996 Report, Annex VIII.D: three years between arrest and trial and no explanation to justify the delay; *Shalto* v. *Trinidad and Tobago*, Human Rights Committee, Communication No.447/1991, HRC 1995 Report, Annex X.C: four years between the judgment of the court of appeal and the beginning of the retrial; *Barroso* v. *Panama*, Human Rights Committee, Communication No.473/1991, HRC 1995 Report, Annex X.F: three and a half years between indictment and trial which cannot be explained exclusively by a complex factual situation and protracted investigations; *Johnson* v. *Jamaica*, Human Rights Committee, Communication No.588/1994, HRC 1996 Report, Annex VIII.W: four years and three months to hear an appeal in a capital case; *Leslie* v. *Jamaica*, Human Rights Committee, Communication No.564/1993, HRC 1998 Report, Annex XI.D: twenty-nine months to bring an accused to trial; *Yasseen and Thomas* v. *Guyana*, Human Rights Committee, Communication No.676/1996, HRC 1998 Report, Annex XI.R: delay of two years between order for retrial and outcome of retrial; *Hill* v. *Spain*, Human Rights Committee, Communication No.526/1993, HRC 1997 Report, Annex VI.B: three years between arrest and disposal of appeal; *McLawrence* v. *Jamaica*, Human Rights Committee, Communication No.702/1996, HRC 1997 Report, Annex VI.V: thirty-one months between trial and dismissal of appeal; *Henry and Douglas* v. *Jamaica*, Human Rights Committee, Communication No.571/1994, HRC 1996 Report, Annex VIII.U: thirty months between arrest and commencement of trial; *Sandiford* v. *Director of Public Prosecutions*, High Court of Guyana, (1979) 28 WIR 152: fourteen months between preliminary hearing and trial of an indictable offence. See also *Pratt and Morgan* v. *Jamaica*, Human Rights Committee, Communication No.210/1986 and 225/87, HRC 1989 Report, Annex X.F; *Francis* v. *Jamaica*, Human Rights Committee, Communication No.320/1988, 24 March 1993; *Collins* v. *Jamaica*, Human Rights Committee, Communication No.356/1989, 25 March 1993. Cf. *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.253/1987, HRC 1991 Report, Annex XI.D: year and a half between arrest and commencement of trial not 'undue delay', as no suggestion that pre-trial investigations could have been concluded earlier, or that accused complained in this respect to the authorities. See also *König* v. *Germany*, European Court, (1978) 2 EHRR 170; *Wemhoff* v. *Germany*, European Court, (1968) 1 EHRR 55; *Neumeister* v. *Austria*, European Court, (1968) 1 EHRR 91; *Delcourt* v. *Belgium*, European Court, (1970) 1 EHRR 355; *Eckle* v. *Germany*, European Court, (1982) 5 EHRR 1; *R* v. *Conway*, Supreme Court of Canada, [1989] 1 SCR 1659.

[79] *Pratt and Morgan* v. *Jamaica*, Human Rights Committee, Communication No.210/1986, HRC 1989 Report, Annex X.F.

[80] *Thornhill* v. *Attorney-General*, Court of Appeal of Trinidad and Tobago, (1976) 31 WIR 498. See also *Bell* v. *Director of Public Prosecutions*, Privy Council on appeal from the Court of Appeal of Jamaica, (1985) 32 WIR 317: In the case of a retrial, the delay should be calculated from the time when the persons responsible should have ensured that the order for retrial was obeyed without avoidable delay, i.e. from the date of the order for the retrial. The fact that the accused did not lead evidence of specific prejudice as a result of the delay did not mean that the possibility of prejudice should be wholly discounted.

The purpose of this right is to minimize the adverse effect which a pending criminal charge has on the person charged. The right, therefore, recognizes that, with the passage of time, a pending criminal charge gives rise to restrictions on liberty, inconvenience, social stigma and pressures detrimental to the mental and physical health of the individual. The time awaiting trial is an agonizing experience for an accused person and his immediate family; there can be no greater frustration for an innocent person charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial. Undue delay may also impair the ability of the individual to present a full and fair defence to the charge.[81] A trial held within a reasonable time also has an intrinsic value. If innocent, the accused should be acquitted with the minimum disruption to his social and family relationships. If guilty, he should be convicted and an appropriate sentence imposed without undue delay. Society has a collective interest in making certain that those who commit crimes are brought to trial quickly and dealt with fairly and justly.[82]

The time frame to be considered in determining whether there has been undue delay commences from the moment a person is charged. This may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially

[81] *Re Mlambo*, Supreme Court of Zimbabwe, [1993] 2 LRC 28, per Gubbay CJ.

[82] *R* v. *Askov*, Supreme Court of Canada, [1990] 2 SCR 119. This societal interest, which is not the object of this right, but the consequence of it, was explained by Cory J: 'There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employers; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.' He added that while victims may be devastated by criminal acts, 'it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to law'.

notified that he would be prosecuted, or the date when preliminary investigations were opened. 'Charge', in this context, may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'. It may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.[83] Accordingly, in some cases, it may be proper to take into account even a period before the accused was arrested, such as abortive proceedings which terminated with the entering of a *nolle prosequi*.[84] The withdrawal of a charge does not interrupt the time frame.[85] Therefore, the prosecution cannot stop the clock by resorting to the expedient of withdrawing the charge before plea, and then reinstating the same charge, or a charge based on the identical information, when in a position to commence with the trial.

[83] *Eckle* v. *Germany*, European Court, (1982) 5 EHRR 1; *Foti* v. *Italy*, European Court, (1983) 5 EHRR 313; *Corigliano* v. *Italy*, European Court, (1982) 5 EHRR 334; *Imbrioscia* v. *Switzerland*, European Court, (1993) 17 EHRR 441; *Director of Public Prosecutions* v. *Feurtedo* (1979) 30 WIR 206. *Re Mlambo*, Supreme Court of Zimbabwe, [1993] 2 LRC 28: Arrests ought not to be investigatory procedures. Rather they are vehicles to court and fall within the same category as the issuance and service of a summons citing the crime the accused is alleged to have perpetrated (per Gubbay CJ). See also *United States* v. *Marion*, United States Supreme Court, 404 US 307 (1971): 'To legally arrest and detain, the government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends' (per White J).

[84] *Mungroo* v. *R*, Privy Council on appeal from the Supreme Court of Mauritius, [1992] LRC (Const) 591. Cf. *R* v. *Kalanj*, Supreme Court of Canada, [1989] 1 SCR 1594: Section 11 of the Canadian Charter affords its protection after an accused is charged with a criminal offence. The reckoning of time in considering whether a person has been accorded a trial within a reasonable time will commence with the information or indictment, and will continue until the completion of the trial. Pre-information delay will not be a factor, since prior to the charge, the rights of the accused are protected by other provisions of law (sections 7, 8, 9 and 10 of the Charter). In a dissenting judgment, Wilson J argued that the relevant starting point for the running of time should not be upon the *ex parte* laying of the information before the justice of the peace but rather when the impact of the criminal process is felt by the accused through the service of process upon him in the form of a summons or notice of appearance or an arrest with or without a warrant. However, the prejudice to the security interests of an accused arising purely from the fact of the imposition of the process upon him should not be considered in assessing the reasonableness of the delay. The prejudice relevant for this purpose is the prejudice arising from the delay and not the prejudice arising from the imposition of the process.

[85] *Re Mlambo*, Supreme Court of Zimbabwe, [1993] 2 LRC 28. See also *Klopfer* v. *North Carolina*, United States Supreme Court, 386 US 213 (1967).

What factors should be considered to determine whether an accused person has been tried without undue delay? Different tests have been adopted in different jurisdictions. The length of delay is the 'triggering mechanism', the threshold requirement for further inquiry. The European Court inquires into the 'reasonableness' of the length of criminal proceedings by having regard to the complexity of the case, the accused's conduct, and the manner in which the matter has been dealt with by the administrative and judicial authorities.[86] The same tests are applied by the Inter-American Court.[87] The United States Supreme Court determines whether a defendant has been deprived of his constitutional right to 'a speedy and public trial' by assessing the reasons given by the prosecution for the delay, the manner in which the defendant has asserted his rights, and the prejudice caused to the defendant.[88]

The Supreme Court of Canada has criticized the American approach, arguing that it has resulted in only the 'most egregious delays' being proscribed.[89] Some Canadian judges have also doubted whether prejudice to the accused is a relevant factor for the purpose of determining whether his constitutional safeguard has been infringed.[90] Rejecting a 'mathematical or administrative formula', they have preferred a judicial determination balancing the interests which this right is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.[91] Accordingly, in analysing how long is too long, that court has considered (1) the reasons for the delay, including

[86] *König* v. *Germany (No. 2)*, European Court, (1980) 2 EHRR 170; *Milasi* v. *Italy*, European Court, (1987) 10 EHRR 333; *Vernillo* v. *France*, European Court, (1991) 13 EHRR 880; *Mitap and Muftuoglu* v. *Turkey*, European Court, (1996) 22 EHRR 209; *Philis* v. *Greece (No.2)*, European Court, (1997) 25 EHRR 417: ECHR 6(1) imposes on states the duty to organize their judicial systems in such a way that their courts can meet each of the requirements of ECHR 6(1), including the obligation to hear cases within a reasonable time. The same factors were taken into account by the Constitutional Court of the Slovak Republic; see Decision of 25 October 1995, Case No.II.US 26/1995, (1995) 3 *Bulletin on Constitutional Case-Law* 345–6.

[87] *Genie Layaco Case*, Inter-American Court, Judgment of 29 January 1997.

[88] *Barker* v. *Wingo*, United States Supreme Court, 407 US 514 (1972). These three factors were adopted in *R* v. *Cameron*, Alberta Queen's Bench Court, [1982] 6 WWR 270; and in *Bell* v. *DPP*, Privy Council on appeal from the Court of Appeal of Jamaica, (1985) 32 WIR 317.

[89] *R* v. *Morin*, Supreme Court of Canada, (1992) 134 NR 321.

[90] See Lamer J in *R* v. *Conway*, Supreme Court of Canada, [1989] 1 SCR 1659. Cf. Wilson J in *R* v. *Rahey*, Supreme Court of Canada, [1987] 1 SCR 588.

[91] *R* v. *Morin*, Supreme Court of Canada, (1992) 134 NR 321.

(a) the inherent time requirements of the case (i.e. the time that would normally be required to process a case, assuming the availability of adequate institutional resources, (b) the actions of the accused, (c) the actions of the prosecution, (d) limits on institutional resources,[92] and (e) other reasons for the delay;[93] and (2) whether by agreement or other conduct the accused has waived in whole or in part his right to complain of delay. Prejudice to the accused may be inferred from the length of the delay. The court has emphasized that the analysis must not proceed in a mechanical manner. The above factors are not immutable or inflexible, nor are they exhaustive. In every case, the ultimate question for consideration is the reasonableness of the overall delay, reasonableness being 'an elusive concept that cannot be juridically defined with precision and certainty'.[94]

[92] The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources. See *R* v. *Morin*, Supreme Court of Canada, (1992) 134 NR 321: a period of institutional delay of between eight and ten months was suggested as a guide to provincial courts. With respect to institutional delay after committal for trial, a range of six to eight months was suggested. See also *R* v. *Askov*, Supreme Court of Canada, [1990] 2 SCR 119: a period of six to eight months between committal and trial would not be unreasonable.

[93] See *R* v. *Rahey*, Supreme Court of Canada, [1987] 1 SCR 598: nineteen adjournments over a period of eleven months instigated by the judge during the course of the trial not regarded as institutional in the strict sense.

[94] The weight to be attached to institutional or systemic delay has been the subject of considerable judicial discussion. See *Bell* v. *Director of Public Prosecutions*, Privy Council on appeal from the Court of Appeal of Jamaica, (1985)32 WIR 317, [1986] LRC (Const) 392; *O'Flaherty* v. *Attorney-General of St Christopher and Nevis*, Court of Appeal of the Eastern Caribbean States, (1986) 38 WIR 146; *Commissioner of Police* v. *Triana* [1990] LRC (Const) 431; *Mungroo* v. *R*, Privy Council on appeal from the Supreme Court of Mauritius, [1992] LRC (Const) 591; *Sanderson* v. *Attorney General of Cape*, Constitutional Court of South Africa, [1998] 2 LRC 543; *State* v. *Heidenreich*, High Court of Namibia, [1996] 2 LRC 115; *Sookermany* v. *DPP*, Court of Appeal of Trinidad and Tobago, [1996] 2 LRC 292. See also *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, Supreme Court of India, AIR 1979 SC 1369: It is the constitutional obligation of the state to devise a procedure that would ensure speedy trial to the accused. The state cannot avoid this constitutional obligation by pleading financial or administrative inability. It is also the constitutional obligation of the Supreme Court to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the state which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial.

A court usually enjoys a discretion as to the relief it could grant for the violation of this right.[95] However, the judicial consensus appears to be that a stay of proceedings is the minimum remedy. The Supreme Court of Zimbabwe has pointed out that if the court were to direct that the trial proceed forthwith, it would be contradicting the accepted claim that the inordinate delay had denied the accused person a fair trial; it would amount to participating in a further violation of the right. On the other hand, an order that the charge be dismissed would be tantamount to a pronouncement of innocence without a final determination of the issue of innocence or guilt.[96] The Supreme Court of Canada has observed that a finding that a right to trial without undue delay has been infringed goes to the jurisdiction of any court to put the accused on trial or to continue with the charges against him. 'If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible.'[97] The New Zealand Court of Appeal doubted whether the issue was one of jurisdiction, but considered that the 'standard remedy' under the Bill of Rights for undue delay should logically be a stay.[98]

[95] *Bailey* v. *Attorney General*, High Court of St Vincent and the Grenadines, [2000] 5 LRC 522: accused charged with rape in 1994 but not brought to trial, sought, and was granted, a declaration that his right to a fair trial within a reasonable time had been infringed.

[96] In *Re Mlambo*, Supreme Court of Zimbabwe, [1993] 2 LRC 28. See also *R* v. *Ogle*, High Court of Guyana, (1966) 11 WIR 439; *Attorney-General* v. *Cheung Wai-bun*, Privy Council on appeal from the Supreme Court of Hong Kong, [1993] 1 LRC 871: permanent stay of criminal proceedings on the ground that undue delay had seriously prejudiced the accused's health and jeopardized the fairness of the proceeedings; *DPP* v. *Lebona*, Court of Appeal of Lesotho, [1998] 4 LRC 524: a public officer suspended from service in March 1994 on suspicion of fraud, indicted in August 1994, but not brought to trial by March 1997, granted a permanent stay of criminal proceedings.

[97] *Rahey* v. *R*, Supreme Court of Canada, [1987] 1 SCR 588, per Lamer J. See *Dharmalingam* v. *State*, Privy Council on appeal from the Supreme Court of Mauritius, [2000] 5 LRC 522: conviction quashed owing to delay in appellate proceedings.

[98] *Martin* v. *Tauranga District Court*, Court of Appeal of New Zealand, [1995] 2 LRC 788, per Cooke P: 'But I would be inclined to see some incongruity in any suggestion that, although undue delay has been found, the state should continue with a trial and, even if it results in conviction and imprisonment, accompany it with an award of compensation. A stay seems the more natural remedy. Generally speaking, it seems better to prevent breaches of rights than to allow them to occur and then give redress.' Cf. Hardy Boys J: 'The right is to trial without undue delay; it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently is, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no

*Right to be tried in his presence.*

An accused has the right to be present during the determination of any charge against him.[99] Reasonable measures must be taken to ensure this right even if an accused resorts to disruptive behaviour, particularly if the offence charged carries the death penalty. While a person charged with a criminal offence is entitled to be present at the first instance trial, his personal attendance does not necessarily take on the same significance for an appeal hearing.[100]

This requirement cannot be construed as invariably rendering invalid proceedings *in absentia* irrespective of the reasons for an accused person's absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused, 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 of accused persons presupposes that the necessary steps are taken to inform an accused person in time of the proceedings against him. Judgment *in absentia* requires that, notwithstanding the absence of the accused, due notification has been given of the date and place of his trial. If the accused does not receive such notification, he is not given adequate time and facilities for the preparation of his defence, cannot defend himself through legal assistance of his own choosing, and does not have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance of witnesses on his behalf.[101]

other satisfactory way . . . In as much as the measure of what is undue delay may depend on whether or not the accused is in custody, a quite sufficient remedy may be the grant of bail. In other instances, the appropriate remedy may be an order for an early trial. If despite measures such as these the delay continues and becomes undue, a stay of proceedings may be acceptable as an appropriate ultimate remedy; but not otherwise.' The consistent practice of the German Bundesgerichtshof is to take procedural delays into account when fixing the penalty; they have a mitigating effect: Decision of 20 January 1987, Bundesgerichtshof, Germany, (1987) 42(10) *Juristen Zeitung* 528.

[99] Human Rights Committee, General Comment 13 (1984). See also *Conteris* v. *Uruguay*, Human Rights Committee, Communication No.139/1983, HRC 1985 Report, Annex XI.

[100] *Belziuk* v. *Poland*, European Court, (1998) 30 EHRR 614.

[101] *Mbenge* v. *Zaire*, Human Rights Committee, Communication No.16/1977, HRC 1983 Report, Annex X: There are, of course, limits to the efforts which can be expected of the responsible authorities to establish contact with an accused. But where a Zairian citizen residing in Belgium as a refugee was required to stand trial in Zaire, and where summons had been issued only three days before the beginning of the hearings, and there was no

*Right to defend himself in person or through legal assistance of his own choosing; and to be informed, if he does not have legal assistance, of this right.*

The legal system must assure the accused person his right either to defend himself in person or to be assisted by counsel of his own choosing. 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.[102] The right to choose one's own counsel requires that one has the opportunity to choose freely.[103] Where a military court forced a concert pianist brought before it to choose his counsel from two lawyers officially appointed by the military, the element of choice was not present.[104] The right was also violated when an accused was forced to choose his counsel from a list of military lawyers.[105] Even an accused who deliberately avoids

indication in the record of any steps actually taken to transmit the summonses to the accused whose address in Belgium was known to the judicial authorities, sufficient efforts had not been made to inform the accused of the impending court proceedings.

[102] Human Rights Committee, General Comment 13 (1984). See *Hill* v. *Spain*, Human Rights Committee, Communication No.526/1993, HRC 1997 Report, Annex VI.B: Where the court denied a request for an interpreter to enable an accused to defend himself, because national legislation did not allow an accused to defend himself in person, ICCPR 14(3)(d) was violated.

[103] See Constitutional Court of Russia, Decision of 27 March 1996, *Rossiyskaya Gazeta* of 04.04.1996, (1996) 1 *Bulletin on Constitutional Case-Law* 253: In proceedings relating to the application of the State Secrets Act, the refusal to allow the accused to be defended by a lawyer of his own choosing on the ground that the latter was not authorized to have access to state secrets, and a proposal to the accused to choose his counsel from among a limited number of lawyers who have such access, infringed this right. Cf. *Balasunderam* v. *Public Prosecutor*, High Court of Singapore, [1997] 4 LRC 597: This right is not unqualified. An accused is only entitled to be represented by counsel of his choice if that counsel is willing and able to represent him. If counsel fails to turn up or is not willing or able to act, the accused person cannot, by virtue of that fact alone, claim that his constitutional right has been violated.

[104] *Estrella* v. *Uruguay*, Human Rights Committee, Communication No.74/1980, HRC 1983 Report, Annex XII.

[105] *Burgos* v. *Uruguay*, Human Rights Committee, Communication No.R. 21/52/1979, HRC 1981 Report, Annex XIX. See also *Mitchell* v. *R*, Privy Council on appeal from the Court of Appeal of Jamaica, [1999] 4 LRC 38: Where a defendant on a murder charge expresses to court his dissatisfaction with the manner in which counsel is conducting his defence, and counsel thereupon withdraws, the interests of justice require that in all but the most exceptional cases, there should be a reasonable adjournment to enable him to secure alternative representation. Cf. *Caesar* v. *State*, Court of Appeal of Guyana, [1999] 4 LRC 32: an adjournment of two days to retain counsel adequate.

appearing in person remains entitled to 'legal assistance of his own choosing'.[106]

Where counsel appearing for an accused on a capital charge seeks leave to withdraw during the course of the trial, the trial judge should do all he can to persuade counsel to remain. If the proposed withdrawal arises out of an altercation with the trial judge, the latter should consider whether it would be appropriate to adjourn the trial for a cooling-off period. The trial judge should only permit withdrawal if he is satisfied that the accused will not thereby suffer significant prejudice. If counsel withdraws notwithstanding his efforts, the judge has to consider whether the trial should be adjourned in order to enable the accused to obtain alternative representation. Where the trial judge failed to do so and allowed the trial to proceed without any adjournment as though nothing had happened, the accused had been denied the right to a fair hearing.[107] An adjournment is particularly necessary when counsel whom the accused had chosen to defend him at a retrial and who was not available and could only become available on a later date if an adjournment of his trial was granted, was the counsel who had defended him at his first trial and on appeal.[108] Even where the unavailability of counsel is partially attributable to the accused, the court must accommodate the right to counsel and, if necessary, adjourn the proceedings. The assistance of a trial judge does not eliminate the accused's right to counsel.[109]

[106] *Poitrimol* v. *France*, European Court, (1993) 18 EHRR 130. See also *Campbell and Fell* v. *United Kingdom*, European Court, (1984) 7 EHRR 165: A prisoner charged before a Board of Visitors with disciplinary offences was entitled to legal representation prior to and at the Board's hearing; *Lala* v. *Netherlands*, European Court, (1994) 18 EHRR 586: For this right to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions; for example, the court must ensure that counsel who attends for the purpose of defending the accused in his absence is given the opportunity to do so; *Pelladoah* v. *Netherlands*, European Court, (1994) 19 EHRR 81.

[107] *Dunkley* v. *R*, Privy Council on appeal from the Court of Appeal of Jamaica, [1994] 1 LRC 365. Cf. *Dietrich* v. *R*, High Court of Australia, [1993] 3 LRC 272.

[108] *In re Charalambous*, Supreme Court of Cyprus, (1986) 1 CLR 319. See also *Ogola* v. *Republic*, High Court of Kenya, [1973] EA 277.

[109] *Robinson* v. *Jamaica*, Human Rights Committee, Communication No.223/1987, HRC 1989 Report, Annex X.H: Where two lawyers retained to appear for a person charged with murder did not appear on the first day of trial, the judge allowed the trial to proceed. On the following day, one of the lawyers appeared and requested permission for both lawyers to withdraw from the case. The judge denied permission and asked the two lawyers to represent the accused through legal aid. When counsel refused the request, the judge

Once an accused has opted for representation by counsel of his choice, any decision by his counsel relating to the conduct of the appeal, including a decision to send a substitute to the hearing or not to arrange for the accused to be present, lies within the accused's responsibility and cannot be attributed to the state.[110] But where the date of the hearing was notified to a lawyer who had previously acted for the accused, and not to his current lawyer, and the latter was therefore not present in court, this article was violated.[111] Where an appeal was dismissed after a hearing in the absence of the accused's lawyer who had not received prior notification of the date of hearing, the fact that the accused may not have suffered any damage since, according to the government, the appeal had no prospects of success, was irrelevant. The authorities were under a duty to take steps to ensure that an accused enjoyed effectively the right to which he was entitled, namely, the possibility of being represented by a lawyer at the examination of his appeal.[112]

Where legal representation is made available to an accused, the fact that he may feel that he would have been better represented by counsel of his own choosing, is not a matter that constitutes a violation of this article.[113]

continued the trial with the accused unrepresented. ICCPR 14(3)(d) was violated. Cf. *Ricketts* v. *R*, Privy Council on appeal from the Court of Appeal of Jamaica, [1998] 2 LRC 1: When at the commencement of a murder trial assigned counsel withdrew on the ground that he could get no instructions from the accused, and the trial proceeded with the accused undefended, and at times even gagged by means of a piece of cloth tied round his mouth because of noisy outbursts made by him, the constitutional guarantee of right to counsel ('shall be permitted to defend himself in person or by a legal representative of his choice') was not infringed since it was not possible to say that he had not been 'permitted' to defend himself in person or by a legal representative of his choice. See also *Reid* v. *Jamaica*, Human Rights Committee, Communication No.250/1987, HRC 1990 Report, Annex IX.J; *Pinto* v. *Trinidad and Tobago*, Human Rights Committee, Communication No.232/1987, HRC 1990 Report, Annex IX.H; *Campbell* v. *Jamaica*, Human Rights Committee, Communication No.248/1987, HRC 1992 Report, Annex IX.D.

[110] *Henry* v. *Jamaica*, Human Rights Committee, Communication No.230/1987, HRC 1992 Report, Annex IX.B.

[111] *Goddi* v. *Italy*, European Court, (1984) 6 EHRR 457.

[112] *Alimena* v. *Italy*, European Court, 19 February 1991.

[113] *Pratt and Morgan* v. *Jamaica*, Human Rights Committee, Communication No.210/1986, HRC 1989 Report, Annex X.F. See *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.537/1993, HRC 1996 Report, Annex VIII.O: Where a lawyer's decision not to call several potential alibi witnesses, or his failure to point to discrepancies in the identification parade, were attributable to the exercise of his professional judgment, ICCPR 14(3)(d) is not violated.

*Right 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.*

A person may be ignorant of this right and may, therefore, fail to apply for legal aid and on that account may not be given legal aid. Therefore, when a person is charged with a serious offence and faces a possible prison sentence, and has no lawyer and cannot provide for one, he ought to be informed of his right to legal aid. If he does not know of his right he cannot exercise it and if he cannot exercise it his right is violated.[114] In respect of offences punishable with death, it is 'axiomatic' that legal assistance should be made available, even if the unavailability of private counsel is to some degree attributable to the accused, and even if the provision of legal assistance entails an adjournment of proceedings. This requirement is not made unnecessary by efforts which the trial judge may otherwise make to assist the accused in the handling of his defence in the absence of counsel.[115] When counsel is assigned, the accused must be notified of this assignment in a timely manner and given sufficient opportunity to consult with counsel prior to the hearing, and afforded an opportunity to be present during the hearing.[116] This applies not only to the trial, but also to any preliminary hearings relating to the case.[117]

The right to free legal assistance is subject to two conditions: that the individual concerned does not have sufficient means to pay for legal assistance and that the interests of justice require it. When determining whether 'the interests of justice' require legal representation, each case must be examined on its facts. While the likelihood of success and

[114] Supreme Court of Ireland, Decision of 22 July 1976, (1976) CXII *Irish Law Times* 37; (1976) 21 *Yearbook* 754.

[115] *Yasseen and Thomas* v. *Guyana*, Human Rights Committee, Communication No.676/1996, HRC 1998 Report, Annex XI.R.

[116] *Simmonds, Gentles and Kerr* v. *Jamaica*, Human Rights Committee, Communication No.352/1989, HRC 1994 Report, Annex IX.G.

[117] *Wright and Harvey* v. *Jamaica*, Human Rights Committee, Communication No. 459/1991, HRC 1996 Report, Annex VIII.F. See *McKenzie et al* v. *Jamaica*, Inter-American Commission, Report No.41/2000, 13 April 2000, *Annual Report 1999*, p. 918, at p. 1016: this right is available in respect of a constitutional review of irregularities in a criminal trial; *Tangiora* v. *Wellington District Legal Services*, Privy Council on appeal from the Court of Appeal of New Zealand, [2000] 4 LRC 44: the Human Rights Committee is not part of the legal system of New Zealand within which legal aid is available.

the availability of legal assistance at other stages of the proceedings are significant factors to be taken into account, they are not the sole criteria. Other facts include the importance of what is at stake for the applicant, e.g. the severity of the sentence; the personal ability of the applicant, and the nature of the proceedings, e.g. the complexity or importance of the issues or procedures involved, or of the applicable law.[118]

What is guaranteed is 'assistance' and not 'nomination'. Therefore, mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting, or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.[119] Therefore, assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused.[120] Measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue that the appeal has no merit.[121] Where legal aid counsel assigned to an accused considers that there is no merit in the appeal and is not prepared to advance arguments in favour of it, another lawyer may need to be appointed.[122] In respect of an offence punishable with death, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel had consulted with the accused and informed him accordingly. If not, the court must ensure that the accused is so informed and given an opportunity to engage another

[118] *Granger* v. *United Kingdom*, European Commission, (1988) 12 EHRR 460; *Quaranta* v. *Switzerland*, European Court, 24 May 1991; *Hoang* v. *France*, European Court, (1992) 16 EHRR 53; *Benham* v. *United Kingdom*, European Court, (1996) 22 EHRR 293; *Perks* v. *United Kingdom*, European Court, (1999) 30 EHRR 33. Cf. *Monnell and Morris* v. *United Kingdom*, European Court, (1988) 10 EHRR 205: The interests of justice do not require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance.

[119] *Artico* v. *Italy*, European Court, (1980) 3 EHRR 1.

[120] *Imbrioscia* v. *Switzerland*, European Court, (1993) 17 EHRR 441.

[121] *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.253/1987, HRC 1991 Report, Annex XI.D; *Grant* v. *Jamaica*, Human Rights Committee, Communication No.353/1988, HRC 1994 Report, Annex IX.H.

[122] *Reid* v. *Jamaica*, Human Rights Committee, Communication No.250/1987, HRC 1990 Report, Annex IX.J; *E.B.* v. *Jamaica*, Human Rights Committee, Communication No.303/1988, HRC 1991 Report, Annex XII.D; *R.M.* v. *Jamaica*, Human Rights Committee, Communication No.315/1988, HRC 1991 Report, Annex XII.H; *W.W.* v. *Jamaica*, Human Rights Committee, Communication No.254/1987, HRC 1991 Report, Annex XII.B.

counsel.[123] When counsel is absent during the judge's summing-up at the trial, this right is denied.[124]

An accused does not have a right to choose the counsel to be assigned to him.[125] However, when appointing defence counsel, the court must have regard to the accused's wishes; the court may override those wishes when there are relevant and sufficient grounds for holding that that is necessary in the interests of justice.[126] But an accused charged with an offence that carries the death sentence may contest the choice of his court-appointed lawyer. Where an accused convicted of murder had assigned to him for the appeal the same counsel who had represented him in the trial, and the latter informed him there was no merit in the appeal, the accused requested a new lawyer and permission to be present in person at the appeal. The court rejected both requests. At the hearing of the appeal, the court-appointed lawyer did not advance any arguments in support of the appeal, which was thereupon dismissed. The Human Rights Committee held the accused was effectively without legal representation in violation of ICCPR 14(3)(d); he should have had another lawyer appointed for his defence or been allowed to represent himself.[127]

*Right to examine, or have examined, the witnesses against him.*

This right is designed to guarantee to the accused the same legal powers of examining or cross-examining witnesses as are available to the prosecution,[128] whether under an accusatorial or inquisitorial system of

[123] *Wright & Harvey* v. *Jamaica*, Human Rights Committee, Communication No.459/1991, HRC 1996 Report, Annex VIII.F; *Price* v. *Jamaica*, Human Rights Committee, Communication No.572/1994, HRC 1997 Report, Annex VI.N; *McCordie Morrison* v. *Jamaica*, Human Rights Committee, Communication No.663/1995 HRC 1999 Report, Annex XI.Q; *Lumley* v. *Jamaica*, Human Rights Committee, Communication No.662/1995 HRC 1999 Report, Annex XI.Q; *Smith and Stewart* v. *Jamaica*, Human Rights Committee, Communication No.668/1995, HRC 1999 Report, Annex XI.T.

[124] *Brown* v. *Jamaica*, Human Rights Committee, Communication No.775/1997, HRC 1999 Report, Annex XI.GG.

[125] *Fourri* v. *The Republic*, Supreme Court of Cyprus, (1980) 2 CLR 142. *Reference by the Head of State*, Supreme Court of Western Samoa, [1989] LRC (Const) 671. See also UN document A/2929, chapter VI, section 84; *State* v. *Vermaas* and *State* v. *Du Plessis*, Constitutional Court of South Africa, [1995] 2 LRC 557.

[126] *Croissant* v. *Germany*, European Court, (1992) 16 EHRR 135.

[127] *Reid* v. *Jamaica*, Human Rights Committee, Communication No.250/1987, HRC 1990 Report, Annex IX.J.

[128] Human Rights Committee, General Comment 13 (1984).

trial. In the latter system, where witnesses are examined by the court, the accused will enjoy the same powers as that of the court.

'Witnesses' must be understood as having an autonomous meaning which may be wider than that of 'witnesses' in the technical sense as understood in a domestic legal system.[129] Where charges against an accused person were based on statements made to the police by his wife and stepdaughter, and they both refused, invoking a privilege under the Austrian Code of Criminal Procedure, to give evidence in court on the ground that they were close relatives of the accused, the European Commission held that they were in fact 'witnesses' in the sense of ECHR 6(3)(d). In view of the fact that their statements contained clear allegations against the accused, and were submitted and relied on by the prosecution, they must be considered as 'witnesses against' the accused.[130] Similarly, where an accused was convicted by a court of robbery on the strength solely of statements made to the police by the victim of the robbery and a friend of hers, whom neither his lawyer nor he himself had been able to examine or have examined before either the criminal court or the court of appeal or, because of recourse to the direct committal procedure, before an investigating judge, the European Court held that both the victim of the robbery and her friend were to be regarded for the purposes of ECHR 6(3)(c) as 'witnesses'. Since the accused had been unable to test their reliability or cast doubts on their credibility, the right was breached. While in principle evidence must be given in the presence of the accused at a public hearing, it is not in itself inconsistent with ECHR 6(1) or 6(3)(d) to use as evidence statements made at the pre-trial stage, provided the rights of the defence have been respected. These rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings.[131]

[129] See *Pullar* v. *United Kingdom*, European Court, (1996) 22 EHRR 391: Eg. a person is a witness if his written statement is produced in court and account is taken of it.

[130] *Unterpertinger* v. *Austria*, European Commission, 11 October 1984 unreported. European Court, (1986) 13 EHRR 175. But the European Commission decided, on the casting vote of the president, that the law which enabled them to refuse to give evidence in court was not contrary to ECHR 6(3)(d). The minority argued that it was unacceptable that privileges were granted to certain groups of witnesses at the expense of the accused and of his right to be heard. Either the witnesses testify at the trial and accept being questioned also by the defence, or their testimony cannot be relied upon at all.

[131] *Delta* v. *France*, European Court, (1990) 16 EHRR 574. See also *Kostovski* v. *Netherlands*, European Court, (1989) 12 EHRR 434; *Windisch* v. *Austria*, European Court, (1990) 13

Where in a prosecution under the Narcotics Act the prosecution introduced in evidence two statements made by two defendants in an earlier drug trial implicating the accused, without providing the accused with an opportunity of cross-examining either of these persons, the Supreme Court of Finland held that the statements had been used as evidence in violation of the right of an accused to examine or have examined witnesses against him.[132] But where an accused complained that he was not given the opportunity to cross-examine a prosecution witness who had left the country and was therefore unable to give evidence during the trial, the Human Rights Committee noted that the accused had been present during the preliminary hearing when that witness gave his statement under oath and caused him to be cross-examined by his counsel. That statement and the answers in cross-examination were admitted in evidence at the trial without objection by the accused. Accordingly, since that witness had been examined by the defence under the same conditions as by the prosecution at the preliminary hearing, ICCPR 14(3)(c) was not violated.[133]

The appointment by the court of an intermediary through whom a sixteen-year-old complainant in a rape case might give her evidence is not inconsistent with the exercise of this right. Although the forcefulness and effect of cross-examination may be blunted when an intermediary is interposed between the questioner and the witness, that does not mean that the accused is denied the right to a fair trial, for in deciding whether his rights are violated it is also necessary to take into account the interest of the child witness. The truth-seeking function of a trial court is furthered by posing questions to children only in a way that is appropriate to their development and in a manner which does not deprive an accused of the right to cross-examine. There are sound reasons why the conveyance by an intermediary of 'the general purport' of a question

EHRR 281; *Asch* v. *Austria*, European Court, (1991) 15 EHRR 597; *Saidi* v. *France*, European Court, (1993) 17 EHRR 251; Decision of the Constitutional Court of the Czech Republic, 12 October 1994, Case No.P1.US 4/94, (1994) 3 *Bulletin on Constitutional Case-Law* 225.

[132] Decision of 6 June 1991, D:R-90/770 T:1930 (KKO 1991:84). See also Decision of 14 January 1992, Vaasa Court of Appeal, Finland, Report No.21, R91/759; *Doorson* v. *Netherlands*, European Court, (1996) 22 EHRR 330.

[133] *Compass* v. *Jamaica*, Human Rights Committee, Communication No.375/1989, 19 October 1993. See also *Boodram* v. *State*, Court of Appeal of Trinidad and Tobago, [1998] 4 LRC 585.

posed by counsel may enable a child witness to participate properly in the system. Questions should be put in a form understandable to the witness so that he or she might answer them properly. However, an intermediary is not permitted to alter the question in conveying its general purport, but has to convey the content and meaning of what is asked in a language and form understandable to the witness.[134]

The failure to make the police statement of a witness available to the defence seriously obstructs the defence in the cross-examination of that witness, thereby violating ICCPR 14(3)(e) and precluding a fair trial of the defendant.[135]

*Right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*

This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses as are available to the prosecution.[136] It does not give the accused an absolute right to call any witness. Municipal law may prescribe conditions for the admission (and examination) of witnesses, provided that such conditions are identical for witnesses on both sides. Similarly, competent judicial authorities are free, subject to respect for other rights and in particular the principle of equality, to decide whether the hearing of a witness for the defence is likely to assist in ascertaining the truth, and if not, to refuse to call that witness.[137] But when a court refuses to allow a witness to be called, it must immediately explain the reason for the decision.[138] An unrepresented accused must be informed by the judge of this right. The matter of informing the accused is one *ex debito justitiae*, and any officer of the court present in court should remind the judge, if needs be, of his duty to do so.[139]

[134] *Klink* v. *Regional Court Magistrate NO*, Supreme Court (South-Eastern Cape Local Division of South Africa, [1996] 3 LRC 667.

[135] *Peart and Peart* v. *Jamaica*, Human Rights Committee, Communication Nos.464/1991 and 482/1991, HRC 1995 Report, Annex X.E.

[136] Human Rights Committee, General Comment 13 (1984).

[137] *Bonisch* v. *Austria*, European Commission, (1984) 6 EHRR 467; *Gordon* v. *Jamaica*, Human Rights Committee, Communication No.237/1987, 5 November 1992.

[138] Decision of the Constitutional Court of Spain, 6 June 1995, Case No.89 of 1995, *Boletin Oficial del Estado* of 8 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 208.

[139] *The State* v. *Cleveland Clarke*, Court of Appeal of Guyana, (1976) 22 WIR 249.

An accused who asks for an adjournment because his witness is absent should normally satisfy the court that: (a) the witness is material to his defence; (b) he, the accused, has not been guilty of neglect in procuring the witness to attend; and (c) there is reasonable expectation that he can procure his attendance for a certain date.[140] Where a witness's failure to appear in court is attributable to state authorities (for example, lack of transportation) ICCPR 14(1)(e) is infringed.[141]

This right relates not only to the calling of witnesses in the narrow sense, but also to the appointment of experts. The same considerations are in principle also applicable to the latter, although distinctions may be made in national legislation and practice between the conditions applicable on the one hand to the calling of witnesses, and on the other to the appointment of experts.[142]

*Right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

The basis of the principle that a trial should be conducted in the presence of the accused is not simply that there should be corporeal presence but that the accused, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him. An accused who has not understood the conduct of proceedings against him cannot, in the absence of express consent, be said to have had a fair trial.[143] Therefore, if the accused cannot understand or speak the language used in court he is entitled to the assistance of an

[140] *Yanor* v. *The State*, Supreme Court of Nigeria, [1965] 1 All ER 193.

[141] *Grant* v. *Jamaica*, Human Rights Committee, Communication No. 353/1988, HRC 1994 Report, Annex IX.H.

[142] *Bonisch* v. *Austria*, European Commission, (1984) 6 EHRR 467: Since a serious dispute existed between various food experts in relation to the matter under consideration, and since the court in full knowledge of this fact nevertheless limited the taking of expert evidence to the hearing of only one expert involved in this dispute who, contrary to other experts, consistently took a view unfavourable to the accused, and the court did so despite the accused's express submission that the views of this expert did not represent the predominant scientific opinion, and it did not even investigate the question whether or not the expert's views were in fact representative otherwise than by questioning this expert himself, ECHR 6(3)(d) was violated.

[143] *Kunnath* v. *The State*, Privy Council on appeal from the Court of Criminal Appeal of Mauritius, [1993] 2 LRC 326.

interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. The failure to provide an accused with a full and contemporaneous translation of all the evidence at his trial constitutes a breach of this right. While the interpretation provided need not be perfect, it must be continuous, precise, impartial, competent and contemporaneous. Not every deviation from the protected standard of interpretation will violate this right; the lapse must have been in respect of the proceedings themselves, thereby involving the vital interests of the accused.[144] The right to an interpreter is a fundamental right that belongs to the accused; it cannot be waived by him or on his behalf by his counsel.[145]

This right 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.[146] But the provision for the use of one official court language, *per se*, does not violate this right. Nor does it require a state to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself or herself adequately in the official language. It is only if the accused or the witnesses have difficulties in understanding, or in expressing themselves in the court language that it is obligatory that the services of an interpreter be made available.[147] The right extends to the translation or interpretation of all documents or statements in the proceedings which it is necessary for the accused to understand in order to have the benefit of a fair trial.[148]

By reason of the judge's duty to ensure that the accused has a fair trial, the judge must satisfy himself that, in accordance with established practice, effective use is made of the interpreter provided for the assistance

[144] *R* v. *Tran*, Supreme Court of Canada, [1994] 2 SCR 951.

[145] *Ogba* v. *The State*, Supreme Court of Nigeria, [1993] 2 LRC 44.

[146] Human Rights Committee, General Comment 13 (1984). See also *Luedicke, Belkacem and Koc* v. *Germany*, European Court, (1978) 2 EHRR 149.

[147] *Barzhig* v. *France*, Human Rights Committee, Communication No.327/1988, HRC 1991 Report, Annex XI.F.

[148] *Luedicke, Belkacem and Koc* v. *Germany*, European Court, (1978) 2 EHRR 149. See Cour de Cassation, Belgium, No.5280, Decision of 27 January 1970: Speeches by defence counsel are not required to be interpreted; *Buraimoh Ajayi* v. *Zaria NA*, Supreme Court of Nigeria, (1964) NNLR 61: There ought to be adequate interpretation to the court of anything said by the accused person in a language which the court does not understand. See also *Gwonto* v. *The State*, Federal Court of Appeal, Nigeria, [1982] 3 NCLR 312. See also UN document A/2929, chapter VI, section 87.

of the accused.[149] But when an accused complains to an appellate court that he did not understand the proceedings at the trial, the fact that the trial judge was satisfied that the accused understood the language of the proceedings is not sufficient; the constitutional guarantee requires more than satisfaction on the part of the presiding officer of the trial court. If it appears from other circumstances that the accused may not have understood the language in which proceedings were conducted, a retrial must be ordered.[150]

*Right not to be compelled to testify against himself or to confess guilt.*

An accused person may not be compelled to testify against himself or to confess guilt. This right, therefore, pertains to a person 'accused of an offence'; it is a protection against 'compulsion to be a witness'; and it is protection against such compulsion resulting in his giving evidence 'against himself'. 'Compulsion' in this context, means 'duress'. In that sense, compulsion is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. Compulsion may not be inferred from the mere request of a police officer investigating an offence to do a certain thing, or from the mere fact that the accused person, when he made the statement in question, was in police custody. It is, of course, open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it.[151]

[149] *Kunnath* v. *The State*, Privy Council on appeal from the Court of Criminal Appeal of Mauritius, [1993] 2 LRC 326. Cf. *The State* v. *Gwonto*, Supreme Court of Nigeria, [1985] LRC (Const) 890: Since the right to an interpreter arose only if the accused could not understand the language used at the trial, it was the duty of the accused, or his counsel, to draw the attention of the court to that lack of understanding. Unless the court was made aware that the proceedings could not properly be understood, no question of infringement of rights could arise.

[150] *Andrea* v. *The Republic*, High Court of Kenya, [1970] EA 46.

[151] *State of Bombay* v. *Kathi Kalu Oghad*, Supreme Court of India, [1954] 3 SCR 10. See judgment of Sinha CJ. For a discussion of the law relating to self-incrimination, see G.L. Peries, 'An Accused Person's Privilege against Self-Incrimination: a Common Law System

The right implies the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.[152] In order to compel an accused person to confess or to testify against himself, methods which violate ICCPR 7 and 10(1) are frequently used. Accordingly, evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.[153] 'Compelled testimony' includes evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, or overbearing and intimidatory methods. If any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, is applied by a police officer for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony'.[154]

The right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may later be deployed in a way which supports the prosecution case, for example, to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury, the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial.[155]

Compared with a Codified System', *University of Ceylon, Inaugural Lecture Series* No.1, 9 November 1979; Robert S. Gerstein, 'The Self-Incrimination Debate in Great Britain' [1979] 27 *The American Journal of Comparative Law* 81.

[152] *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.253/1987, HRC 1991 Report, Annex XI.D; *Campbell* v. *Jamaica*, Human Rights Committee, Communication No.248/1987, HRC 1992 Report, Annex XI.D; *Berry* v. *Jamaica*, Human Rights Committee, Communication No.330/1988, HRC 1994 Report, Annex IX.D; *Johnson* v. *Jamaica*, Human Rights Committee, Communication No.588/1994, HRC 1996 Report, Annex VIII.W.

[153] Human Rights Committee, General Comment 13 (1984). During the drafting of this paragraph, a proposal to add the words: 'or be induced to make such a confession by a promise of reward or immunity' was rejected. See UN document A/2929, chapter VI, section 88.

[154] *Satpathy* v. *Dani*, Supreme Court of India, [1978] 3 SCR 608.

[155] *Saunders* v. *United Kingdom*, European Court, (1996) 23 EHRR 313 (statements obtained by DTI inspectors in the exercise of their statutory powers of compulsion). See *Jijon* v.

Protection against self-incrimination extends beyond a particular investigation or trial and protects the accused in regard to other offences, pending or imminent, which might deter him from voluntary disclosure of incriminatory matter. In the United States, the scope of the privilege against self-incrimination under the Fifth Amendment to the Constitution not only extends to answers that would in themselves support a conviction but also embraces those which would furnish a link in the chain of evidence needed to prosecute the accused.[156] In Canada, evidence obtained by recording a conversation between an accused person and a friend, was excluded since it had been obtained by conscripting the accused against himself.[157] A statutory provision which compels testimony at a company liquidation and permits the use of such testimony against the person who testifies in subsequent criminal proceedings is inconsistent with this right.[158] But the protection does not apply to proceedings before a Commission of Inquiry which has no power to try anyone for a criminal offence.[159] In determining the ambit of the protection against self-incrimination, it is important to consider the particular context in which its application arises. In a regulatory context, the

*Ecuador*, Human Rights Committee, Communication No.277/1988, HRC 1992 Report, Annex IX.I, individual opinion of Bertil Wennergren: An accused person was forced to sign ten blank sheets of paper during an interrogation that took place when he was held in incommunicado detention. The experience must necessarily have cast a shadow on the accused since there was always the risk that what had been signed or recorded might exercise undue influence on the issue of proof in the determination of criminal charges at a subsequent stage.

156 The link, however, must be reasonably strong to make the accused apprehend danger from such answer. It must appear to the court that the implications of the question, in the setting in which it was asked, made it evident that a responsive answer or an explanation of why it could not be answered might be dangerous because injurious disclosure could result. The apprehension of incrimination from the answer sought must be substantial and real as distinguished from danger of remote possibilities or fanciful flow of inference.

157 *R* v. *Broyles* (1991) 131 NR 118. Section 11(c) of the Canadian Charter of Rights and Freedoms provides that 'Any person charged with an offence has the right . . . not to be compelled to be a witness in proceedings against that person in respect of the offence.'

158 *Ferreira* v. *Levin*, *Vryenhoek* v. *Powell*, Constitutional Court of South Africa, [1996] 3 LRC 527 (Companies Act 1973, s. 417(2)(b)); *Parbhoo* v. *Getz NO*, Constitutional Court of South Africa, [1998] 2 LRC 159 (Companies Act 1973, s. 415).

159 *Bethel* v. *Douglas*, Privy Council on appeal from the Court of Appeal of The Bahamas, [1995] 1 LRC 248: While persons attending before a commission, appointed under the Commissions of Inquiry Act, were not excused from answering any question or producing any document or thing by reason that the answer thereto or the production thereof would tend to be self-incriminatory, the relevant law provided that no answer given by a witness summoned to appear before a commission may be used in criminal proceedings against him other than in proceedings for perjury before the commission.

principle against self-incrimination does not prevent the prosecution from relying on records statutorily required to be submitted as one of the terms and conditions of participation in that regulatory sphere. The protection against self-incrimination does not elevate such records to the status of compelled testimony at a criminal or investigative hearing.[160]

The guarantee is against 'testimonial compulsion'. But a person can be a 'witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness. 'To be a witness' is 'to furnish evidence', and such evidence can be furnished orally or in writing, or by production of a thing or document or in any other mode.[161] The protection does not extend to the giving of thumb, palm or foot impressions or specimen handwriting and signature or exposing a part of the body for the purpose of identification. 'Self-incrimination' means conveying information based upon the personal knowledge of the giver and does not include the mere mechanical process of producing documents in court which do not contain any statement of the accused based on his personal knowledge.[162] Nor does it embrace incriminating conditions of the body such as alcoholic content of the breath or blood.[163] The protected right is primarily concerned

[160] *R* v. *Fitzpatrick*, Supreme Court of Canada, [1995] 4 SCR 154: In accepting a licence, the captain of a vessel engaged in a regulated commercial groundfish fishery is presumed to have known, and to have accepted, the terms and conditions associated with it, which include the completion of hail reports and fishing logs, and the prosecution of those who overfish. The information in these records may later be used in adversarial proceedings in which the state seeks to enforce the restrictions necessary to accomplish its regulatory objectives. Hail reports and fishing logs are necessary for the effective regulation of the fishery and should be seen to constitute the 'ordinary' records of those licensed to participate in the groundfish fishery. The fact that they are statutorily required did not transform them into compelled testimony. See also *Poli* v. *Minister of Finance and Economic Development*, Supreme Court of Zimbabwe, [1988] LRC (Const) 501: Where s.18(8) of the Constitution states that 'No person who is tried for a criminal offence shall be compelled to give evidence at the trial', the protection afforded to a person against self-incrimination is effective only when that person is being tried. Within the trial one can refuse to testify because of the fear of self-incrimination. There is nothing in s.18(8) which forbids the police, before the trial, from taking fingerprints, samples of handwriting, voice identification, breath analysis, or specimens of blood. Accordingly, s.18(8) cannot be invoked by a person who was required, under the Exchange Control Act, to furnish written details of his foreign bank account within fourteen days.

[161] *Sharma* v. *Satish Chandra*, Supreme Court of India, [1954] SCR 1077.

[162] *State of Bombay* v. *Kathi Kalu Oghad*, Supreme Court of India, AIR 1961 SC 1808; [1962] 3 SCR 10.

[163] *Curr* v. *The Queen*, Supreme Court of Canada, (1972) SCR 889. See *Regina* v. *McKay*, Manitoba Court of Appeal, (1971) 4 CCC (2nd) 45: When a person furnishes a pre-trial

with respecting the will of an accused person to remain silent. It does not extend to the use in criminal proceedings of material which may be obtained from the accused under legal compulsion but which has an existence independent of the will of the accused such as documents acquired pursuant to a warrant, breath, blood and urine samples, and bodily tissue for the purpose of DNA testing.[164]

## The right to silence

The right to silence arises from the combined application of the presumption of innocence and the protection against self-incrimination. Lord Mustill has identified 'a disparate group of immunities, which differ in nature, origin, incidence and importance', which constitute this right. Among them are: (1) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies; (2) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them; (3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind; (4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock; (5) a specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority; (6) a specific immunity, possessed by accused persons undergoing trial, from having adverse comments made

sample of his breath to a peace officer he is merely providing something about which another person may later give evidence; he himself is not giving evidence; *Zambrana Daza, Norma Beatriz s. infraccion a la ley*, 23.737, Supreme Court of Justice of the Nation, Argentina, Z.17.XXX1, 12 August 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 346: Evidence of the commission of an offence obtained from the accused's physical condition when the offender seeks medical treatment in a public hospital does not infringe this right.

[164] *Saunders* v. *United Kingdom*, European Court, (1966) 23 EHRR 313. See also Decision of the Constitutional Court of Spain, 161/1977, 2 October 1997, *Boletin Oficial del Estado*, no.260 of 30.10.1997, 79–90, (1997) 3 *Bulletin on Constitutional Case-Law* 441.

on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.[165]

The right to silence is, therefore, engaged when a person is subject to the coercive power of the state. This occurs upon arrest, charge or detention of the individual. It is at this point that an adversarial relationship is created between the state and the individual. Once under the coercive power of the state, the accused's right to silence could only be waived by an informed decision of the accused; 'state trickery is unacceptable'.[166] However, according to the Supreme Court of Canada, the right to silence is subject to the following limits:

1. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence;
2. The right to silence applies only after detention. Prior to detention, the individual from whom information is sought is not in the control of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected;
3. The right to silence predicated on the suspect's right to choose freely whether to speak to the police or to remain silent does not affect voluntary statements made to fellow cellmates. The violation of the suspect's rights occurs only when the police act to subvert the suspect's constitutional right to choose not to make a statement to the authorities.
4. When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient of such information may inform the police.[167]

[165] *R* v. *Director of Serious Fraud Office, ex parte Smith* [1992] 3 All ER 456, at 463.
[166] *R* v. *Herbert*, Supreme Court of Canada, [1990] 2 SCR 151.
[167] *R* v. *Herbert*, Supreme Court of Canada, [1990] 2 SCR 151. See also *R* v. *Van Haarlem*, Supreme Court of Canada, (1992) 135 NR 377.

To permit an adverse inference to be drawn from the right to silence of an accused person appears to constitute compulsion which has the effect of shifting the burden of proof from the prosecution to the accused and is, therefore, inconsistent with this right. The accused, in such a situation, is left with no reasonable choice between silence – which will be taken as testimony against himself – and testifying. While it is self-evident that it is incompatible with this right to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself, these immunities should not prevent the accused's silence, in situations which clearly call for an explanation from him, being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. A court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give that failure to give an explanation 'may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty'. Conversely, if the case presented by the prosecution has so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt.[168]

*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

ICCPR 14(5) does not require states to provide for several instances of appeal. The words 'according to law' must be understood to mean that, if domestic law provides for further instances of appeal, the convicted person should have effective access to each of them.[169] The expression

[168] *Murray* v. *United Kingdom*, European Court, (1996) 22 EHRR 29. See also *Funke* v. *France*, European Court, (1993) 16 EHRR 297; *Condron* v. *United Kingdom*, European Court, (2000) 31 EHRR 1; *Averill* v. *United Kingdom*, European Court, (2000) 31 EHRR 839; *Griffin* v. *State of California*, United States Supreme Court, 380 US 609 (1965); *Miranda* v. *Arizona*, United States Supreme Court, 384 US 436 (1966): the constitutional protection against self-incrimination guarantees to the individual the right to remain silent unless he chooses to speak in the unfettered exercise of his own free will, whether during custodial interrogation or in court.

[169] *Douglas* v. *Jamaica*, Human Rights Committee, Communication No.352/1989, HRC 1994 Report, Annex IX.G.

'according to law' is not intended to leave the very existence of the right of review to the discretion of the state; what is to be determined 'according to law' are the modalities by which the review by a higher tribunal is to be carried out.[170] This guarantee is not confined only to the most serious offences.[171] To enjoy the effective exercise of this right, a convicted person is entitled to have, within a reasonable time, access to written judgments, duly reasoned, for all instances of appeal.[172]

The extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It cannot, however, be understood as requiring a detailed answer to every argument. In dismissing an appeal, an appellate court may, in principle, simply endorse the reason for the lower court's decision.[173] The Court of Appeal of New Zealand had noted, however, that reason-giving provides a discipline for a judge to ensure against wrong or arbitrary decisions and inconsistent delivery of justice. Therefore, while the reasons for a judgment may be abbreviated or self-evident in certain cases, they are required to be sufficient to show to what a judge was directing his mind when he came to his conclusion.[174]

A court of appeal is not required to proceed to a factual retrial. What is required is a full evaluation of the evidence presented at the trial and

[170] *Montejo* v. *Colombia*, Human Rights Committee, Communication No.64/1979, HRC 1982 Report, Annex XV.

[171] Human Rights Committee, General Comment 13 (1984).

[172] *Smith* v. *Jamaica*, Human Rights Committee, Communication No.282/1988, 31 March 1993: where the Court of Appeal had not, more than four years after the dismissal of an appeal, issued a reasoned judgment, the accused person was denied the possibility of an effective appeal to the Judicial Committee of the Privy Council. See *Pratt and Morgan* v. *Jamaica*, Human Rights Committee, Communication No.210/1986, HRC 1989 Report, Annex X.F; *Kelly* v. *Jamaica*, Human Rights Committee, Communication No.253/1987, HRC 1991 Report, Annex XI.D; *Little* v. *Jamaica*, Human Rights Committee, Communication No.283/1988, HRC 1992 Report, Annex IX.J; *Francis* v. *Jamaica*, Human Rights Committee, Communication No.320/1988, 24 March 1993; *Johnson* v. *Jamaica*, Human Rights Committee, Communication No.588/1994, HRC 1996 Report, Annex VIII.W. See also *Pinkney* v. *Canada*, Human Rights Committee, Communication No.27/1978, HRC 1982 Report, Annex VII: delay of two and a half years in the production of the transcripts of the trial for the purposes of the appeal is excessive, and prejudicial to the effectiveness of the right to appeal; *Alexander* v. *Williams*, Court of Appeal of Trinidad and Tobago, (1984) 34 WIR 340: the furnishing of reasons in cases against which appeals have been lodged is an indispensable requirement of 'due process'.

[173] *Garcia Ruiz* v. *Spain*, European Court, (1999) 31 EHRR 589.

[174] *Lewis* v. *Wilson & Horton Ltd*, Court of Appeal of New Zealand, [2002] 2 LRC 205.

of the conduct of the trial.[175] But where the procedure limits the review to the formal or legal aspects of the conviction, this right is denied.[176] Similarly, a judicial review, which takes place without a formal hearing and on matters of law only, falls short of the requirements of ICCPR 14(5).[177] Requiring leave to appeal is not inconsistent with the right to have recourse to a higher court.[178] But a limitation contained in a code of criminal procedure relating to the amount in respect of which an appeal on points of law may be lodged is unconstitutional.[179] The denial of legal aid for an appeal to the Judicial Committee of the Privy Council effectively precludes the review of the conviction and sentence by that court.[180]

*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.*

This right is enjoyed by an accused person who has been finally convicted or acquitted. The phrase 'finally convicted or acquitted' signifies that all the ordinary methods of judicial review and appeal have been exhausted and that all waiting periods have expired.[181] If a jury brings a general verdict of acquittal on an indictment, the accused may thereafter maintain a plea of *autrefois acquit* in respect of every crime of which he could have been convicted on that indictment. Accordingly, a general verdict of acquittal on an indictment for murder will enable *autrefois acquit* to be maintained for manslaughter. But where the judge left to the jury the two issues of murder or manslaughter, and the jury brought

[175] *Perera* v. *Australia*, Human Rights Committee, Communication No.536/1993, HRC 1995 Report, Annex XI.G.

[176] *Gomez* v. *Spain*, Human Rights Committee, Communication No.701/1996, HRC 2000 Report, Annex IX.I.

[177] *Domukovsky et al* v. *Georgia*, Human Rights Committee, Communications Nos.623, 624, 626 and 627/1995, HRC 1998 Report, Annex XI.M.

[178] *State* v. *Rens*, Constitutional Court of South Africa, [1996] 2 LRC 164.

[179] Decision of the Supreme Court of Argentina, G-342.XXVL.R.H., 7 April 1995, *El Derecho* 1995, No.8784, (1995) 3 *Bulletin on Constitutional Case-Law* 271.

[180] *La Vende* v. *Trinidad and Tobago*, Human Rights Committee, Communication No.554/1993, HRC 1998 Report, Annex XI.B.

[181] See UN document A/2929, chapter VI, section 63. The Human Rights Committee has drawn a distinction between the resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of *non bis in idem* as contained in this paragraph. See General Comment 13 (1984).

in a verdict of not guilty of murder, but were unable to agree sufficiently as to manslaughter and did not bring in a verdict on that issue, the verdict of partial acquittal did not cover by inference the crime of manslaughter about which the jury disagreed.[182]

If a finding of guilt constitutes a 'conviction',[183] an accused will be regarded as 'convicted' either upon his pleading guilty to the charge or, in a trial by jury, upon the jury bringing a verdict of guilty. An accused thus convicted may not be 'tried' again. In this respect, the right recognized in ICCPR 14(7) appears to be broader in scope than the common law principle of *autrefois convict* where the underlying rationale is 'to prevent duplication of punishment'.[184] The latter principle was applied in a Jamaican case where an accused charged on indictment with murder pleaded guilty to manslaughter, and prosecuting counsel accepted the plea in open court. The judge did not dissent. The defence then successfully applied for an adjournment to call character witnesses in mitigation. At the resumed hearing the prosecution entered a *nolle prosequi* from the director of public prosecutions who considered that the plea of manslaughter ought not to have been accepted, and the proceedings thereupon terminated. The accused was then indicted for murder on a fresh indictment and was tried by a jury, found guilty, and sentenced to death. He argued he had been convicted of manslaughter on a previous indictment in relation to the same circumstances and based on the same facts as those referred to in the subsequent indictment. Rejecting this plea, the Privy Council held that a finding of guilt 'without proof of the court's final adjudication by sentence or other order' was not sufficient to sustain a plea of *autrefois convict*.[185]

[182] *Director of Public Prosecutions* v. *Nasralla*, Privy Council on appeal from the Supreme Court of Jamaica, [1967] 2 All ER 161. *Lawrence* v. *State*, Court of Appeal of Cyprus, [1999] 4 LRC 129: the same principle would apply if the alternative verdict of manslaughter had not been a proper one and amounted to a nullity.

[183] *R* v. *Blaby* [1894] 2 QB 170.

[184] *Richards* v. *R*, Privy Council on appeal from the Court of Appeal of Jamaica, [1993] 1 LRC 625, per Lord Bridge.

[185] *Quaere*: whether sentencing is required to give the accused the benefit of s. 20(8) of the Constitution of Jamaica?: 'No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence'. Lord Bridge thought that 'If in any case following trial and conviction by the jury [sic], the judge were to die before passing sentence, there would be no court seised of the case by which sentence could be passed. The defendant . . . would in those circumstances have to be rearraigned before another court and if he again pleaded not guilty would have to be retried. But it would be absurd that he should be able to plead the jury's verdict in the

This right prohibits double jeopardy only with regard to an offence in a particular state. It does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more states.[186] It appears, therefore, to be permissible (though perhaps undesirable) for a state to try, in accordance with its laws, a person already sentenced for the same offence by a court in another state. Where a person has already been convicted of a service offence by a service tribunal, is it lawful for that person to be prosecuted for a criminal offence in respect of the same act? The Supreme Court of Canada thought the answer would be in the negative if a particular proceeding by its very nature was a criminal proceeding or because a conviction in respect of the offence might lead to a true penal consequence. The court distinguished between a matter of a public nature, intended to promote public order and welfare within a public sphere of activity, and a private, domestic or disciplinary matter which was regulatory, protective or corrective and was primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity. A true penal consequence was imprisonment or a fine which by its magnitude appeared to be imposed in order to redress the wrong done to society at large.[187]

The existence of this right is not an absolute bar to a civil claim for exemplary damages, although the latter are punitive in nature and intended to deter repetition of outrageous conduct, not to compensate a victim or assuage the thirst for revenge. The word 'punished' is concerned with the criminal process, preventing the punishment function of

first trial as a bar to the second . . . The need for finality of adjudication by the court whose decision is relied on to found a plea of autrefois convict is even more clearly apparent where a defendant has pleaded guilty. Not only may the defendant be permitted, in the discretion of the court, to change that plea at any time before sentence, but, when a plea of guilty to a lesser offence than that charged has initially been accepted by the prosecutor with the approval of court, there can . . . be no finality in that "acceptance" until sentence is passed.'

[186] *A.P.* v. *Italy*, Human Rights Committee, Communication No.204/1986, HRC 1988 Report, Annex VIII.A. See also UN document A/4299, section 60; Decision of the Constitutional Court of Croatia, U-1–370/1994, 5 July 1994, *Narodnenovine* No.56/1994, (1994) 2 *Bulletin on Constitutional Case-Law* 119: When criminal proceedings for offences committed within the territory of Croatia are commenced or terminated in a foreign state, prosecutions in Croatia may be undertaken only exceptionally and with the approval of the state public prosecutor.

[187] *Wigglesworth* v. *R*, Supreme Court of Canada, [1989] LRC (Const) 591. Section 11(h) of the Canadian Charter: 'Any person charged with an offence has the right . . . if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.'

that process from being revisited. However, in determining whether such a claim may be brought on the basis of facts which had been the subject of criminal proceedings, a court is required to make a policy decision, balancing public and private interests: (1) Where criminal proceedings have resulted in a conviction, there are compelling reasons to hold that there can be no justification for a subsequent civil claim for exemplary damages on the basis of the same facts; (2) Although a prosecution which had resulted in an acquittal does not operate as a general bar to subsequent civil proceedings arising from the same facts, it will be an abuse of process to allow the same issues to be relitigated for the sole purpose of exacting a punishment in the form of exemplary damages which fulfils broadly the same punitive purposes as criminal sanctions; (3) Where a prosecution had commenced but not concluded, it will be an abuse of process to pursue a civil claim for exemplary damages; it will also be appropriate to stay a civil proceeding if a criminal prosecution is likely although not yet instituted.[188]

*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.*

This right seeks to protect a person from being prosecuted and punished for an act or omission which when it occurred did not constitute an offence. It seeks to prevent retrospective legislation in the field of criminal law whereby an innocent act or omission or a non-criminal act when it took place might not be converted into a criminal act or omission punishable under the law. What is prohibited is conviction or sentence under an *ex post facto* law and not the trial thereof. A trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time is not prohibited. A person accused of the commission of an offence has no right to trial by a particular court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.[189]

[188] *Daniels* v. *Thompson*, Court of Appeal of New Zealand, [1998] 4 LRC 420. New Zealand Bill of Rights Act 1990, s. 26(2): 'No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.'

[189] *Rao Shiv Bahadur Singh* v. *State of Vindhya Pradesh*, Supreme Court of India, [1953] SCR 1188; *Dobbert* v. *Florida*, United States Supreme Court, 432 US 282 (1977). See also *Ikpasa*

This right does not merely prohibit the retroactive application of the criminal law to the detriment of the accused. It also embodies the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sina lege*).[190] A person cannot, therefore, be held guilty under an obsolete law if the acts of which he is accused were performed after the abrogation of that law. A conviction in such circumstances will relate to an act or omission which did not constitute a criminal offence under national law at the time when it was committed. No distinction is made between an act or omission which no longer constitutes a criminal offence, and an act or omission which does not yet constitute one. For this purpose, it is immaterial whether the abrogation of the criminal law be express or implicit, provided that the latter form of abrogation exists in the domestic legal system of the state concerned.[191] The term 'law' in this context comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.[192]

Another principle embodied in this right is that the criminal law must not be extensively construed to an accused's detriment, for instance, by analogy. An offence must be clearly defined in the law. But this requirement of certainty does not mean that the concrete facts giving rise to criminal liability should be set out in detail in the statute concerned. It is sufficient if it is possible to determine from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what act or omission is subject to criminal liability.[193] The term

v. *Bendel State*, Supreme Court of Nigeria, [1982] 3 NCLR 152; *Walter Humberto Vasquez Vejarano* v. *Peru*, Inter-American Commission, Report No.48/2000, Case II.166, 13 April 2000, *Annual Report 1999*, p.1200: ACHR 9 applies to any type of sanction adversely affecting the rights of the individual since its ultimate aim is to provide security to the individual in the sense of knowing what kind of behaviour is legal and what kind is not so that the legal consequences of his actions can be anticipated.

190 *Kokkinakis* v. *Greece*, European Court, (1993) 17 EHRR 397. For the distinction between 'retroactive' and 'retrospective' law, see *Benner* v. *Secretary of State of Canada*, Supreme Court of Canada, [1997] 2 LRC 469.

191 *X* v. *Germany*, European Commission, Application 1169/61, (1963) 13 *Collection of Decisions* 1; *X* v. *Netherlands*, European Commission, Application 7721/76, (1977) 11 *Decisions & Reports* 209.

192 *Miloslavsky* v. *United Kingdom*, European Court, (1995) 20 EHRR 442.

193 *Handyside* v. *United Kingdom*, European Commission, 30 September 1975; *X* v. *Germany*, European Commission, Application 7900/77, (1978) 13 *Decisions & Reports* 70. See also *Bouie* v. *Columbia*, United States Supreme Court, 378 US 347 (1964): An unforeseeable judicial enlargement of a criminal statute, applied retrospectively, operates precisely like an *ex post facto* law. If a state legislature is barred by the *ex post facto* clause from passing

'law' also includes judicial pronouncements and the judicial interpretation of statutory provisions which create criminal liability.[194] However clearly drafted a legal provision may be, there is in any system of law, including criminal law, an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Therefore, this right cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and can reasonably be foreseen.[195] While courts are precluded from retrospectively reversing a previous interpretation of a criminal statutory provision where the new interpretation created criminal liability for the first time, and where it would operate to the prejudice of an accused, the same prohibition against retrospective overruling has to apply equally where the new interpretation represents a reversal of the law as previously interpreted and effectively extends criminal liability.[196]

A law which aggravates the degree of the crime resulting from an act committed prior to its enactment violates this right.[197] So does a law

such a law, it must follow that a state supreme court is barred from achieving precisely the same result by judicial construction.

194 *Public Prosecutor* v. *Manogaran*, Court of Appeal of Singapore, [1997] 2 LRC 288.

195 *C.R.* v. *United Kingdom*, European Court, (1995) 21 EHRR 363: In the definition of the offence of rape in the Sexual Offences (Amendment) Act 1976 ('unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it'), the word 'unlawful' was merely surplusage and did not inhibit the appellate courts from 'removing a common law fiction which had become anachronistic and offensive', and from declaring that 'a rapist remains a rapist subject to the criminal law irrespective of his relationship with his victim'. There has been a perceptible line of case-law development dismantling the immunity of the husband from prosecution for rape upon his wife. There was no doubt under the law as it stood [on the date of the alleged offence] that a husband who forcibly had sexual intercourse with his wife could, in certain circumstances, be found guilty of rape. There was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation, towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law. See also *S.W.* v. *United Kingdom*, European Court, 22 November 1995.

196 *Public Prosecutor* v. *Manogaran*, Court of Appeal of Singapore, [1997] 2 LRC 288.

197 *Calder* v. *Bull*, United States Supreme Court, 3 US 386 (1798); *Malloy* v. *South Carolina*, United States Supreme Court, 237 US 180 (1915). See also *G* v. *France*, European Court, 27 September 1995: Where a new law downgraded the offence of which the accused was

which eliminates, after the date of a criminal act, a defence which was available to the accused at the time the act was committed, or which alters the legal rules of evidence so as to require less proof, in order to convict the accused, than the law required at the time of the commission of the offence.[198] Equally inconsistent with this right is a law which operates to disqualify a person from holding public office or engaging in a profession or other calling because of his refusal to take an oath denying the commission of past acts not previously punishable as an offence;[199] a law which takes away a person's right to vote because of some prior non-criminal conduct;[200] or a law which authorizes the seizure of a person's property for previously non-criminal conduct.[201] A resolution of the Hungarian Parliament which sought to exempt the period between 1944 and 1989 from the statute of limitations for political crimes violated this article because it was *ex post facto* legislation making retroactive criminal prosecutions possible.[202]

In Ceylon (Sri Lanka), the Privy Council invalidated a law which it found, in effect, to constitute a special direction to the court as to the trial of particular persons (who, though not named in the law were identifiable from a previously published White Paper), charged with particular offences on a particular occasion, and which purported to legalize their detention while they were awaiting trial, made admissible their statements inadmissibly obtained during that period, altered the law of evidence so as to facilitate their conviction, and altered *ex post facto* the punishment to be imposed on them.[203]

The provision in ICCPR 15 (2) that '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

charged from serious offence (crime) to less serious offence (delict), its application, admittedly retrospective, operated in the accused's favour.

198 *Kring* v. *Missouri*, United States Supreme Court, 107 US 221 (1883); *Dobbert* v. *Florida*, United States Supreme Court, 432 US 282 (1977).

199 *Cummings* v. *Missouri*, United States Supreme Court, 71 US 277 (1967); *Ex parte Garland*, United States Supreme Court, 71 US 333 (1867); *Garner* v. *Board of Public Works*, United States Supreme Court, 341 US 716 (1951).

200 *Johannessen* v. *United States*, United States Supreme Court, 225 US 227 (1912).

201 *Fletcher* v. *Peck*, United States Supreme Court, 10 US 87 (1810).

202 Decision of the Constitutional Court of Hungary, *Magyar Kozlony*, No.85/1993, (1993) 2 *Bulletin on Constitutional Case-Law* 27.

203 *Liyanage* v. *The Queen*, Privy Council on appeal from the Supreme Court of Ceylon, [1966] 1 All ER 650.

general principles of law recognized by the community of nations' was intended as a confirmation of the principles applied by the war crimes tribunals established after the Second World War. It was intended to ensure that no one escaped punishment for a criminal offence under international law on the plea that his act was legal under the law of his country. Conversely, it was thought that the reference to international law would constitute an additional guarantee of security to the individual whom it would protect from possible arbitrary action even by an international organization.[204] But this provision appears to derogate from the substantive provision in paragraph (1). It is of the essence of this right that any penal provision should first define the offence and then prescribe the penalty, and a person ought not, therefore, to be convicted by the application of 'general principles' not yet incorporated in the domestic law of his country.

*Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.*

This right seeks to prevent the imposition of a heavier punishment for an offence which at the time of its commission attracted a lesser punishment. In determining whether legislation has increased the punishment for a prior offence, the key question is whether the new law makes it possible for the accused to receive a heavier punishment, even though it is also possible for him to receive the same punishment under the new law as could have been imposed under the prior law.[205] This could happen, for example, if a simple offence like misdemeanour is converted into a felony which would attract a heavier punishment on conviction, or if a law imposes additional punishment to that prescribed when the criminal act was committed.

The word 'penalty' is autonomous in meaning, and applies to penalties imposed by civil and administrative bodies as well as those imposed by courts for criminal offences.[206] To render the protection effective, a court must remain free to go behind appearances and assess for itself

[204] See UN document A/2929, chapter VI, section 94. See also *R* v. *Finta*, Supreme Court of Canada, [1994] 4 LRC 641.

[205] *Lindsay* v. *Washington*, United States Supreme Court, 301 US 397 (1937).

[206] *Maclsaac* v. *Canada*, Human Rights Committee, Communication No.55/1979, HRC 1983 Report, Annex VII.

whether a particular measure amounts in substance to a 'penalty'. The starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'. Other factors that may be taken into account are the nature and purpose of the measure, its characterization under national law, the procedures involved in the making and implementation of the measure, and its severity. Applying this test, the European Court has held that the retrospective imposition of a confiscation order following a conviction in respect of drug offences,[207] and the prolongation by twenty months of a term of imprisonment in default ordered by a court pursuant to a law enacted after a drug-related offence was committed,[208] amounted to penalties. Mandatory supervision, however, cannot be considered as equivalent to a penalty, but is rather a measure of social assistance intended to provide for the rehabilitation of the convicted person, in his own interest. The fact that even in the event of remission of the sentence being earned, the person concerned remains subject to supervision after his release and does not regain his unconditional freedom, cannot therefore be characterized as the imposition or reimposition of a penalty incompatible with this right.[209]

Where an enactment creating an offence has been repealed and re-enacted with heavier penalties, an offence committed before the repeal should be punished in accordance with the repealed enactment.[210] But

[207] *Welch* v. *United Kingdom*, European Court, 9 February 1995: this conclusion concerned only the retrospective application of the relevant law and did not call in to question in any respect the powers of confiscation conferred on the courts.

[208] *Jamil* v. *France*, European Court, 8 June 1995.

[209] *A.R.S.* v. *Canada*, Human Rights Committee, Communication No.91/1981, 28 October 1981.

[210] *Buckle* v. *Commissioner of Police*, Supreme Court of Sierra Leone, (1964–6) ALR SL 265. See also *Rao Shiv Bahadur Singh* v. *Vindhya Pradesh*, Supreme Court of India, [1953] SCR 1188: The expression 'law in force' in s. 20(1) of the Constitution of India (which prohibits the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence) means the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law 'deemed' to have become operative by virtue of the power of the legislature to pass retrospective laws; *R* v. *Ali*, Supreme Court of Mauritius, [1989] LRC (Const) 610: A person who arrived in the country's international airport on a Saturday morning carrying a substantial quantity of heroin in his suitcase was charged under the Dangerous Drugs Act 1986 which came into operation on that day by proclamation signed by the governor-general and published that afternoon in an extraordinary edition of the government gazette. That law prescribed the death penalty for the relevant offence, whereas the law which it replaced, the Dangerous Drugs Act 1976, provided a maximum penalty of twenty years' imprisonment.

the prohibition of the imposition of a penalty more severe than that which might have been imposed at the time the offence was committed is not directed to laws which have no retrospective effect but which provide prospectively for different penalties for different categories of offenders. For example, where a law made the cancellation of the driver's licence mandatory with effect from the date of imposition of sentence, and an accused charged with culpable homicide arising out of a traffic accident held a learner's licence at the time of the accident, the court held that the only licence which was in existence at the time of conviction and which the court was obliged to cancel, was the full driver's licence.[211] Similarly, where a new law provided for murder to be classified into capital (for which the mandatory sentence was death) and non-capital murder and required a judge to review the cases of persons convicted of murder and sentenced to death before the law came into force with a view to their classification and redetermination of sentences, the new law was not an *ex post facto* law as it did not increase the punishment or adversely affect the position of a person already convicted of murder and sentenced to death.[212]

In the United States, laws have been construed as imposing additional punishment: (a) where the original statute which allowed the court to impose a sentence less than the maximum term of imprisonment was amended to require the court to impose the maximum sentence upon conviction;[213] (b) where a statute took away parole eligibility for offences which had been subject to parole under the law at the time when they were committed;[214] (c) where a statute requiring that persons sentenced

The Supreme Court held that, notwithstanding the statutory rule of interpretation that an Act comes into operation 'on the expiration of the day before commencement' and the general principle that fractions of a day are disregarded for the application of an Act, the new law was not applicable to the accused since it had not been published when the accused arrived at the airport in the morning with the imported heroin. Even though it was repealed with retrospective effect later that day, it was the 1976 Act which was in force at the precise time the accused arrived in Mauritius.

211 *S* v. *Kalize*, Court of Appeal of Zimbabwe, (1992) *Commonwealth Law Bulletin* 50. In any event, the cancellation of a full driver's licence was not a more severe penalty than the cancellation of a learner's licence, since the effect on the holder was the same.

212 *Huntley* v. *Attorney General*, Privy Council on appeal from the Court of Appeal of Jamaica, [1994] 4 LRC 159.

213 *Lindsay* v. *Washington*, United States Supreme Court, 301 US 397 (1937).

214 *Warden, Lewisburg Penitentiary* v. *Marrero*, United States Supreme Court, 417 US 653 (1974).

to death be placed in solitary confinement awaiting execution was applied to persons who had committed their offences before the effective date of that statute;[215] and (d) where a statute altered the manner in which the death penalty might be carried out by authorizing a prison official to set the time of execution.[216] But a habitual offender statute which increased the punishment for a current offence if the accused had been convicted of one or more previous offences, was not considered to be an *ex post facto* law.[217]

### *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*

The Privy Council examined the application of this right and concluded that (a) where a defendant is convicted of a charge which remains unchanged at the time of sentencing, but which by then has been given lesser penal provisions, the defendant is entitled to the benefit of the new law; (b) where the law existing at the time when the criminal conduct took place has been repealed and replaced by another creating an identical offence but with lesser penalties, the defendant is entitled to the benefit of the lesser penalties; (c) where through changes in the law conduct which was criminal at the time either ceases to be criminal at all, or falls to be assessed within the framework of a reformulated system which has no exact counterpart in the former law, 'logic' demands in the first case that since the law no longer makes any provision for the offence the conviction should stand but should not be visited with any penalty. But in the second case, i.e. where, through changes in the law, conduct which was criminal at the time the offences were committed falls to be assessed within the framework of a reformulated system which has no exact counterpart in the former law, so that the old law was no longer reflected directly in the new law, the question to be determined

[215] *Re Medley*, United States Supreme Court, (1890) 134 US 160; *Holden* v. *Minnesota*, United States Supreme Court, 137 US 483 (1890); *McElvaine* v. *Brush*, United States Supreme Court, 142 US 155 (1891); *Rooney* v. *North Dakota*, United States Supreme Court, 196 US 319 (1905).

[216] *Re Medley*, United States Supreme Court, 134 US 160 (1890).

[217] *McDonald* v. *Massachusetts*, United States Supreme Court, 180 US 311 (1901); *Gryger* v. *Burke*, United States Supreme Court, 334 US 728 (1948).

is what range of sentences would have been open to the court to impose if the defendant had been convicted and sentenced under the new law rather than the old, rather than how the new definition of the offence corresponded with the old.[218]

*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.*

While this paragraph emphasizes the need for juveniles to be tried according to legal provisions that have regard to their age and are designed to promote their rehabilitation, it is assumed that juveniles will enjoy at least the same guarantees and protection as are accorded to adults under this article.[219]

*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.*

A right to compensation may arise in relation to criminal proceedings if either the conviction of a person has been reversed or he 'has been pardoned on the ground that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice'.[220] ECHR 14(6) does not necessarily require an entitlement to retrial.[221]

[219] *Chan Chi-hung* v. *R*, Privy Council on appeal from the Court of Appeal of Hong Kong, [1995] 3 LRC 45.

[220] *Muhonen* v. *Finland*, Human Rights Committee, Communication No.89/1981, HRC 1985 Report, Annex VII.

[221] *L.G.* v. *Mauritius*, Human Rights Committee, Communication No.354/1989, HRC 1991 Report, Annex XI.K, individual opinion of Rosalyn Higgins and Amos Wako.

# 18

# The right to recognition as a person

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

6. Everyone has the right to recognition everywhere as a person before the law.

#### International Covenant on Civil and Political Rights (ICCPR)

16. Everyone shall have the right to recognition everywhere as a person before the law.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

17. Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

#### American Convention on Human Rights (ACHR)

3. Every person has the right to recognition as a person before the law.

#### African Charter on Human and Peoples' Rights (AfCHPR)

5. Every individual shall have the right . . . to the recognition of his legal status.

## Comment

The original draft of ICCPR 16 provided that 'No person shall be deprived of his juridical personality'. But that text was considered to be not

sufficiently clear and precise, particularly because 'deprivation of juridical personality' did not have a well-defined meaning in some systems of law. It was also considered necessary to emphasize that this article referred to human beings and not to 'juridical persons'. Accordingly, it was decided to base the text of ICCPR 16 on UDHR 6.[1]

## Interpretation

### *person before the law*

The expression 'person before the law' is meant to ensure recognition of the legal status of every individual and of his capacity to exercise rights and enter into contractual obligations.[2] It is intended to ensure that every person would be a subject, and not an object, of the law. For example, the issue of identity papers by the state implies recognition as a person.[3] It is not intended to deal with the question of a person's legal capacity to act, which may be restricted for reasons such as minority or infirmity of mind.[4]

It has been suggested that national legislation which considers a person whose brain is still alive to be legally dead may be incompatible with this article. It has also been suggested that similar questions could arise in connection with a declaration that a missing or disappeared person is officially dead, or with an attempt by an oppressive regime to have refugees living abroad or political opponents living underground declared dead.[5]

[1] UN document A/2929, chapter VI, sections 97–8.
[2] UN document A/2929, chapter VI, section 97.
[3] *Darwinia Rosa Monaco de Gallicchio* v. *Argentina*, Human Rights Committee, Communication No.400/1990, HRC 1995 Report, Annex X.B.
[4] UN document A/4625, section 25.
[5] Michael Bogdan, 'Article 6' in Asbjorne Eide *et al.* (ed.), *The Universal Declaration of Human Rights: a Commentary* (Oslo: Scandinavian University Press, 1992), 111.

# 19

# The right to privacy

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

#### International Covenant on Civil and Political Rights (ICCPR)

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.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

5. Every person has the right to the protection of the law against abusive attacks upon his honour, his reputation, and his private and family life.
9. Every person has the right to the inviolability of his home.
10. Every person has the right to the inviolability and transmission of his correspondence.

#### European Convention on Human Rights and Fundamental Freedoms (ECHR)

8. (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### American Convention on Human Rights (ACHR)

11. (1) Everyone has the right to have his honour respected and his dignity recognized.
(2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.
(3) Everyone has the right to the protection of the law against such interference or attacks.

14. (1) Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communication outlet, under such conditions as the law may establish.
(2) The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
(3) For the effective protection of honour and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.

*Related texts:*

Conclusions of the Nordic Conference of Jurists on the Right to Privacy 1967.

## Comment

The right to privacy as an independent and distinctive concept originated in the field of tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognized.[1]

[1] See Warren and Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193; *Olmstead* v. *United States*, United States Supreme Court, 277 US 438 (1928); *New York Times Co.* v.

Elsewhere, in legal systems based on Roman Dutch Law, a right to privacy gained recognition as an independent personality right within the concept of *dignitas*.[2] The constitutional recognition of a right of personal privacy, or more accurately, a guarantee of certain 'zones of privacy', was developed by the courts as an extension of constitutionally guaranteed rights of life, liberty and security of person. For example, the United States Bill of Rights does not explicitly mention a right of privacy, but in a series of decisions the Supreme Court held that that right may be implied from the rights to protection of personal liberty and protection against unreasonable search and seizure.[3] Similarly, in India, the Supreme Court has held that although the right to privacy, as such, had not been identified under the constitution, it was implicit in the right to 'life' and 'personal liberty' guaranteed to the citizens of that country and could not, therefore, be curtailed 'except according to procedure established by law.[4] While the Canadian Charter of Rights and Freedoms 1982 does not specifically provide for the protection of personal privacy, the guarantee of security from unreasonable search and seizure has been held to constitute, in a positive sense, an entitlement to 'a reasonable expectation of privacy'.[5] While the decisions of these courts are helpful in understanding certain attributes of the concept of 'privacy', caution must be exercised to avoid projecting the principles

*Sullivan*, United States Supreme Court, 376 US 254 (1964); *Time Inc* v. *Hill*, United States Supreme Court, 385 US 374 (1967); *Cox Broadcasting Corp.* v. *Cohn*, United States Supreme Court, 420 US 469 (1975).

[2] Examples of wrongful intrusion and disclosure which have been acknowledged are entry into a private residence, reading of private documents, listening in to private conversations, shadowing of a person, disclosure of private facts which have been acquired by a wrongful act of intrusion such as telephone tapping, and disclosure of private facts contrary to the existence of a confidential relationship. See *Bernstein* v. *Bester NO*, Constitutional Court of South Africa, [1966] 4 LRC 528, at 568.

[3] See *Pierce* v. *Society of Sisters*, United States Supreme Court, 268 US 510 (1925): child-rearing and education; *Skinner* v. *Oklahoma*, United States Supreme Court, 316 US 535 (1942): procreation; *Prince* v. *Massachusetts*, United States Supreme Court, 321 US 158 (1944): family relationships; *Griswold* v. *Connecticut*, United States Supreme Court, 381 US 479 (1965): contraception; *Loving* v. *Virginia*, United States Supreme Court, 388 US 1 (1967): marriage; *Eisenstadt* v. *Baird*, United States Supreme Court, 405 US 438 (1972): contraception; *Roe* v. *Wade*, United States Supreme Court, 410 US 113 (1973): termination of pregnancy.

[4] *Kharak Singh* v. *State of Uttar Pradesh*, Supreme Court of India, [1964] 1 SCR 332: surveillance; *Gobind* v. *State of Madya Pradesh*, Supreme Court of India, (1975) 2 SCC 148: surveillance; *Rajagopal* v. *State of Tamil Nadu*, Supreme Court of India, [1995] 3 LRC 566: prior restraint on publication; *People's Union for Civil Liberties* v. *Union of India*, Supreme Court of India, [1999] 2 LRC 1: telephone tapping.

[5] *Hunter* v. *Southam Inc*, Supreme Court of Canada, (1984) 11 DLR ($4^{th}$) 641, at 652.

thus developed on to the interpretation of the fundamental right to privacy.[6]

UDHR 12, which was the first attempt to formulate a right to privacy as a separate fundamental right, distinguishes the concept of 'privacy' (or private life) from a private sphere comprising family, home and correspondence. Accordingly, ICCPR 17, which is based on it, protects 'privacy', 'family', 'home', and 'correspondence' from 'arbitrary' or 'unlawful' interference, and recognizes that everyone has the right to the protection of the law against such interference. ECHR 8 and ACHR 11 prefer the term 'private life' to 'privacy', while the former also substitutes 'family life' for 'family'. The French texts of ICCPR 17 and ECHR 8 both use the expression *vie privée*, suggesting that the terms 'privacy' and 'private life' are interchangeable.[7] ICCPR 17 and ACHR 11 (but not ECHR 8) also protect an individual from 'unlawful attacks' on his 'honour' and 'reputation', and recognize the right to protection of the law against such attacks.

ICCPR 17 requires the state to adopt legislative and other measures not only to protect this right, but also to prohibit any interference or attack, whether emanating from state authorities or from natural or legal persons. Since protection is guaranteed against both 'unlawful' and 'arbitrary' interference, domestic legislation needs to make appropriate provision for that purpose, specifying in detail the precise circumstances in which interference may be permitted. Such provision should include the establishment of competent organs to authorize interference to the extent permitted by law, as well as other organs to ensure that any interference is strictly within the law, and complaint procedures for persons aggrieved by the application of such laws.[8] Although ECHR 8 substitutes

[6] *Bernstein* v. *Bester NO*, Constitutional Court of South Africa, [1996] 4 LRC 528, at 569.

[7] Robertson, A.H., *Human Rights in Europe* (2nd edn Manchester: Manchester University Press 1977), 86, explains that the use of the expression 'private life' in ECHR 8 does not reflect any difference of substance, but rather an attempt to secure concordance between the English and French texts.

[8] Human Rights Committee, General Comment 16 (1988). A proposal made at the drafting stage that ICCPR 17 should be confined to imposing restraints on governmental action and should not deal with acts of private individuals was not accepted. See UN documents A/2929, chapter VI, section 100; and A/4625, section 34. See also *Stubbings* v. *United Kingdom*, European Court, (1966) 23 EHRR 213: the state may be required to adopt measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves; *Police* v. *Georghiades*, Supreme Court of Cyprus, (1983) 2 CLR 33: The rapid development of technology in recent years has created vast dangers for human rights. The right to privacy is at risk from a wide variety of devices, such as electronic acoustics, recordings of

for the requirement of 'protection of the law', the obligation 'to respect', its object is also essentially that of protecting the individual against arbitrary interference by public authorities.[9]

ECHR 8(2) requires any interference by a public authority to be 'in accordance with the law',[10] and 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others'.[11] Although ICCPR 17 does not contain such express limitations, in determining whether an interference is 'arbitrary' it may be appropriate to consider, *inter alia*, democratic necessities such as are listed in that paragraph. Both ICCPR 17 and ECHR 8 may require 'a form of balancing exercise', and the verbal differences 'should not be heavily stressed'.[12]

It has been argued that, while the association of family, home and correspondence suggests that ECHR 8 was designed, primarily at least, to protect the physical framework of personal life: the family from separation, the home from intrusion, and correspondence from being searched or stopped, the right 'goes to inner life as well'.[13] On the other hand, it

conversation – optical, film and photographic – and the computerization and assembly of data by individuals, the state, private institutions and organizations. The right to privacy may be imperilled by the use of any one or more of the aforementioned devices, whether used by the state or anybody else. Therefore, the protection to be effective must extend against everyone.

[9] *Guerra* v. *Italy*, European Court, (1998) 26 EHRR 357: In addition to this negative obligation to abstain from interference, there may be positive obligations inherent in effective 'respect'; *Sheffield and Horsham* v. *United Kingdom*, European Court, (1998) 27 EHRR 163: In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.

[10] The expression 'in accordance with the law' requires, first, that the impugned measure should have a basis in law. It also refers to the quality of the law in question, requiring it to be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, those circumstances need not be foreseeable with absolute certainty, since such certainty might give rise to excessive rigidity, and the law must be able to keep pace with changing circumstances. See *McLeod* v. *United Kingdom*, European Court, (1998) 27 EHRR 493.

[11] The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. See *McLeod* v. *United Kingdom*, European Court, (1998) 27 EHRR 493.

[12] *Fok Lai Ying* v. *Governor-in-Council*, Privy Council on appeal from the Court of Appeal of Hong Kong, [1997] 3 LRC 101.

[13] J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Clarendon Press, 2nd edn, 1987), 211.

has been contended that the main, if not the sole, object and intended sphere of the application of ECHR 8 is the 'domiciliary protection' of the individual, and not the internal, domestic regulation of family relationships.[14] The jurisprudence of the European Court, however, appears to indicate that the concept of privacy is much broader. It extends beyond the definition given by numerous Anglo-Saxon and French authors, namely, the 'right to live as far as one wishes, protected from publicity'. It comprises, to a certain degree, also the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality.[15]

The right to privacy needs to keep pace with technological development. In 1928 Brandeis J foresaw that the progress of science in furnishing governments with the means of 'espionage' could not be expected to stop with wiretapping.[16] The 'vertiginous pace'[17] at which eavesdropping technology has since developed is strikingly encapsulated by Anthony Amsterdam when he suggests that we can only be sure of being free from surveillance today if we retire to our basements, cloak our windows, turn out the lights and remain absolutely quiet.[18] These developments underscore the need for a regular review of domestic legislation on this subject.[19]

It is not always possible to precisely determine whether an alleged infringement of this right ought to be examined with reference to one's 'privacy' (or private life) on the one hand, or the private sphere (i.e. 'family', 'home' or 'correspondence') on the other. For instance, German

[14] *Marckx* v. *Belgium*, European Court, (1979) 2 EHRR 330, per Judge Fitzmaurice: 'He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delayings and confiscation of correspondence; to the planting of listening devices; to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another – in short, the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently.'

[15] See *X* v. *Iceland*, European Commission, Application 6825/75, 5 *Decisions & Reports* 88.

[16] *Olmstead* v. *United States*, United States Supreme Court, 277 US 438 (1928).

[17] See *R* v. *Wong*, Supreme Court of Canada, [1990] 3 SCR 36 at 44, per La Forest J.

[18] Anthony G. Amsterdam, 'Perspectives on the Fourth Amendment' (1974) 58 *Minnesota Law Review* 349 at 402, cited by La Forest J in *R* v. *Wong* [1990] 3 SCR 36 at 45.

[19] *R* v. *Wong*, Supreme Court of Canada, [1990] 3 SCR 36 at 53.

courts have been inclined to treat telephone conversations as being part of 'privacy' rather than of 'correspondence', while in Cyprus conversation has been regarded both as a form of 'communication' and a matter of 'private life'. Moreover, national formulations of this right do not necessarily contain the distinctions which the international and regional instruments make. For example, the Constitution of South Africa includes 'home', and 'communications' within the concept of 'privacy'.[20]

## Interpretation

*No one shall be subjected to arbitrary or unlawful interference*

The term 'unlawful' in ICCPR 17(1) means that no interference may take place except as authorized by law. The law, in turn, must comply with the provisions, aims and objectives of the ICCPR. An interference provided for under the law may yet be 'arbitrary'. 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.[21] The requirement of reasonableness implies that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given

[20] The Constitution of the Republic of South Africa, s.13: 'Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'

[21] Human Rights Committee, General Comment 16 (1988). In the Third Committee, the necessity of retaining both the words 'arbitrary' and 'unlawful' was discussed. It was explained that there could be lawful measures which were nevertheless arbitrary. One representative emphasized that the terms 'arbitrary' and 'unlawful' referred to two different concepts: 'arbitrary' implied abuse of power by public bodies, while 'unlawful' meant action contrary to the law. Another pointed out that 'arbitrary' related to procedure, whereas 'unlawful' related to substance. That representative further suggested that to act in an arbitrary manner meant to act unreasonably where reasonable behaviour was required. Earlier, in the Commission on Human Rights, when it had been proposed that the word 'unreasonable' be added to the words 'arbitrary' and 'unlawful' in qualifying 'interference', it was recalled that when UDHR 12 was adopted, the General Assembly had preferred the term 'arbitrary' to 'unreasonable' as conveying both the notion of illegality and of unreasonableness. See UN document A/4625, section 39. In the Court of Appeal of Hong Kong, Litton JA failed to appreciate the significance of this distinction when he observed that 'in my judgment, the suggestion that the "interference" exercised by an investigator under a law is "arbitrary" is wholly untenable': *Ex parte Lee Kwok-hung* [1994] 1 LRC 150.

case.[22] For example, while a person is entitled to keep his state of health secret, it is reasonable for facts concerning his health to be made known to persons responsible for examining a complaint against the refusal to reimburse medical expenses submitted by him and in support of which those facts were relied on without any request that it should be dealt with anonymously.[23]

### *his privacy*

The notion of privacy, according to the Human Rights Committee, refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.[24] While observing that it is not possible to attempt an exhaustive definition of the notion of 'private life', the European Commission has noted that it would be too restrictive to limit it to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings and the outside world.[25] It also protects the right to take fundamentally personal decisions free from unjustified external interference, provided

[22] *Toonen* v. *Australia*, Human Rights Committee, Communication No.488/1992, HRC 1994 Report, Annex IX.EE: The criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV or of protecting morals; *Canepa* v. *Canada*, Human Rights Committee, Communication No.558/1993, HRC 1997 Report, Annex VI.K: Arbitrariness within the meaning of ICCPR 17 is not confined to procedural arbitrariness (i.e. conformity with procedural safeguards, including a full hearing), but extends to the reasonableness of the interference with a person's rights and its compatibility with the purposes, aims and objectives of the covenant. The separation of a person from his family by means of his expulsion may be regarded as an arbitrary interference with the family if in the circumstances of the case the separation and its effects were disproportionate to the objectives of removal.

[23] *K* v. *Commission of the European Communities*, Decision of the Court of First Instance, European Union, 13 July 1995, Case No.T-176/94, (1995) 2 *Bulletin on Constitutional Case-Law* 240. See also Decision of the Supreme Court of the Netherlands, 20 October 1995, Case No.8648, *Rechtspraak van de Week*, 1995, 210, (1995) 2 *Bulletin on Constitutional Case-Law* 326: the recording of accurate facts in a register of births, deaths and marriages is not an infringement of this right.

[24] *Coeriel and Aurik* v. *Netherlands*, Human Rights Committee, Communication No.453/1991, HRC 1995 Report, Annex X.D.

[25] *Niemietz* v. *Germany*, European Court, (1992) 16 EHRR 97; *Friedl* v. *Austria*, European Commission, (1995) 21 EHRR 83, at 85–95.

those choices are of a fundamentally private and inherently personal nature.[26] 'Privacy' is regarded as fundamental because of the protection it affords to the individuality of the person on the one hand, and the space it offers for the development of his personality on the other. An individual is entitled to function autonomously in his private life, and 'privacy' is aimed to shield him in this area from public gaze.[27] What it seeks to recognize is 'a zone of isolation, a legal cloister for those qualities, wishes, projects, and life styles which each individual man, woman, or child wishes to enjoy or experience'.[28]

The Constitutional Court of South Africa has described the right to privacy as not merely a negative right to occupy a private place free from governmental intrusion, but a person's right to 'get on with his life, express his personality and make fundamental decisions about intimate relationships without being penalised'. Accordingly, the positive aspects of the right to privacy suggest at least some responsibility on the state to promote conditions in which personal self-realization is able to take place. What is crucial is the nature of the activity in respect of which the right to privacy is invoked, not its site.[29] The court has also cautioned that the scope of 'privacy' is closely related to the concept of identity and is not based on a notion of the unencumbered self but on the notion of what is necessary to have one's own autonomous identity. Since no right is absolute it is implied that each right is limited by every other right accruing to another. In the context of privacy it means that only the inner sanctum of a person, such as his or her family life, sexual preference and home environment, is shielded from erosion by conflicting rights of the community. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly. The court noted that there was no authority for the notion that the right to privacy extends beyond the private sphere of an individual's existence. 'Beyond this the scope of a person's right to privacy extends only to those aspects in regard to which a legitimate expectation of privacy can

[26] *Godbout* v. *City of Longueuil*, Supreme Court of Canada, [1998] 2 LRC 333.

[27] *Police* v. *Georghiades*, Supreme Court of Cyprus, (1983) 2 CLR 33, at 54, per Pikis J.

[28] Fernando Volio, 'Legal Personality, Privacy and the Family' in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1983), 185, at 190.

[29] *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*, Constitutional Court of South Africa, [1998] 3 LRC 648.

be harboured. In each particular situation an assessment has to be made as to whether the public's interest to be left alone by government has to give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement'.[30] However, the European Court has held that, for instance, in respect of telephone conversations, both private and business premises are equally protected.[31]

## Personal information

The competent public authorities may call for only such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the ICCPR.[32] A common example is the legally and factually accurate information required for inclusion in registers of births, deaths and marriages.[33] Information relating to the affairs of a company, whether held by its directors or officers or by its auditors or debtors, is not protected.[34] Nor is the right

[30] *Bernstein* v. *Bester NO*, Constitutional Court of South Africa, [1996] 4 LRC 528, per Ackermann J. See also Human Rights Committee, General Comment 16 (1988): As all persons live in society, the protection of privacy is necessarily relative; *Schreiber* v. *Canada*, Supreme Court of Canada, [1998] 4 LRC 136: The degree of privacy which the law protects is closely linked to the effect that a breach of that privacy would have on the freedom and dignity of the individual. Hence, a person is entitled to an extremely high expectation of privacy in relation to his or her bodily integrity, or residence, and entitled to a much lesser expectation in relation to a vehicle in which he or she is merely a passenger, or an apartment to which he or she is a visitor.

[31] *Amann* v. *Switzerland*, European Court, (2000) 30 EHRR 843.

[32] Human Rights Committee, General Comment 16 (1988). Cf. Constitutional Court of Hungary, Decision No.46/1995, 30 June 1995, *Magyar Kozlony*, no.56/1995, (1995) 2 *Bulletin on Constitutional Case-Law* 168: The universal personal identification number (PIN) conflicts with the right to self-determination of information and implies a direct and significant restriction on the basic rights protecting personal data.

[33] Supreme Court of the Netherlands, Decision No.8648, 20 October 1995, *Rechtspraak van de Week*, 1995, 210, (1995) 3 *Bulletin on Constitutional Case-Law* 326. See *X* v. *United Kingdom*, European Commission, Application 9702/82, (1983) 30 *Decisions & Reports* 239; and *X* v. *Belgium*, European Commission, Application 9804/82, (1982) 31 *Decisions & Reports* 231: Although the obligation of a householder to complete a census form, and the request of a tax authority to produce for inspection a statement of a person's private expenditures, were interferences with private life, they were justified as being necessary for the economic well-being of the country, having regard to the precautions taken to ensure the confidentiality of the information thus collected.

[34] *Bernstein* v. *Bester NO*, Constitutional Court of South Africa, [1996] 4 LRC 528: A company is an artificial person with no mind or other senses of its own; it depends entirely on the knowledge, senses and mental powers of humans for all its activities. The establishment of a

to privacy infringed when members of parliament are required by law to disclose their income, property and business interests.[35] The compilation and keeping of anthropometric data is permissible only if there is an adequate legal basis for so doing, if such acts are in the public interest, and if the proportionality principle is observed.[36]

The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals 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 by law to receive, process and use it, and is never used for purposes incompatible with the covenant.[37] This requirement has been applied to information relating to personal status and relations acquired by law enforcement officers;[38] banking records, since these reveal personal details about an individual including financial status and intimate life choices;[39] facts relating to one's physical condition, health or

company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute, will have concomitant responsibilities, including the statutory obligation of proper disclosure and accountability to shareholders. It cannot therefore be said that in relation to such information a reasonable expectation of privacy exists. The same applies to the auditors and the debtors of the company.

[35] Constitutional Court of Hungary, Decision No.30/1997, 29 April 1997, *Magyar Kozlony*, no.37/1997, (1997) 1 *Bulletin on Constitutional Case-Law* 53; Constitutional Court of Portugal, Case 470/96, 14 March 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 65.

[36] *S* v. *Ausgleichskasse der Schweizer Maschinenindustrie*, Decision of the Federal Court of Switzerland, 24 March 1994, Case No.1336/93, ATF 120 V 150, (1994) 3 *Bulletin on Constitutional Case-Law* 292: Where a robbery suspect has been released from custody and no suspicion remained which would have justified the keeping of personal data relating to her, the proportionality principle was not observed.

[37] Human Rights Committee, General Comment 16 (1988).

[38] Constitutional Court of Slovenia, Decision U-1–139/94, 30 January 1997, *Odlocbe in sklepi Ustavnega sodisca*, VI.1997, (1997) 1 *Bulletin on Constitutional Case-Law* 87: the use of such information in performing the work of a private detective infringes the right to privacy.

[39] *Schreiber* v. *Canada*, Supreme Court of Canada, [1998] 4 LRC 136: Although triggered by a request from the department of justice, a search carried out by foreign authorities, in a foreign country, in accordance with foreign law, was held not to infringe a person's reasonable expectation of privacy. Cf. dissenting opinion of Iacobucci J: the focus of the right to privacy is the impact of an unreasonable search or seizure on the individual, and it matters not where the search or seizure takes place. See also Decision of the Constitutional Court of Portugal, 31 May 1995, Case No.278/95, *Diario da Republica* (Serie II) of 28 July

personality;[40] and confidential information about a person, including his or her education, marital status, state of health, date and place of birth and property status.[41] Respecting the confidentiality of medical data is crucial not only to respect the privacy of the patient, but also to preserve his or her confidence in the medical profession and in the health service in general.[42] It is incompatible with respect for this right for the contents of a psychiatric report to be used, without permission, for a purpose other than that for which it was prepared.[43] Even

1995, (1995) 2 *Bulletin on Constitutional Case-Law* 185: restrictions on bank secrecy must be authorized by law and must comply with the proportionality principle.

[40] See Supreme Court of the Netherlands, Decision No.8870, 28 February 1997, *Rechtspraak van de* Week, 1997, 59, (1997) 2 *Bulletin on Constitutional Case-Law* 222: a sex change constitutes sensitive information, and it should not be possible to infer it from other information that is not in itself of a sensitive nature; Van *Oosterwijck* v. *Belgium*, European Commission, (1979) 3 EHRR 581. Disclosure or improper discovery might occur, for example, if the law were to require a person, who on undergoing hormone and surgical treatment has taken on the appearance and the characteristics of a sex different to that which appeared on his birth certificate, to carry identity documents which were manifestly incompatible with his appearance. Cf. *Metropolitaine (La), compagnie d'assurance-vie* v. *Frenette*, Supreme Court of Canada, (1992) 134 NR 169: Where a person who had obtained an insurance policy on his life, and in doing so had signed a standard form authorizing the insurance company to have access to his medical records for the purpose of risk assessment and loss analysis, died probably by asphyxiation due to drowning, the insurance company was entitled to have access to those records in the course of an investigation into the validity of a claim for supplementary indemnity for accidental death. The insured had waived the professional secrecy attaching to the medical records. See also *K* v. *Commission of the European Communities*, European Union, Court of First Instance, T-176/94, 13 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 240.

[41] Constitutional Court of Ukraine, Decision 5-ZP/18/203/-97, 30 October 1997, *Ophitsiynyi Visayk Ukrayiny*, (1997) 3 *Bulletin on Constitutional Case-Law* 456. See Constitutional Court of Hungary, Decision No.12/1996, 22 March 1996, *Magyar Koslony*, no.32/1996, (1996) 1 *Bulletin on Constitutional Case-Law* 37: to require applicants for admission to higher educational institutions to present a document certifying the lack of a criminal record violates their right to privacy.

[42] *Z* v. *Finland*, European Court, (1997) 25 EHRR 371: These considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection. Although the interests of a patient and the community as a whole in protecting confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings, (i) an order to make the transcripts of evidence given by medical advisers and medical records accessible to the public after ten years did not correspond to the wishes or interests of the litigants in the proceedings, all of whom had requested a longer period of confidentiality, and was not supported by reasons which could be considered sufficient to override the patient's interest in the data remaining confidential for a longer period, and therefore amounted to a disproportionate interference with ECHR 8, and (ii) the disclosure of the patient's identity in the judgment was not supported by cogent reasons.

[43] Supreme Court of the Netherlands, Decision No.101558, 9 January 1996, *Delikt en Delinjwent*, 96.159, (1996) 1 *Bulletin on Constitutional Case-Law* 52: a request by an accused that

a medical consultation is an intrinsically private matter and its conduct in an atmosphere of privacy is essential for the effectiveness of the examination.[44]

To secure the most effective protection of one's 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. An individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his files.[45] In certain circumstances, a person may wish to obtain personal data from his or her files. For example, where a person had been taken into care at a very young age and subsequently had very little contact with his natural family, or continuity of care from a substitute family, and the file compiled and maintained by the local authority provided the only coherent record of his early childhood and formative years, the refusal to allow that person access to the file was an interference with his private life. Respect for private life requires that a person should be able to establish details of his identity as an individual human being, especially in relation to a period when he was particularly vulnerable as a young child and in respect of which personal memories cannot provide a reliable or adequate source of information.[46] Respect for private life also requires that when a government engages in hazardous activities, such as a nuclear test programme, which might have hidden adverse

psychiatric reports on two witnesses which had been prepared for use in their own criminal cases be made available for incorporation in his case file.

[44] *Police* v. *Georghiades*, Supreme Court of Cyprus, (1983) 2 CLR 33: Where a psychologist was charged with perjury, evidence of a conversation between the accused and his client that was overheard by the use of an electronic listening and recording device which had previously been installed by the client's lawyer in the room where the consultation was due to take place was inadmissible. See also *X* v. *Norway*, European Commission, Application 7945/77, (1978) 14 *Decisions & Reports* 228: unauthorized disclosure to third persons of information contained in a person's criminal record.

[45] Human Rights Committee, General Comment 16 (1988).

[46] *Gaskin* v. *United Kingdom*, European Court, (1989) 12 EHRR 36; European Commission, (1987) 11 EHRR 402. The records contained information of where the applicant lived from time to time when in care together with a large variety of other material submitted by a number of contributors concerning the applicant's health, education, criminal records and, generally, his past. During the applicant's minority while he was in care, the file was available to be referred to and contributed to by all those who were involved in his care and upbringing. In this respect the file provided a substitute record for the memories and experience of the parents of a child who is not in care. However, the refusal to provide a person *complete* access to his case records could not be said to have 'interfered' with his private life since part of the information had been received in confidence and maintaining that confidentiality was necessary for the protection of third persons.

consequences for the health of those involved in such activities, an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information which could either allay their fears or enable them to assess the danger to which they had been exposed.[47]

If any files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual has the right to request rectification or elimination.[48] Accordingly, the refusal to allow a person an opportunity to refute information relating to his private life stored in a secret police register may constitute an interference with his right to privacy.[49]

## Search and surveillance

Personal and body search are necessary elements in criminal investigation. However, 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 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.[50] A strip search conducted in a public place is unreasonable.[51]

In the absence of any special circumstances, video surveillance is not incompatible with this right.[52] But where the police installed a video camera without prior judicial authorization and monitored the activities in a hotel room in the course of an investigation of a 'floating' gaming house, the right to privacy was violated.[53] Garbage bags placed out on

[47] *McGinley* v. *United Kingdom*, European Court, (1998) 27 EHRR 1.

[48] Human Rights Committee, General Comment 16 (1988).

[49] *Leander* v. *Sweden*, European Court, (1987) 9 EHRR 433; European Commission, (1985) 7 EHRR 557. Where a person who had been refused permanent employment as a technician with the Swedish Naval Museum on account of certain secret information which allegedly made him a security risk argued that the vetting had involved an attack on his reputation and that he should have had the opportunity of defending himself before a tribunal, it was held that the collection, recording, and release of information under Swedish law had the legitimate aim of protecting national security, and that adequate and effective safeguards against abuse existed.

[50] Human Rights Committee, General Comment 16 (1988).

[51] *R* v. *Pratt*, Court of Appeal, New Zealand, [1994] 1 LRC 333.

[52] Supreme Court of the Netherlands, Decision 99.663, 6 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 179.

[53] *R* v. *Wong*, Supreme Court of Canada, [1990] 3 SCR 36:'It is safe to presume that a multitude of functions open to invited persons are held every week in hotel rooms across the country.

the street to be collected are not subject to rules governing the protection of privacy, and may therefore be searched by the police.[54]

While reasonable surveillance and supervision of vehicles and their drivers is essential for the safety and well-being of society, and the individual has a diminished expectation of privacy in respect of his automobile,[55] the installation of a tracking device (i.e. a beeper[56]) in, and the monitoring thereby of, a car violates the right to privacy. An automobile is so central to one's daily life that the interior of the vehicle becomes an area meriting protection against state intrusion.[57] But it is not an infringement of privacy for a police officer to open an unlocked door of a car parked in a public thoroughfare in order to speak to the car's occupant.[58]

## Human relationships

The concept of privacy recognizes that an individual has a right to a sphere of private intimacy and autonomy which allows him or her to establish and nurture human relationships without interference. The way in which one gives expression to sexuality is at the core of this area of

These meetings will attract persons who share a common interest but who will often be strangers to each other. Clearly, persons who attend such meetings cannot expect their presence to go unnoticed by those in attendance. But, by the same token, it is no part of the reasonable expectations of those who hold or attend such gatherings that as a price of doing so they must tacitly consent to allowing agents of the state unfettered discretion to make a permanent electronic recording of the proceedings', per La Forest J. See also *R* v. *Sanelli, Duarte and Fasciano*, Supreme Court of Canada, [1990] 1 SCR 30; *R* v. *Kokesch*, Supreme Court of Canada, [1990] 3 SCR 3; Supreme Court of the Netherlands, Case No.101094, 19 March 1996, *Delikt en Delinkwent*, 96.251, (1996) 1 *Bulletin on Constitutional Case Law* 54: Covert and continuous surveillance, using a video camera and monitor, of a suspect who has been confined in a police cell for questioning, without his being able to take account of the possibility that he is under surveillance, constitutes a violation of the suspect's privacy.

[54] Supreme Court of the Netherlands, Decision No.101269, 19 December 1995, *Nederlandse Jurisprudentie*, 1996, 249, (1996) 1 *Bulletin on Constitutional Case-Law* 50.

[55] *R* v. *Belnavis*, Supreme Court of Canada, [1997] 4 LRC 302.

[56] A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.

[57] *R* v. *Wise*, Supreme Court of Canada, (1992) 133 NR 161, per La Forest J. In this case, the police were seeking to track the movements of a person who was the prime suspect in several homicides in the rural area in which he lived.

[58] Supreme Court of the Netherlands, Decision No.102009, 19 March 1996, *Delikt en Delinkwent*, 96.256, (1996) 1 *Bulletin on Constitutional Case-Law* 55: upon opening the door, the officer saw that the man seated at the steering-wheel was using narcotics.

private intimacy. 'If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy'.[59] Accordingly, the continued existence of provisions in a criminal code which criminalize private homosexual behaviour 'continuously and directly' interferes with privacy, even if those provisions have not been enforced for a decade.[60] Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, 'this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved'.[61]

Not every sexual activity carried out in private necessarily falls within the scope of 'privacy' since the concept of privacy does not give blanket libertarian permission for people to do anything they wanted, however bizarre and shameful, provided it is done in private. The law may continue to proscribe acts, such as inter-generational, intra-familial and cross-species sex and sex involving violence, deception, voyeurism, intrusion or harassment where the privacy interest is overcome because of the perceived harm. Respect for personal privacy does not require disrespect for social standards, and provided whatever limits are established do not offend the guaranteed right, the law may continue to prescribe what is acceptable and unacceptable in relation to sexual expression even in the sanctum of the home, and may within justifiable limits, penalize what is harmful and regulate what is offensive. The choice is not one

[59] *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*, Constitutional Court of South Africa, [1998] 3 LRC 648, per Sachs J.

[60] *Toonen* v. *Australia*, Human Rights Committee, Communication No.488/1992, HRC 1994 Report, Annex IX.EE. See *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*, Constitutional Court of South Africa, [1998] 3 LRC 648: 'What was really being punished by the anti-sodomy laws (Sexual Offences Act 1957, s.20A: an act between males which is calculated to stimulate sexual passion or give sexual gratification) was deviant conduct simply because it was deviant and not because it was violent, dishonest, treacherous or in some way disturbed the public peace or provoked injury. Moreover, the repression was for its perceived symbolism rather than because of its proven harm. The effect was that all homosexual desire was tainted and the whole gay and lesbian community was marked with deviance and perversity', per Sachs J. See also *X and Y* v. *United Kingdom*, European Commission, Application 9369/81, (1983) 32 *Decisions and Reports* 220; *Dudgeon* v. *United Kingdom*, European Court (1981) 4 EHRR 149. See also European Commission, (1980) 3 EHRR 40. *B* v. *United Kingdom*, European Commission, Application 9237/81, 34 *Decisions & Reports* 68.

[61] *Norris* v. *Ireland*, European Court (1988) 13 EHRR 186. See also *Modinos* v. *Cyprus*, European Court, (1993) 16 EHRR 485.

between 'maintaining a spartan normality' at the one extreme, or entering what has been called the 'post-modern supermarket of satisfactions' at the other.[62]

While pregnancy and its termination are not solely a matter of the private life of the mother,[63] the determination of a person's legal relationship with a child concerns his private life.[64] Measures taken in the field of education which are intended to disturb, or have the effect of disturbing, private life in an unjustified manner, particularly by removing children arbitrarily from their parents, may also come within this concept. But a right to an education in the parents' language provided by, or with the help of, the public authorities is not guaranteed.[65]

[62] *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*, Constitutional Court of South Africa, [1998] 3 LRC 648, per Sachs J. See *Laskey, Jaggard and Brown* v. *United Kingdom*, European Court, (1997) 24 EHRR 39: Where members of a group of homosexual men took part in sadomasochistic activities, involving maltreatment of the genitals, ritualistic beatings and branding, they were liable to be prosecuted under the Offences against the Person Act for causing bodily harm and wounding. The fact that the activities were consensual, and took place in private between men of full age, or that the infliction of pain was subject to certain rules, including the use of a code word to call a halt to any activity, or that no permanent injury or infection was caused, was irrelevant. The determination of the level of harm that the law should tolerate is a matter for the state in the first instance, since what is at stake is a balancing act between public health considerations and the deterrent effect of the criminal law, and the personal autonomy of the individual.

[63] *Brüggemann and Scheuten* v. *Germany*, European Commission, (1977) 3 EHRR 244: When a woman is pregnant, her private life becomes closely connected with the developing foetus. See *Roe* v. *Wade*, United States Supreme Court, 410 US 113 (1965): a woman's constitutional right to privacy is broad enough to include the decision to terminate her pregnancy. This right to abortion is a qualified one that must be balanced against competing state interests, namely maternal health and foetal life.

[64] *Rasmussen* v. *Denmark*, European Court, (1984) 7 EHRR 371: But a statutory rule imposing a time limit for a husband to contest his paternity of a child born during the marriage, in circumstances where his former wife was entitled to institute paternity proceedings at any time, was for a justifiable aim, namely, the desire to ensure legal certainty and to protect the interests of the child. The difference of treatment established on this point between husbands and wives was based on the notion that such time limits were less necessary for wives than for husbands since the mother's interests usually coincided with those of the child, she being awarded custody in most cases of divorce or separation. See also *X* v. *Switzerland*, European Commission, Application 8257/78, (1978) 13 *Decisions & Reports* 248: A relationship may exist where, even in the absence of any legal tie by blood or marriage, a person has cared for a child for many years and is deeply attached to him.

[65] *Inhabitants of Les Fourons* v. *Belgium*, European Commission, 30 March 1971. Therefore, the Belgian government's refusal to establish or subsidize French schools in the Les Fouron area was not a violation of this right. If French-speaking parents consequently decided to send their children to schools some distance away from their homes, that decision was of their own choosing. It was not imposed upon them by the legislature.

The right to privacy does not extend to relationships of the individual with his entire immediate surroundings, in so far as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationships within the private sphere. For example, the right to keep a dog does not pertain to the sphere of private life of the owner because the keeping of a dog is by the very nature of that animal necessarily associated with a certain degree of interference with the lives of others and even with public life.[66] But considerable noise nuisance can affect the physical well-being of a person and thus interfere with his private life.[67]

While detention is by its very nature a limitation on private life, it is an essential part of both private life and the rehabilitation of prisoners that their contact with the outside world be maintained as far as practicable, in order to facilitate their integration in society on release. This is effected, for example, by providing visiting facilities for the prisoners' friends and by allowing correspondence with them and others. However, since visiting facilities create a heavy administrative and security burden for prison administration, it is not feasible to require that prisons provide unlimited visiting facilities. A general limitation, with certain exceptions, to visits from relatives and close friends, appears, therefore, to be reasonable.[68]

## Physical and moral integrity

Private life is a concept that covers the physical, moral and psychological integrity of the person.[69] Accordingly, in the absence of statutory authority, the police may lawfully take blood and hair samples from a suspect only with the latter's consent. For such consent to be valid, it has to be an informed consent.[70] But a court order for an analysis of a

[66] *X* v. *Iceland*, European Commission, Application 6825/75, (1976) 5 *Decisions & Reports* 88. At issue was the validity of a regulation made by the Reykjavik town council which provided that 'The keeping of dogs is not permitted with the exception of needful dogs in connection with farming at a legally established farm and shall be subject to supervision by the public health board.'

[67] *Baggs* v. *United Kingdom*, European Commission, (1985) 9 EHHR 235; *Powell* v. *United Kingdom*, European Commission, (1985) 9 EHRR 241; *Rayner* v. *United Kingdom*, European Commission, (1986) 9 EHRR 375.

[68] *X* v. *United Kingdom*, European Commission, Application 9054/80, (1982) 30 *Decisions & Reports* 113.

[69] *Botta* v. *Italy*, European Court, (1998) 26 EHRR 241.

[70] *R* v. *Arp*, Supreme Court of Canada, [2000] 2 LRC 119. See also *D* v. *K*, Supreme Court of South Africa (Natal Provincial Division), [1999] 1 LRC 308: The taking of a blood sample

suspect's hair to establish whether he had consumed cocaine and if so, for how long, and which required a forensic medical expert to remove hair from several regions of the head and body, infringed the suspect's right to privacy.[71] An order authorizing a doctor to give a psychiatric expert opinion of a person interferes with the right to protection of the private life of that person, regardless of whether the expert opinion is obtained by way of a voluntary or enforced personal examination or by an examination of documentary evidence only.[72] But where in the course of disciplinary proceedings against a lawyer, the circumstances gave rise to well-founded doubts as to his mental state, a psychiatric examination was necessary both for the prevention of disorder and the protection of the rights and freedoms of others.[73] A voluntary vaccination scheme which is designed to protect the health of society and which is subject to a proper system of control to minimize the risks involved, does not interfere with this right.[74]

Sexual abuse is a grave form of interference with the essential aspects of a person's private life. Children and other vulnerable persons are accorded protection by the state through the application of the criminal law.[75] Where, in respect of a sexual assault committed on a mentally handicapped person, the criminal code required a complaint by the actual victim before criminal proceedings could be instituted against the alleged suspect, and therefore no prosecution was instituted following a complaint made by the father on behalf of his sixteen-year old mentally defective daughter, the state had failed to provide

to either establish or disprove paternity is an intrusion on privacy. Cf. Constitutional Court of Spain, Case No.7/1994, 17 January 1994, *Boletin Oficial del Estado* of 17 February 1994, (1994) 1 *Bulletin on Constitutional Case-Law* 59.

[71] Constitutional Court of Spain, Decision No.207/1996, 16 December 1996, *Boletin Oficial del Estado* no.19 of 22.01.1997, 12–71, (1996) 3 *Bulletin on Constitutional Case-Law* 425.

[72] *X* v. *Germany*, European Commission, Application 9687/82, (1983) 5 EHRR 511.

[73] *Wain* v. *United Kingdom*, European Commission. See also *Vernonia School District 47J* v. *Acton*, United States Supreme Court, 26 June 1995, summarized in (1995) 2 *Bulletin on Constitutional Case-Law* 226: a compulsory drug testing programme for students who participate in interscholastic athletics did not violate the protection against unreasonable searrches and seizures.

[74] *Association X* v. *United Kingdom*, European Commission, Application 7154/75, (1978) 14 *Decisions & Reports* 31.

[75] *Stubbings* v. *United Kingdom*, European Court, (1996) 23 EHRR 213: ECHR 8 does not necessarily require the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation.

practical and effective protection for the private life of that handicapped person.[76]

### *Personal identification*

As a means of personal identification and of linking to a family, a person's name concerns his private life. A person's surname, in particular, constitutes an important component of their identity, and the protection against arbitrary or unlawful interference extends to the right to choose and change one's own name. The European Court considers it to be a question of fact whether the refusal to recognize a change of surname is beyond the threshold of permissible interference.[77] For example, where the authorities refused to permit a married couple to use the wife's surname as the family name, they were in breach of ECHR 8.[78] The Human Rights Committee considers that a request to have one's change of name recognized can only be refused on grounds that are reasonable in the specific circumstances of the case.[79] Accordingly, when two persons of Dutch origin wished to change their surnames into Hindu names in order to study and practise the Hindu religion and become Hindu priests, the rejection of their request on the grounds that they had not shown that the changes sought were essential to pursue their studies; that the names had religious connotations; and that they were not 'Dutch sounding' were found not to be reasonable.[80]

[76] *X and Y* v. *Netherlands*, European Court, (1985) 8 EHRR 235.

[77] *Stjerna* v. *Finland*, European Court, 25 November 1994. Where a Finnish national living in Finland sought permission to change his surname 'Stjerna' to 'Tawaststjerna' (a surname borne by a paternal ancestor some 160 years previously), arguing that his current surname was an old and uncommon Swedish name which was exceptionally difficult for a non-Swedish-speaking Finnish person to spell and pronounce; that his mail was delayed as a result of his name being misspelt; and that the name had given rise to a pejorative nickname 'kirnn' meaning 'churn', the sources of inconvenience complained of were found not sufficient to raise an issue of failure to respect private life.

[78] *Burghartz* v. *Switzerland*, European Court, (1994) 18 EHRR 101.

[79] *Coeriel and Aurik* v. *Netherlands*, Human Rights Committee, Communication No.453/1991, HRC 1995 Report, Annex X.D.

[80] *Coeriel and Aurik* v. *Netherlands*, Human Rights Committee, Communication No.453/1991, 31 October 1994. In a dissenting opinion, Nisuke Ando observed that a family name did not belong to an individual person *alone*, whose privacy is protected under Article 17. In the Western society a family name might be regarded only as an element to ascertain one's identity, thus replaceable with other means of identification such as a number or a cipher. However, in other parts of the world, names had a variety of social, historical and cultural implications, and people did attach certain values to their names. This was particularly true with family names. Thus, if a member of a family changed his or her family name, it was

While an absolute right to anonymity cannot be inferred from the right to privacy, a person seeking to protect his anonymity and prevent his picture being taken and disseminated is entitled to legal protection.[81] A person has a right to his or her image. It follows that this right is infringed as soon as one's image is published without consent and enables such person to be identified. However, this right has to be balanced against the right to freedom of expression, an exercise which depends on the nature of the information, the situation of those concerned, and the context of the particular case at issue.[82] In certain circumstances, the public's right to information, supported by freedom of expression, may be conclusive in limiting the right to privacy: with regard to certain aspects of the private life of a person engaged in a public activity or one who had acquired a certain notoriety, or where a person, albeit unwittingly, places himself or herself incidentally in a photograph of a crowd at a sporting event or a demonstration or in a public place.[83]

In the case of a person who has undergone a sex change through hormone and surgical treatment, it is the responsibility of the national authorities to devise the legal measures necessary to provide identity documents consistent with the adopted identity without revealing the

likely to affect other members of the family as well as values attached thereto. Therefore, it was difficult for him to conclude that the family name of a person belonged to the exclusive sphere of privacy which is protected under ICCPR 17. See also Constitutional Court of Croatia, Decision U-III-938/1995, 3 April 1996, *Narodne novine*, 30/1996, 1175–79, (1996) 1 *Bulletin on Constitutional Case-Law* 20: The legislature may impose upon change of name only such restrictions as are authorized generally for restricting rights and freedoms, such as to protect public order, morals or health, or to protect the rights and freedoms of others. Accordingly, the grounds on which an administrative body had refused permission to change a name and surname, namely that the request was 'uncustomary in the region in which he lived, that it was contrary to the orthography of the Croatian language, and that his reasons for the proposed name were subjective in character' were rejected.

[81] Decision of the Constitutional Court of Spain, 11 April 1994, *Boletin Oficial del Estado* of 17 May 1994, (1994) 2 *Bulletin on Constitutional Case-Law* 163.

[82] *Aubry* v. *Duclos*, Supreme Court of Canada, [1998] 4 LRC 1: The artistic expression of the photograph which was alleged to have served to illustrate contemporary urban life, could not justify the infringement of the right to privacy which it entailed. It had not been shown that the public's interest in seeing the photograph was predominant. Therefore, the respondent's right to protection of her image was more important than the appellant's right to publish the photograph without her prior permission. See also Supreme Court of the Netherlands, Decision No.16246, 2 May 1997, *Rechtspraak van de Week*, 1997, 117, (1997) 2 *Bulletin on Constitutional Case-Law* 226: the use for commercial advertising purposes of a person's portrait without that person's consent infringes the right to privacy.

[83] *Aubry* v. *Duclos*, Supreme Court of Canada, [1998] 4 LRC 1.

true biological sex of the person concerned. Where the birth certificate correctly described a person as being of the male sex, to require that entry to be altered to record that he was born a member of the biological female sex would be to falsify a correct historical record. But when such person is psychologically self-identified with the female sex and that condition had existed since childhood and had grown more pronounced with age, and had ultimately led him to undergo 'sex-change' surgery necessitated by psychological imperatives rather than medical ones, he has adopted a new 'gender identity' and is now, to all outward appearances, a female. The new identity must be recognized in law as an essential element of the privacy of her new life style, free from interference by the state and its agencies and public authorities.[84]

## Personal choices

The right to privacy contemplates the right to remove one's private life from public view. In a society that respects freedom, one cannot be obliged to reveal pastimes, reading, eating or drinking habits or where one spends the night, unless there is some compelling reason. Even when these matters are not kept secret and through circumstances are made known to a limited number of people, the individual may decide whom to inform and how much to inform them. This applies even to the most mundane private life. The essence of privacy is that it is not subject to

[84] *B* v. *France*, European Court, (1992) 16 EHRR 1. See the concurring judgment of Judge Walsh. Under French law, events that take place during the lives of individuals and affect their status give rise to a marginal note on the birth certificate or are transcribed onto the certificate: acknowledgement of an illegitimate child, adoption, marriage, divorce, and death. Where the French authorities refused to rectify the statement as to sex in the case of a male transsexual who, through hormone and surgical treatment, had attained the appearance of the female sex, the transsexual found herself in a situation which was not compatible with the respect due to her private life. The court distinguished its judgments in *Cossey* v. *United Kingdom* (1990) 13 EHRR 622, and *Rees* v. *United Kingdom* (1986) 9 EHRR 56, where it had held that the refusal to alter the register of births or issue a new birth certificate could not be considered an interference with the private life of a transsexual. In England and Wales the birth certificate was a document revealing not current identity but historical facts. Civil status certificates or equivalent current identity documents were not in use or required in the United Kingdom, and where identification was needed, this was normally met by the production of a driving licence or a passport. These documents could be issued in the adopted names of the persons in question with a minimum of formality and, in the case of transsexuals, they would in all respects be consistent with the new identity. See also *Sheffield and Horsham* v. *United Kingdom*, European Court, (1988) 27 EHRR 163 Cf. Reports of the European Commission in *Van Oosterwijck* v. *Belgium*, 1 March 1979: (1979) 3 EHRR 581; and *Rees* v. *United Kingdom*, (1984) 7 EHRR 429.

public evaluation and needs no particular reason to justify it being kept secret. Accordingly, renting video cassettes for home viewing is a feature of private life. The right to privacy is violated when this is subjected to state or public control or supervision.[85] A statutory provision prohibiting the possession of indecent or obscene photographic material is also an infringement of the right to privacy.[86]

The right to privacy is guaranteed not only behind closed doors but also in public places; its essence is to prevent the state from imposing on individuals restrictions that are not absolutely necessary. Accordingly, a law which prohibited the consumption of all drinks containing more than 0.75 per cent of alcohol in public places infringed the right to privacy. A law designed to protect the public peace by prohibiting alcoholism, smoking and other forms of toxicomania, must be distinguished from a law which prohibited an activity without reference to individual conduct or to any real participation in a breach of public peace.[87]

Not every law that has some immediate or remote effect on an individual's personality, by preventing him from doing what he would like to do or requiring him to do something he would rather not do, can be considered to constitute an interference with his private life. For example, the obligation to use subways in railway stations or pedestrian crossings on public highways and numerous other measures of individual or collective protection adopted in the public interest in no way affect a person's private life. Nor does the obligation for the driver and front-seat passenger of a motor vehicle to wear a safety belt.[88]

The claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests. Therefore, the subsequent communication of statements made in the course of public proceedings,[89] or the taking of photographs of a person

[85] Decision of the Constitutional Court of Austria, 14 March 1991, G 148–150/90.

[86] *Case* v. *Ministry of Safety and Security, Curtis* v. *Ministry of Safety and Security*, Constitutional Court of South Africa, 9 May 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 85.

[87] Constitutional Court of the Slovak Republic, Decision II.US 94/95, 13 December 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 347.

[88] *X* v. *Belgium*, European Commission, Application 8707/79, (1979) 18 *Decisions & Reports* 255.

[89] *X* v. *United Kingdom*, European Commission, Application 3868/68, (1970) 34 *Collection of Decisions* 10.

participating in a public incident,[90] do not amount to interference with private life.

### *his family*

The term 'family' is given a broad interpretation to include all those comprising the family as understood in the society in question.[91] Cultural traditions should also be taken into account when defining the term 'family' in a specific situation.[92] The notion of family life is not confined solely to families based on marriage and may encompass other *de facto* relationships.[93] A man and a woman who live together constitute a 'family', and are entitled to its protection, notwithstanding the fact that their relationship exists outside marriage.[94] When deciding whether a relationship can be said to amount to family life, a number of factors may be relevant, including whether the couple live together, the length of their relationship, and whether they have demonstrated

[90] *X* v. *United Kingdom*, European Commission, Application 5877/72, (1973) 45 *Collection of Decisions* 90.

[91] Human Rights Committee, General Comment 16 (1988). The inclusion of the word 'family' in ICCPR 17 was considered desirable by the Third Committee, particularly since in some countries 'home', in the strict sense of the term, did not refer to the family home and all persons living in it, but merely to the dwelling-place. Several representatives, on the other hand, considered that the addition of the word 'family' was unnecessary since the words 'home' and 'privacy' indicated also the idea of the family. It was pointed out that ICCPR 17 protected the individual and, since the family was composed of individuals, the protection necessarily extended to the family. See UN Document A/4625, section 37.

[92] *Francis Hopu and Tepoaitu Bessert* v. *France*, Human Rights Committee, Communication No.549/1993, HRC 1997 Report, Annex VI.H.

[93] *X, Y, and Z* v. *United Kingdom*, European Court, (1997) 24 EHRR 143. Where a transsexual who had undergone gender reassignment surgery lived with a woman to all appearances as her male partner since 1979, and the couple applied jointly for, and were granted, treatment by AID (artificial insemination by donor) to allow the woman to have a child, the transsexual being involved throughout in that process and acting as the father of the child in every respect since the birth, *de facto* family ties linked the three persons. However, given that transsexuality raises complex scientific, legal, moral and social issues in respect of which there is no generally shared approach among European states, ECHR 8 cannot be taken to imply an obligation for the state to formally recognize as the father of a child a person who is not the biological father, particularly since under English law a female-to-male transsexual is still treated for legal purposes as female.

[94] *Johnston* v. *Ireland*, European Court, (1986) 9 EHRR 203. But ECHR 8 does not oblige states to establish for unmarried couples a status analogous to that of married couples, or a special regime for a particular category of unmarried couples (eg. those who wish to marry but are legally incapable of doing so). See also European Commission, (1985) 8 EHRR 214.

their commitment to each other by having children together or by any other means.[95] No distinction is drawn between the 'legitimate' and the 'illegitimate' family. The members of the 'illegitimate' family too enjoy this right on an equal footing with the members of the traditional family. Also included in the concept of 'family' are near relatives, such as grandparents, since they often play a significant role in family life.[96] In certain societies, relationship to ancestors may be an essential element of their identity and play an important role in their family life.[97] But a homosexual relationship, even a stable one, does not fall within the concept of 'family'.[98]

The relationship of a wife to her husband clearly belongs to the area of 'family'. It is therefore protected against 'arbitrary or unlawful interference'. Since the common residence of husband and wife is considered as the normal behaviour of a family, the exclusion of one spouse from a country where the other spouse is living may constitute an interference with the enjoyment of this right. This will be so even if one of the spouses is an alien. Whether immigration laws affecting the residence of a spouse are compatible with this right depends on whether interference arising under such laws is either 'arbitrary or unlawful', or conflicts in any other way with the country's obligations under the covenant or relevant regional instrument.[99]

[95] *X, Y, and Z* v. *United Kingdom*, European Court, (1997) 24 EHRR 143.

[96] *Marckx* v. *Belgium*, European Court, (1979) 2 EHRR 330, European Commission, 10 December 1977. See also *Boyle* v. *United Kingdom*, European Court, (1994) 19 EHRR 179, European Commission, 9 February 1993 (an uncle and nephew may constitute a 'family'); *Vermeire* v. *Belgium*, European Commission, Application 12849/87, (1988) 58 *Decisions & Reports* 136.

[97] *Francis Hopu and Tepoaitu Bessert* v. *France*, Human Rights Committee, Communication No.549/1993, HRC 1997 Report, Annex VI.H. In such societies, burial grounds may play an important role in their history, culture and life. Accordingly, the construction of a hotel complex on ancestral burial grounds will be an arbitrary interference with their right to privacy.

[98] *X* v. *United Kingdom*, European Commission, Application 9369/81, (1983) 32 *Decisions & Reports* 220.

[99] *Aumeeruddy-Cziffra et al* v. *Mauritius*, Human Rights Committee, Communication No.35/1978, HRC 1981 Report, Annex XIII. Cf. *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, European Court, (1985) 7 EHRR 471: ECHR 8 does not oblige states to respect the choice by married couples of their matrimonial residence and to accept the non-national spouse for settlement in that country. See also *Beldjoudi* v. *France*, European Court, (1992) 14 EHRR 801: Where an Algerian citizen, born in France of parents who were then French, and married to a Frenchwoman, was served with a deportation order on account of his criminal record, the decision to deport, if put into effect, would not be proportionate to the legitimate aim pursued and would therefore violate ECHR 8. If his wife were to follow him

The fact of birth, i.e. the existence of a biological bond between mother and child, creates family life. Since the proof of descent is generally a precondition for the recognition of family status, the means permitting and facilitating proof of such descent are vitally important. Accordingly, the automatic and immediate transformation of the biological bond into a bond of legal relationship is essential for the recognition of the existence of family life. This means that the registration of the child's birth should, without further formalities, have the effect of the recognition of the legal bond of relationship with the mother.[100] A child born of a marital union is *ipso jure* part of that relationship. Hence, from the moment of the child's birth, and by the very fact of it, there exists between the child and its parents a bond amounting to 'family life' which subsequent events cannot break save in exceptional circumstances.[101] The bond that exists between the child and the parents continues even when the parents are not living together.[102] A divorced parent, who has not been granted custody of a child after the dissolution

after his deportation, she would have to settle abroad, presumably in Algeria, a state whose language she probably did not know. To be uprooted in this way could cause her great difficulty in adapting, and there might be real practical or even legal obstacles. The interference in question might therefore imperil the unity or even the very existence of the marriage; *Gul* v. *Switzerland*, European Court, (1996) 22 EHHR 93: In regard to a state's obligation to admit to its territory relatives of settled immigrants, the applicable principles are: (1) The extent of the obligation will vary according to the particular circumstances of the persons involved and the general interest; (2) As a matter of well-established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory; and (3) Where immigration is concerned, ECHR 8 cannot be considered to impose on a state a general obligation to respect the immigrant's choice of the country of their matrimonial residence and to authorize family reunion in its territory.

[100] *Marckx* v. *Belgium*, European Commission, (1977) 2 EHRR 330. Under Belgian law, birth did not establish a legal relationship between the mother and her illegitimate child. The registration of the birth and the statement of the mother's identity in the birth certificate were not of themselves sufficient to establish descent from the mother. The birth certificate was merely a declaratory instrument and did not create a right. All it did was to provide proof of a material fact, namely, the birth, but it did not create a legal relationship. Maternal affiliation of an illegitimate child was established by means either of a voluntary recognition by the mother or of legal proceedings taken for the purpose by the child. See also European Court, (1979) 2 EHRR 330; *Johnston* v. *Ireland*, European Court, (1986) 9 EHRR 203, European Commission, (1985) 8 EHRR 214.

[101] *Ahmut* v. *Netherlands*, European Court, (1966) 24 EHRR 62: A father with Dutch and Moroccan nationality resident in the Netherlands, and his Moroccan son, claimed unsuccessfully that the refusal of the Dutch authorities to grant the latter a residence permit violated ECHR 8; *Gul* v. *Switzerland*, European Court, (1996) 22 EHHR 93: The refusal by Swiss authorities to permit the minor son of a Turkish national who held a residence permit issued on humanitarian grounds to join him in Switzerland did not infringe the right to privacy.

[102] *Hendriks* v. *Switzerland*, European Commission, (1982) 5 EHRR 223.

of the marriage, has the right to visit his child or have contacts with it.[103] The refusal by the authorities to renew the residence permit of a foreign parent following the dissolution of his marriage, and his resulting expulsion, may constitute an interference with the right of a father and his minor daughter to respect for their family life.[104]

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. It is, therefore, an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child. It is not enough that the child will be better off if placed in care. Reasons for taking a child into care must be not only 'relevant' but also 'sufficient'.[105] The taking of a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit, and any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent and child. In this regard, a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In carrying out this balancing exercise, the court must attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be

[103] Only very serious reasons can justify totally excluding a father from access to his child. See *K* v. *Netherlands*, European Commission, Application 9018/80, (1983) 33 *Decisions & Reports* 9: where a sixteen-year-old girl who was considered sufficiently grown up and balanced for her age and was attending her fifth year in a secondary school objects to having any contacts with her father, despite the fact that his ex-wife did not object to her daughter meeting her father, priority must be given to the interests of the child, and it was not in her interests to force her to see her father by granting him a right of access.

[104] *Berrehab* v. *Netherlands*, European Court, (1988) 11 EHRR 322: Although he could return on a temporary visa, this possibility was theoretical in a situation where regular contacts were essential in view of the very young age of the child; *Moustaquim* v. *Belgium*, European Court, (1991) 13 EHRR 802: Where a Moroccan citizen who had lived in Belgium on a residence permit for nineteen years was deported because of his criminal record, and thereby separated from his parents and seven brothers and sisters, a proper balance was not achieved in relation to his family life between the interests involved, and the means employed were therefore disproportionate to the legitimate aim pursued. See also *Djeroud* v. *France*, European Court, (1991) 14 EHRR 68; *Lamguindaz* v. *United Kingdom*, European Court, 28 June 1993; *Alam and Khan* v. *United Kingdom*, European Commission, 17 December 1968; *Uppal* v. *United Kingdom*, European Commission, (1980) 3 EHRR 399; *Kamal* v. *United Kingdom*, European Commission, (1980) 4 EHRR 244; *Abdulmassih* v. *Sweden*, European Commission, (1984) 35 *Decisions & Reports* 57.

[105] *Olsson* v. *Sweden*, European Court, (1988) 11 EHRR 259. See *X* v. *Sweden*, European Commission, Application 10141/82, (1984) 8 EHRR 253; *Andersson* v. *Sweden*, European Court, (1992) 14 EHRR 615.

entitled to have such measures taken as would harm the child's health and development.[106] An adoption ordered without the mother's consent is a specific act of interference of a particularly serious nature.[107] The decision-making process in respect of these matters must be such as to ensure that the views and interests of the natural parents are made known and duly taken into account, and that they are able to exercise in due time any remedies available to them.[108]

Since the upbringing and education of children is a central aspect of family life, parental rights and choices are paramount as against the state. But such rights and choices are necessarily limited by law. For example, parents may not insist on the corporal punishment of their children where the law prohibited such punishment.[109] Matters of intestate succession, and of disposition, between near relatives are intimately connected with family life. While inheritance rights are not normally exercised until the estate-owner's death, that is, at a time when family life undergoes a change or even comes to an end, an issue concerning such

[106] *Johansen* v. *Norway*, European Court, (1996) 23 EHRR 33: Particularly far-reaching measures which totally deprive a mother of her family life with the child and are inconsistent with the aim of reuniting them, should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests. Cf. *Soderback* v. *Sweden*, European Court, (1998) 29 EHRR 95 which concerned the severance of links between a natural father and a child who had been in the care of the mother since birth and who was to be adopted by the man who had since married the mother. See also *Olsson* v. *Sweden*, European Court, (1988) 11 EHRR 259: In the case of three children taken into care, their separation, the placement of two of them at great distance from their parents' home, and the restrictions placed on the latter's visits impeded easy and regular access to each other by members of the family and thus ran counter to the ultimate aim of its reunification. Good faith did not suffice to render a measure necessary, and administrative difficulties should not play more than a secondary role in so fundamental an area as respect for family life; *Andersson* v. *Sweden*, European Court, (1992) 14 EHRR 615: restrictions imposed by social welfare authorities on meetings and communications by correspondence and telephone between a mother and her eleven-year-old son who was subject to a care order, were disproportionate to the legitimate aims pursued; *Eriksson* v. *Sweden*, European Court, (1989) 12 EHRR 183; *Rieme* v. *Sweden*, European Court, (1992) 16 EHRR 155; *Olsson* v. *Sweden* (No.2), European Court, (1992) 17 EHRR 134.

[107] *X* v. *United Kingdom*, European Commission, Application 7626/76, (1978) 11 *Decisions & Reports* 160.

[108] *W* v. *United Kingdom*, European Court, (1987) 10 EHRR 29, European Commission, (1985) 10 EHRR 62. See also *R* v. *United Kingdom*, European Court, (1987) 10 EHRR 74; *C* v. *United Kingdom*, European Commission, Application 9276/81, (1983) 35 *Decisions & Reports* 13.

[109] *X* v. *Sweden*, European Commission, Application 8811/79, (1982) 29 *Decisions & Reports* 104: a group of parents belonging to a Protestant free church congregation argued that, as an aspect of their religious doctrine, they believed in the necessity of physical punishment of their children.

rights may arise before the death: the distribution of the estate may be settled, and in practice fairly often is settled by the making of a will or of a gift on account of a future inheritance.[110] While detention is by its very nature a limitation on family life, prison authorities are obliged to assist a prisoner to maintain effective contact with his close family members.[111]

### *his home*

The choice of where to establish one's home falls within the sphere of decision-making protected by the right to private life.[112] The term 'home' in English, 'manzel' in Arabic, 'zhuzhai' in Chinese, 'domicile' in French, 'zhilische' in Russian, and 'domicilio' in Spanish, as used with reference to this right, indicates the place where a person resides or carries out his usual occupation.[113] A hotel room occupied for temporary stay constitutes a 'home',[114] as does a trailer.[115] But neither property on

[110] *Marckx* v. *Belgium*, European Court, (1979) 2 EHRR 330.

[111] *X* v. *United Kingdom*, European Commission, Application 9054/80, (1983) 30 *Decisions & Reports* 113. See also *S* v. *United Kingdom*, European Commission, Application 9466/81, (1986) 36 *Decisions & Reports* 41: Where on at least two occasions a prisoner was transferred when his family were due to visit him in prison, an infringement of this right might have occurred; *X* v. *United Kingdom*, European Commission, Application 9658/82, (1983) 5 EHRR 603: The requirement for a near relative to be dangerously ill before allowing a prisoner serving a life sentence a home visit is not unreasonable.

[112] *Godbout* v. *City of Longueuil*, Supreme Court of Canada, [1998] 2 LRC 333: Where a municipality requires all its permanent employees to live within the territorial limits of the city and to maintain their homes there for the duration of their employment, s.5 of the Quebec Charter of Rights and Freedoms ('Every person has a right to respect for his private life') is infringed. For a similar decision, see also *Brasserie Labatt Ltee* v. *Villa*, Quebec Court of Appeal, [1995] RGQ 73.

[113] Human Rights Committee, General Comment 16 (1988). See *Niemietz* v. *Germany*, European Court, (1992) 16 EHRR 97: the word 'home' extends to business premises since activities which are related to a profession or business may well be conducted from a person's private residence, and activities which are not so related may well be carried on in an office or commercial premises. Cf. *Psaras* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1987) 2 CLR 132; *Garcia* v. *Attorney General of Gibraltar*, Supreme Court of Gibraltar, (1978) Gib.LR 53.

[114] *R* v. *Wong*, Supreme Court of Canada, [1990] 3 SCR 36: 'Normally, the very reason we rent such rooms is to obtain a private enclave where we may conduct our activities free of uninvited scrutiny. Accordingly, I can see no conceivable reason why we should be shorn of our right to be secure from unreasonable searches in these locations which may be aptly considered to be our homes away from home', per La Forest J at 50. See also *Oueiss* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1987) 2 CLR 49. In *Kanthak* v. *Germany*, European Commission, (1988) 58 *Decisions & Reports* 94, the question whether a camping car could be considered a home was left unresolved.

[115] *R* v. *Feeney*, Supreme Court of Canada, [1997] 3 LRC 37.

which it is planned to build a house for residential purposes, nor an area where one had grown up and where one's family had its roots but where one no longer lives, can be considered 'home'.[116] A 'home' includes the grounds or curtilage forming part of it.[117] A family absent from home for a long period of time may nevertheless retain sufficient continuing links with it for it to be considered their home.[118] Nor may a person be deprived of his tenancy rights by reason of a temporary absence of six months when he was serving a prison sentence imposed by a court.[119]

The right to inviolability of one's home 'exists to protect a private sphere projected onto a certain physical area which the occupant preserves and keeps private from third parties, except where his consent or judicial authorization is given to the contrary'. In the absence of such consent or of necessity, no one may enter another person's home if such a measure is not ordered or authorized by a competent judge.[120] Police entry and search of a home without either prior judicial authority or the owner's express consent is an interference with one's privacy at home, unless such interference is based on knowledge or clear perception that an offence is being committed in the house and provided that the police action is urgently needed to prevent completion of the offence, to arrest the presumed offender, to protect the victim, or to prevent

[116] *Loizidou* v. *Turkey*, European Court, (1996) 23 EHRR 513.

[117] *Fok Lai Ying* v. *Governor-in-Council*, Privy Council on appeal from the Court of Appeal of Hong Kong, [1997] 3 LRC 101.

[118] *Gillow* v. *United Kingdom*, European Court, (1986) 11 EHRR 335: In 1956, a family moved to Guernsey. In the following year, they bought a plot of land on which they built a house for themselves. In 1960, they left Guernsey and lived overseas until 1978. During this period they retained ownership of the house and let it out furnished to persons approved by the housing authority. On their return in 1979, they had no other home in the United Kingdom or elsewhere; the house was vacant and there were no prospective tenants. But under the Housing Law 1969, which had been enacted during their absence abroad, they were obliged to seek a licence to occupy it because, as a consequence of a change of the law, they had lost their residence qualifications in Guernsey. The decisions by the housing authority to refuse them permanent and temporary licences to occupy the house, as well as their conviction for unlawful occupation of their property and the imposition of a fine, constituted an interference with their home. See also *Wiggins* v. *United Kingdom*, European Commission, (1979) 13 *Decisions & Reports* 40.

[119] Decision of the Constitutional Court of Russia, 23 June 1995, *Sobraniye Zakonodatelstava Rossiyskoy Federatsii*, 1997, 27, *Rossiyskaya Gazeta*, 4 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 191.

[120] Constitutional Court of Spain, Case No.228/1997, 16 December 1997, *Boletin Oficial del Estado*, no.18 of 21.01.1998, 12–19, (1997) 3 *Bulletin on Constitutional Case-Law* 448.

the disappearance of the effects or instruments of the offence.[121] Police entry without a warrant may also be justified in order to deal with or prevent a breach of the peace,[122] or if it is in response to a 911 call; but any such intrusion must be strictly limited to such purpose, and does not constitute permission to search the premises or otherwise intrude on a resident's privacy or property.[123]

The deliberate destruction of home and household property by security forces is a flagrant violation of ECHR 8.[124] But interference with one's home may arise in other ways as well. A statute which authorizes entry without warrant into private homes and the search of intimate possessions intrudes on the 'inner sanctum', as does a law which is so wide and unrestricted in its reach as to authorize a public official to enter upon 'any premises, place, vehicle, vessel or aircraft' for the purpose of inspection, search or seizure.[125] Where the customs authorities had exclusive competence to assess the expediency, number, length and scale of inspections which they could embark on without a judicial warrant, the relevant legislation and practice did not afford adequate and effective safeguard against abuse.[126] Interference by way of a compulsory purchase order made in the context of redevelopment will be justified under ECHR 8 as necessary in a democratic society for the protection of the rights

[121] Constitutional Court of Spain, Case No.94/1996, 25 May 1996, *Boletin Oficial del Estado*, no.150 of 21.06.1996, 62–67, (1996) 2 *Bulletin on Constitutional Case-Law* 269. See also *R* v. *Feeney*, Supreme Court of Canada, [1997] 3 LRC 37.

[122] *McLeod* v. *United Kingdom*, European Court, (1998) 27 EHRR 493.

[123] *Godoy* v. *R*, Supreme Court of Canada, [2000] 3 LRC 40. See Supreme Court of the Netherlands, Case No.101.655, 23 April 1996, *Nederlandse Jurisprudentie*, 1996, 548, (1996) 2 *Bulletin on Constitutional Case-Law* 242: Opening a movable roof to look inside a garage which is not being used as residential accommodation does not constitute a violation of the right to respect for private life.

[124] *Selcuk and Asker* v. *Turkey*, European Court, (1998) 26 EHRR 477; *Mentes* v. *Turkey*, European Court, (1997) 26 EHRR 595.

[125] *Mistry* v. *Interim National Medical and Dental Council of South Africa*, Constitutional Court of South Africa, [1999] 1 LRC 49: seizure of medicines or scheduled substances, and books, records or documents, under s.28(1) of the Medicines Act. See also Constitutional Court of the Former Yugoslav Republic of Macedonia, Case No.U.27/1996, 12 June 1996, *Sluzben vesnik na Republika Makedonija*, no.33/96, (1996) 2 *Bulletin on Constitutional Case-Law* 286: officer of the tax department authorized by statute to enter into the rooms of the taxpayer against his will in order to make an inventory of the objects suitable for forced tax collection and which are assumed to be found in the rooms.

[126] *Funke* v. *France*, European Court, (1993) 16 EHRR 297. See also *Cremieux* v. *France*, European Court, (1993) 16 EHRR 357; *Miailhe* v. *France*, European Court, (1993) 16 EHRR 332.

and freedoms of others who would benefit from the proposed redevelopment only if the interests of the person whose house and property are to be the subject of such compulsory purchase order have been balanced against the interests of the community as a whole. Such a balance will be achieved, for example, by offering alternative accommodation suitable for his requirements in the immediate vicinity of his existing home, full compensation for disturbance and for removal expenses, together with compensation for the full value of his house and land.[127] The same principles apply to environmental pollution that affects an individual's well-being and prevents him from enjoying his home.[128]

The search of a person's home is restricted to a search for necessary evidence, and may not be allowed to amount to harassment.[129] The notion of 'private life' does not exclude activities of a professional or business nature. Accordingly, the search of a lawyer's office in the course of criminal investigations against a third party violated the right because it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time.[130]

[127] *Howard* v. *United Kingdom*, European Commission, (1985) 9 EHRR 116.

[128] *Lopez Ostra* v. *Spain*, European Court, 9 December 1994: (1994) 20 EHRR 277. Where in a town with a heavy concentration of leather industries, the tanneries had a plant for the treatment of liquid and solid waste, and emissions (gas fumes, repetitive noise and strong smells) from that plant caused serious health problems to a family that lived twelve metres away, this right was infringed. The state had failed to strike a fair balance between the interest of the town's economic well-being – that of having a waste treatment plant – and the individual's effective enjoyment of her right to respect for her home. It was not necessary to establish that the family's health had been endangered; it was sufficient that, due to their inability to enjoy their home, their private and family life had been adversely affected. *Guerra* v. *Italy*, European Court, (1998) 26 EHRR 357: failure to provide information relating to the release of inflammable gas and other toxic substances to enable residents to assess the risks they might run if they continued to live in the area.

[129] Human Rights Committee, General Comment 16 (1988). See *Chappell* v. *United Kingdom*, European Court, (1989) 12 EHRR 1: an 'Anton Piller order' made by the High Court in civil proceedings against the applicant for breach of copyright, requiring him to permit the plaintiffs in that action to search his business premises (which were also his home) and to remove specified films and documents, and which order was executed simultaneously with a police search warrant.

[130] *Niemietz* v. *Germany*, European Court, (1992) 16 EHRR 97. 'It is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest,

### *his correspondence*

'Correspondence' includes oral and written communications as well as communications transmitted by any mechanical or electronic means. According to the Human Rights Committee, compliance with ICCPR 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.[131] However, the prohibition of 'arbitrary' or 'unlawful' interference with correspondence suggests that in certain circumstances interception is permitted. Relevant legislation, therefore, must specify in detail the precise circumstances in which such interference may be permitted. A decision to make use of such authorized interference must be made by the authority designated under the law, and on a case-by-case basis.[132]

### Telephone conversations

Tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.[133] In France, where neither written nor unwritten law indicated with reasonable clarity the scope and manner of exercise of the discretion conferred on public authorities to intercept telephone conversations,

opportunity of developing relationships with the outside world'. See also *X* v. *Germany*, European Commission, Application 6794/74, (1976) 3 *Decisions & Reports* 104: the seizure of a 'draft novel' from the office of a solicitor.

131 Human Rights Committee, General Comment 16 (1988).

132 Human Rights Committee, General Comment 16 (1988). See *Klass* v. *Germany*, European Court, (1978) 2 EHRR 214: The mere existence of legislation which permits the authorities to open and inspect mail and listen to telephone conversations involves a menace of surveillance to all to whom the controls can be applied. This necessarily strikes at freedom of communication between users of the postal and telecommunications services, and thereby constitutes an interference by a public authority with the exercise of the right to correspondence. Accordingly, powers of secret surveillance of citizens, characterizing as they do the police state, are tolerable only in so far as strictly necessary for safeguarding democratic institutions.

133 *Kopp* v. *Switzerland*, European Court, (1998) 27 EHRR 91.

this right was breached.[134] Similarly, in the United Kingdom where it emerged during the trial of an antique dealer, prosecuted for offences relating to dishonest handling of stolen goods, that his telephone communications had been intercepted and metered[135] by the police acting on the authority of a warrant issued by the Home Secretary, the right was infringed. It could not be said with any reasonable certainty what elements of the powers to intercept were incorporated in legal rules and what elements remained within the discretion of the executive.[136]

But in Germany, legislation permitted the authorities to open and inspect mail and listen to telephone conversations in order to protect,

[134] *Huvig* v. *France*, European Court, (1990) 12 EHRR 528, European Commission, (1988) 12 EHRR 310; *Kruslin* v. *France*, European Court, (1990) 12 EHRR 547. See also *Domenichini* v. *Italy*, European Court, 15 November 1996: A law which merely identified the category of persons whose correspondence might be censored, and the competent court, without saying anything about the length of the measure or the reasons that might warrant it, did not satisfy the requirements of ECHR 8; *Kopp* v. *Switzerland*, European Court, (1998) 27 EHRR 91: Where during the course of criminal investigations against him and his wife, a lawyer's telephone was tapped in the absence of a law which clearly stated how, under what conditions, and by whom, the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to a proceeding (which were privileged) and those relating to activity other than that of counsel, ECHR 8 was infringed.

[135] The process known as 'metering' involves the use of a device (a meter check printer) which registers the numbers dialled on a particular telephone and the time and duration of each call.

[136] *Malone* v. *United Kingdom*, European Court, (1984) 7 EHRR 14, European Commission, (1983) 6 EHRR 385. Following this judgment, the Interception of Communications Act 1985 was enacted. But see *Halford* v. *United Kingdom*, European Court, (1977) 24 EHRR 523: Where telephone calls made by an assistant chief constable from her office were intercepted by the police in order to gather information to assist them in the defence of sex discrimination proceedings, the interference had not been 'in accordance with law' because the 1985 Act did not apply to the internal communications systems operated by public authorities. See also Decision of the Constitutional Court of Spain, Case No.181/1995, 11 December 1995, *Boletin Oficial del Estado*, No.11 of 12 January 1996, (1995) 2 *Bulletin on Constitutional Case-Law* 275: The monitoring of telecommunications constitutes a serious interference with the right to privacy and must, therefore, be subject to the principle of lawfulness and, in particular, to the principle of proportionality. The latter requires not only that the gravity of the criminal offence must justify the nature of the measure adopted, but also that the requisite guarantees of specific and reasoned judicial authorization be observed; Decision of the Constitutional Court of Spain, Case No.54/1996, 26 March 1996, *Boletin Official del Estado*, No.102 of 27 April 1996, 41–8, (1996) 1 *Bulletin on Constitutional Case Law* 97: The statement of reasons for the decision authorizing telephone tapping was insufficient because it did not identify the person concerned, and did not specify the offence being investigated. It explained neither the reasons for adopting the measure nor its purpose. It merely listed the telephone numbers to be tapped and cited, as the reason for granting authorization, the letter applying for it and the reasons given in it.

*inter alia*, 'imminent dangers' threatening the 'free democratic constitutional order' and 'the existence or the security' of the state. Certain factual indications had to be present before such surveillance could be undertaken, which required the approval of the supreme *Land* authority or a designated federal minister, on the application of the head of one of four security agencies. The measures lapsed after three months, but could be renewed. The subject of the surveillance had to be notified after termination if it could be done without jeopardizing the purpose of the surveillance, and a statutory commission supervised this aspect of the system. The surveillance itself was supervised by an independent official. The minister reported regularly to an all-party parliamentary committee; and the statutory commission normally had to approve surveillance desired by the minister. The European Court found these measures to be necessary in a democratic society in the interests of national security and for the prevention of disorder or crime.[137]

It has been suggested that since it is widely known that telephone conversations conducted on mobile telephones can be monitored by anyone who wishes to do so with the aid of simple, readily available electronic devices, interference with such conversation may need to be accepted. This means not only that persons conducting a conversation by mobile telephones should take into account the possibility that a third party may be able to receive and overhear the call, but also that he is to a certain extent obliged – given that everyone is in principle free to receive radio signals – to resign himself to that possibility. This does not however mean that such person forfeits altogether the right to privacy in this regard.[138] A person with whom another person under lawful surveillance holds a telephone conversation can, in principle, require that such conversation should not be disclosed or used in evidence against him or her. For such telephone conversation to be used against that person as

[137] *Klass* v. *Germany*, European Court, (1978) 2 EHRR 214, Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the state must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. See also *Ludi* v. *Switzerland*, European Court, (1992) 15 EHRR 173; *A, B, C, and D* v. *Germany*, European Commission, Application 8290/78, (1979) 18 *Decisions & Reports* 176. In *People's Union for Civil Liberties* v. *Union of India*, [1999] 2 LRC 1, at 17–18, the Supreme Court of India prescribed procedural safeguards, designed 'in order to rule out arbitrariness', for the exercise of the power to intercept telegraphed messages.

[138] Supreme Court of the Netherlands, Case No.101269, 19 December 1995, *Delikt en Delinkwent*, 96,152, *Nederlandse Jurisprudentie*, 1995, 246, (1996) 1 *Bulletin on Constitutional Case-Law* 50.

evidence obtained by chance, the criteria governing surveillance of telephone conversations must also be fulfilled in respect of him or her.[139] A telephone conversation is protected even when it is carried out on the line of a third party.[140]

### Private conversations

Courts in North America have adopted the test of 'a reasonable expectation of privacy' in determining whether or not an infringement occurs when a person is engaged in what he has every reason to believe is an ordinary private conversation. Accordingly, police eavesdropping from an adjoining room of conversations loud enough to be heard by the naked human ear may not be a violation of privacy.[141]

### Written communications

This right extends to the protection against positive interference with the contents or the delivery of communications. It does not include a right to the perfect functioning of the postal service which by its very nature, being a service handling huge amounts of mail, involves a certain statistical risk of occasional miscarriage of mail. Accordingly, the post office's failure to carry out a mailing order by which a person's mail should have been forwarded to another address than that indicated by the sender, did not constitute an interference with his correspondence.[142] While it may be considered necessary to have recourse to a bankrupt's correspondence in order to identify and trace the sources of his income, the implementation of any measures must be accompanied by adequate and effective safeguards which ensure minimum impairment of the right to respect for his correspondence.[143]

[139] Federal Tribunal of Switzerland, Case IP.670/1994, 27 December 1994, (1995) 1 *Bulletin on Constitutional Case-Law* 98.

[140] *Lambert* v. *France*, European Court, (1998) 30 EHRR 346.

[141] *United States* v. *Agapito*, United States District Court, 620 F.2nd 324 (2nd Cir.1980).

[142] *X* v. *Germany*, European Commission, Application 8383/78, (1980) 17 *Decisions & Reports* 227. See *X* v. *United Kingdom*, European Commission, Application 10333/83, (1983) 6 EHRR 353: Where a Libyan national serving a life sentence for murder and firearms offences in a prison in England was able to communicate in writing with his mother and other members of his family in Tripoli, notwithstanding that his mother's reading ability was not substantial, the refusal of permission to telephone his mother and speak to her in Arabic did not constitute an interference with his rights under ECHR 8.

[143] *Foxley* v. *United Kingdom*, European Court, (2000) 31 EHRR 637.

A prisoner's right to correspondence is not subject to implied limitations by virtue of his situation. A prisoner has the same rights as a person at liberty in respect of his correspondence, the ordinary and reasonable requirements of imprisonment being of relevance in assessing the justification for any interference with the exercise of that right.[144] Therefore, this right is breached if the authorities read and destroy a letter which a prisoner has written, or destroy a letter without reading it. Failure to provide a prisoner with the means of writing a letter has the same effect as if the prisoner's letter is destroyed without being read. If a prisoner is told that he may not write to a particular person, he is in the same position as if his letter to that person is confiscated and destroyed. When a prisoner requests permission to 'consult' a solicitor, he is in fact requesting permission to write to a solicitor since he has no opportunity of meeting a solicitor in the ordinary course of his confinement. When permission is refused, he is in the position in which he would have found himself had he first written a letter which was later

[144] In *Silver* v. *United Kingdom*, European Commission, (1980) 3 EHRR 474, it was held that: (1) prisoners may write to Members of Parliament complaining about prison treatment even without first airing such complaints through internal prison channels; (2) prisoners may write seeking responsible legal advice on any subject in order to protect or enforce their rights or simply to be reasonably informed; (3) since prisoners have little choice of social contacts, and since there is a basic human need to express thoughts and feelings, including complaints about real and imagined hardships, they may, through correspondence, share their experiences and grievances with their close relatives and friends. The following restrictions were 'over-broad' and not 'necessary in a democratic society': (a) a general prohibition on writing to persons other than relatives or friends; (b) a blanket prohibition on prisoners' letters containing material intended for publication (since access to the media is an important element in a democratic society); (c) a prohibition on material calculated to hold the prison authorities up to contempt (since a prisoner may express his grievances or frustrations freely in his correspondence, in emotional or vehement terms, this often being an essential outlet or 'safety valve' in closed community existence); (d) a prohibition on letters containing representations about trial, conviction or sentence; (e) a blanket prohibition on prisoners' letters which attempt to stimulate public petition, as distinct from public agitation (since petition-raising is a normal activity in a democratic society to demonstrate one's opinion pacifically on matters of personal or public importance); (f) a blanket prohibition on allegations against prison officers; (g) the prohibition on prisoners' correspondence containing grossly improper language (since it is an essential feature of freedom of expression in a democratic society that the individual may freely correspond in whatever terms he or she desires, even though such terms may be vulgar, controversial, shocking or offensive, and since this freedom may be particularly important for persons, such as prisoners, subject to the daily frustrations of a closed community life). See also *Silver* v. *United Kingdom*, European Court, (1983) 5 EHRR 347; *McCallum* v. *United Kingdom*, European Court, (1990) 13 EHRR 596, European Commission, (1984) 13 EHRR 597, at 605–19.

'stopped'. For all practical purposes there is an implied refusal of his right to correspond.[145]

The objective of confidential communication with one's lawyer cannot be achieved if correspondence is the subject of automatic control. Where a prisoner wished to institute legal proceedings against the prison authorities, the European Court observed that for such correspondence to be susceptible to routine scrutiny, particularly by individuals or authorities who might have a direct interest in the subject-matter contained therein, was 'not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client'. While conceding that the borderline between mail concerning contemplated litigation and that of a general nature was especially difficult to draw and that correspondence with a lawyer might concern matters which had little or nothing to do with litigation, the court nevertheless saw no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concerned matters of a private and confidential character. All such letters were privileged.[146]

The stopping of a letter addressed to a prisoner may also constitute an interference with his right to correspondence.[147] Where it is alleged by a

[145] *Golder* v. *United Kingdom*, European Court, (1975) 1 EHRR 524. See also *De Wilde, Ooms and Versyp* v. *Netherlands*, European Court, (1971) 1 EHRR 373; *Boyle and Rice* v. *United Kingdom*, European Court, (1988) 10 EHRR 425; *McMahon* v. *United Kingdom*, European Commission, (1977) 10 *Decisions & Reports* 163; *Carne* v. *United Kingdom*, European Commission, (1977) 10 *Decisions & Reports* 205; *Reed* v. *United Kingdom*, European Commission, (1979) 19 *Decisions & Reports* 113.

[146] *Campbell* v. *United Kingdom*, European Court, (1992) 15 EHRR 137. This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused.

[147] *Schonenberger and Durmaz* v. *Switzerland*, European Court, (1988) 11 EHRR 202. See also *Colne* v. *United Kingdom*, European Commission, (1977) 10 *Decisions & Reports* 154.

prisoner that he is not receiving his correspondence, it is not sufficient to merely produce a record of the prisoner's incoming mail. In the absence of documents or other evidence such as might establish the contrary, a court cannot be certain that the items in question have reached their addressee.[148]

*Everyone has the right to the protection of the law against unlawful attacks on his honour and reputation*

The need for this clause was questioned in the Commission on Human Rights since ICCPR 2 already required states parties to take the necessary steps to adopt such legislative or other measures as might be necessary to give effect to the recognized rights. On the other hand, it was contended that the addition of the clause would not be superfluous. It was not enough to recognize the right of everyone not to be subjected to arbitrary or unlawful attacks on his honour and reputation; his right to be protected by the law against such interference or attacks must also be expressly recognized. It was emphasized, however, that the expression 'protection of the law', is not to be interpreted as authorizing any form of censorship, since that would violate the provisions concerning freedom of opinion and expression in ICCPR 19.[149] Accordingly, a state is obliged to enact legislation adequate to protect personal honour and reputation. Provision is also required to be made for everyone effectively to be able to protect himself or herself against any unlawful attacks that do occur and to have an effective remedy against those responsible.[150] The fact that an applicant is not successful in court does not mean that the state has failed in its obligation to provide adequate protection for his rights.[151] The insertion of 'unlawful' before 'attacks' in ICCPR 17 was intended to meet the objection that, unless qualified, the clause might be construed in such a way as to stifle free expression of public opinion.

[148] *Messina* v. *Italy*, European Court, 26 February 1993.

[149] UN document A/2929, chapter VI, section 104.

[150] Human Rights Committee, General Comment 16 (1988).

[151] *X* v. *Sweden*, European Commission, Application 11366/85, (1986) 50 *Decisions & Reports* 173: A person's honour was protected in Swedish law by provisions on defamation in the Penal Code and in the Freedom of the Press Act. On the basis of these provisions, the applicant had brought proceedings before a court sitting with a jury which had found that there was no breach of either law.

Accordingly, fair comments or truthful statements which might affect an individual's honour or reputation are not prohibited.[152]

The substance of the right to honour is constantly changing and depends on the social norms, values and ideas which predominate at the time. An individual may also have the right to honour as an integral part of human groups which have no legal personality but which have some other clear and consistent personality formed by dominant features of their structure and cohesion, such as historical, sociological, ethnic or religious attributes.[153] A legal person may also suffer a violation of its right to honour from the disclosure of facts concerning its identity, where such disclosure constitutes defamation or causes it to lose its reputation in the estimation of others.[154] But the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals. Such persons inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also by bodies representing the public interest.[155]

[152] UN document A/2929, chapter VI, section 103. When ICCPR 17 was being drafted, the view was expressed that a slur on an individual's honour involved a judgment of his moral conduct, whereas a slur on his reputation might concern merely an alleged failure to conform to professional or social standards. See UN document A/4625, section 38.

[153] Constitutional Court of Spain, Case No.176/1995, 11 December 1995, *Boletin Oficial del Estado*, no.11 of 12.01.1996, 7–13, (1995) 3 *Bulletin on Constitutional Case-Law* 373.

[154] Constitutional Court of Spain, Case No.139/1995, 26 September 1995, *Boletin Oficial del Estado*, no.246 of 14.10.1995, 45–51, (1995) 3 *Bulletin on Constitutional Case-Law* 367: a construction undertaking was accused of carrying out illegal acts amounting to bribery.

[155] *Fayed* v. *United Kingdom*, European Court, (1994) 18 EHRR 393.

# 20

# The right to freedom of thought

## Texts

### *International instruments*

### Universal Declaration of Human Rights (UDHR)

18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

### International Covenant on Civil and Political Rights (ICCPR)

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 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.

*Regional instruments*

## American Declaration of the Rights and Duties of Man (ADRD)

3. Every person has the right freely to profess a religious faith, and to manifest and practise it both in public and in private.

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

9. (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice or observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals or for the protection of the rights and freedoms of others.

P1, 2 . . . In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

## American Convention on Human Rights (ACHR)

12. (1) Everyone has the right to freedom of conscience and of religion. This includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.

(2) No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

(3) Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

(4) Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

African Charter on Human and Peoples' Rights (AfCHPR)

8. Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

*Related texts:*

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.

Standard Minimum Rules for the Treatment of Prisoners 1955, rules 6, 41, 42, 77.

## Comment

This right is expressed in two limbs: the first guarantees a general right to freedom of thought, conscience, religion and belief; and the second protects the more specific right to manifest such religion or belief in worship, observance, practice and teaching ('profess or disseminate' in ACHR 12).[1] The former includes the right to have or to adopt a religion or belief of one's choice, and the freedom 'to change' one's religion or belief, and is protected unconditionally. No one may be compelled to reveal his thoughts or adherence to a religious belief.[2] The latter may be exercised in public or private, and either individually or in community ('together' in ACHR 12) with others. During the drafting of ICCPR 18, many of the participants characterized the general right as 'absolute', 'sacred' and 'inviolable'. It was agreed that no restrictions of a legal character could be imposed upon a person's inner thought or moral consciousness, or his attitude towards the universe or its creator; only external manifestations of religion or belief could be subject to legitimate limitations.[3] Accordingly, restrictions may be prescribed by law only on the freedom to manifest one's religion or belief, but these must be necessary ('in a democratic society' in ECHR 9) for the protection of public safety (not in ECHR 9), order, health or morals or the

[1] In ACHR, the right to freedom of thought is contained in Art.13.

[2] Human Rights Committee, General Comment 22 (1993). The freedom 'to change' one's religion or belief is specifically mentioned in ECHR 9 and ACHR 12, but not in ICCPR 18. However, it is necessarily implied in 'the freedom to have or to adopt a religion of one's choice'.

[3] UN document A/2929, chapter VI, section 106.

('fundamental' in ICCPR 18) rights and freedoms of others. ICCPR 18 specifically prohibits 'coercion' which would impair one's freedom to have or to adopt a religion or belief of one's choice. ICCPR 18(4), ECHR P1,2, and ACHR 12(4) recognize the right of parents to ensure the religious and moral education of their children ('and wards' in ACHR 12) in conformity with their convictions.[4]

Religious liberty, which is the essence of this right, must be distinguished from religious tolerance. Tolerance as a legal concept is premised on the assumption that the state has ultimate control over religion and the churches, and whether and to what extent religious freedom will be granted and protected is a matter of state policy.[5] The right of religious liberty is a fundamental right, the essence of which is the right to entertain such beliefs as a person chooses, the right to declare such beliefs openly and without fear of hindrance or reprisal, and the right to manifest such belief by worship and practice or by teaching and dissemination.[6]

Any tendency to discriminate against any religion or belief for any reason, including the fact that it is newly established, or represents a religious minority that may be the subject of hostility on the part of a

[4] When ICCPR 18 was being drafted, several proposals were made to the effect that in the case of a minor the parent or guardian should have the right to determine what form of religious education he should receive. Against these proposals it was argued that the age at which a minor ceased to be such varied in different countries, and that, in any event, if the right of a parent to determine what form of religious education a minor should receive were written into ICCPR 18, the right of a parent to give a minor a purely secular education should also be guaranteed. While there was general agreement that religious education should not be imposed upon a minor against the will of the parent, it was thought that the proper place for such a provision would be in an article on education. However, Greece proposed the inclusion of a new paragraph (the present paragraph 4) based on the provisions contained in draft ICESCR 14(3). It was decided to include this new paragraph having regard to the possibility that some states might not become parties to that covenant (UN documents A/2929, chapter VI, s.115; A/4625, s.54). To the specific question whether under this paragraph a state would be obliged to provide instruction in the religion of the parents' choice, the representative of Greece replied in the negative, and explained that a state would not be committed to do anything other than to respect the wish of parents that their children be brought up in their own religion (UN document A/4625, s.55). The view was also expressed that the religious and moral upbringing of children who were deprived of their parents should follow the expressed or presumed wish of the latter (UN document A/4625, s.56).

[5] *Pitsillides* v. *Republic of Cyprus*, Supreme Court of Cyprus, (1983) 2 CLR 374, per Stylianides J at 385. Cf. *Mamat bin Daud* v. *Government of Malaysia*, Supreme Court of Malaysia, [1988] LRC (Const) 46.

[6] See *R* v. *Big M Drug Mart Ltd*, Supreme Court of Canada, [1986] LRC (Const) 332, per Dickson J at 359.

predominant religious community, is not consistent with this right. If a religion is recognized as a state religion or is established as official or traditional or if its followers comprise the majority of the population, it is essential to ensure that that does not result in any impairment of the enjoyment of this right, or in any discrimination against adherents of other religions or non-believers. Similarly, if a set of beliefs is treated as official ideology in a constitution, statutes, proclamations of the ruling party, or in actual practice, it is essential to ensure that that does not result either in the impairment of this or any other recognized right or in any discrimination against persons who do not accept the official ideology or who oppose it. In particular, certain measures discriminating against the latter, such as restricting eligibility for employment under the state to members of the predominant religion, or giving economic privileges to them, or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under ICCPR 26. The measures contemplated by ICCPR 20(2) constitute important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise this right and that guaranteed by ICCPR 27, and against acts of violence or persecution directed towards those groups.[7]

## Interpretation

### *Everyone*

This right may be enjoyed by 'everyone', including an alien.[8] But a corporation, being a legal and not a natural person, is incapable of having

[7] Human Rights Committee, General Comment 22 (1993). See Decision of the Constitutional Court of Italy, 18 October 1995, Case No.440/1995, *Gazzetta Ufficiale*, No.44 of 25 October 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 318: The offence of blasphemy 'against the Divinity' is not unconstitutional to the extent that blasphemy is punishable irrespective of the religion to which the Divinity belongs. The rule protects all believers and all religions. But the offence of blasphemy against the 'symbols and persons' worshipped in the 'state religion' only, infringes the principle of equality before the law and non-discrimination in respect of religious opinions, and the equal freedom of all religions. Cf. *R* v. *Chief Metropolitan Stipendiary Magistrate, ex parte Chaudhury*, Queen's Bench Division, United Kingdom, [1991] LRC (Const) 278: The common law of 'blasphemy' protects only the Christian religion.

[8] *Darby* v. *Sweden*, European Commission, 9 May 1989: It is not necessary that an alien should move from his permanent home and take up residence in the state concerned before he can

or exercising this right.[9] An accused corporation, however, may defend a criminal charge against it by arguing that the law under which the charge is brought is inconsistent with a provision in the constitution that guarantees the freedom of religion. Where a law infringes religious freedom, it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.[10]

A church is an organized religious community based on identical or at least substantially similar views. Through the enjoyment of this right by its members, the church itself is protected in its right to manifest its religion, to organize and carry out worship, teaching, practice and observance, and it is free to act out and enforce uniformity in these matters. In a state church system its servants are employed for the purpose of applying and teaching a specific religion. Their individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings. The church is, therefore, not obliged to provide religious freedom to its servants and members.[11]

A person who chooses to pursue a military career accepts of his own accord a system of military discipline that by its very nature implies the possibility of placing on certain rights and freedoms of the armed forces, limitations incapable of being imposed on civilians. For example, a state may adopt for its army a disciplinary regulation that forbids an attitude inimical to the established order. Accordingly, the compulsory retirement of a judge advocate in the air force for 'fundamentalist tendencies'

enjoy the right to have his freedom of thought, conscience and religion respected by that state. See also, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live 1985, Article 5; Convention Relating to the Status of Refugees 1951, Articles 3, 4; Convention Relating to the Status of Stateless Persons 1954, Articles 3, 4.

[9] *Church of X* v. *United Kingdom*, European Commission, Application 3798/1968, (1968) 12 *Yearbook* 306.

[10] *R* v. *Big M Drug Mart Ltd*, Supreme Court of Canada, [1986] LRC (Const) 332, per Dickson J at 343–5.

[11] *X* v. *Denmark*, European Commission, Application 7374/1974, (1976) 5 *Decisions & Reports* 157: ECHR 9 does not include the right of a clergyman, in his capacity of a civil servant in a state church system, to set up conditions for baptism which are contrary to the directives of the highest administrative authority within that church, i.e. the church minister.

which infringed the principle of secularism which was the foundation of the state, did not breach ECHR 9.[12]

### *the right to freedom of thought, conscience and religion [or belief]*

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction, and the commitment to religion or belief, whether manifested individually or in community with others. It protects theistic, non-theistic, and atheistic beliefs, and includes the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. The right is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[13] The fundamental character of this right

[12] *Kalac* v. *Turkey*, European Court, (1997) 27 EHRR 552: The officer was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque. The impugned acts included participating in the activities of the Suleyman sect by giving it legal assistance, participating in training sessions, and intervening on several occasions in the appointment of servicemen who were members of the sect. Thereby, he breached military discipline.

[13] Human Rights Committee, General Comment 22 (1993). See UN documents A/4625, s.51; A/2929, chapter VI, section 107: When ICCPR was being drafted, the question was raised whether the words 'thought' and 'belief' were intended to be different concepts. It was asked whether the word 'religion' might not be interpreted as referring only to such faiths as had scriptures or prophets and whether the word 'belief' covered also secular beliefs. Some representatives on the Third Committee thought that 'religion' covered all belief in a divinity, irrespective of the existence of scriptures or prophets. Others felt it would not be desirable to attempt to define 'religion'. As regards 'belief', while some held that only religious beliefs should be dealt with in this article, others stated that what was intended was to provide for complete freedom of thought, conscience and religion which, of necessity, included non-religious beliefs. When requested to clarify whether the word 'belief' was meant to have a religious connotation, or whether it referred also to secular convictions, the secretary-general referred the committee to the following statement in Arcot Krishnaswami, Final Report of the Special Rapporteur: *Study of Discrimination in the Matter of Religious Rights and Practices* (New York: United Nations publications, Sales No.E.60.XIV.2, 1960): 'In view of the difficulty of defining "religion", the term "religion or belief" is used in this study to include, in addition to various theistic creeds, such other beliefs as agnosticism, free thought, atheism and rationalism.' See also Karl Josef Partsch, 'Freedom of Conscience and Expression, and Political Freedom', in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 209: Although no definition of 'thought' or 'conscience' is provided in ICCPR 18, taken together with 'religion' they include all possible attitudes of the individual towards the world, towards society, and towards that

is also reflected in the fact that neither ICCPR 18 nor ACHR 12 may be derogated from even in time of public emergency.

The Supreme Court of Cyprus has confirmed the view that conscience and religion are not confined to the belief in or the relation of a human being to a creator. Religion or convictions refer to theistic, non-theistic and atheistic convictions. It includes convictions such as agnosticism, free-thinking, pacifism, atheism and rationalism.[14] Pacifism as a philosophy falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief ('conviction') protected by ECHR 9.[15] In Zimbabwe, the Supreme Court has held that freedom of conscience and religion had to be broadly construed to extend to conscientiously held beliefs whether grounded in religion or secular morality. The wearing of dreadlocks is a symbolic expression of the beliefs of Rastafarianism, which has the status of a religion in the wider and non-technical sense, or in any event is a system of belief founded on personal morality. A court is not concerned with the validity or attraction of Rastafarian beliefs, but only with the sincerity with which they are held.[16]

The right to freedom of religion excludes any discretion on the part of the state to determine which religious beliefs or the means used to

which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance. 'Thought' includes political and social thought; 'conscience' includes all morality. 'Religion or belief' is not limited to a theistic belief but comprises equally non-theistic and even atheistic beliefs. The same guarantees of freedom apply to all these, and no limitation whatsoever is admitted as far as the realm of personal conscience is concerned; Elizabeth Odio Benito, Special Rapporteur, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* (New York: United Nations, 1989), paragraph 19: 'religion' is 'an explanation of the meaning of life and how to live accordingly'.

[14] *Pitsillides* v. *Republic of Cyprus*, Supreme Court of Cyprus, (1983) 2 CLR 374, at 385, per Stylianides J. Cf. *Barralet et al* v. *Attorney General* [1980] 3 All ER 918, where an English court defined 'religion' as being concerned with man's relations with God. Two of the essential attributes of religion are faith and worship; faith in a god and worship of that god. But Dillon J conceded that this definition which he formulated may not accommodate Buddhism. 'It is said that religion cannot be necessarily theist or dependent on belief in a god, a supernatural or supreme being, because Buddhism does not have any such belief . . . I do not know enough about Buddhism. It may be that the answer in respect of Buddhism is to treat it as an exception.'

[15] *Arrowsmith* v. *United Kingdom*, European Commission, (1978) 3 EHRR 218: 'The commitment, in both theory and practice, to the philosophy of securing one's political or other objectives without resort to the threat or use of force against another human being under any circumstances, even in response to the threat of or use of force.'

[16] *Re Chikweche*, Supreme Court of Zimbabwe, [1995] 2 LRC 93.

express such beliefs are legitimate. While a state is entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population, that power may not be used to impose rigid, or indeed prohibitive, conditions on the practice of religious beliefs by certain non-orthodox movements.[17] To require an elected member of parliament to take an oath on the Gospel, which he did not wish to do, infringed this right since it required him to swear allegiance to a particular religion on pain of forfeiting his parliamentary seat. The religious dimension of this right is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.[18]

A state church system in itself does not infringe ECHR 9 provided that such system includes specific safeguards for the individual's freedom of religion.[19] In particular, no one may be forced to enter, or be prohibited

[17] *Manoussakis* v. *Greece*, European Court, (1996) 23 EHRR 387: The prosecution and conviction of a group of Jehovah's Witnesses for having established and operated a place of worship without first obtaining the authorization required by law, was neither proportionate to the legitimate aim (namely, protection of public order) nor necessary in a democratic society. Cf. *Chan Hiang Leng Colin* v. *Minister for Information and the Arts*, Court of Appeal, Singapore, [1997] 1 LRC 107: The minister prohibited as contrary to the public interest the importation, sale or distribution of publications of the International Bible Students Association, an organization under the ambit of the Jehovah's Witnesses. These publications were essential in the profession, practice and propagation of that faith. The sole reason for the order was the refusal of Jehovah's Witnesses, on religious grounds, to perform national service. The minister argued that such refusal constituted a serious threat to national security. The court refused to grant leave to apply for judicial review on the ground that issues of national security were not justiciable.

[18] *Buscarini* v. *San Marino*, European Court, (1999) 30 EHRR 208.

[19] The argument against a state religion has been presented very cogently in *Engel* v. *Vitale*, United States Supreme Court, 370 US 421 (1962), by Black J in applying the First Amendment to the Constitution ('Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof') which contains both an 'establishment clause' and a 'free exercise clause': 'When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same

from leaving, a state church. An individual may not be compelled to be involved directly in religious activities against his will without being a member of the religious community carrying out those activities. For example, the paying of taxes to a church for its religious activities will constitute such involvement.[20] Similarly, freedom of religion requires schools to abstain from enforcing religious truth. Accordingly, to make it mandatory for crucifixes to be hung in all elementary school classrooms is an infringement of this right. 'The crucifix was not merely an element of occidental culture; it was the expression of the Christian religion'.[21] A state education system must guarantee respect for the political and religious beliefs of pupils and their parents. The public officials who staff the educational system must be non-sectarian, and their conduct

history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its unhallowed perversion by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.' In his concurring opinion, Douglas J noted that: 'By reason of the First Amendment government is commanded "to have no interest in theology or ritual", for on those matters "government must be neutral". The First Amendment leaves the government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic – the nonbeliever – is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.'

[20] *Darby* v. *Sweden*, European Commission, 9 May 1989. Where a church tax was imposed by virtue of a taxation power which the church itself enjoyed, and was paid to the tax authorities as a small but identifiable part of what was called 'municipal taxes' and then transferred to the church, ECHR 9 requires that a state respects the religious convictions of those who do not belong to the church by making it possible for them to be exempted from the obligation to make contributions to the church for its religious activities. Cf. *C* v. *United Kingdom* European Commission, Application 10358/83, (1983) 37 *Decisions & Reports* 142: The commission distinguished the duty to pay general taxes which are not earmarked for a specific religious purpose, even if the state uses money collected by way of such taxes to support religious communities or religious activities. In the case of general taxes there is no direct link between the individual taxpayer and the state's contribution to the religious activities.

[21] Decision of the Federal Constitutional Court of Germany, 16 May 1995, 1 BvR 1087/91, (1995) 2 *Bulletin on Constitutional Case-Law* 157. Cf. Decision of the Constitutional Tribunal of Poland, 7 June 1994, Case No.K.17/93, (1994) 2 *Bulletin on Constitutional Case-Law* 151: A law which obliged public broadcasting organizations 'to respect the Christian values which correspond with universal ethical rules' did not result in giving a privileged position to one system of values. The obligation to respect Christian values did not constitute an obligation to promote them. Moreover, the law referred only to those Christian values that concur with universal ethical principles.

and appearance must be consistent with the secular nature of a state. For example, there is a strong public interest in prohibiting a teacher from wearing an Islamic veil, a cassock or a kippa or displaying a crucifix.[22]

### *freedom to have or to adopt a religion or belief of his choice*

Much of the discussion at the drafting stage of ICCPR 18 centred on whether this article should contain explicit reference to the right of a person to change his religion or belief. It was argued that the right to change was implicit in the statement that 'Everyone shall have the right to freedom of thought, conscience and religion', and there was no need to mention it specifically. Concern was expressed that specific mention of the right to 'change' one's religion or belief might be interpreted as lending support to proselytizing or missionary activities or concerted efforts to propagate anti-religious beliefs or as encouraging doubts in the mind of a believer of the truth of his belief. It was also contended that a provision in the covenant on the right to change one's religion would create uncertainty and difficulty for those states whose constitutions or basic laws were religious in origin or in character. Accordingly, Saudi Arabia proposed that the words 'freedom to change his religion or belief', which appeared in the working draft, be deleted.[23] Many members, on the other hand, preferred these words to remain. They stressed that the paramount issue was the protection of the individual's freedom of choice in matters of thought, conscience and religion. The detailed provisions, including recognition of the right not only to maintain but, equally, to change one's religion or belief, were necessary to give legal content to that freedom. It was pointed out that there were religious bodies which discouraged religious conversions, and laws which recognized state religions and discriminated against non-believers of such religions. It was also pointed out that the article dealt only with the right to change one's own religion or belief, not that of other persons.[24] Finally, a compromise formula submitted by Brazil and the Philippines

[22] *X* v. *Conseil d'Etat of the Canton of Genève*, Federal Court of Switzerland, 12 November 1997, *Arrêts du Tribunal fédéral*, 123 1 296, (1997) 3 *Bulletin on Constitutional Case-Law* 453: A veil when worn by a woman of the Islamic faith is a clearly visible religious insignia, and the authorities are entitled to prohibit a woman teacher employed in a state school from wearing a veil within the school.

[23] UN documents A/2929, chapter VI, section 108; A/4625, section 48.

[24] UN documents A/2929, chapter VI, section 109; A/4625, section 49.

to substitute the words 'freedom to have a religion or belief of his choice', further amended on the suggestion of the United Kingdom to include also the words 'or to adopt' after the words 'to have', was accepted without dissent. The amendment was suggested when concern was expressed by some delegates that the words 'to have' might be interpreted in a static manner, barring a change of religion or belief once a choice had been made. It was also agreed to add a further provision protecting a person from being subjected to 'coercion'.[25]

This issue was put to the test, significantly, in a predominantly Islamic country. A Malaysian was detained under the Internal Security Act to prevent him acting in a manner prejudicial to the security of Malaysia. The essence of the ground for the detention was the allegation that he was involved in a plan or programme to disseminate Christianity among Malays, that he took part in meetings and seminars for that purpose, and that he had converted six Malays to Christianity. Affirming the decision of the trial judge that the detention was unlawful, the Supreme Court held that the respondent's alleged actions did not go beyond what could normally be regarded as professing and practising one's religion.[26] The Human Rights Committee has now confirmed that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.[27]

### *freedom either individually or in community with others and in public or in private*

The right to manifest one's religion 'in community with others' has always been regarded as an essential part of the freedom of religion. The two alternatives 'either individually or in community with others'

[25] UN documents A/4625, section 50; A/2929, chapter VI, sections 110, 111. A proposal that 'any change of religion made unlawfully or to evade obligations under the law governing the personal status of the person concerned shall be declared null and void' submitted by Egypt was rejected because it was felt that the question of religious conversion as such should be distinguished from the question of personal status, the former being spiritual in character, the latter being a legal matter.

[26] *Minister for Home Affairs, Malaysia* v. *Jamaluddin bin Othman*, Supreme Court of Malaysia, [1990] LRC (Const) 380.

[27] Human Rights Committee, General Comment 22 (1993).

cannot be considered as mutually exclusive, or as leaving a choice to the authorities, but only as recognizing that religion may be practised in either form.[28]

### *to manifest his religion or belief in worship, observance, practice and teaching*

The freedom to manifest a religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The United Nations has identified the following as being some of them: (a) to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (b) to establish and maintain appropriate charitable or humanitarian institutions; (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (d) to write, issue and disseminate relevant publications in these areas; (e) to teach a religion or belief in places suitable for these purposes; (f) to solicit and receive voluntary financial and other contributions from individuals and institutions; (g) to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; (h) to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; (i) to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.[29] However, what constitutes an essential part of a religion or a religious practice will need to be determined with reference not only

[28] *Ahmed* v. *United Kingdom*, European Commission, (1981) 4 EHRR 126. See also *The Bahamas District of the Methodist Church in the Caribbean and the Americas* v. *Symonette*, Privy Council on appeal from the Supreme Court of The Bahamas, [2000] 5 LRC 196: Where, following irreconcilable differences among the members of The Bahamas District of the Methodist Church in the Caribbean, legislation was introduced to establish a new autonomous church, the Methodist Church of The Bahamas, leaving members of the former free to remain as members of the Caribbean church or to join the new church, the inconvenience flowing from the division, which was made genuinely and reasonably for the legitimate purpose of ending an internal schism in the interests of both groups, did not amount to a hindrance of the practice of religion.

[29] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, Article 6. A religious matrimonial ceremony is also a manifestation of the freedom of religion: Decision of the Constitutional Court of Croatia, 16 February 1994, Case No.U-1-231/1990, *Narodne novine*, No.25/1994, (1994) 1 *Bulletin on Constitutional Case-Law* 14.

to the doctrine of a particular religion, but also to practices regarded by the community as part of its religion.[30]

While the European Commission has expressed the view that as regards the modality of a particular religious manifestation, the situation of the person claiming that freedom would be a relevant factor to consider, and that the right to exercise freedom of religion may be limited by contractual obligations,[31] a more rigorous adherence to this right was demonstrated by the United States Supreme Court which held that if an employee is forced to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand, the imposition of such a choice places the same kind of burden upon the free exercise of religion as would a fine imposed on her for following her religious precepts.[32]

The right to manifest a religion or belief does not mean that a particular creed or confession is protected from criticism, unless such criticism or 'agitation' reaches such a level that it might endanger the freedom of religion. Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious

[30] *Seshammal* v. *State of Tamil Nadu*, Supreme Court of India, (1972) 2 SCC 11. See also, *Quareshi* v. *State of Bihar*, Supreme Court of India, [1959] SCR 629, AIR 1958 SC 731; *Yulitha Hyde* v. *State of Orissa*, High Court of Orissa, AIR 1973 Or. 116.

[31] *Ahmed* v. *United Kingdom*, (1981) 4 EHRR 126. A British national of the Islamic faith complained unsuccessfully that he was forced to resign from his post as a full-time teacher because he was refused permission to attend a mosque for congressional prayer (thereby missing about forty-five minutes of classwork in the beginning of the afternoon on those Fridays which were schooldays).

[32] *Sherbert* v. *Verner*, United States Supreme Court, 374 US 398 (1963). A Seventh-Day Adventist who had been discharged by her employer for her refusal to work on Saturday, the Sabbath Day of her faith, and who was refused unemployment compensation on the ground that her refusal to work on Saturdays, causing other employers to refuse to hire her, disqualified her for failure to accept suitable work, claimed successfully that her right to the free exercise of her religion had been abridged. See also opinion of Douglas J: 'Religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily. Religious scruples of a Sikh require him to carry a regular or a symbolic sword. Religious scruples of a Jehovah's Witness teach him to be a colporteur, going from door to door, from town to town, distributing his religious pamphlets. Religious scruples of a Quaker compel him to refrain from swearing and to affirm instead. Religious scruples of a Buddhist may require him to refrain from partaking of any flesh, even of fish. The examples could be multiplied, including those of the Seventh-Day Adventist whose Sabbath is Saturday and who is advised not to eat some meats. These suffice, however, to show that many people hold beliefs alien to the majority of our society – beliefs that are protected by the First Amendment.'

majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the state, notably its responsibility to ensure the peaceful enjoyment of the right to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.[33]

### worship

The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.[34]

### observance

The observance of a religion or a belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.[35] This principle was applied

[33] *Otto-Preminger-Institut* v. *Austria*, European Court, (1994) 19 EHRR 34. The seizure and forfeiture of a film that portrayed 'God the Father as old, infirm and ineffective; Jesus Christ as a "mummy's boy" of low intelligence; and the Virgin Mary as an unprincipled wanton' was justified as being for 'the protection of the rights of others'. Cf. *Church of Scientology* v. *Sweden*, European Commission, (1980) 21 *Decisions & Reports* 109: A newspaper report of certain statements made by a professor of theology in the course of a lecture, including the following passage: 'Scientology is the most untruthful movement there is. It is the cholera of spiritual life. That is how dangerous it is', did not raise an issue under ECHR 9.

[34] Human Rights Committee, General Comment 22 (1993). See also *R* v. *Registrar General, ex parte Segerdal*, United Kingdom, [1970] 3 All ER 886, per Buckley LJ at 892: 'Worship' will have some, at least, of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession.

[35] Human Rights Committee, General Comment 22 (1993). But see *Sumayyah Mohammed* v. *Moraine*, High Court of Trinidad and Tobago, [1996] 3 LRC 475: The exclusion from attendance at classes of a female student who refused to wear the prescribed school uniform because, as a Muslim, she sincerely believed that the wearing of the *hijab* (a mode of

by the Supreme Court of Zimbabwe to a follower of the Rastafarian movement who had applied to the High Court to be registered as a legal practitioner, having met all the statutory requirements for admission to the profession. When he appeared in person before the High Court, the presiding judge considered that he was not properly dressed; he objected, in particular, to the applicant's hair which, as a Rastafarian, he wore habitually in dreadlocks. The judge declined to permit the applicant to take the oath of loyalty and of office as a necessary preliminary to registration. The Supreme Court held that the applicant's manifestation of his religion by the wearing of dreadlocks fell within the protection of freedom of conscience afforded by the constitution. Therefore, the refusal to permit him to take the two oaths as a preliminary to registration as a legal practitioner on the ground of his appearance had placed the applicant in a dilemma. He was forced to choose between adherence to the precepts of his religion, which meant foregoing the right to practise the profession he had chosen, or sacrificing an important edict of his religion in order to be able to practise; it followed that the judge's ruling violated his constitutional right to freedom of religion.[36]

A state is not obliged to enact personal laws to enable a person to manifest his religion by observance. Under Muslim law, a Muslim marriage could not take place unless the parties also underwent a civil marriage. In the Supreme Court of Mauritius, Glover CJ and Lallah SPJ noted that if freedom of religion could be fully enjoyed only on the condition that all that was ordained in religion was given effect to in the law, the principle of the duality of religion and state is infringed.

> 'The secular state is not anti-religious but recognizes freedom of religion in the sphere that belongs to it. As between the state and religion each has its own sphere, the former that of law-making for the public good and the latter that of religious teaching, observance and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its

dress ensuring that only the hands and face are exposed) was a mandatory requirement of Islam, was quashed, not on the ground that the exclusion violated the 'right to freedom of conscience, religious belief and observance (Constitution of the Republic of Trinidad and Tobago 1976, s.4(h)), but because the school authorities had based their decision on extraneous or irrelevant considerations, namely that a grant of exemption would lead to indiscipline, they would have to accede to other similar requests, could transfer to another school, etc.

[36] *Re Chikweche*, Supreme Court of Zimbabwe, [1995] 2 LRC 93.

> own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion is the state religion but also the holy book of that religion is the supreme law.'[37]

## practice

The practice of a religion or belief includes acts integral to the conduct by religious groups of their basic affairs such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools, and the freedom to prepare and distribute religious texts or publications.[38] But the term 'practice' does not cover each act which is motivated or influenced by a religion or a belief. For example, public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence, which may be considered to be a normal and recognized manifestation of pacifist belief, must be distinguished from an attempt by a pacifist to induce troops not to perform their military duties. An act that does not actually express such belief is not protected by ECHR 9(1), whether or not it is motivated or influenced by such belief.[39]

[37] *Bhewa and Another* v. *Government of Mauritius*, Supreme Court of Mauritius, [1991] LRC (Const) 298. Two persons of the Islamic faith who wished to be married solely in accordance with the rites of their religion, and not also under the uniform provisions of the Civil Code as required by law, claimed that as practising Muslims they would contemplate marriage only in accordance with their religion and only if they would be governed by the rules of their faith as regards marriage, divorce and devolution of property. See also *Serif* v. *Greece*, European Court, (1999) 31 EHRR 561: The conviction of a Muslim religious leader who had not been elected Mufti in accordance with statute law for having publicly worn the uniform of a minister of a 'known religion', issued a message about the religious significance of a feast, and delivered a speech at a religious gathering, infringed his right, in community with others and in public, to manifest his religion in worship and teaching; Decision of the Constitutional Court of Spain, 166/1996, 28 October 1996, *Boletin Official del Estado*, no.291 of 03.12.1996, (1996) 3 *Bulletin on Constitutional Case-Law* 421: Where a person belonging to the religious congregation Jehovah's Witnesses claims medical expenses of undergoing surgery for an ulcer at the private clinic because the state hospital under the public health service declines to perform the surgery without a blood transfusion to which he objects on religious grounds, the state is not obliged to provide such services for adherents of a given faith so that they might fulfil the requirements of religious observance.

[38] Human Rights Committee, General Comment 22 (1993).

[39] *Arrowsmith* v. *United Kingdom*, European Commission, (1978) 3 EHRR 218. The commission upheld the conviction under the Incitement to Disaffection Act of a pacifist who had distributed leaflets to troops stationed at an army camp on the ground that she had thereby endeavoured to seduce them from their duty, namely, service in Northern Ireland.

The freedom to manifest religion and belief 'in practice' cannot be interpreted to include a right for prisoners convicted of scheduled 'terrorist-type' offences under special laws who consider themselves 'political prisoners' or 'prisoners of war' to wear their own clothes in prison and be relieved from the requirement of prison work and, in general, be treated in a way which distinguishes them from other prisoners convicted of criminal offences by the ordinary courts.[40] Nor does the refusal of a practising Jew to hand over the guett (letter of repudiation) to his ex-wife, after the divorce, constitute the manifestation of religious observance or practice.[41] The obligation imposed on a member of the Church of England to change the registration of his religion in the prison records before the prison authorities would allow him to attend a religious service of the non-conformist church does not constitute a violation of his religious freedom.[42]

The right to hold a belief does not necessarily guarantee the right to behave in the public sphere in a way which is dictated by such belief; for instance, by refusing to pay certain taxes because part of the revenue so

Mr Opsahl who, in a separate opinion, agreed that a distinction may be drawn between manifestation and motivation, recognized that it would be difficult to determine where this line should be drawn. 'On the one hand, ordinary crimes such as violence or theft certainly cannot be protected as manifestations of a belief even if it is shown that they were motivated or inspired by it . . . On the other hand, one cannot . . . generally exclude from article 9 all acts which are declared unlawful according to the law of the land if they do not *necessarily* manifest a belief, provided they are clearly motivated by it . . . I consider that article 9 must, in principle, be applicable to a great many acts which are not, on their face, necessarily manifesting the underlying or motivating belief, if that is what they *genuinely* do. He disagreed with the view of the majority that because one might have done what the applicant did without sharing her belief in pacifism, ECHR 9 was inapplicable. Describing that approach as 'too narrow', he argued that the protection of ECHR 9 might have to be denied to one person but granted to another for the same acts, whether it is for the distribution of the same leaflets, or for other alleged manifestations of a belief as, for instance, in different cases of alleged conscientious objection. On the facts of this case, he had no doubt concerning the connection between the applicant's belief and the acts for which she was punished. Sharing that view was Mr Klecker who, in his dissenting opinion, observed that in relation to ECHR 9, if it was accepted that practical action was an important part of the philosophy of pacifism, it seemed difficult not to admit that the applicant was prosecuted for her pacifist belief 'since the distribution of the leaflet was not merely an extension of her belief but an integral part if it'. See also, *Le Cour Grandmaison and Fritz* v. *France*, European Commission, 10 EHRR 67.

[40] *McFeeley* v. *United Kingdom*, European Commission, (1980) 20 *Decisions & Reports* 44.

[41] *D* v. *France*, European Commission, Application 10180/82, (1983) 35 *Decisions & Reports* 199.

[42] *X* v. *United Kingdom*, European Commission, Application 9796/82 (1982) 5 EHRR 487.

raised may be applied for military expenditure. The obligation to pay taxes is a general one which has no specific conscientious implications in itself. 'Its neutrality in this sense is also illustrated by the fact that no tax payer can influence or determine the purpose for which his or her contributions are applied, once they are collected.'[43]

### teaching

The right to manifest one's religion or belief in teaching includes in principle the right to try to convince one's neighbour. But the European Court has distinguished between 'bearing Christian witness' and 'improper proselytism': the former corresponds to true evangelism; the latter represents a corruption or deformation of it, which may take the form of activities offering material or social advantages with a view to gaining new members for a church or exerting improper pressure on people in distress or in need. It may even entail the use of violence or brainwashing.[44] Even 'evangelism', if conducted within a superior/subordinate relationship may constitute an abuse of trust and, therefore, an infringement of ECHR 9.[45] The teaching of religion or belief does, of course, include the freedom to establish seminaries or religious schools, and the freedom to prepare and distribute religious texts or publications.[46]

A proposal to include a reference to the freedom of religious denominations or communities to organize themselves to perform missionary,

[43] *X* v. *United Kingdom*, European Commission, Application 10295/82, (1983) 6 EHRR 558. When a pacifist complained that she should not be obliged to pay a portion of her taxes without an assurance that they would not be applied for military or related expenditure, arguing that the compulsion to contribute to expenditure for armaments rather than for peaceful purposes prevented her from manifesting her belief through practice, the commission rejected her complaint.

[44] *Kokkinakis* v. *Greece*, European Court, (1993) 17 EHRR 397.

[45] *Larissis* v. *Greece*, European Court, (1998) 27 EHRR 329. For example, the hierarchical structures which are a feature of life in the military may colour every aspect of the relationship between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. However, not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category. But where circumstances so require, a state may be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces.

[46] Human Rights Committee, General Comment 22 (1993).

educational and medical work was considered when ICCPR 18 was being drafted. On the one hand, it was emphasized that any religious sect or order, as a corporate body, should have an inherent right to perpetuate its own mode of life and to propagate its doctrine. On the other hand, it was argued that the missionary society of one religion often tended to undermine the fundamental faith of another religion and might therefore constitute a source of inter-religious misunderstanding or friction. No decision was made on this proposal. Another proposal that 'every person of full age and sound mind' should be free 'to endeavour to persuade other persons of full age and sound mind of the truth of his beliefs' was at first accepted but eventually rejected.[47]

### *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice*

Freedom is primarily characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, but also indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[48] Accordingly, coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief, or to convert, are barred. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment, or the rights guaranteed by ICCPR 25 and other provisions of the

[47] UN document A/2929, chapter VI, section 116.

[48] Per Dickson J in *R* v. *Big M Drug Mart Ltd*, Supreme Court of Canada, [1986] LRC (Const) 332, at 359.

covenant, are similarly prohibited. The same protection is enjoyed by holders of all beliefs of a non-religious nature.[49]

For any custom to compel a person to do that which is not the practice of his or her religion is a violation of this right. For example, in Nigeria, a widow, who had adopted Christianity after having married under Idoma native law and custom, argued that on the death of her husband she could not be compelled to offer a goat demanded of her by custom for the burial sacrifice, since as a Christian she could not be a party to the sacrifice. Ogebe J observed that no court, authority or person has the power to compel anybody to practise what is not recognized or allowed by his religion so long as that practice is generally known not to be allowed by his religion.[50]

A government may not compel individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. Accordingly, the Lord's Day Act, which compelled the observance of the Christian sabbath in Canada, infringed the freedom of conscience and religion. It took religious values rooted in Christian morality and, using the force of the state, translated them into a positive law binding on believers and non-believers alike. It prohibited non-Christians for religious reasons from carrying out activities which are otherwise lawful, moral and normal.[51] A different view was taken by the Constitutional Court of South Africa which examined the prohibition imposed by section 90 of the Liquor Act 1989 on the selling of liquor by wine licensees on Sundays. A majority were of the view that the selection of a Sunday for purposes which were not purely religious

[49] Human Rights Committee, General Comment 22 (1993). When this provision was proposed for inclusion in ICCPR 18, it was understood that the word 'coercion' should not be construed as applying to moral or intellectual persuasion, or to any legitimate limitation of freedom to manifest one's religion or belief. The words 'impair his freedom' were preferred to 'deprive him of his right to freedom' since they were broader in scope and also covered indirect pressures. (UN document A/4625, section 52). A proposal that no one should be required to do any act which was contrary to his religious observance or practice was not adopted. Although there was no objection in principle to the proposal, it was thought that it might not always be possible to apply such a provision, especially in countries where many different religions were practised. (UN document A/2929, chapter VI, section 117).

[50] *Ojonye* v. *Adegbudu*, High Court of Nigeria, [1983] 4 NCLR 492.

[51] *The Queen* v. *Big M Drug Mart Ltd* [1986] LRC (Const) 332. 'If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom', per Dickson CJ.

could not be said to compel sabbatical observance or to promote any particular religion. In South Africa, Sundays had acquired a secular as well as a religious character, being the most common day of the week on which people did not work. Its secular nature was evidenced by the ways in which many people spent their Sunday, engaging in sport and recreation rather than worship. No coercion or constraint, whether direct or indirect, giving rise to an infringement of the freedom of religion could be discerned in the law since it did not compel licensees or any other persons, directly or indirectly, to observe the Christian Sabbath, nor did it in any way constrain their right to entertain such religious beliefs as they might choose or to declare their religious beliefs openly or to manifest their religious beliefs. Moreover, whatever connection there might be between the Christian religion and restrictions against grocers selling wine on Sundays at a time when their shops were open for other business was too tenuous for the restriction to be characterized as an infringement of religious freedom.[52]

A proposal which was not adopted, and therefore not included in ICCPR 18, was that made by the Philippines that 'persons who conscientiously object to war as being contrary to their religion shall be exempt from military service'.[53] But the Supreme Court of Cyprus entertained an application from two Jehovah's Witnesses who argued that their conscience did not allow them to take up arms. The court held that having regard to the national realities at the time, the security of the state justified the imposition of compulsory military service, but that if and when in the future the circumstances of the country permitted it, the appropriate authorities should consider the exemption of conscientious objectors from military service and/or the imposition of alternative service.[54] The Human Rights Committee has now stated that although the

[52] *State* v. *Lawrence*, Constitutional Court of South Africa, [1998] 1 LRC 390. Cf. concurring opinion of Sachs and Mokgoro JJ: Section 90 'contained a sectarian message by identifying Sunday, Good Friday and Christmas Day as closed days for purposes of selling liquor thereby manifesting a state indorsement of Christianity as a religion requiring special observance and meriting more respect than other religions. Implicit in this was the assumption that Christians occupied central positions in the political kingdom, while non-Christians lived on the periphery'; dissenting opinion of O'Regan, Goldstone and Madala JJ: The definition of closed day was not a secular one having regard to the fact that Good Friday and Christmas had been selected with Sundays to comprise the definition of closed day because of their religious significance to Christians, thus giving indorsement to Christianity but not to other religions.

[53] UN document A/2929, chapter VI, section 117.

[54] *Pitsillides* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1983) 2 CLR 374.

covenant did not explicitly refer to a right of conscientious objection, such a right could be derived from ICCPR 18, inasmuch as the obligation to use lethal force might seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.[55]

*Freedom to manifest one's religion or beliefs may be subject to such limitations as are prescribed by law (in a democratic society) and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*

The legislature may interfere only with the freedom to manifest one's religion or belief. The freedom from coercion to have or to adopt a religion or belief, and the liberty of parents to ensure religious and moral education cannot be restricted. This limitation clause is required to be strictly interpreted, in that restrictions are not allowed on grounds not specified in it. Limitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.[56]

The protection of 'public order' has been invoked to require parties wishing to go through a religious marriage ceremony to produce evidence of a previous civil marriage;[57] to require a person wishing to perform the ritual slaughter of a goat to give prior notice of his intention to do so to the administrative authorities designated by law;[58] to

[55] General Comment 22 (1993). In its earlier decisions, the committee took the view that the covenant did not provide for the right to conscientious objection; neither ICCPR 18 nor ICCPR 19, especially taking into account ICCPR 8(3)(c)(ii), could be construed as implying that right. See *L.T.K* v. *Finland*, Human Rights Committee, Communication No.185/1984, HRC 1985 Report, Annex XXI; *Muhonen* v. *Finland*, Human Rights Committee, Communication No.89/1981, HRC 1985 Report, Annex VII. For decisions under the European Convention, see *Grandrath* v. *Germany*, European Commission, (1966) 10 *Yearbook* 626; (1966) 16 *Collection of Decisions* 41; *X* v. *Germany*, European Commission, Application 7705/19, (1977) 9 *Decisions & Reports* 196.

[56] Human Rights Committee, General Comment 22 (1993). See also *Manoussakis* v. *Greece*, European Court, (1996) 23 EHRR 387: The need to secure true religious pluralism is an inherent feature of the notion of a democratic society. Considerable weight must be attached to that need when it comes to determining whether the restriction is proportionate to the legitimate aim pursued.

[57] Decision of the Hoge Raad (Supreme Court), Netherlands, 22 June 1971, *Nederlandse Jurisprudentie* No.22.

[58] Decison of the Hoge Raad (Supreme Court), Netherlands, 4 November 1969, *Nederlandse Jurisprudentie* 3298, No.127.

prohibit the celebration of a religious service in public in places other than those permitted by law for public worship;[59] to refuse permission for a prisoner to grow a chin beard or to obtain a prayer chain;[60] and to justify the refusal to excuse a juror who claimed that his conscience did not permit him 'to take part in judging a person'.[61]

The protection of 'health' was the basis upon which the prosecution, conviction and sentence of a Sikh who failed to wear a crash helmet as a necessary safety measure when riding his motorcycle was justified.[62]

The concept of 'morals' derives from many social, philosophical and religious traditions. Consequently, limitations on the freedom to manifest a religion or belief for the purpose of protection of morals must be based on principles not deriving exclusively from a single tradition.[63]

Compulsory motor insurance, to which a person objected on grounds of conscience, has been justified as being necessary 'for the protection of the rights and freedoms of others'. It safeguarded the rights of third parties who might become victims of motor accidents.[64] Similar considerations were relied upon by prison authorities to confiscate a book which, though religious or philosophical in character, contained a chapter dedicated to martial arts.[65] In Greece, the rule whereby the clergy of recognized religions are disqualified from standing for election to public office is designed to protect the right of the voter to form his or her opinions unhindered by the special spiritual relationship that exists between the clergy and members of religious communities, and also to protect the clergy from the dangers inherent in the exercise by them of public office.[66]

[59] Decision of the Hoge Raad (Supreme Court), Netherlands, 19 January 1962, *Nederlandse Jurisprudentie* 1962, p.417.

[60] *X* v. *Austria*, European Commission, Application 1753/63, (1965) 8 *Yearbook* 174.

[61] *Re Eric Darien, A Juror*, Supreme Court of Jamaica, (1974) 22 WIR 323.

[62] *X* v. *United Kingdom*, European Commission, Application 7992/77, (1978) 14 *Decisions & Reports* 234. The requirement to wear a crash helmet obliged him to remove his turban. See also *Bhinder* v. *Canada*, Human Rights Committee, Communication No.208/1986, HRC 1990 Report, Annex IX.E.

[63] Human Rights Committee, General Comment 22 (1993).

[64] *X* v. *Netherlands*, European Commission, Application 2988/66, (1967) 10 *Yearbook* 472.

[65] *X* v. *United Kingdom*, European Commission, Application 6886/75, (1976) 5 *Decisions & Reports* 100. But see Human Rights Committee, General Comment 22 (1993): Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.

[66] Decision of the State Council of Greece, 3704/95, 29 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 164.

*the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions*

The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions is related to the guarantee of the freedom to teach a religion or belief.[67] Public education that includes instruction in a particular religion or belief is inconsistent with this right unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians. But public school instruction in the study of the history of religions and ethics is permissible if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion.[68]

Arrangements that allow compliance with this right include (a) the prohibition of all forms of religious instruction or observance in public schools, with religious education being provided either outside school hours or in private schools; (b) religious education in the official or majority religion in public schools, with provision for full exemption for adherents of other religions and non-religious persons; (c) the offering of instruction in several or even all religions, on the basis of demand, within the public system of education; and (d) the inclusion in public school curricula of neutral and objective instruction in the general history of religions and ethics.[69] The need to apply for exemption from a statutory requirement of compulsory education by attendance at a

[67] In Canada, in the absence of any specific reference to this aspect of the right, it has been held that 'the freedom of conscience and religion' (Canadian Charter of Rights and Freedoms 1982, s.2(a)) encompasses the right of parents to educate their children according to their religious beliefs: *B* v. *Children's Aid Society of Metropolitan Toronto*, Supreme Court of Canada, [1995] 4 LRC 107.

[68] Human Rights Committee, General Comment 22 (1993). See *Hartikainen* v. *Finland*, Human Rights Committee, Communication No.40/1978, HRC 1981 Report, Annex XV. A school teacher alleged that the textbooks on the basis of which such classes were taught were written by Christians and, therefore, the teaching was unavoidably religious in nature.

[69] *Waldman* v. *Canada*, Human Rights Committee, Communication No.694/1996, HRC 2000 Report, Annex IX.H, individual concurring opinion of Martin Scheinin. See *Engel* v. *Vitale*, United States Supreme Court, 370 US 421 (1962): A programme of daily classroom prayers in public schools in New York State ('Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country'), the observance of which on the part of students was voluntary, violated the First Amendment ('Congress shall make no law respecting an establishment of religions, or prohibiting the free exercise thereof').

public school, by certified instruction at home or elsewhere, or by attendance at an approved private school, does not offend religious freedom.[70]

The right of parents to choose medical or other treatment according to their beliefs flows from their right to educate their children according to their own religious beliefs. However, while the freedom of religious belief is broad, the freedom to act on those beliefs is considerably narrower. Accordingly, although parents are entitled to educate and rear their children in the tenets of their faith, they may not impose on the child religious practices which threaten its life, health or safety. The denial of necessary medical care to a child on the grounds of the parents' religious beliefs can have the effect, if the child were consequently to die, of precluding the child from exercising its own right to choose a religion. Freedom of religion does not extend to encompassing activity that so categorically negates the freedom of conscience of another.[71]

[70] *Jones* v. *The Queen*, Supreme Court of Canada, [1988] LRC (Const) 289.

[71] *B.* v. *Children's Aid Society of Metropolitan Toronto*, Supreme Court of Canada, [1995] 4 LRC 107: The parents belonged to a religious sect, Jehovah's Witnesses, which objected to blood transfusions. When the haemoglobin level of a baby born prematurely dropped to such a level that the physicians considered that her life could be in danger if, in accordance with the parents' wishes, they continued to treat her without blood transfusions, the Children's Aid Society applied to court and secured the care and custody of the child under the Ontario Child Welfare Act 1980. The child thereafter received a blood transfusion and recovered and was returned to the parents who then challenged the right of the society and the court to interfere with their freedom of conscience and religion. The court held that the restriction on the parents' right was necessary to protect the child's health and her rights and freedoms.

# 21

# The right to freedom of opinion, expression, and information

## Texts

### *International instruments*

### Universal Declaration of Human Rights (UDHR)

19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

### International Covenant on Civil and Political Rights (ICCPR)

19. (1) Everyone shall have the right to hold opinions without interference.
    (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
    (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
        (a) For respect of the rights or reputations of others;
        (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
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.

*Regional instruments*

## American Declaration of the Rights and Duties of Man (ADRD)

4. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

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

10. (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## American Convention on Human Rights (ACHR)

13. (1) Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

(2) The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

(a) respect for the rights or reputations of others; or

(b) the protection of national security, public order, or public health or morals.

(3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
(4) Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

### African Charter on Human and Peoples' Rights (AfCHPR)

9. (1) Every individual shall have the right to receive information.
(2) Every individual shall have the right to express and disseminate his opinions within the law.

*Related texts:*

Convention on the International Right of Correction 1952 (1962).

Resolution on Journalistic Freedoms and Human Rights, adopted at the Fourth European Ministerial Conference on Mass Media Policy, Prague, 8 December 1994.

Resolution on the Confidentiality of Journalists' Sources, adopted by the European Parliament, 18 January 1994.

Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission of Human Rights at its 108th regular session.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted by an expert group convened by ARTICLE 19, the International Centre Against Censorship, 1 October 1995.

## Comment

Freedom of expression is one of a number of mutually supporting rights (including freedom of thought, of association and of assembly, and the right to vote) which, taken together, implicitly recognize the importance, both for a democratic society and for individuals personally, of

the ability to form and express opinions, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.[1]

An individual has the right and freedom not only to express his or her own thoughts, but also to seek, receive and impart information and ideas of all kinds. Therefore, when an individual's freedom of expression is unlawfully restricted, the right of others to 'receive' information and ideas is also violated. Consequently, there is a dual aspect to freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. On the other hand, it implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others. In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes, and cannot be separated from, the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. The expression and dissemination of ideas and information are, therefore, indivisible concepts. In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions. These two dimensions of the right to freedom of expression are guaranteed simultaneously.[2]

ICCPR 19 and ECHR 10 recognize the right ('freedom' in ECHR) to hold opinions without interference, while ACHR 13 substitutes 'thought'

[1] *South African National Defence Union* v. *Minister of Defence*, Constitutional Court of South Africa, [2000] 2 LRC 152.

[2] *Compulsory Membership of Journalists' Association*, Inter-American Court, Advisory Opinion OC-5/85, 13 November 1985. See also *Schmidt* v. *Costa Rica*, Inter-American Commission, Case No.9178, 3 October 1984; *Sunday Times* v. *United Kingdom*, European Court, (1979) 2 EHRR 245. The concept of 'expression' does not encompass any notion of the physical expression of feelings, such as the expression of love within a sexual relationship: *X* v. *United Kingdom*, European Commission, Application 7215/75, 12 October 1978.

for 'opinions'.[3] Freedom of 'opinion' was first introduced into UDHR 19 at the instance of the representative of the United States who explained how, in his country, people had been forced by committees of the Congress to reveal their intimate opinions; for example, about communism.[4] When ICCPR 19 was being drafted it was recognized that although a person is invariably conditioned or influenced by the external world, no law can regulate his opinion and no power can dictate what opinion he may or may not entertain.[5] The right to hold opinions is, therefore, a right to which no exception or restriction is permitted.[6] As originally proposed, the phrase 'without interference' was followed by the phrase 'by governmental action'. The latter phrase was then omitted in accordance with the favoured view that the individual should be protected against all forms of interference.[7]

The right to freedom of expression includes the right to 'seek' (in ICCPR 19 and ACHR 13),[8] 'receive' and 'impart' ('express and disseminate opinions' in AfCHPR 9) information and ideas, regardless of frontiers. What is protected is a two-way flow of information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through any other media of one's choice. Any restrictions on the exercise of the right to freedom of expression must be 'provided by law' (1CCPR 19), 'prescribed by law' (ECHR 10), or 'established by law' (ACHR 13).

ACHR 13 prohibits 'prior censorship' (except in respect of 'public entertainments' for the 'sole purpose of regulating access to them for

[3] In ICCPR 19(1), the right to hold opinions without interference is separate and distinct from the right to freedom of expression, while in ECHR 10(1) the freedom to hold opinions is included in the right to freedom of expression.

[4] John P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers Inc., 1984), 51.

[5] UN document A/2929, chap.VI, s.120.

[6] Human Rights Committee, General Comment 10 (1983).

[7] UN document A/2929, chap.VI, s.122. The phrase 'by public authority', is retained in ECHR 10.

[8] When ICCPR 19 was being drafted, there was considerable discussion on whether to retain the expression 'freedom to seek', or to substitute for it 'freedom to gather information' as suggested by India. Those who favoured retention of the word 'seek' argued that it implied the right of active inquiry, while 'gather' had a connotation of passively accepting news provided by governments or news agencies. Others argued that 'seek' had come to imply unrestrained and often shameless probing into the affairs of others, while 'gather', far from having any passive connotations, merely lacked the aggressive connotations of 'seek'. By a roll-call vote of fifty-nine votes to twenty-five with six abstentions, the proposal to replace 'seek' by 'gather' was rejected: UN document A/5000, s.22.

the moral protection of childhood and adolescence'), but allows 'subsequent imposition of liability' to the extent necessary to ensure respect for the rights or reputations of others, or the protection of national security, public order or public health or morals. ICCPR 19 permits 'certain restrictions' as are 'necessary', and ECHR 10 recognizes that the right to freedom of expression may be subject to 'such restrictions, formalities, conditions, restrictions or penalties' as are 'necessary in a democratic society' to protect similar interests or objectives.[9] For 'public order', ICCPR 19 substitutes the expression 'public order (*ordre public*)', while ECHR 10 uses the expression 'prevention of disorder or crime'. ECHR 10 contains two additional interests: 'territorial integrity' and 'public safety', as well as two more objectives: 'for preventing the disclosure of information received in confidence' and 'for maintaining the authority and impartiality of the judiciary'. Both ICCPR 19 and ECHR 10 base the need for restrictions and limitations on 'duties and responsibilities' which the right to freedom of expression carries with it.[10]

ECHR 10 allows states to require the licensing of broadcasting, television or cinema enterprises, while ACHR 13 expressly states that the right of expression may not be restricted by indirect methods or means such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. When ICCPR 19 was being drafted, a proposal to include the words: 'by legally operated visual or

[9] The Commission on Human Rights rejected a French proposal to add after the word 'necessary' in ICCPR 19(2), the phrase 'in a democratic society': UN documents E/CN.4/SR.167, s.21; E/CN.4/SR.322, p.12. But since the latter phrase appears in the ICCPR in respect of the related rights to freedom of assembly and to freedom of association (which provisions were drafted at different times), it is unlikely that the right to freedom of expression alone was conceived of in the context of a non-democratic society.

[10] During the drafting of ICCPR 19, the proposal to include the phrase 'carries with it duties and responsibilities' was opposed in the Commission on Human Rights on the ground that the purpose of the ICCPR was to set forth civil and political rights and to guarantee and protect them rather than to lay down 'duties and responsibilities' and to impose them upon individuals. It was also contended that since each right carried with it a corresponding duty and since in respect of no other right was the corresponding duty set out, this article should not be an exception. In support of the proposal it was argued that freedom of expression could also be a dangerous instrument, and in view of the powerful influence modern media exerted upon the minds of people and upon national and international affairs, 'duties and responsibilities' should be especially emphasized. The clause stating that the right to freedom of expression 'carries with it duties and responsibilities' was adopted, with the addition of the qualifying word 'special': UN document A/2929, chapter VI, section 127.

auditory devices' and 'by duly licensed visual or auditory devices' was rejected. It was thought that these words could be arbitrarily interpreted and applied to throttle channels of communication.[11] Those who supported such a provision explained that what was sought to be licensed was not the information imparted by such devices but rather the devices themselves, such as radio and television stations, a measure which was necessary to prevent chaos in the use of frequencies. Those who opposed feared that it might be utilized to hamper free expression over such media and even be misconstrued to authorize the licensing of the printed word. It was, moreover, widely believed that licensing in the above sense was covered by the reference to 'public order'.[12]

The significance of this right has been affirmed in several national jurisdictions. The Supreme Court of India has observed that freedom of expression is not only politically useful but is indispensable to the operation of a democratic system. 'In a democracy the basic premise is that the people are both the governors and the governed. In order that the governed may form intelligent and wise judgment it is necessary that they must be appraised of all the aspects of a question on which a decision has to be taken so that they might arrive at the truth'.[13] The High Court of Nigeria, has recognized that 'without free discussion particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible'.[14] The Constitutional Court of Lithuania has emphasized that 'information is a need of the individual, as well as the measure of his knowledge'.[15] The High Court of St Vincent and the Grenadines has noted that new and better ideas are most likely to be developed in a community which allows free discussion.[16] The

[11] UN document A/2929, chapter VI, section 126. [12] UN document A/5000, section 23.

[13] *Bennett Coleman & Co* v. *The Union of India*, Supreme Court of India, [1973] 2 SCR 757, at 811, per Mathew J. See also, *Romesh Thappar* v. *The State of Madras*, Supreme Court of India, [1950] SCR 594, per Patanjali Sastri J at 602; *Sakal Newspapers (P) Ltd* v. *The Union of India*, Supreme Court of India, [1962] 3 SCR 842, per Mudholkar J at 866; *Rangarajan* v. *Jagjivan Ram et al*, Supreme Court of India, [1990] LRC (Const) 412, per Jagannatha Shetty J at 427; *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282, per Gubbay CJ.

[14] *The State* v. *The Ivory Trumpet Publishing Co Ltd*, High Court of Nigeria, [1984] 5 NCLR 736, at 747, per Araka CJ.

[15] Decision of the Constitutional Court of Lithuania, 3/96, 19 December 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 377.

[16] *Richards* v. *Attorney General of St Vincent and the Grenadines*, High Court of St Vincent and the Grenadines, [1991] LRC (Const) 311, at 318, per Singh J. See also *Dennis* v. *USA*,

United States Supreme Court has reminded 'that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones'.[17] In Canada, the Supreme Court has cautioned that freedom of expression is too important to be lightly cast aside or limited. 'It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited.' It was this proposition that motivated the early church in restricting access to information, and was then relied upon to oppose and restrict public education for women on the basis that wider knowledge would only make them dissatisfied with their role in society.[18]

## Interpretation

### *everyone*

The word 'everyone' includes both natural and legal persons, as well as a limited company whose activities are commercial.[19] The right to

United States Supreme Court, 341 US 494 (1951), per Douglas J: 'The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.'

[17] *Whitney* v. *California*, United States Supreme Court, 274 US 357 (1927), at 375, per Brandeis J. Holmes J added that 'the best test of truth is the power of thought to get itself accepted in the competition of the market': *Abrams* v. *United States*, United States Supreme Court, 250 US 616 (1919), at 630. Over a century and a half ago, James Madison warned that 'A Popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power which it gives': Letter to W. T. Baray, 4 August 1822, cited by R. Bruce McColm in his dissenting opinion in *Schmidt* v. *Costa Rica*, Inter-American Commission, Case No. 9178, 3 October 1984.

[18] *Irvin Toy Ltd* v. *Attorney General of Quebec*, Supreme Court of Canada, [1989] 1 SCR 927, at 1008, per McIntyre J.

[19] *Autronic AG* v. *Switzerland*, European Court, (1990) 12 EHRR 485. See also *Sunday Times* v. *United Kingdom*, European Court, (1979) 2 EHRR 245; *Markt Intern Verlag GmbH* v. *Germany*, European Court, (1989) 12 EHRR 161; *Groppera Radio AG* v. *Switzerland*, European Court, (1990) 12 EHRR 321; *Attorney General of Antigua* v. *Antigua Times*, Privy Council, [1975] 3 All ER 81. Where the government creates a corporation by special law,

freedom of expression is enjoyed by civil servants;[20] the general proposition that they hold a unique status in a democratic society does not necessarily justify a substantial invasion of their basic rights and freedoms, but requires a proper balance to be struck between freedom of expression and the duty of a civil servant properly to perform his or her functions.[21] Teachers enjoy the freedom to teach their subjects in accordance with their own views, without interference,[22] and students may make their views known during school hours.[23] Freedom of expression does not stop at the gates of an army barracks.[24] To prohibit members of the defence force from participating in public protest or from joining

for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of that corporation's directors, the corporation is part of the government for the purposes of the guarantee of free speech: *Lebron* v. *National Railroad Passenger Corporation*, United States Supreme Court, 21 February 1995.

[20] *Osborne* v. *Treasury Board of Canada*, Supreme Court of Canada, [1991] 2 SCR 69, [1993] 2 LRC 1: A statute which prohibited partisan political expression and activity by public servants under threat of disciplinary action including dismissal from employment, infringed the right to freedom of expression. It applied to all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the public service hierarchy, and therefore to many who were completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. See also *Vogt* v. *Germany*, European Court, (1995) 21 EHRR 205; *Wille* v. *Liechtenstein*, European Court, (1999) 30 EHRR 558.

[21] *De Freitas* v. *Permanent Secretary of Agriculture, Fisheries, Lands and Housing*, Privy Council on appeal from the Court of Appeal of Antigua and Barbuda, [1998] 3 LRC 62: The constitution permitted restrictions to be imposed on public officers' freedom of expression to the extent that such restrictions were 'reasonably necessary for the proper performance of their functions'. However, the imposition of a blanket prohibition on all civil servants from communicating any expression of view on any matter of political controversy was excessive.

[22] *Paez* v. *Colombia*, Human Rights Committee, Communication No.195/1985, HRC 1990 Report, Annex IX.D. But where a concordat existed between the church and the state that religious education in official institutions should be imparted in accordance with the teaching of the church, the latter was entitled to supply curricula, approve texts, and verify how such education was provided.

[23] *Tinker* v. *Des Moines Independent Community School District*, United States Supreme Court, 393 US 503 (1969). A regulation issued by public school authorities prohibiting students from wearing black armbands during school hours to publicize their objections to the hostilities in Vietnam and their support for a truce, violated the students' constitutional rights to free speech in the absence of evidence that the school authorities had reason to anticipate that the wearing of armbands would have substantially interfered with the work of the school or impinged upon the rights of other students or that the prohibition was necessary to avoid material and substantial interference with schoolwork or discipline.

[24] *Grigoriades* v. *Greece*, European Court, (1997) 27 EHRR 464: The prosecution and conviction of a conscripted army officer for making strong and intemperate remarks concerning the armed forces in a letter addressed to his commanding officer could not be justified as 'necessary in a democratic society' since the remarks were made in the context of a general and lengthy discourse critical of army life and the army as an institution.

trade unions is inconsistent with the freedom of expression.[25] Similarly, police officers have the same right to enter into debate about matters of public concern as other citizens.[26] Short of abusive language and insulting behaviour, a lawyer has the freedom to voice assertions and value-judgments on behalf of his or her client.[27]

The pre-eminent role of the press in the exercise of this right has been repeatedly stressed.[28] The freedom of the press comprises not only the choice of the contents of an individual issue of a newspaper, periodical or programme to be broadcast, but also the basic decision about the product's orientation and shape. This includes a decision to publish contributions by third parties who are non-professional writers, including contributions published anonymously, particularly where anonymity has the purpose of protecting authors from disadvantages and of securing the flow of information.[29] News reporting based on interviews, whether edited or not, constitutes one of the most important means

[25] *South African National Defence Union* v. *Minister of Defence*, Constitutional Court of South Africa, [2000] 2 LRC 152. Members of the Defence Force remain part of society with obligations and rights of citizenship. They are required to perform their duties dispassionately, but not to lose their rights and obligations of citizenship in other aspects of their lives.

[26] *Kauesa* v. *Minister of Home Affairs*, Supreme Court of Namibia, [1995] 3 LRC 528. Regulations which prohibit members of the police force from commenting unfavourably in public on the administration of the force or any other government department are inconsistent with freedom of expression.

[27] Decision of the Constitutional Court of Spain, 157/1996, 15 October 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 420. But a personal attack on a judge made by a lawyer in the course of an interview is not protected: Decision of the Constitutional Court of Spain, 46/1998, 2 March 1998, (1998) 1 *Bulletin on Constitutional Case-Law* 129.

[28] *Saxbe* v. *Washington Post*, United States Supreme Court, 417 US 843 (1974): An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large; *Castells* v. *Spain*, European Court, (1992) 14 EHRR 445: Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.

[29] Decision of the Federal Constitutional Court of Germany, 8 October 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 355: House journals, which are distributed exclusively within a company, belong to the 'press'. It is the communication medium which is decisive, not its distribution pathway or its specific group of readers. See also Decision of the Federal Constitutional Court of Germany, 15 December 1999, (2000) 2 *Bulletin on Constitutional Case-Law* 280.

whereby the press is able to play its vital role of 'public watchdog'.[30] Journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation.[31] Indeed, by being permitted to rely on the absence of *animus injuriandi*, and by not attracting liability in the absence of negligence, the media is not always treated on the same footing as ordinary members of the public.[32]

### *the right to hold opinions without interference*

Freedom of opinion is different in character from freedom of expression. The former is a purely private matter, belonging to the realm of the mind, while the latter is a public matter, involving public manifestation. But the difference between freedom of thought (ICCPR 18) and freedom of opinion is less apparent. One commentator suggests that there are no clear frontiers between 'thought' and 'opinion'; both are internal. 'Thought' is a process, while 'opinion' is the result of the process. 'Thought' may be nearer to religion or other beliefs, 'opinions' nearer to political convictions. 'Thought' may be used in connection with faith and creed, 'opinion' for convictions in secular and civil matters.[33] Accordingly, the action of a state board of education in requiring public school pupils to salute the flag of the United States while reciting a pledge of allegiance, under penalty of expulsion entailing a liability of both pupils and parents to be proceeded against for unlawful absence,

[30] *Jersild* v. *Denmark*, European Court, (1994) 19 EHRR 31. The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview seriously hampers the contribution of the press to discussion of matters of public interest.

[31] *Fressoz and Roire* v. *France*, European Court, (1999) 21 EHRR 28.

[32] *National Media Ltd* v. *Bogoshi*, Supreme Court of Appeal, South Africa, [1999] 3 LRC 617. Cf. *Ivan* v. *Attorney General*, Supreme Court of Sri Lanka, [1999] 2 LRC 716.

[33] Karl Josef Partsch, 'Freedom of Conscience and Expression, and Political Freedoms' in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1983), 209, at 217. See Decision of the Constitutional Court of 'the former Yugoslav Republic of Macedonia', U.205/96, 23 October 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 434: The freedom of personal conviction, conscience, thought and public expression of thought are mutual and reciprocal. The freedom of conviction is expressed through personal decisions and choices, depending on an individual's personal interests and his relationship with the society in which he lives. The freedom of personal conviction, as a result of the process of thinking, is especially expressed in an individual's political conviction, which in practice means accepting or rejecting a particular political movement, actively supporting such a movement or not, founding and being a member of a political party in order to express, propagate and exercise certain political purposes.

invaded the sphere of intellect and spirit which was reserved from all official control by the First and Fourteenth Amendments to the United States Constitution. The compulsory flag salute and pledge required affirmation of a belief and an attitude of mind. A pupil had either to forego any contrary convictions of his own and become an unwilling convert to the prescribed ceremony, or simply simulate assent by words without belief and by a gesture barren of meaning. In either event, a pupil would be compelled by a public authority to utter what was not in his mind or other matters of opinion in his mind.[34]

### *the right to freedom of expression*

The right to freedom of expression protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.[35] Content and form can be inextricably linked, as with language and art. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.[36] The choice of language is more than a utilitarian decision; language is, indeed, an expression of one's culture and often of one's sense of dignity and self-worth.[37] So with art,

[34] *West Virginia State Board of Education* v. *Walter Barnette*, United States Supreme Court, 319 US 624 (1943). 'We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes . . . But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion' or other matters of opinion or force citizens to confess by word or act their faith therein, per Jackson J.

[35] *Lehideux and Isorni* v. *France*, European Court, (1998) 30 EHRR 665; *News Verlags GmbH & Co KG* v. *Austria*, European Court, (2000) 31 EHRR 246.

[36] *Ford* v. *Attorney General of Quebec*, Supreme Court of Canada, [1988] 2 SCR 712.

[37] Decision of the Constitutional Court of France, 29 July 1994, Case No.94–345 DC, (1994) 2 *Bulletin on Constitutional Case-Law* 122: The provision of an official language is not inconsistent with this right. However, while it may be made compulsory for public institutions to use such language in the provision of public services, neither private individuals nor radio or television broadcasting bodies or services, whether public or private, may be compelled to use the official language. Nor may state aid to academic or scientific research be made conditional on publication or dissemination of the findings in that official language or on translation of the publication into the official language.

yet another example of where form and content intersect. It is not possible to conceive, for instance, of a content of a piece of music, a painting, a dance, a play or a film without reference to the manner or form in which it is presented. Just as language colours the content of writing or speech, artistic forms colour and indeed help to define the product of artistic expression. As with language, art is in many ways an expression of cultural identity, and in many cases is an expression of one's identity with a particular set of thoughts, beliefs, opinions and emotions.[38]

If activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of this right. While most human activity combines expressive and physical elements, some activity is purely physical and does not convey or attempt to convey meaning. It may, for example, be difficult to characterize a mundane task like parking a car as having expressive content. To bring such activity within the protected sphere, it would be necessary to show that it was performed to convey a meaning. An unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could show that his activity did in fact have expressive content, he would be protected by this right.[39] The content of expression may be conveyed through an infinite variety of forms, including silence, the apparent antithesis of expression.[40] A protest which takes the form of impeding activities of which the participants disapprove constitutes an expression of opinion.[41]

[38] *Reference Re ss.193 and 195.1(1)(c) of the Criminal Code of Manitoba*, Supreme Court of Canada, [1990] 1 SCR 1123, at 1182, per Lamer J.

[39] *Irvin Toy Ltd* v. *Attorney General of Quebec*, Supreme Court of Canada, [1989] 1 SCR 927. See also *Lavigne* v. *Ontario Public Service Employees Union*, Supreme Court of Canada, (1991) 126 NR 161: While the contribution of money to a fund will in many circumstances constitute an activity capable of expressing meaning, where a collective agreement between the employer and an employees' union provides for the compulsory recovery of monthly union dues from the salaries of all employees in the bargaining unit, regardless of whether or not the employees are members of the union, the compelled financial support does not necessarily violate freedom of expression; Decision of the Hoge Raad, Netherlands, 15 April 1975, (1976) 19 *Yearbook* 1147: Where a person offers oranges for sale in order that they may be purchased and thrown at a map of South Africa, the sale or display of merchandise as a means of manifesting opinions or emotions is too far removed from the right to freedom of expression.

[40] For example, a moment's silence on Remembrance Day conveys a meaning.

[41] *Hashman and Harrup* v. *United Kingdom*, European Court, (1999) 30 EHRR 241. On non-verbal conduct, see *Levy* v. *State of Victoria*, High Court of Australia, [1997] 4 LRC 222. See

Raising a banner is a form of expression.[42] Placards posted in public streets are an important means of expression as it permits individuals to communicate their opinions with a minimum of hindrance to others.[43] A demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed.[44] It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person can also be a form of speech.[45]

also *Schenck* v. *Pro-Choice Network of Western New York*, United States Supreme Court, 117 SCR 855 (1997): Where protesters opposed to the provision of abortion services attempted to impede physical access to an abortion clinic, a fixed buffer zone (i.e. a court injunction which banned demonstrators within a fixed distance from doorways) was permissible, while a floating buffer zone (i.e. within a fifteen-foot distance from any person or vehicle seeking access to or leaving the clinic) was not, particularly in view of the traditional use of sidewalks for expressive activity regarding matters of public concern.

[42] *Kivenmaa* v. *Finland,* Human Rights Committee, Communication No.412/1990, 31 March 1994. On the occasion of a visit of a foreign head of state and his meeting with the President of Finland, the author stood outside the presidential palace and raised a banner critical of the human rights record of the visiting head of state.

[43] *X* v. *Netherlands*, European Commission, Application 9628/81, (1983) 6 EHRR 138.

[44] *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282. See also *Hurley and the South Boston Allied War Veterans Council* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, United States Supreme Court, 94 US 749 (1995): The organizers of a parade have a right to control the message of the parade they are sponsoring. They cannot be required or compelled to express someone else's opinion. Where a war veterans' council, organizers of an annual St Patrick's day parade in Boston, refused to allow the Gay, Lesbian and Bisexual Group of Boston (GLIB) who wished to express pride in their Irish heritage as openly gay, lesbian and bisexual individuals to march in the parade, the refusal was justified. A parade is presumptively expressive, and the refusal to permit GLIB to march was only because of its message and not because of its members' sexual orientation, since homosexuals and bisexuals were not prevented from participating as members of other groups; Decision of the Hoge Raad, Netherlands, 7 November 1967, (1968) *Nederlandse Jurisprudentie* 266: Joining in a procession to protest against United States intervention in Vietnam was an expression of opinion; *Mulundika* v. *The People*, Supreme Court of Zambia, [1996] 2 LRC 175: The requirement of prior permission to organize a public gathering, with the possibility that such permission may be refused on improper, arbitrary, or even unknown grounds, is an obvious hindrance to freedom of expression.

[45] *Kameshwar Prasad* v. *The State of Bihar*, Supreme Court of India, [1962] Supp. 3 SCR 369. See also *G and E* v. *Norway*, European Commission, Applications 9278/81 and 9415/81 (1983) 35 *Decisions & Reports* 30: a demonstration, by setting up tent in front of the legislature, was a form of expression; Decision of the Tribunal de Première Instance de Bruxelles, Belgium, 30 January 1970: the display by a foreign national seeking Belgian nationality of active sympathy for a foreign political system based on an ideology contrary to the conceptions underlying the Belgian institutions amounted to the public manifestation of political and philosophical convictions. Such manifestation was an aspect of the freedom of expression; Decision of the Milan Court of Appeal, No.1313/70, 29 May 1970: the acquisition by a group of persons of entry tickets, each of which entitled the holder to a vote in a public

The verbal expression of voters' opinions is clearly within the scope of 'expression'. But the most effective manner in which such opinion is expressed, with minimum risk, is by silently marking a ballot paper in the secrecy of a polling booth. It follows that the right to vote is one form of 'expression'.[46]

An advertisement is a form of speech – though often embellished or exaggerated – since it seeks to convey opinions, information, or ideas. There does not appear to be any basis for distinguishing commercial advertising from other forms of propaganda, whether political or ideological. The fact that its aim is profit-making is irrelevant.[47] An individual has the right to receive information that would help him make an informed decision, whether it be in regard to the political party or candidate he should vote for, or the state of the art personal computer he should invest his money in.[48] Accordingly, the prohibition on advertising

poll, amounted to a fraudulent method of choosing the best song, in so far as the number of tickets exceeded the number of spectators, and thus constituted a violation of the freedom of expression of the spectators who were no longer in a position to express their true choice.

[46] *Karunathilaka* v. *Commissioner for Elections*, Supreme Court of Sri Lanka, [1999] 4 LRC 380. The silent and secret expression of an individual's preference as between one candidate and another by casting a vote is no less an exercise of the freedom of expression than the most eloquent speech from a political platform.

[47] *Casado Coca* v. *Spain*, European Court, (1994) 18 EHRR 1; *Retrofit (Pvt) Ltd* v. *Posts and Telecommunications Corporation*, Supreme Court of Zimbabwe, [1996] 4 LRC 489. See also *Bigelow* v. *Virginia,* United States Supreme Court, 421 US 809 (1975), and the earlier dissenting opinion to the same effect of Douglas J, Burger CJ, Stewart J and Blackman J in *Pittsburg Press Co* v. *Human Relations Commission*, United States Supreme Court, 413 US 376 (1973). Commercial speech is subject to state regulation in order to protect consumers from misleading advertisements: Decision of the Constitutional Court of Hungary, 1270/B/1997, 8 May 2000, (2000) 2 *Bulletin on Constitutional Case-Law* 304.

[48] *Sakal Papers (P) Ltd* v. *The Union of India*, Supreme Court of India, [1962] 3 SCR 842. The Newspaper (Price and Page) Act 1956 which, *inter alia*, empowered the government to regulate the allocation of space for advertising matter, violated the right to freedom of expression. See also *Grosjean* v. *American Press Co.*, United States Supreme Court, 297 US 233 (1935); *Carey* v. *Population Services International*, United States Supreme Court, 431 US 678 (1977): A state statute which prohibited any advertisement or display of contraceptives was an unconstitutional suppression of expression; it could not be justified on the ground that the advertisement of contraceptive products would be offensive and embarrassing to those exposed to them or would legitimize sexual activity of young people. Cf. *Hamdard Dawakhana (Wakf) Lal Kuan* v. *The Union of India*, Supreme Court of India, [1960] 2 SCR 671: an advertisement that sought to commend the efficacy, value and importance of certain drugs and medicines in the treatment of particular diseases was 'a part of business' and had no relationship with the essential concept of the freedom of speech. In upholding the constitutionality of the Drug and Magic Remedies (Objectionable Advertisement) Act, the court applied article 19(1)(a) of the Constitution of India which guarantees 'the freedom of expression' but does not contain the explanatory provisions of ICCPR 19.

and promotion of tobacco products, and the requirement that tobacco manufacturers place an unattributed health warning on tobacco packages, constituted a violation of the right to free expression.[49] A magazine publisher's right to freedom of expression is violated if he is prohibited from publishing advertisements with regard to which the advertiser enjoys the protection of this right.[50]

Speech may be symbolic. In the United States, where a person affixed a peace symbol to a flag and hung it from the window of his apartment, and was thereupon charged and convicted under a statute forbidding the exhibition of a United States flag to which was attached or superimposed figures, symbols or other extraneous material, the Supreme Court held that the conduct constituted symbolic speech entitled to constitutional protection.[51] Earlier, the court had held that setting fire to the national flag and thereafter publicly 'casting contempt' upon it was the expression of an opinion.[52] In the Hong Kong Special Administrative Region of China, however, the Court of Final Appeal held that criminalizing

[49] *RJR-MacDonald Inc* v. *Attorney General of Canada*, Supreme Court of Canada, [1995] 3 LRC 653. Freedom of expression necessarily entails the right to say nothing or the right not to say certain things, and the combination of the unattributed health warnings and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views, constituted an infringement of the right to free expression. Cf. Decision of the Court of Arbitration of Belgium, 102/99, 30 September 1999, (1999) 3 *Bulletin on Constitutional Case-Law* 353: Banning advertising for tobacco products is not at variance with freedom of expression.

[50] Decision of the Federal Constitutional Court of Germany, 12 December 2000, (2000) 3 *Bulletin on Constitutional Case-Law* 492: concerned the publication of expressive images that raised themes critical of society ('oil-covered duck', 'child labour' and 'HIV-positive' together with the note 'United Colours of Benetton').

[51] *Spence* v. *Washington*, United States Supreme Court, 418 US 405 (1974).

[52] *Street* v. *New York*, United States Supreme Court, 394 US 576 (1969). According to the evidence, the appellant, an African-American, heard a news report on the radio that civil rights leader James Meredith had been shot by a sniper in Mississippi. Saying to himself, 'They didn't protect him', he took from his drawer a neatly folded American flag which he formerly had displayed on national holidays, carried it to a nearby intersection, lit it with a match, and dropped it on the pavement when it began to burn. A police officer testified that he found the appellant saying aloud to a small group of persons: 'We don't need no damn flag.' When asked whether he had burned the flag, he replied: 'Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag.' See also *Texas* v. *Johnson*, 491 US 397 (1989): 'If there be a bedrock principle underlying the First Amendment it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved. In short, nothing in our precedents suggests that a state may foster its own view of the flag by prohibiting expressive conduct relating to it.' *United States* v. *Eichman*, United States Supreme Court, 496 US 310, (1990).

flag desecration constitutes a 'limited restriction' of the freedom of expression. It bans one mode of expressing whatever message the person concerned may wish to express. It does not interfere with that person's freedom to express the same message by other modes. Accordingly, the conviction was upheld on the ground that it was necessary for the protection of public order (*ordre public*).[53]

The right to freedom of expression is the freedom to communicate opinions, information, and ideas without interference.[54] The primary suggestion of the term 'freedom' is the negative one, the absence of external interference whether to suppress or to constrain. To be free is essentially to be free from any arbitrary impediment to action, some dominating power or authority.[55] This right is protected against any form of interference, whatever the source.[56] The Human Rights Committee has stressed that, following 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 the limitation clauses.[57] In the words of the Supreme Court of India, this right 'is somewhat thin if it can be exercised only on the sufferance of the managers of the leading newspapers'.[58]

[53] *HKSAR* v. *Ng Kung Siu*, Court of Final Appeal of the Hong Kong SAR, [1999] 3 HKLRD 907. In this case, the defendants were protesting against the system of government in China. The Chinese character 'shame' was written on the flags, and the slogan 'build up a democratic China' was chanted during the procession. Cf. *HKSAR* v. *Ng Kung Siu* [1999] 1 HKLRD 783, where the Court of Appeal disagreed: (a) the law already catered for a large variety of situations arising out of abuse of the flag and it would be an unimaginative prosecutor who was unable to find an appropriate offence to charge from the readily available armoury of well-defined offences; and (b) it was unlikely that a serious civil disturbance would arise from an act of desecrating a national or regional flag.

[54] *Geerk* v. *Switzerland*, European Commission, Admissibility decision: (1978), 12 *Decisions & Reports* 103, (1978) 21 *Yearbook* 470; Friendly settlement: (1979) 16 *Decisions & Reports* 56.

[55] *Richards* v. *Attorney General of St Vincent and the Grenadines*, High Court of Saint Vincent and the Grenadines, [1991] LRC (Const) 311.

[56] UN document A/5000, s.24. When ICCPR 19 was being drafted, a suggestion to include in paragraph 2 the phrase 'without governmental interference, save as provided in paragraph 3' was opposed on the ground, *inter alia*, that private financial interests and monopoly control of media of information could be as harmful to the free flow of information as government interference, and that the latter should therefore not be singled out to the exclusion of the former.

[57] Human Rights Committee, General Comment 10 (1983).

[58] *Bennett Coleman & Co* v. *The Union of India*, Supreme Court of India, [1973] 2 SCR 757, at 812. The court added that 'It is no use having a right to express your idea, unless you have got a medium for expressing it. The concept of a free market for ideas presupposes that every type of idea will get into the market and if free access to the market is denied for any

To single out particular meanings that may not be conveyed, or to restrict a form of expression in order to control access by others to the meaning being conveyed, or to control the ability of the one conveying the meaning to do so, is to restrict the content of the expression to be conveyed.[59] On the other hand, to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, is not to control expression. For example, a rule against handing out pamphlets is a restriction on a manner of expression and is 'tied to content', even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. By contrast, a rule against littering is not a restriction 'tied to content'. It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. But rules may sometimes be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning. For example, a municipal by-law forbidding distribution of pamphlets without prior authorization from the chief of police is a colourable attempt to restrict expression.[60]

Freedom of expression serves the general interest. The fact that a person defends a particular interest, whether economic or any other, does not deprive him of the benefit of this freedom.[61] Nor does the fact that an interference with a person's freedom of expression is based on grounds relating to his particular professional status remove the matter

ideas, to that extent, the process of competition becomes limited and the chance of all the ideas coming to the market is removed.'

[59] *Reference Re ss.193 and 195.1(1)(c) of the Criminal Code of Manitoba*, Supreme Court of Canada, [1990] 1 SCR 1123: Section 195.1(1)(c) of the Criminal Code of Manitoba which prohibited 'a person from communicating or attempting to communicate with any person in a public place for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute' restricted freedom of expression in that the section aimed at prohibiting access to the message sought to be conveyed. While the act for which the communication took place, namely, the exchange of sexual services for money, was not itself illegal, the prohibition was not just a 'time, place or manner' restriction; rather, it aimed specifically at content. The prohibited communication related to a particular message sought to be conveyed.

[60] *Irvin Toy Ltd* v. *Attorney General of Quebec*, Supreme Court of Canada, [1989] 1 SCR 927. See also *Saumur* v. *City of Quebec*, Supreme Court of Canada, [1953] 2 SCR 299; *Lovell* v. *City of Griffin*, United States Supreme Court, 303 US 444 (1938); *Organization for a Better Austin* v. *Keefe*, United States Supreme Court, 402 US 415 (1971).

[61] *Markt Intern Verlag GmbH* v. *Germany*, European Court, (1989) 12 EHRR 161, joint dissenting opinion of Judges Golcuklu, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo, and Valticos.

from the scope of this right. For example, a rule of professional conduct obliging veterinary surgeons to abstain from advertising may not be invoked in order to prevent a veterinary surgeon from making known his views on the need for an emergency veterinary service. A strict criterion in approaching the matter of advertising and publicity in the liberal professions is not consonant with freedom of expression. Its application risks discouraging members of such professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the same token, application of such criteria is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.[62]

The exercise of the freedom of expression cannot be made either directly or indirectly obligatory. Accordingly, the provisions of a law which required the state broadcasting corporation to invite the candidates for the office of president to participate in televised discussions among themselves, amounted to an indirect coercion to appear in order to avoid creating the impression that they were avoiding a public discussion, and was therefore inconsistent with the freedom of speech and expression.[63]

### *freedom to seek*

The freedom to seek information means that a person has a right of access to information, subject only to the prescribed limitations and the other provisions of the relevant instrument. Access to information is essential for the proper exercise of this freedom since it is on the basis of accurate information that opinions ought to be formed and ideas imparted. In the absence of such access, a person will be compelled to act on the basis of suspicions, rumours and conjectures.[64] Access to information is also

[62] *Barthold* v. *Germany*, European Court, (1985) 7 EHRR 383, European Commission, (1983) 6 EHRR 882: A prohibitory injunction issued by a court following the publication of an article in a daily newspaper was a violation of the freedom of expression. The restrictions imposed related to the inclusion, in any statement of the veterinary surgeon's views as to the need for a night veterinary service in Hamburg, of certain factual data and assertions regarding, in particular, his person and the running of his clinic. See also *Casado Coca* v. *Spain*, European Court, (1994) 18 EHRR 1.

[63] *President of the Republic of Cyprus* v. *House of Representatives*, Supreme Court of Cyprus, [1989] LRC (Const) 461: Cyprus Broadcasting Corporation (Amendment) Law 1987.

[64] See Walter Lippmann quoted by Jagannatha Shetty J in *Rangarajan* v. *Jagjivan Ram*, Supreme Court of India, [1990] LRC (Const) 412: 'When men act on the principle of intelligence,

an essential element of the freedom of the press.[65] The right to private life must, in particular cases, be balanced against the media's right to seek information.[66]

### *freedom to receive*

The freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him.[67] For example, a government may not withhold from a subscriber a copy of a journal to which he has subscribed.[68] This right extends also to information relating to a criminal investigation in progress. The operation of the presumption of innocence does not prevent state authorities from informing the public about criminal investigations in progress, but requires that they do so with the discretion and circumspection necessary to ensure that the presumption of innocence is respected.[69] But this freedom cannot be construed as imposing on a state a positive obligation to collect and disseminate information of its own motion.[70]

The airways are public property and control is needed to avoid chaos and maximize the benefits available. Accordingly, the freedom to receive

they go out to find the facts . . . When they ignore it, they go inside themselves and find out what is there. They elaborate their prejudice instead of increasing their knowledge.'

[65] *Canadian Broadcasting Corporation* v. *Attorney General for New Brunswick*, Supreme Court of Canada, [1997] 1 LRC 521: The exclusion of the general public and media from the sentencing stage of a trial of charges of sexual conduct was not warranted.

[66] Decision of the Supreme Court of Denmark, Case No.191/1994, 28 October 1994, (1994) 3 *Bulletin on Constitutional Case-Law* 227. A journalist working for a local television channel was charged with unlawfully entering the private garden of a well-known politician during a demonstration that took place in the garden. The journalist had tried to contact the politician by knocking on the door. The door remained closed and the journalist remained in the garden where he spoke to the demonstrators and made an interview which was broadcast the same evening. Acquitting the accused, the court held that, in that instance, the media's right to news coverage had priority over the right to private life.

[67] *Leander* v. *Sweden*, European Court, (1987) 9 EHRR 433. See also *Gaskin* v. *United Kingdom*, European Court, (1989) 12 EHRR 36.

[68] *Open Door and Dublin Well Woman* v. *Ireland*, European Court, (1992) 15 EHRR 244. An injunction granted by a court restraining certain counselling agencies from providing pregnant women with information concerning abortion facilities abroad infringed the latter's right to receive information. While the constitution protected the right to life of the unborn, and the criminal code made it an offence to procure or attempt to procure an abortion it was not a criminal offence for a pregnant woman to travel abroad in order to have an abortion.

[69] *Allenet de Ribemont* v. *France*, European Court, (1995) 20 EHRR 557.

[70] *Guerra* v. *Italy*, European Court, (1998) 26 EHRR 357: The inhabitants of a town in which a 'high risk' chemical factory was located argued unsuccessfully that the state had failed to provide information about the risks and how to proceed in the event of an accident.

information is not necessarily infringed by the refusal of a licence to broadcast.[71] But any restriction imposed on the means of transmission or reception of information necessarily interferes with the right to receive information.[72] In the United States, a law which required the addressee of non-sealed mail from abroad containing communist propaganda material to request its delivery in writing was held to be an unconstitutional limitation on the unfettered exercise of the addressee's right of free speech. An addressee was likely to feel some inhibition in sending for literature which government officials had condemned as 'communist political propaganda'. Brennan J noted that 'The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.'[73]

Plurality of sources of information is essential to the enjoyment of this right. Any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates this right.[74] Therefore, an individual has the right to receive information from several competing sources. Within the national broadcasting system, the mere existence of a public licensed company alongside private

[71] *Observer Publications Ltd* v. *Matthew*, Court of Appeal of Antigua and Barbuda, [2001] 1 LRC 37.

[72] *Autronic AG* v. *Switzerland*, European Court, (1990) 12 EHRR 485. The reception of television programmes by means of a dish or other aerial comes within the protection of the freedom of expression without it being necessary to ascertain the reason and purpose for which the right is to be exercised. In this case, the government argued that the object of the application for permission to show at a trade fair uncoded television programmes made and broadcast in the Soviet Union was to give a demonstration of the technical capabilities of the equipment in order to promote its sales. See also *Oberschlick* v. *Austria*, European Court, (1991) 19 EHRR 389.

[73] *Lamont* v. *Postmaster-General*, United States Supreme Court, 381 US 301 (1965).

[74] *Retrofit (Pvt) Ltd* v. *Posts and Telecommunications Corporation*, Supreme Court of Zimbabwe, [1996] 4 LRC 489. See also *Retrofit (Pvt) Ltd* v. *Minister of Posts and Telecommunications*, Supreme Court of Zimbabwe, [1996] 4 LRC 512; *Cable and Wireless (Dominica) Ltd* v. *Marpin Telecoms and Broadcasting Co Ltd*, Privy Council on appeal from the Court of Appeal of Dominica, [2001] 1 LRC 632; *TS Masiyiwa Holdings (Pvt) Ltd* v. *Minister of Information, Posts and Telecommunications*, Supreme Court of Zimbabwe, [1997] 4 LRC 160. Cf. Decision of the Supreme Court of the Netherlands, 8770, 15 November 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 382: The granting of a monopoly position to a single enterprise in the establishment and running of a pay-TV service is permissible where there are compelling reasons for it. Where the Netherlands-Antilles granted such a licence, the reasons urged were: (a) it was deemed financially and economically impossible for any company to establish and run a high quality paid television system covering the entire island if a second provider were to be admitted; (b) a fixed period of time for the monopoly position – ten years – was necessary to enable the licensee to earn back its start-up expenses.

licensed companies (when one operator was permitted to hold several broadcasting licences provided they did not account for more than 25 per cent of the total number of national channels in the frequency band allocation plan and did not account for more than three channels in all, thereby making it possible for the same operator to control three of the twelve channels in the national plan (nine private and three public channels)), infringed this right. The dominant position which resulted from ownership of three of the nine private channels conferred a grossly unfair advantage where the use of resources and the concentration of advertising were concerned.[75]

A charge on ownership of a television set does not constitute an interference with a person's right to receive information unless the charge were so high as to be beyond the means of certain persons or sectors of the population.[76] But the refusal of a landlord to permit his foreign tenant to install a parabolic antenna which would have enabled him to receive news from his home country, violated the latter's right to freedom of expression.[77] Similarly, where a prisoner was deprived, as a disciplinary measure not prescribed by law, of reading matter, radio and television for long periods, he was denied access to information.[78] But a right to receive information within a specified period of time by way of correspondence is not an element of this right.[79] The potential audience of a film which the board of censors had banned from being shown in public are entitled to bring an action for infringement of this right. In Switzerland, the Federal Tribunal has held that the right to receive information or ideas and the right to form an opinion are not subject to supervision by the authorities. A private screening of a film is not a substitute for a public exhibition in a cinema.[80]

[75] Decision of the Constitutional Court of Italy, Case No.420/1994, 5 December 1994, (1994) 3 *Bulletin on Constitutional Case-Law* 247. See also Decision of the Constitutional Court of Belarus, Case No.J-12/95, 14 April 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 135: monopolization of mass media by the state is inadmissible.

[76] Decision of the Hoge Raad of the Netherlands, 15 December 1992, (1993) *Nederlandse Jurisprudentie* 374.

[77] Decision of Amtsgericht Tauberbischofsheim, 8 May 1992, 7 (18) *Neue Juristische Wochenschrift* 1098–9. See also Decision of the Federal Constitutional Court of Germany, 18 January 1996, 1 BvR 2116/1994, (1996) 1 *Bulletin on Constitutional Case Law* 32.

[78] *Herczegfalvy* v. *Austria*, European Court, (1992) 15 EHRR 437.

[79] *X* v. *Germany*, European Commission, Application 8383/78, (1980) 17 *Decisions & Reports* 227: A post office's failure to forward mail to the address indicated by a person did not constitute an interference with his right to receive information.

[80] *E.Z.* v. *The Administrative Court of the Canton of Valais*, Federal Tribunal, Switzerland, Case No.2P.395/1992, 18 July 1994, (1995) 1 *Bulletin on Constitutional Case-Law* 96.

The freedom to receive information and ideas implies the freedom to decline to receive. The constitutional right of free speech does not, therefore, include a right to insist that others listen.[81] A mailer's right to communicate must stop at the mailbox of an unreceptive addressee.[82] More difficult is the question whether the transmission of radio programmes through receivers and loud speakers in passenger vehicles of a street railway violates the freedom not to receive information and ideas. The United States Supreme Court held that where the programmes did not interfere substantially with the conversation of passengers, and there was no substantial claim that the programmes had been used for objectionable propaganda, the transmission did not interfere with the passengers' freedom. Douglas J, who dissented, considered that compulsion which comes from circumstances can be as real as compulsion which comes from a command. 'One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen and to try *not* to listen'.[83]

### *freedom to impart*

The freedom of expression means freedom to express so as to be heard by others, and therefore to convey one's opinions and ideas to others. Indeed, the concept necessarily connotes that what one has a right to express may be communicated to others.[84] The steps taken by an editor of a newspaper to impart ideas and information include the expression of such ideas and information in words followed by the printing of such

[81] *Kovacs* v. *Albert Cooper*, United States Supreme Court, 336 US 77 (1949). See also *Lehman* v. *City of Shaker Delights*, United States Supreme Court, (1974) 418 US 298 (1974): The right of free speech does not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time, and, accordingly, reasonable 'time, place and manner' regulations which are applied in an even-handed fashion are constitutional.

[82] *Rowan* v. *United States Post Office*, United States Supreme Court, 397 US 728 (1970).

[83] *Public Utilities Commission of the District of Colombia* v. *Pollak*, United States Supreme Court, 343 US 451 (1952). The judge warned against the implications of the judgment. 'When we force people to listen to another's ideas, we give the propagandist a powerful weapon. Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group.'

[84] *All India Bank Employees Association* v. *National Industrial Tribunal*, Supreme Court of India, [1962] 3 SCR 269, at 293. See also *Richards* v. *Attorney General of St Vincent and the Grenadines*, High Court of Saint Vincent and the Grenadines, [1991] LRC (Const) 311.

words in the paper followed by publishing the paper and circulating it. An interference with circulation constitutes an infringement of this freedom.[85]

The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons is each an integral part of the freedom of speech and expression. A law which empowered the Government of India to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertising matter, and which fixed the maximum number of pages that might be published by a newspaper according to the price charged and prescribed the number of supplements that could be issued, was void as it violated the freedom of speech and expression.[86]

The press may not be hindered from having the commodity in which it communicates, namely, newsprint.[87] In India, the Supreme Court examined the government's import control policy with respect to newsprint,

[85] *Olivier* v. *Buttigieg*, Privy Council on appeal from the Court of Appeal of Malta, [1966] 2 All ER 459. The ecclesiastical authorities in Malta condemned certain newspapers, including a labour party newspaper, the 'Voice of Malta'. The labour party was then in opposition, and the editor of the paper was also the president of the party. Shortly thereafter, the government issued a circular to hospital employees prohibiting 'the entry in the various hospitals and branches of the department of newspapers which are condemned by the church authorities'. The prohibition constituted a hindrance of the editor in the enjoyment of his freedom of expression under section 14(2) of the Malta (Constitution) Order in Council 1961. See also *Romesh Thappar* v. *The State of Madras*, Supreme Court of India, [1950] SCR 594: An order made by the government under the Madras Maintenance of Public Order Act 1949 banning the entry and circulation in the state of a journal called *Cross Roads* which was printed and published in Bombay infringed the freedom to impart; Decision of 23 June 1989 of the Constitutional Court of Austria, B 990/87–11: The seizure, following a search of the luggage of a traveller at the border, of a newspaper *Demokratischer Informationsdienst* edited by an Anti-Strauss-Committee was a violation of his constitutionally guaranteed right to freedom of expression; Decision of the Constitutional Court of Turkey, Case No.E.1992/36, 19 March 1993, (1993) 1 *Bulletin on Constitutional Case-Law* 46: A law that prohibited the publication of newspapers during the first days of two particular religious holidays was unconstitutional.

[86] *Sakal Papers (P) Ltd* v. *The Union of India*, Supreme Court of India, [1962] 3 SCR 842. See also *Talley* v. *California*, United States Supreme Court, 363 US 60 (1960).

[87] *T & T Newspaper Publishing Group Ltd* v. *Central Bank of Trinidad and Tobago*, High Court of Trinidad and Tobago, [1990] LRC (Const) 391. Action taken by the central bank, purportedly pursuant to the Exchange Control Act, which restricted the ability of a newspaper publisher to pay for newsprint, infringed his fundamental right to freedom of expression. 'The government, in the national interest, must control the outflow of foreign exchange, more so whenever reserves are being depleted. The press, in the national interest, has to publish information. Society has a right to receive information so that in the national interest it can develop.' In striking a balance, the court must be guided by the fundamental rights and freedoms enshrined in the constitution, per Lucky J.

formulated under the Newsprint Control Order made under the Essential Commodities Act. Four features of the newsprint policy were called in question. The court held that two of them, namely, a limitation on the maximum number of pages to ten with no adjustment being permitted between circulation and the pages so as to increase the pages; and no interchangeability being permitted between different papers of a common ownership unit or different editions of the same paper, effectively controlled the growth and circulation of newspapers, and therefore violated the freedom of speech and expression.[88]

The freedom to impart information and ideas does not include a general and unfettered right for any private citizen or organization to have access to broadcasting time on radio or television. But the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue relating to the exercise of this right. Such an issue would, in principle, arise if one political party was excluded from broadcasting facilities at election time.[89] The freedom to impart information such as radio and television programme data is only granted to the person or body who produces, provides or organizes it. In other words, the freedom to impart such information is limited to information produced, provided or organized by the person claiming that freedom, being the author, the originator or otherwise the intellectual owner of the information concerned.[90]

Unhindered freedom of political expression is essential to the proper functioning of a democratic system and, consistent with that principle, the capacity of political parties to engage in dialogue and communicate their arguments and opinions may not be restricted. Accordingly a law which provided that a party would be entitled to state funding

[88] *Bennet Coleman & Co* v. *The Union of India*, Supreme Court of India, [1973] 2 SCR 757. In respect of the other two features, the court upheld the power of the government to import newsprint and to control the distribution of newsprint. See also *Hope* v. *New Guyana Co Ltd*, Court of Appeal of Guyana, (1979) 26 WIR 233: The requirement of a licence to import newsprint and printing equipment did not hinder the enjoyment of the freedom of expression.

[89] *X and the Association of Z* v. *United Kingdom*, European Commission, Application 4515/70, (1972) 38 *Collections of Decisions* 86. See also *Belize Broadcasting Authority* v. *Courtney*, Supreme Court of Belize, [1988] LRC (Const) 276, (1990) 38 WIR 79.

[90] *De Geillustreerde Pers NV* v. *Netherlands*, European Commission, (1976) 8 *Decisions & Reports* 5. The data compiled each week by the Netherlands Broadcasting Foundation on information supplied by the various broadcasting organizations may be published only by or with the consent of the Foundation or the organizations concerned.

in proportion to the number of its members elected to parliament, but that a party with fewer than fifteen elected members (or 12.5 per cent of the total membership) would not qualify, was inconsistent with the freedom of expression. Its practical effect was to restrict the ability of smaller parties to campaign and to communicate effectively with the electorate. Even if the threshold was set below fifteen, the requirement of representation by a registered political party in parliament in order to qualify for annual funding, will still place aspiring political parties at a severe monetary disadvantage in mounting an electoral campaign and, thereafter, in maintaining potent political survival.[91]

In the United States, Douglas J has observed that 'a state may not impose a charge for the enjoyment of a right granted by the federal constitution'.[92] But an Antiguan law which made the right to publish a newspaper subject to an annual payment of $600, was affirmed on the basis that the amount of the licence fee was neither manifestly excessive nor of such a character as to lead to the conclusion that it had been enacted for some purpose other than that of raising revenue.[93] A law which requires every edition of a periodical to contain publication data which can only be obtained from the administrative authorities, imposes on a

[91] *United Parties* v. *Minister of Justice, Legal and Parliamentary Affairs*, Supreme Court of Zimbabwe, [1998] 1 LRC 614. See also *Libman* v. *Attorney General of Quebec*, Supreme Court of Canada, [1998] 1 LRC 318: By restricting, in respect of a referendum, the right to incur regulated expenses to the national committees and their affiliates, and by limiting third party campaigners to unregulated expenses, the political expression of three categories of campaigners was restricted: (a) groups or individuals who supported a referendum option but did not wish to join or affiliate to a committee; (b) individuals who supported an option but did not wish to join the relevant committee and could not affiliate with it because affiliation was restricted to groups; and (c) individuals or groups who wished to participate in the campaign without supporting either option. Moreover, the system of unregulated expenses was so restrictive as to constitute a near total ban on spending by third parties and non-affiliated individuals or groups. Cf. *Decision on the Application of Charles Pasqua*, Constitutional Council of France, 6 September 2000, (2000) 3 *Bulletin on Constitutional Case-Law* 483: By requiring that, in order to be entitled to time on air, political parties or groups must have at least five seats in parliament or have gained, alone or as part of a coalition, at least 5 per cent of the votes at the previous election, the law applied objective criteria which, in view of the limited time available on radio and television, did not contravene the freedom of expression.

[92] *Murdock* v. *Pennsylvania*, United States Supreme Court, 319 US 105 (1942), at 113. See also *Corona Daily Independent* v. *City of Corona California*, United States Supreme Court, 346 US 833 (1953): Freedom of expression was violated by a city ordinance imposing a licence tax for the privilege of engaging in any business in the city, as applied to the business of publishing a newspaper.

[93] *Attorney General* v. *Antigua Times Ltd*, Privy Council on appeal from the Court of Appeal of the West Indies Associated States, [1975] 3 All ER 81.

leaflet with a print run as low as 200, such obstacles as to restrict the author's freedom of expression.[94] The Supreme Court of India has stressed that, while the press was not immune from ordinary forms of taxation or from the application of general laws relating to industrial relations or laws regulating payment of wages, if a law were to single out the press for laying prohibitive burdens on it which would restrict circulation, penalize its freedom of choice as to personnel, prevent newspapers from being started and compel the press to seek government aid, it would violate the right to freedom of expression.[95]

### *information and ideas of all kinds*

The existence of a democracy requires the expression of new ideas and opinions about the functioning of public institutions. These opinions may be critical of practices in such institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Such criticism will not always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful, language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.[96] Therefore, freedom of expression extends not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. 'Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'[97]. This view of the European Court is shared by national jurisdictions too.

In Canada, Dickson CJ observed that freedom of expression is guaranteed 'so as to ensure that everyone can manifest their thoughts, opinions,

[94] *Laptsevich* v. *Belarus*, Human Rights Committee, Communication No.780/1997, HRC 2000 Report, Annex IX.P.

[95] *Express Newspaper (Private) Ltd* v. *The Union of India*, Supreme Court of India, [1959] SCR 12.

[96] Per Cory JA in *R* v. *Kopyto* (1987) 24 OAC 81, at 90–1, quoted with approval by L'Heureux-Dube J in *Committee for the Commonwealth of Canada* v. *Canada*, Supreme Court of Canada, [1991] 1 SCR 139, at 181–2: an appeal by a person convicted of scandalizing the court by suggesting that the police and the courts were not independent of one another.

[97] *Handyside* v. *United Kingdom*, European Court, (1976) 1 EHRR 737, at 754; *Grigoriades* v. *Greece*, European Court, (1997) 27 EHRR 464. See also Decision of the Constitutional Court of Austria, B.1701/88, 21 June 1989: two journalists who interviewed Dr Kurt Waldheim,

beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream'.[98] The Indian Supreme Court was of the same view: 'one of the basic values of a free society to which we are wedded under our Constitution [is] that there must be freedom not only for the thought that we cherish, but also for the thought that we hate'.[99] The Constitutional Court of Spain considered that 'Any opinion whatsoever may be expressed, no matter how wrong or dangerous it may appear; even opinions which actually attack the democratic system, since the constitution also protects those who reject it'.[100] In the United States, Brennan J observed that debate on public issues 'should be uninhibited, robust and wide-open', and may well include 'vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'.[101] Douglas J added that a function of free speech is to invite dispute. 'It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea'.[102]

President of Austria, on television in a provocative and critical manner and were then censured by the competent authority for having violated the principle of objectivity by their 'suggestive and aggressive manner of questioning' had suffered a violation of their constitutionally guaranteed right to freedom of expression; *Piermont* v. *France*, European Court, (1995) 20 EHRR 301: A person opposed to official ideas and positions must be able to find a place in the political arena. Where a member of the European Parliament who was both an environmentalist and a pacifist was expelled from New Caledonia for having made statements which were 'an attack on French policy', her right to freedom of expression was violated; *Nilsen and Johnson* v. *Norway*, European Court, (1999) 30 EHRR 878: A degree of exaggeration should be tolerated in the context of a heated and continuing public debate of general concern.

98 *Irvin Toy Ltd* v. *Attorney General of Quebec*, Supreme Court of Canada, [1989] 1 SCR 927, at 968.

99 *Naraindas* v. *State of Madya Pradesh*, Supreme Court of India, [1974] 3 SCR 624, at 650.

100 Decision of the Constitutional Court of Spain, Case No.176/1995, 11 December 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 373.

101 *New York Times Co* v. *Sullivan*, United States Supreme Court, 376 US 254 (1964), at 270.

102 *Terminiello* v. *City of Chicago*, United States Supreme Court, 337 US 1 (1949). This protection, however, does not extend to the use of lewd and obscene, profane, libellous and insulting, or 'fighting words' which by their very utterance inflict injury or tend to incite to an immediate breach of the peace: *Beauharnais* v. *People of the State of Illinois*, United States Supreme Court, 343 US 250 (1952). In a dissenting opinion, in which he argued that under the United States Constitution free speech, free press, and free exercise of religion were above and beyond the police power, Douglas J cautioned against 'the suffocating influence of orthodoxy and standardized thought'. See also *Cohen* v. *California*, United States Supreme Court, 403 US 15 (1971): the wearing of a jacket bearing the plainly visible words

The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.[103] The prohibition of the publication of any text, local or foreign, 'criticising directly or indirectly' the government in the discharge of its duties is a violation of this right.[104] The European Court of Human Rights has emphasized that criticism levelled at a government should find an answer in the form of counter-arguments. For this purpose a government is able to avail itself of a wide range of means: statements by the appropriate minister before parliament, the holding of a press conference, use of the right of reply, publication of an official announcement, etc. Accordingly, interference with freedom of expression through the institution of criminal proceedings in the context of political debate is justified only in so far as it is aimed at abuses of a defamatory nature to which it is not possible to react in a suitable and adequate manner by way of the means usually available to democratic states. But it is as a general rule difficult to justify the penalization of the expression of true facts and indeed of erroneous facts in as much as the person relating them has good reasons to believe that they are true.[105]

'Fuck the Draft' did not constitute 'fighting words'; *Hess* v. *Indiana*, United States Supreme Court, 414 US 105 (1973): A statement by a person: 'We'll take the fucking street later', made during an anti-war demonstration on a university campus while standing at the side of a street being cleared by a sheriff, did not constitute 'fighting words' and could not be punished as having a tendency to lead to violence or as being intended or likely to produce imminent lawless action, since the undisputed evidence showed that the statement was not directed to any person or group, and was at best, counsel for present moderation, and at worst, nothing more than advocacy of illegal action at some indefinite future time.

[103] *Castells* v. *Spain*, European Court, (1992) 14 EHRR 445. See also *Ceylan* v. *Turkey*, European Court, (1999) 30 EHRR 73; *Baskaya and Okcuogh* v. *Turkey*, European Court, (1999) 31 EHRR 292: While the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, it is open to the competent state authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately but without excess, to remarks which incite to violence against an individual, a public official or a sector of the population.

[104] *Denmark, Norway, Sweden and Netherlands* v. *Greece*, (*The Greek Case*), European Commission, (1969) 12 *Yearbook*.

[105] *Castells* v. *Spain*, (1992) 14 EHRR 445; *Thorgeirson* v. *Iceland,* European Court, (1992) 14 EHRR 843. See also *Rajagopal* v. *State of Tamil Nadu*, Supreme Court of India, [1955] 3 LRC 566: The government, local authorities, and other organs and institutions exercising governmental power cannot maintain a suit for damages for defamation.

Persons who hold office in government and who are responsible for public administration will always be open to criticism. The limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[106] Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. Often the very purpose of criticism levelled by their political opponents at those who have responsibility for the conduct of public affairs is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office.[107] Therefore, a politician's previous criminal convictions, together with his public conduct in other respects, may be relevant factors in assessing his fitness to exercise political functions, and may therefore be the subject of comment.[108]

[106] *Lingens* v. *Austria*, European Court, (1986) 8 EHRR 103. See also *Oberschlick* v. *Austria (No.2)*, European Court, (1997) 25 EHRR 357: Calling a politician an 'idiot' in public might offend him but, having regard to the circumstances, did not seem disproportionate to the indignation caused by the politician concerned through a speech he had made. The use of the word could be considered polemical; was part of the political discussion provoked by the politician; and amounted to an opinion whose truth was not susceptible to proof.

[107] *Hector* v. *Attorney General of Antigua and Barbuda*, [1991] LRC (Const) 237, Privy Council, setting aside the decision of the Court of Appeal of the Eastern Caribbean States in *Attorney General of Antigua and Barbuda* v. *Hector* (1988) 40 WIR 135: Section 33B(b) of the Public Order Act 1972 of Antigua and Barbuda, which criminalized statements likely 'to undermine public confidence in the conduct of public affairs', offended against freedom of expression. *Cohen* v. *California*, United States Supreme Court, 403 US 15 (1971): The right to criticize public men and measures means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.

[108] *Schwabe* v. *Austria*, European Court, 28 August 1992. See also *Lingens* v. *Austria*, European Commission, (1984) 7 EHRR 447: The publisher of a magazine in Vienna printed two articles critical of the Austrian Chancellor, accusing him of protecting former members of the Nazi SS for political reasons and of facilitating their participation in Austrian politics. He was convicted of criminal defamation, and issues of his magazine were confiscated. Particular emphasis was placed by the prosecutor on descriptions of the Chancellor's behaviour as coming near to 'ugliest opportunism' and as 'immoral' or 'undignified'. The commission rejected the opinion of the Austrian Court of Appeal that 'the press has merely the task to provide information, while the assessment and evaluation of the imparted facts must primarily be left to the readers'. In its view, the press had a special responsibility to impart ideas or opinions, particularly where the matter discussed related to the behaviour and attitudes of individual politicians in matters of public interest. Referring to the permissible limits of criticism of politicians, the commission observed: 'It is obvious that by

Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do, and should not therefore be treated on an equal footing with the latter when it comes to criticism of their actions. Moreover, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks, and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.[109]

These principles are equally applicable in respect of the administration of justice. The courts do not operate in a vacuum. The fact that they are the forum for the settlement of disputes does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large. While the mass media may not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.[110]

The freedom of artistic expression is included within the meaning of 'information and ideas. Those who create, perform, distribute or exhibit works of art too contribute to the exchange of ideas and opinions.[111]

his public office a politician exposes himself to public criticism to a larger degree than the ordinary citizen . . . The democratic system requires that those who hold public power are subject to close control not only by their political adversaries in the institutions of the state or other organizations, but also by the public opinion which is to a large extent formed and expressed in the media. To exercise such control is not only a right, but may even be considered as a "duty and responsibility" of the press in a democratic state'; *Lingens and Leitgens* v. *Austria*, European Commission, (1981) 4 EHRR 373: 'A politician must be prepared to accept even harsh criticism of his public activities and statements, and such criticism may not be understood as defamatory unless it throws a considerable degree of doubt on his personal character and good reputation.'

[109] *Janowski* v. *Poland*, European Court, (1999) 29 EHRR 705: A conviction for insulting two municipal guards in a public square by calling them 'oafs' and 'dumb', following a request by them that street vendors trading in the square move to another venue, did not infringe ECHR 10.

[110] *Sunday Times* v. *United Kingdom*, European Court, (1979) 2 EHRR 245. See also the dissenting opinion of Judge Golcuklu in *Barfod* v. *Denmark*, European Court, (1989) 13 EHRR 493.

[111] *Muller* v. *Switzerland*, European Court, (1988) 13 EHRR 212.

Although it is generally accepted that 'art' includes the production, according to aesthetic principles, of works of the imagination, imitation or design, the question whether a particular drawing, film or text is 'art' is a matter for the court to determine on the basis of a variety of factors, such as the subjective intention of the creator, the form and content of the work, the opinion of experts, or the mode of production, display and distribution.[112] Information of a commercial nature is not excluded from the protection accorded to 'information and ideas'.[113] The Human Rights Committee has held that commercial activity such as outdoor advertising falls within the ambit of ICCPR 19(2) which must be interpreted as 'encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with ICCPR 20'. These should not be confined to means of political, cultural or artistic expression, but would include commercial expression and advertising.[114] Opinion surveys regarding political candidates or electoral issues are part of the electoral process, and thus lie at the core of the freedom of expression. A prohibition imposed on the broadcasting, publication or dissemination of opinion survey results during the final three days of an election campaign infringed the freedom of expression.[115]

[112] *R* v. *Sharpe*, Supreme Court of Canada, [2001] 2 LRC 665.

[113] *Markt intern Verlag GmbH* v.*Germany*, European Court, (1989) 12 EHRR 161: The openness of business activities requires the possibility to disseminate freely information and ideas concerning the products and services proposed to consumers; *Barthold* v. *Germany*, European Court, (1985) 7 EHRR 383: 'The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites, cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of private broadcasting, by depriving the latter of its financial backing', per Judge Pettiti.

[114] *Ballantyne et al.* v. *Canada,* Human Rights Committee, Communication Nos.359/1989 and 385/1989, 31 March 1993. See also Decision of the Constitutional Court of Austria, V 575/90–6, 12 December 1991: Any restriction on commercial advertising by lawyers must be shown to be necessary to protect the 'rights and reputations of others'; *Liquormart inc* v. *Rhode Island*, United States Supreme Court, 13 May 1996: A law which banned the advertisement of retail liquor prices except at the place of sale was an abridgement of the freedom of speech guaranteed by the First Amendment. The speech in question was not flawed in some way, either because it was deceptive or related to unlawful activity; Decision of the Constitutional Court of Austria, G 93/96, 8 October 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 330: Private cable television companies may not be prohibited from making commercial advertising broadcasts.

[115] *Thomson Newspapers Co Ltd* v. *Attorney General of Canada*, Supreme Court of Canada, [1998] 4 LRC 288: In the absence of specific and conclusive evidence that an inaccurate poll

The right to communicate accurate information takes precedence over the right to honour, provided the facts have implications in the public forum, constitute an item of news, and the information is accurate, i.e. that the journalist or informant has used reasonable means to verify the news he disseminates, in writing or by any other means, by checking it against the facts.[116] Facts need to be distinguished from value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. It is immaterial whether the value judgment is right or wrong. The question of the defence of truth is not relevant in relation to a person's assessment of a situation. He cannot be considered to have exceeded the limits of the freedom of expression if the facts on which he has based his value judgment are substantially correct and his good faith does not give rise to serious doubts.[117] Indeed, where a person publishes a true statement of facts followed by a value judgment as to those facts, a requirement that he should prove the truth of his allegations is impossible of fulfilment and is itself an infringement of freedom of opinion.[118]

would mislead a large number of voters and significantly distort the conduct of the election, it was not sufficient for the government to rely merely on a reasonable apprehension of harm to justify legislation which transgressed the freedom of expression.

[116] Decision of the Constitutional Court of Spain, Case No.320/1994, 28 November 1994, (1994) 3 *Bulletin on Constitutional Case-Law* 287. See also *Mallawarachchi* v. *Seneviratne*, Supreme Court of Sri Lanka, [1992] 1 Sri LR 181: A true statement made in the public interest or in the protection of a lawful interest would be clearly in the exercise of freedom of speech although prima facie defamatory. Such statements may be made by way of criticism of those holding or seeking public office, particularly where relevant to such office.

[117] *Lingens* v. *Austria*, European Court, (1986) 8 EHRR 103; *Castells* v. *Spain*, European Court, (1992) 14 EHRR 445, and concurring opinion of Judge de Meyer; *Schwabe* v. *Austria*, European Court, 28 August 1992. See also *Lingens* v. *Austria*, European Commission, (1984) 7 EHRR 447: 'The commission cannot accept that critical value judgments may be made by the press only if their "truth" can be proven. Value judgments are an essential element of the freedom of the press and the impossibility of proof is inherent in value judgments. The use of strong wording may itself be a means of expressing disapproval of a particular behaviour and should be restricted only where the terms used are incommensurate to the legitimate object of the intended criticism'; *Singer* v. *Canada,* Human Rights Committee, Communication No.455/1991, HRC 1994 Report, Annex IX.Y.

[118] *Oberschlick* v. *Austria*, European Court, (1991) 19 EHRR 389. See also *Gertz* v. *Welch*, United States Supreme Court, 418 US 323 (1974): There is no such thing as a 'false idea'. However pernicious an opinion may seem, its correction depends not on the conscience of judges and juries, but on the competition of other ideas.

*regardless of frontiers*

The right to freedom of expression is not limited within the confines of any political or territorial entity; it may be exercised regardless of frontiers.[119] Information received from abroad, by whatever means, may be restricted only in the prescribed manner and for the specified purposes.[120] This freedom of cross-boundary communication must be taken into account when interpreting this right.[121]

*either orally, in writing or in print, in the form of art, or through any other media of his choice*

'Other media' include broadcasting of programmes over the air and cable retransmission of such programmes,[122] television,[123] and the communication of matter through the mail[124] or telephone system where any member of the public could dial a particular number and listen to a prerecorded message.[125] Theatres[126] and movies[127] are also legitimate and important media. In Nigeria, it has been held that the word 'medium' (used with reference to the freedom of expression in the constitution),[128] is not limited to the newspaper or 'mass media', but includes a school.

[119] UN document A/2929, chap.VI, s.124.

[120] *Autronic AG* v. *Switzerland*, European Commission, 8 March 1989.

[121] *Groppera Radio AG* v. *Switzerland*, European Court, (1990) 12 EHRR 321, per Judge Bernhardt.

[122] *Groppera Radio AG* v. *Switzerland*, European Court, (1990) 12 EHRR 321. See also European Commission, (1988) 12 EHRR 297.

[123] *Belize Broadcasting Authority* v. *Courtney*, Court of Appeal of Belize, (1990) 38 WIR 79; *NTN Pty Ltd and NBN Ltd* v. *The State*, Supreme Court of Papua New Guinea, [1988] LRC (Const) 333.

[124] *Winters* v. *People of the State of New York*, United States Supreme Court, 333 US 507 (1948); *Roth* v. *USA*, United States Supreme Court, 354 US 476 (1957); *Lamont* v. *Postmaster General*, United States Supreme Court, 381 US 301 (1965).

[125] *Taylor* v. *Canadian Human Rights Commission*, Supreme Court of Canada, [1991] LRC (Const) 445.

[126] *Schacht* v. *United States*, United States Supreme Court, 398 US 58 (1970): An actor, like everyone else, enjoys a constitutional right to freedom of expression, including the right openly to criticize the government during a dramatic performance.

[127] *Abbas* v. *The Union of India*, Supreme Court of India, [1971] 2 SCR 446; *Ramesh* v. *The Union of India*, Supreme Court of India, [1988] 2 SCR 1011; *Rangarajan* v. *Jagjivan Ram*, Supreme Court of India, [1990] LRC (Const) 412; *Burstyn* v. *Wilson*, United States Supreme Court, 343 US 495 (1952); *Kingsley International Pictures Corporation* v. *Regents of the University of the State of New York*, United States Supreme Court, 360 US 684 (1959); *Interstate Circuit* v. *Dulles*, United States Supreme Court, 390 US 676 (1968).

[128] Section 36(2) provided that 'every person shall be entitled to own, establish and operate any *medium* for the dissemination of information, ideas and opinions'.

Accordingly, a private individual or agency had the right to establish a university, a secondary school or a post primary institution.[129]

While freedom of expression does not encompass the right to use any and all government property for the purposes of disseminating views on public matters, it does include the right to use streets and parks which are dedicated to the use of the public, subject to reasonable limitations to ensure their continued use for the purposes to which they are dedicated.[130] When an individual undertakes to communicate in a public place, he or she must consider the function which that place must fulfil and adjust his or her means of communicating so that the expression is not an impediment to that function. The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others.[131]

### *carries with it special duties and responsibilities*

The scope of the 'duties and responsibilities' which a person exercising his freedom of expression undertakes depends on (a) the particular situation of such person and the duties and responsibilities which are incumbent on him by reason of this situation, and (b) the technical means he uses.[132] But reference to such duties and responsibilities alone is not sufficient to justify an interference with his freedom of expression; such justification must be found in one of the specified grounds on which the exercise of this right may be restricted by law. Different standards may be applicable to different categories of persons, such as civil servants, soldiers, policemen, journalists, publishers, politicians, etc., whose duties and responsibilities must be seen in relation to their function in society.[133]

[129] *Ukaegbu* v. *The Attorney General of Imo State*, Supreme Court of Nigeria, [1985] LRC (Const) 867, [1984] 5 NCLR 78. See also *Archbishop Okogie* v. *The Attorney General of Lagos State*, Supreme Court of Nigeria, [1981] 1 NCLR 218.

[130] *Hague* v. *Committee for Industrial Organization*, United States Supreme Court, 357 US 496 (1939).

[131] *Committee for the Commonwealth of Canada* v. *Canada*, Supreme Court of Canada, [1991] 1 SCR 139. An airport is a thoroughfare, which in its open or waiting areas can accommodate expression without the effectiveness or function of the place being in any way threatened.

[132] *Hertzberg* v. *Finland*, Human Rights Committee, Communication No.61/1979, 2 April 1982.

[133] See, for example, *Stewart* v. *Public Service Relations Board*, Federal Court of Canada, [1978] 1 FC 133.

Where several soldiers complained that their freedom of expression had been infringed by military authorities who had awarded them a disciplinary punishment for writing articles in a camp journal which allegedly undermined military discipline, the fact that one of their duties and responsibilities was to maintain discipline and order in the armed forces, was the background against which the interference must be viewed in their cases.[134] Similarly, a university lecturer, some of whose students may be at a stage of intellectual development when their vulnerability to indoctrination is a factor which cannot be ignored, is subject to special duties and responsibilities in relation to his opinions and their expression, both directly at the college and, to a lesser degree, as a figure of authority for students and other members of staff, at other times. At the same time, his job as a lecturer imposes special responsibilities on his employer to ensure the free exchange and development of ideas in the context of freedom of expression within the college, since overprotection from one form of indoctrination may constitute an indoctrination of another kind.[135] Where a book is intended to be read by schoolchildren, it is against that background that the interference with the exercise of the right to freedom of expression should be examined. The prosecution and conviction of a publisher for 'having in his possession obscene books entitled *The Little Red Schoolbook* for publication for gain', had a legitimate aim which was necessary in a democratic society, namely,

[134] *Engel* v. *Netherlands*, European Commission, 19 July 1974. Cf. *Vereinigung Demokratischer Soldaten Österreichs and Gubi* v. *Austria*, European Court, 19 December 1994: The refusal to permit distribution to servicemen of a monthly magazine which contained information and articles – often of a critical nature – on military life constituted a violation of ECHR 10; *Hadjianastassiou* v. *Greece*, European Court, (1992) 16 EHRR 219: An aeronautical engineer in charge of a project for the design and production of a guided missile who communicated to a private company a technical study on guided missiles which he had himself prepared, was bound by an obligation of discretion in relation to anything concerning the performance of his duties.

[135] *Kosiek* v. *Germany*, European Commission, (1984) 6 EHRR 467: The dismissal of a physics lecturer because of his membership of the extreme right wing National Democratic Party and the views he had expressed in two books, did not breach ECHR 10. The European Court held that the case concerned not the freedom of expression but access to the civil service, which was not the subject of a right recognized in the ECHR: (1986) 9 EHRR 328. Cf. *Vogt* v. *Germany*, European Court, (1995) 21 EHRR 205: Where a school teacher was dismissed from the civil service on account of her political activities as a member of the German Communist Party, but no allegation was made that she had taken advantage of her position to indoctrinate or exert improper influence in another way on her pupils during lessons, the disciplinary sanction was disproportionate to the legitimate aim pursued.

the protection of morals.[136] As far as radio and television programmes are concerned, because the audience cannot be controlled and therefore harmful effects on minors cannot be excluded, the responsible organs are subject to special duties and responsibilities.[137]

In considering the 'duties and responsibilities' of a journalist, the potential impact of the medium concerned is an important factor. It is commonly acknowledged that the audio visual media has a much more immediate and powerful effect than the print media because of its ability to convey through images meanings which the print media are not able to impart. Nevertheless, it is for the press to determine what technique of reporting should be adopted, since the protection extends not only to the substance of the ideas and information expressed, but also to the form in which they are conveyed.[138] It is for the journalist to decide whether or not it is necessary to reproduce any documents to ensure credibility. His right to divulge information on issues of general interest is protected provided he acts in good faith, and on an accurate factual basis, and provides 'reliable and precise' information in accordance with the ethics of journalism.[139]

Whenever the freedom of expression of high-ranking judges is at issue, the 'duties and responsibilities' assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in all situations where the authority and impartiality of the judiciary are likely to be called in question. But where the President of the Liechtenstein Administrative Court delivered a public lecture in which he expressed the view that his court had competence in respect of disputes involving the powers of the Prince of Liechtenstein, and the

[136] *Handyside* v. *United Kingdom*, European Court, (1976) 1 EHRR 737; European Commission, 30 September 1975. See also *Muller* v. *Switzerland*, European Court, (1988) 13 EHRR 212: artists and those who promote their work also have 'duties and responsibilities'.

[137] *Hertzberg* v. *Finland,* Human Rights Committee, Communication No.61/1979, HRC 1982 Report, Annex XIV.

[138] *Jersild* v. *Denmark*, European Court, (1994) 19 EHRR 1.

[139] *Fressoz and Roire* v. *France*, European Court, (1999) 21 EHRR 28: publication of tax returns obtained through a breach of professional confidence by an unidentified tax official. See also *Bladet Tromso and Stensaas* v. *Norway*, European Court, (1999) 29 EHRR 125: A newspaper is entitled to rely on an official report without being required to carry out its own research into the accuracy of the facts reported; Decision of the Constitutional Court of Spain, 21/2000, 31 January 2000, (2000) 1 *Bulletin on Constitutional Case-Law* 140: An unidentified information source does not permit a journalist to assert that he has properly discharged his duty of diligence as regards verification of the facts.

latter announced his intention not to reappoint the judge to his office, the judge's freedom of expression was breached. The Prince's action was disproportionate to the aim pursued and was not necessary in a democratic society.[140] In the context of religious opinions and beliefs, 'duties and responsibilities' may legitimately include an obligation to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory, and which, therefore, does not contribute to any form of public debate capable of furthering progress in human affairs.[141]

*may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others, (b) for the protection of national security or of public order* (ordre public)*, or of public health or morals*

It is the interplay between the principle of freedom of expression and the prescribed limitations and restrictions which determines the actual scope of the individual's right. Therefore, when a state imposes certain restrictions on the exercise of the freedom of expression, these may not put in jeopardy the right itself. The international instruments lay down conditions, and it is only subject to those conditions that restrictions may be imposed: the restrictions must be provided by law; they may only be imposed for one of the purposes set out in ICCPR 19(3)(a) and (b), ECHR 10(2), or ACHR 13(2)(a) and (b); and they must be justified as being 'necessary' for the state for one of these purposes.[142]

[140] *Wille* v. *Liechtenstein*, European Court, (1999) 30 EHRR 558.

[141] *Otto-Preminger-Institut* v. *Austria*, European Court, (1994) 19 EHRR 34.

[142] Human Rights Committee, General Comment 10 (1983). When ICCPR 19 was being drafted, there were two schools of thought on the question of how the limitations or restrictions should be formulated. One was of the opinion that the limitations clause should be a brief statement of general limitations. The other maintained it should be a full catalogue of specific limitations. The advocates of a brief clause argued that no catalogue could ever be sufficiently exhaustive to cover all situations, in view of the divergent political and legal systems in different states, and that the only way to draft a limitations clause was to find a workable common formula. Those in favour of specific limitations insisted that a general formula could be arbitrarily interpreted and applied and that permissible restrictions on freedom of expression should therefore be set forth in precise, unequivocal language; limitations which were enumerated carefully and in detail would ensure a wider degree of freedom (UN document A/2929, chap.VI, ss.128, 129, 130). In the course of debate it was proposed, for instance, that freedom of expression should be subjected to such restrictions as were necessary 'for preventing the disclosure of information received

The exceptions must be narrowly interpreted, and the necessity for any restrictions must be convincingly established.[143]

## Censorship

Censorship was extensively discussed at the drafting stage of ICCPR 19. In the Commission on Human Rights it was proposed that 'prior censorship of the press should be explicitly banned' and that 'previous censorship of written and printed matter, the radio and news-reels should not exist'. These proposals were not considered necessary because the restrictions in paragraph 3 were not to be understood as authorizing censorship. A reminder to the journalist of his duties and responsibilities and of the limitations which might be placed upon him in the exercise of the right to freedom of expression could not be equated to a system of

in confidence' and 'for ensuring the fair and proper conduct of judicial proceedings'. It was also proposed that freedom of expression should be subject to such restrictions as were necessary 'for the maintenance of peace and good relations among States'. These and other similar proposals were rejected not only on the ground that they were not susceptible of precise interpretation, but also because they might justify the establishment of a system of censorship. The question was raised whether freedom to seek and the freedom to receive information should be subject to the same restrictions as freedom to impart information, and whether they should be subject to any restrictions at all. On this point, no definite understanding appeared to have been established (UN document A/2929, chap.VI, s.135).

[143] *Grigoriades* v. *Greece*, European Court, (1997) 27 EHRR 464. For the position under the United States Constitution, see *Dennis* v. *USA*, United States Supreme Court, 341 US 494 (1951), per Douglas J: 'The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed'; *Whitney* v. *California*, United States Supreme Court, 274 US 357 (1927), per Brandeis J: 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.' Referring to advocacy of law-breaking, Brandeis J noted that every advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of a clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

censorship.[144] In the Third Committee, it was strongly urged that paragraph (3) should contain an express provision barring censorship. Subsequent criminal liability and exercise of the right of reply so as to correct misinformation were considered to be the proper means of preventing this freedom from degenerating into licence, without endangering the right itself. Against the insertion of any reference to censorship it was argued, on the one hand, that prior censorship in questions of public morals might be necessary, especially with regard to the cinema and, on the other, that invoking subsequent liability might prove insufficient or too costly, especially in matters such as incitement to war or to national or racial hatred. It was further pointed out that censorship could take many forms, some of them not affected by the suggested prohibition, such as the deliberate withholding of information.[145] The amendment regarding censorship was eventually withdrawn by the sponsors, the representative of Peru explaining on their behalf that that was being done because the text, as elaborated by the commission, could not in any way be interpreted as authorizing prior censorship. At the same time, the representative of the United Kingdom and others expressed their understanding that the licensing of visual or auditory devices was covered by the concept of 'public order'.[146]

The imposition of prior restraint on speech, violates the freedom of expression. Where an emergency regulation in Sri Lanka provided that: 'No person shall without the permission of the Inspector-General of Police or any police officer authorized in that behalf by the Inspector-General of Police, affix in any place visible to the public or distribute among the public any posters, handbills or leaflets', it conferred 'a naked and arbitrary power on the police to grant or refuse permission to distribute pamphlets or posters as it pleases, in exercise of its absolute and uncontrolled discretion, without any guiding principle or policy to control and regulate the exercise of such discretion'. There was no rational or proximate nexus between the restriction imposed by the regulation and

[144] UN document A/2929, chapter VI, section 136. On censorship, see William Blackstone, *Commentaries on the Laws of England (1765–1769)* (Chicago: The University of Chicago Press, 1979), vol. IV, p. 151. A preliminary injunction ordering the publisher and authors of certain historical books to enclose a correction does not infringe the freedom of expression: Decision of the Supreme Court of Norway, 30 November 1999, (1999) 3 *Bulletin on Constitutional Case-Law* 417.

[145] UN document A/5000, s.31. [146] UN document A/5000, s.33.

national security or public order.[147] In South Africa, the Supreme Court held that a regulation which prohibited any person from publishing the report of a commission of inquiry or any part of it or any information regarding the consideration of evidence before the commission 'unless and until the State President [had] released the report for publication or until [it had] been laid upon the table in Parliament', constituted a prior restraint which was inconsistent with the freedom of expression. The prohibition was cast in such a manner that the report might never see the light of day. If the President did not release it for publication or lay it upon the table in Parliament, a matter of public interest could well be kept from the public forever.[148]

A distinction may be drawn between the censorship of films and of printed matter. In respect of the latter, the imposition of pre-censorship was a restriction on the liberty of the press.[149] But films, having a unique capacity to disturb and arouse feelings and catering for unselective mass audiences, must necessarily be subject to censorship by prior restraint. In judging the effect of a film, the standard to be applied is that of the ordinary man of common sense and prudence and not that of an extraordinary or hypersensitive man. Upholding a decision of the board of film censors to permit the public exhibition of a film which contained material which was critical of the government's reservation policy in educational institutions for the benefit of backward communities, the Supreme Court of India rejected a plea by a state government that organizations which had been agitating that the film be banned might not hesitate to damage the cinemas which screened it. The court observed that freedom of expression cannot be suppressed on account of threats of demonstrations and processions or threats of violence. That would be tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the state to protect the freedom of expression; the state cannot plead its inability to handle the hostile

[147] *Perera* v. *Attorney General*, Supreme Court of Sri Lanka, [1992] 1 Sri LR 199, per Sharvananda CJ. See also *Rajagopal* v. *State of Tamil Nadu*, Supreme Court of India, [1995] 3 LRC 566: Imposition of prior restraint or prohibition upon publication of material defamatory of the state or its officials is an infringement of the freedom of expression; Decision of the Supreme Court of Norway, Inr 64 B/1999, 30 November 1999, (1999) 3 *Bulletin on Constitutional Case-Law* 417.

[148] *Government of the Republic of South Africa* v. *The Sunday Times Newspaper*, Supreme Court of South Africa, [1995] 1 LRC 168.

[149] *Brij Bhushan* v. *The State of Delhi*, Supreme Court of India, [1950] 1 SCR 605.

audience problem. It is its obligatory duty to prevent it and protect the freedom.[150]

### Licensing of media

The licensing power of states in respect of radio and television broadcasting, where it exists, may only affect the means of communication and not the communication by these means itself, i.e. it cannot include a right to interfere with what is communicated, the content of the communication. The licensing power does not, as such, imply a power to deny certain individuals or categories of individuals the right to avail themselves of the freedom of expression by means of the media in question or to prohibit certain things or certain categories of things from being broadcast, transmitted or, above all, received in that way.[151]

### Licensing of journalists

If the compulsory licensing of journalists can result in the imposition of liability, including penal liability, on those who are not licensed when they intrude on what, according to the law, is defined as the professional practice of journalism, the licensing requirement constitutes a restriction on the freedom of expression. Journalism must be distinguished from other professions. 'The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression. This is not true of the practice of law or medicine, for example.' Reasons of public order which may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalists because they will have the effect of permanently depriving those who are not members of professional bodies of the right to freedom of expression.[152]

[150] *Rangarajan* v. *Jagjivan Ram*, Supreme Court of India, [1990] LRC (Const) 412, at 429. See also *Abbas* v. *The Union of India*, Supreme Court of India, [1971] 2 SCR 446.

[151] *Groppera Radio AG* v. *Switzerland*, European Court, (1990) 12 EHRR 321, per Judge De Meyer (dissenting opinion).

[152] *Compulsory Membership of Journalists' Association*, Inter-American Court, Advisory Opinion OC-5/85, 13 November 1985.

## Disclosing source of information

Protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. Consequently, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the potentially chilling effect an order of source disclosure will have on the exercise of press freedom, such a measure is not compatible with the freedom of expression unless it is justified by an overriding requirement in the public interest.[153] A journalist is, in principle, entitled to refuse to answer a question put to him if he would risk exposing his source by doing so. The court is not obliged to accept an invocation of this right, however, if it is of the opinion that in the particular circumstances of the case, revealing the source is necessary in a democratic society with a view to protecting one or more of the protected interests, provided that the interest is cited and a plausible case for its existence is made.[154]

The High Court of Nigeria has held that an editor summoned by the Senate to appear before it and disclose sources of his information of an article about senators and their lobbying for contracts from the executive branch of government, was not obliged to furnish such information.[155] The High Court also held that no person or authority (not even a court of law) may require any individual, reporter, editor, or publisher of a newspaper to disclose his source of information of any published matter, unless such matter fell within the permissible limitations of the right to freedom of expression under the constitution.[156] In Switzerland, where, following the publication in a weekly of alleged differences of opinion between two members of the Federal Council, the

[153] *Goodwin* v. *United Kingdom*, European Court, (1996) 22 EHRR 123.

[154] Decision of the Supreme Court of the Netherlands, 8772, 10 May 1996, (1996) 2 *Bulletin on Constitutional Case-Law* 244: When the only interest in exposing the journalist's source is a desire to locate the 'leak' so that legal proceedings could be brought against the parties involved, both to obtain compensation and to forbid any further 'leak' to the press, the interest is in itself insufficient to offset the compelling public interest in the protection of journalistic sources.

[155] *Momoh* v. *Senate of the National Assembly*, High Court of Nigeria, [1981] 1 NCLR 105.

[156] *Oyegbemi* v. *Attorney General of the Federation of Nigeria*, High Court of Nigeria, [1982] 3 NCLR 895.

public prosecutor ordered a public telephone company to monitor the telephone conversations of members of the editorial staff of the weekly in order to ascertain which federal civil servants had spoken to them during a specified period, the Federal Court held that the betrayal of confidentiality was not of such importance as to justify the infringement of freedom of expression.[157]

### Search of Media Premises

The search by police of media premises and seizure of records and documents may impinge on the values underlying freedom of the press. First, searches may be physically disruptive and impede efficient and timely publication. Second, retention of seized material by the police may delay or forestall completing the dissemination of news. Third, confidential sources of information may be fearful of speaking to the press, and the press may lose opportunities to cover various events because of fears on the part of participants that press files will be readily available to the authorities. Fourth, reporters may be deterred from recording and preserving their recollections for future use. Fifth, the processing of news and its dissemination may be chilled by the prospect that searches will disclose internal editorial deliberations. Sixth, the press may resort to self-censorship to conceal the fact that it possesses information that may be of interest to the police in an effort to protect its sources and its ability to gather news in the future. All this may adversely impact on the role of the media in furthering the search for truth, community participation and self-fulfilment.[158]

The constitutional protection of freedom of expression does not import any new or additional requirements for the issuance of search warrants in respect of media premises, but provides a backdrop against which the reasonableness of the search might be evaluated. The factors which should be taken into account when determining whether to issue a warrant to search the premises of a media organization that is not implicated in the crime under investigation were considered by the Supreme Court of Canada following the issue of a warrant by a justice of the peace authorizing the police to seize from the Canadian Broadcasting

[157] *A.B.C. and TA-Media AG* v. *Public Prosecutor's Office of the Confederation*, Federal Court of Switzerland, 8G.15/1997, 4 November 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 451.

[158] *Société Radio-Canada* v. *Lessard*, Supreme Court of Canada, (1991) 130 NR 321.

Corporation a videotape record of a demonstration that had turned violent. Cory J summarized the following factors that ought to be considered:

1. The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crime and the right to privacy of the media in the course of their news gathering and dissemination, bearing in mind that the media play a vital role in the functioning of a democratic society and that it is an innocent third party in the crime under investigation.
2. The affidavit in support of the application should disclose whether there are alternative sources from which the information may reasonably be obtained and, if so, that such sources have been investigated and all reasonable efforts to obtain the information have been made.
3. If the information sought has been disseminated by the media in whole or in part, that will be a factor favouring the issue of the search warrant.
4. If a warrant is being issued, conditions should be imposed to ensure that the media organization will not be unduly impeded in the publishing or dissemination of the news.
5. If, subsequent to the issuing of a search warrant, it appears that the authorities had failed to disclose relevant information that could well have affected the decision to issue the warrant, or if the search had been unreasonably conducted, the warrant or the search, as the case may be, may be regarded as invalid.[159]

In the High Court of New Zealand, Fisher J adopted a more cautious view. While recognizing that no rigid formula could be devised to accommodate in advance the infinite range of possible circumstances, he commended the following approach:

1. The police will need to show a special reason for intruding upon the operations of a news media organization. It will not be sufficient to

[159] *Société Radio-Canada* v. *Nouveau-Brunswick (Procureur général)*, Supreme Court of Canada, (1991) 130 NR 362. See also *Re Pacific Press Ltd* v. *The Queen*, Supreme Court of British Columbia, (1977) 37 CCC (2nd) 487: the police had not demonstrated the necessity to obtain the information from the newspaper office by satisfying the justice of the peace that (1) no other reasonable source was available; or (2) if an alternative source were available, that reasonable steps had been taken to obtain the information from the alternative source and that they had proved unsuccessful.

satisfy the court that reasonable grounds exist for believing that an offence punishable by imprisonment has been committed, that the things specified will be found in the designated place, and that the things in question will be evidence of the offence.

2. The special reason will usually be that the evidence sought is of critical importance to the prosecution and that special controls included in the warrant can adequately minimize the effects of the intrusion, although there will be others such as the need to prevent imminent danger to life and limb.
3. The evidence sought by the warrant is likely to be of critical importance to the prosecution if the indications are that without it the prosecution would be unable to prove all of those elements of the offence likely to be in issue and that alternative sources of proof are not reasonably available.
4. Even where those conditions are satisfied, a warrant may be refused if there are contrary indications, for example if the alleged offence is not serious, if the police could have been expected to make advance arrangements to secure evidence by other means, or if the warrant appears to have been sought for some purpose other than to gain evidence of the offences alleged in the application.
5. A warrant may also be refused if no amount of restrictions in the warrant could adequately protect the media organization against unacceptable breaches of confidence, disruption to its news disseminating operations or disclosure to a level which is oppressive in the sense that the search will be unreasonably wide compared with the likely probative value of the end result.

The judge stressed that there will always be a broad discretion to achieve in the particular case a proper balance between legitimate law enforcement on the one hand and a respect for freedom of the press, privacy, confidentiality and property on the other. If the application survives these tests the warrant issued should normally be limited to films, videotapes, sound recordings and photographs of public events, and be made expressly subject to special conditions for executing warrants against news media organizations.[160]

[160] *Television New Zealand Ltd* v. *Police*, High Court of New Zealand, [1995] 2 LRC 808. See also *Zurcher* v. *Stanford Daily*, United States Supreme Court, 436 US 547 (1978); *Senior* v. *Holdsworth*, Court of Appeal of the United Kingdom, [1975] 2 All ER 1009.

### necessary

The adjective 'necessary' implies the existence of a 'pressing social need'.[161] According to the Supreme Court of India, the restriction 'must be justified on the anvil of necessity and not the quicksand of convenience or expediency'. It is not simply a case of balancing the two interests as if they were of equal weight. Freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.[162]

A penalty imposed on a former mayor of an important city in Turkey for making statements in support of a 'national liberation movement', which were published in a major national newspaper and which coincided with violent attacks carried out by the movement on civilians, was likely to exacerbate an already explosive situation in the region and could, therefore, reasonably be regarded as responding to a 'pressing social need'.[163] But the prosecution and conviction of a person for making a public defence of crimes of collaboration with the enemy (during the Second World War) by placing an advertisement in a newspaper, was disproportionate and, as such, unnecessary in a democratic society.[164]

[161] *Vogt* v. *Germany*, European Court, (1995) 21 EHRR 205; *Grigoriades* v. *Greece*, European Court, (1997) 27 EHRR 464.

[162] *Rangarajan* v. *Jagjivan Ram*, Supreme Court of India, [1990] LRC (Const) 412, at 427, per Jagannatha Shetty J.

[163] *Zana* v. *Turkey*, European Court, (1997) 27 EHRR 667.

[164] *Lehideux and Isorni* v. *France*, European Court, (1998) 30 EHRR 665. Cf. Decision of the Court of Arbitration of Belgium, 45/96, 12 July 1996, (1996) 2 *Bulletin on Constitutional Case-Law* 184: A Belgian law which was designed to make the negation, minimization, justification or approval of the genocide committed by the German National Socialist regime during the Second World War an offence can be considered as meeting an imperative need, because the expression of such opinions is dishonourable and offensive to the memory of the victims of genocide, its survivors and in particular the Jewish people themselves. The law can also be regarded as necessary in a democratic society: it is punitive, does not provide for any preventive measure to hinder the circulation of opinions, and only punishes opinions expressed in certain places and certain circumstances, not because of their content but because of their injurious consequences for others and for democratic society as such. The law does not aim to hinder scientific and critical research into the historical reality of the genocide in question or to obstruct any form of factual information on the subject.

rights or reputations of others

The 'rights' may relate to the interests of other persons or to those of the community as a whole. For example, a French law which made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945–6, was a restriction that served to respect the right of the Jewish community to live free from fear of an atmosphere of anti-semitism.[165]

In finding the right balance between the right to communicate information freely and the right to respect for the reputation of the person to whom the information relates, particular note has to be taken of the information-provider's duty of care, since observance of the latter makes it possible to ensure the veracity of information. The greatest care is required when the information is likely to discredit the reputation of the person concerned.[166] It is not necessary to ensure the truthfulness of all factual statements,[167] provided that the information disclosed is not unreasonable, is not manifestly without foundation, and concerns public affairs which, in view of the issues dealt with and the person involved, can be deemed to be in the public interest.[168] Once information has been secured and checked with a certain minimum of care, that information is protected by the right to communicate information freely, and takes precedence over the right to reputation.[169]

[165] *Faurisson* v. *France*, Human Rights Committee, Communication No.550/1993, HRC 1997 Report, Annex VI.I.

[166] Decision of the Constitutional Court of Spain, 28/1996, 26 February 1996, (1996) 2 *Bulletin on Constitutional Case-Law* 93.

[167] Decision of the Constitutional Court of the Czech Republic, II.US 357/96, 10 December 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 372. An article written in the form of a polemic cannot be considered as giving rise to a claim for damage to personal honour. See also Decision of the Supreme Court of the Netherlands, 15.549, 6 January 1995, (1995) 1 *Bulletin on Constitutional Case-Law* 58: A person who has been convicted of an offence should not in principle be held to account for his actions after he has paid the penalty for them. This implies that making a fresh accusation relating to such offence after a long period of time and giving to such accusation wide publicity can be justified only in special circumstances where compelling reasons related to the public interest exist, and it is legitimate to require that the accusation be based on extremely meticulous research.

[168] Decision of the Constitutional Court of Spain, 19/1996, 12 February 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 89.

[169] Decision of the Constitutional Court of Spain, 22/1995, 30 January 1995, (1995) 1 *Bulletin on Constitutional Case-Law* 88.

Laws relating to defamation are designed to protect the reputations of individuals. The requirement of protecting the reputation and rights of others must be weighed against the individual's freedom of expression. But it is not simply a choice between two conflicting principles of equal weight. The freedom of expression is the guiding principle, and any exceptions to that fundamental principle must be interpreted narrowly.[170] Where an Australian politician brought an action for defamation against a newspaper in respect of a letter which it had published, the High Court held that the publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate. To require more of those wishing to participate in political discussion would impose impractical and, sometimes, severe restraint on commentators and others who participate in discussion of public affairs. Such a restraint would severely cramp that freedom of political discussion which is so essential to the effective and open working of modern government. At the same time, it cannot be said to be in the public interest or conducive to the working of democratic government if anyone were at liberty to publish false and damaging defamatory matter free from any responsibility at all in relation to the accuracy of what is published. In other words, if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (i.e. not caring whether the matter was true or false), and that the publication was reasonable in the sense described.[171]

Although the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual[172] the rights and

[170] *Jacubowski* v. *Germany*, European Court, (1994) 19 EHRR 64, per Judges Walsh, MacDonald and Wildhaber. See also *Prager and Oberschlick* v. *Austria*, European Court, (1995) 21 EHRR 1, where the court was divided five to four on whether or not a conviction of two journalists for defamation, following the publication of an article critical of judges sitting in Austrian criminal courts, constituted a violation of their freedom of expression. Cf. *National Media Ltd* v. *Bogoshi*, Supreme Court of Appeal, South Africa, [1999] 3 LRC 617: Neither of the rival interests is more important than the other.

[171] *Theophanous* v. *Herald and Weekly Times Ltd*, High Court of Australia, [1994] 3 LRC 369. See also Decision of the Constitutional Court of Romania, 140, 19 November 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 397.

[172] *Lingens* v. *Austria*, European Court, (1986) 8 EHRR 103. See also Decision of the Constitutional Court of Spain, 134/1999, 15 July 1999, (1999) 3 *Bulletin on Constitutional Case-Law*

reputations of politicians are also protected. The criticism of a politician may be understood as defamatory if such criticism throws a considerable degree of doubt on his personal character and good reputation.[173] However, the law of defamation must be interpreted as precluding impersonal attacks on governmental operations from being treated as libels of an official responsible for those operations. It is of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism. Since the threat of civil actions for defamation induces the chilling effect or tendency to inhibit free discussion and places an undesirable fetter on the freedom to express such criticism, it is contrary to the public interest for governmental institutions to have any right to maintain an action for damages for defamation. Since those in public positions are taken to have offered themselves to public attack, impersonal criticism of public conduct leading to injury to official reputation will not attract liability provided that criticism contained no actual malice.[174] Where a remedy is successfully sought for defamation, any award that is made must be proportionate to the damage suffered, and be of a sum 'necessary' to provide adequate compensation and to re-establish the victim's reputation.[175]

The Newspaper Surety Ordinance (Amendment) Act 1971 of Antigua made it unlawful for anyone to print or publish a newspaper unless he had first deposited a sum of $10,000 with the accountant-general to satisfy any final judgment for libel. The law, in fact, offered an option to

443, where a distinction was drawn between 'a public figure' and 'a celebrity'; celebrity is voluntarily acquired and involves a person exposing his or her private or working life to public scrutiny in the knowledge that it would be accompanied by exposure to criticism and censure from others.

[173] For other decisions involving 'the rights or reputations of others', see *Engel* v. *Netherlands,* European Commission, (1973) 20 *Yearbook* 462; *X* v. *Germany*, European Commission, Application 9235/1981, (1982) 29 *Decisions & Reports* 194; *Markt intern Verlag GmbH* v. *Germany*, European Court, (1989) 12 EHRR 161; *Groppera Radio AG* v. *Switzerland*, European Court, (1990) 12 EHRR 321; *The Observer and The Guardian* v. *United Kingdom*, European Court, (1991) 14 EHRR 153.

[174] *Sata* v. *Post Newspapers Ltd*, High Court of Zambia, [1995] 2 LRC 61.

[175] *Miloslavsky* v. *United Kingdom*, European Court, (1995) 20 EHRR 442: The lack of adequate and effective safeguards against a disproportionately large award (UKP 1,500,000) being made by a jury constituted a violation of the right to freedom of expression; *Cheung Ng Sheong* v. *Eastweek Publisher Ltd*, Court of Appeal of the Hong Kong SAR, (1995) 5 HKPLR 428: An award by a jury of HK$2.4 million for libel against a magazine was well above the general level of awards made by judges in libel cases in Hong Kong, and was likely to have a serious effect on freedom of expression, and could not be regarded as necessary to protect the reputation of the plaintiff.

the printer and publisher to either deposit that sum and be paid interest on it, or take out a policy of insurance or obtain a bank guarantee. The Privy Council thought this law clearly had as its purpose the protection of the reputations and rights of others. 'Damages are awarded to a libelled person to compensate him for the injury he has suffered. Unless there is a reasonable prospect of his obtaining the damages awarded to him and of payment of his costs, he may be deterred from instituting proceedings. A mere right of action is not likely to be regarded by him as an adequate protection of his reputation. Further, the fact that the deposit will be used to satisfy a judgment for libel and that, if it is, it must be replenished by them, is an inducement to the publishers of a newspaper to take care not to libel and to damage unjustifiably the reputations of others'.[176]

The offence of blasphemous libel as it is construed under the applicable common law has the main purpose of protecting the right of citizens not to be offended in their religious feelings by publications.[177] But the law of blasphemy, which only protects the Christian faith, may not be invoked to prohibit the expression of views hostile to the Christian religion or of any opinion offensive to Christians. What it may do is to control the manner in which such views are advocated. The extent of insult to religious feeling has to be significant. The high degree of profanation required is a safeguard against arbitrariness.[178]

### national security

While access to, and the use of, especially important military information may be restricted, precise criteria for determining which information is to be so regarded must be prescribed by law and not left to the discretion of the government.[179] But the prosecution and conviction of a person under the national security law of the Republic of Korea for

[176] *Attorney General* v. *Antigua Times Ltd*, Privy Council, on appeal from the Court of Appeal of the West Indies Associated States Supreme Court, [1975] 3 All ER 81, per Lord Fraser.

[177] *Gay News Ltd and Lemon* v. *United Kingdom*, European Commission, (1982) 5 EHRR 123.

[178] *Wingrove* v. *United Kingdom*, European Court, (1996) 24 EHRR 1: The public distribution of an eighteen-minute video film entitled 'Visions of Ecstasy', which concerned the life and writings of Saint Teresa of Avila, a sixteenth-century Carmelite nun who experienced powerful ecstatic visions of Jesus Christ, could outrage and insult the feelings of believing Christians and constitute the offence of blasphemy because it portrayed the crucified Christ in an act of an overtly sexual nature.

[179] Decision of the Constitutional Court of Lithuania, 3/96, 12 December 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 377.

having read out and distributed printed material coinciding with the policy statements of the Democratic People's Republic of Korea, a country with which the former was in a state of war, in a context where these policies were well-known within the territory, infringed the freedom of expression in the absence of any evidence that such action threatened national security.[180] Where an Amsterdam court ordered the seizure of the entire print run of a left-wing weekly containing a quarterly report by the country's internal security service prepared six years previously, the European Court held that the interference with the publisher's right to freedom of expression was unquestionably designed to protect national security, but was, in the circumstances, not necessary in a democratic society. The document in question was six years old, the information was of a fairly general nature, and no longer contained state secrets. The document was also marked 'confidential' which represented a low degree of secrecy.[181] Similarly, where injunctions were issued by English courts restraining the publication of any details of a book written and published abroad by a former member of the British Security Service (MI5), the European Court held that the court order was unwarranted. The injunctions prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.[182]

A directive issued by the minister to a broadcasting station in Ireland to refrain from broadcasting any interview or a report of any interview with spokesmen for the Irish Republican Army, Sinn Fein, Republican Sinn Fein, Ulster Defence Association, or the Irish National Liberation Army, or broadcasting any matter by or in support of Sinn Fein or Republican Sinn Fein, and guidelines issued by the management of the station to its staff which required them to use mute film or stills to illustrate news or current affairs programmes involving representatives of these organizations, had a legitimate aim, namely, to protect the interests of national security. The purpose of the impugned directive was to ensure that spokesmen of the listed organizations did not use the

[180] *Keun-Tae Kim* v. *Republic of Korea*, Human Rights Committee, Communication No.574/1994, HRC 1999 Report, Annex XI.A. See also *Tae Hoon Park* v. *Republic of Korea*, Human Rights Committee, Communication No.628/1995, HRC 1999 Report, Annex XI.K.

[181] *Vereniging Weekblad Bluf* v. *Netherlands*, European Court, (1995) 20 EHRR 189.

[182] *The Observer and The Guardian* v. *United Kingdom*, (1991) 14 EHRR 153.

opportunity of live interviews and other broadcasts for promoting illegal activities which aimed at undermining the constitutional order of the state.[183]

The disclosure of a state's interest in a particular weapon and of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security.[184] The desertion of soldiers may, even in peacetime, create a threat to 'national security'. Where a pacifist who distributed leaflets urging soldiers to go absent without leave or to refuse openly to be posted in Northern Ireland, because 'by one means or another, you will avoid taking part in the killing in Northern Ireland', was convicted under the Incitement to Disaffection Act, a majority of the European Commission held that the conviction served a legitimate aim, namely, the protection of national security.[185]

With television reaching out to the remotest corners of the country, catering to the not too sophisticated, literary or educated people living in distant villages, the motion picture acquires a potency as much for good as for evil. If some scenes of violence, some nuances of expression or some events in a film can stir up certain feelings in the spectator, an equally deep, strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interests, scenes depicting mutual respect and tolerance, and scenes showing comradeship, help and kindness which transcend the barriers of religion. Accordingly, the Supreme Court of India rejected an application to restrain the telecasting of a serial which depicted the period prior to partition when communal violence between Hindus and Muslims was generated by fundamentalists and extremists in both communities. National security was not threatened by the attempt to draw a lesson from the country's past history by exposing the motives of persons who operated behind the scenes to generate and foment conflicts.[186]

[183] *Purcell* v. *Ireland*, European Commission, 16 April 1991.

[184] *Hadjianastassiou* v. *Greece*, European Court, (1992) 16 EHRR 219.

[185] *Arrowsmith* v. *United Kingdom*, European Commission, (1978) 3 EHRR 218. In a dissenting opinion, Mr Opsahl observed that the aim of influencing others who are themselves responsible for their actions is an essential and legitimate aspect of the exercise of freedom of expression and opinion, in political and other matters. If others are in fact led to accept such beliefs, opinions or ideas or make use of information which has been imparted to them with a view to influencing them, they do so mainly on their own responsibility.

[186] *Ramesh* v. *The Union of India*, Supreme Court of India, [1988] 2 SCR 1011, per Mukerjee J.

### public order (ordre public)

In the interest of public order the state may prohibit the causing of loud noises in the streets and public places by means of sound amplifying instruments, regulate the hours and places of public discussion and the use of public streets for the purpose of exercising the freedom of speech, provide for the expulsion of hecklers from meetings and assemblies, and punish utterances tending to incite an immediate breach of the peace or riot as distinguished from utterances causing mere public inconvenience, annoyance or unrest.[187] The Human Rights Committee has held that the protection of parliamentary procedure could be seen as a legitimate goal of public order, and an accreditation system for journalists could be a justified means of achieving that goal. But since such a system restricts the freedom of expression, its operation and application must be shown to be necessary and proportionate to the goal in question and not arbitrary. The relevant criteria should be specific, fair and reasonable, and their application should be transparent.[188]

In Cameroon, a journalist, writer and long-time opponent of the one-party system in that country was arrested after he had given an interview to a correspondent of the BBC in which he criticized both the president of Cameroon and the government. The government sought to justify its action on grounds of national security and/or public order by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity. The Human Rights Committee considered that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest and continued detention. The legitimate objective of safeguarding or, indeed, strengthening national unity under difficult

[187] *Perera* v. *Attorney General*, Supreme Court of Sri Lanka, [1992] 1 Sri LR 199. See *Francis* v. *Chief of Police*, Privy Council on appeal from the Court of Appeal for St Christopher, Nevis and Anguilla, [1973] 2 All ER 251: The control of loudspeakers at public meetings by requiring prior written permission for their use from the chief of police did not infringe the freedom of expression since public order required that the public, who did not wish to hear the speaker, be protected from any excessive noise.

[188] *Gauthier* v. *Canada*, Human Rights Committee, Communication No.633/1995, HRC 1999 Report, Annex XI.L. Where the state allowed a private organization (Canadian Press Gallery Association) to control access to parliamentary press facilities, and that organization denied access to an independent journalist because he was not a member of the organization, the accreditation system had not been shown to be a necessary and proportionate restriction of rights in order to ensure the effective operation of parliament and the safety of its members.

circumstances could not be achieved by attempting to muzzle the advocacy of multi-party democracy, democratic tenets and human rights.[189]

In the Hong Kong Special Administration Region of China, the Court of Appeal has held that *ordre public* includes the due administration of justice. Accordingly, contempt by scandalizing the court is a necessary exception to the fundamental right of freedom of expression. Such an exception is 'necessary' to protect the administration of justice. First, Hong Kong was part of the Commonwealth tradition, which attached great importance to the preservation of all the factors which contributed to the due administration of justice as a continuing process – as well as the integrity of proceedings in progress or in contemplation. Secondly, the particular circumstances of Hong Kong required this. The Hong Kong legal system was relatively small. Communication with a very substantial proportion of the population was easily achieved. Confidence in the legal system, the maintenance of the rule of law and the authority of the court were matters of special importance in Hong Kong. In order to establish such contempt, proof is necessary that: (a) the statement or conduct was calculated to interfere with the administration of justice in its widest sense; (b) it involved a 'real risk' that the due administration of justice would be interfered with; and (c) there was an intention to interfere with the administration of justice, or recklessness by appreciating this possible consequence and ignoring it. This requisite mental element will almost always be implicit in the statement or conduct itself.[190]

## public health

In Canada, the prohibition of commercial advertising directed at persons under thirteen years of age was upheld on the ground that it sought

[189] *Mukong* v. *Cameroon*, Human Rights Committee, Communication No.458/1991, 21 July 1994.

[190] *Wong Yeung Ng* v. *Secretary for Justice*, Court of Appeal of the Hong Kong SAR, [1999] 2 HKLRD 293. The court stressed that judges are not immune from criticism. They must rely upon merited good reputation for protection against bona fide censure even if it is fierce or misguided. The administration of justice in Hong Kong is held in high repute and enjoys general confidence and respect. Therefore, it has little to fear from bona fide, temperate and rational criticism. Like many public institutions, it stands to benefit from, rather than be damaged by, such criticism – especially if constructive. Also, such criticism is susceptible to reasoned answer and even acceptance. However, a scurrilous and preposterous attack which might be recognized for what it was, was more likely to result in risk rather than a rational attack. Such attacks are not susceptible to a reasoned answer. If they continued unchecked they would almost certainly lead to interference with the administration of justice.

to protect a group that was most vulnerable to commercial manipulation.[191] Similarly, where a person was convicted of aiding and abetting the suicide of third parties, and pleaded that, as a member of the voluntary euthanasia society, EXIT, he was only imparting information and ideas to those desirous of committing suicide, the European Commission held that while there had been an interference with the right to impart information, such interference was justified as being necessary for the protection of the life of those who belonged to especially vulnerable categories by reason of their age and infirmity.[192] In Lithuania, the prohibition of the advertisement of alcohol and tobacco products was justified on the ground that their consumption was undoubtedly harmful to human health.[193]

### public morals

While legislation against obscenity and the dissemination of pornographic material, and laws providing for prior censorship of films, are the most obvious examples of restrictions to protect public morals,[194] the Supreme Court of India has observed that standards must be so framed that 'we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read'. These comments were made in a case where the decision of the censor to restrict to adults only a film which attempted to portray the contrast between the life of the rich and the poor in the four principal cities in India was challenged. The censor's decision was apparently influenced by certain shots of the red light district in Bombay. The court noted that sex and obscenity were not always synonymous and that it was wrong to classify sex as essentially obscene or even indecent or immoral.[195]

[191] *Irvin Toy Ltd* v. *Attorney General of Quebec*, Supreme Court of Canada, [1989] 1 SCR 927.

[192] *R* v. *United Kingdom*, European Commission, Application 10083/82, (1983) 33 *Decisions & Reports* 270.

[193] Decision of the Constitutional Court of Lithuania, 6/96, 13 February 1997, (1997) 1 *Bulletin on Constitutional Case-Law* 61.

[194] Danilo Turk and Louis Joinet, Special Rapporteurs appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Freedom of Opinion and Expression,* UN document E/CN.4/Sub.2/1992/9 of 14 July 1992.

[195] *Abbas* v. *The Union of India*, Supreme Court of India, [1971] 2 SCR 446, at 474, per Hidayatullah CJ.

### For maintaining the authority and impartiality of the judiciary

The 'authority and impartiality of the judiciary' includes the protection of the rights of litigants in general.[196] Restrictions on freedom of expression for maintaining the authority and impartiality of the judiciary do not entitle a state to restrict all forms of public discussion on matters pending before the courts. While the courts are the forum for the determination of a person's guilt or innocence, this does not mean that there can be no prior or contemporaneous discussion of the subject-matter of criminal trials in specialized journals, the general press, or among the public at large. But permissible comment on pending criminal proceedings may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.[197]

In a democratic state based on the rule of law, where the principle of the separation of powers is entrenched, it is necessary for the judiciary to have, as an integral part of its constitutional function, the power and duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it in order to be able to discharge its primary duty to maintain the fair and effective administration of justice. The power to punish for all forms of contempt is one of the defining features of superior courts and underscores the essential role of the judiciary in protecting the due administration of justice. The power to punish for contempt is narrowly defined and exists solely to protect the administration of justice rather than the feelings of judges. While it is in the public interest, and therefore a good defence, for judicial misconduct to be subject to exposure and criticism, the offence of scandalizing the court is necessary in a democratic society. This offence is made out if the publication is intentional, if the article is calculated to undermine the authority of the court, and if the defence of fair criticism in good faith is inapplicable.[198]

[196] *News Verlags GmbH & Co KG* v. *Austria*, European Court, (2000) 31 EHRR 246.
[197] *Worm* v. *Austria*, European Court, (1997) 25 EHRR 454.
[198] *Ahnee* v. *Director of Public Prosecutions*, Privy Council on appeal from the Supreme Court of Mauritius, [1999] 2 LRC 676.

*Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

ICCPR 20 contains a prohibition of specific forms of expression. What is required is a law that declares such propaganda or advocacy to be contrary to public policy and provides for an appropriate sanction in the event of violation. 'War' is understood in the sense of any act of aggression or breach of the peace contrary to the Charter of the United Nations. Any propaganda for war is prohibited, whether it has aims which are internal or external to the state. Advocacy of national, racial or religious hatred must constitute incitement to commit acts of discrimination, hostility or violence in order for it to be prohibited. It is irrelevant whether the aim of such advocacy is internal or external to the state. Advocacy of the sovereign right of self-defence, or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations is not prohibited.[199]

Tape-recorded messages which were linked to a telephone system, which any member of the public could listen to by dialling the relevant telephone number, and the contents of which were basically the same, namely, to warn callers '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', clearly constituted the advocacy of racial or religious hatred which ICCPR 20 obliged the state to prohibit.[200] Similarly, statements in a political party programme addressed to the dark-skinned part of the population of Norway, offering adopted children continued residence in the country if they allowed themselves to be sterilized; requiring the 'alien party' in a mixed relationship to separate, leave the country, or be sterilized; and requiring an induced abortion in the event of a conception occurring, were serious violations of the most fundamental human rights and were not protected by the right to freedom of expression.[201]

[199] Human Rights Committee, General Comment 11 (1983).

[200] *Taylor and the Western Guard Party* v. *Canada*, Human Rights Committee, Communication No.104/1981, HRC 1983 Report, Annex XXIV. See also *Taylor* v. *Canadian Human Rights Commission,* Supreme Court of Canada, [1991] LRC (Const) 445.

[201] Decision of the Supreme Court of Norway, 28 November 1997, (1997) 3 *Bulletin on Constitutional Case-Law* 405.

# 22

# The right to freedom of assembly

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

20. (1) Everyone has the right to freedom of assembly . . .

#### International Covenant on Civil and Political Rights (ICCPR)

21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

21. Every person has the right to assembly peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

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

11. (1) Everyone has the right to freedom of peaceful assembly . . .
(2) No restrictions shall be placed on the exercise of [this right] other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the

protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of [this right] by members of the armed forces, or of the police or of the administration of the state.

### American Convention on Human Rights (ACHR)

15. The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.

### African Charter on Human and Peoples' Rights (AfCHPR)

11. Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

## Comment

Freedom of assembly is a major part of the political and social life of any country. It is an essential part of the activities of political parties, and of the conduct of elections, particularly if such elections are to ensure the free expression of the opinion of the people.[1] In 1875, an American judge observed that 'the very idea of a government, republican in form, implies a right on the part of citizens to meet peaceably for consultation in respect of public affairs and to petition for a redress of grievances'.[2] This freedom is also linked to the freedom of religion or belief, since an individual may manifest his religion or belief in community with others;

[1] *Denmark, Norway, Sweden and Netherlands* v. *Greece*, European Commission, (1976) 12 *Yearbook*, 196.

[2] *United States* v. *Cruikshank*, United States Supreme Court, 92 US 542 (1875), per Waite CJ at 552. See also *Sa'ar Adv et al* v. *Minister of the Interior and of the Police*, Supreme Court of Israel, 34(2) *Piskei Din* 169, excerpted in (1982) 12 *Israeli Yearbook on Human Rights* 296, where Barak J noted that this freedom is more efficient and real than other means of expression.

and to freedom of expression, since the protection of personal opinion is one of the objectives of this right. An assembly in whatever form is different from other means of communication in that it brings the public into direct contact with those expressing opinions, and thereby stimulates both attention and discussion.

On the efficacy of public processions, a writer has noted that 'where the message is an unpopular one, or one that mainstream thought would prefer to ignore, the constant presence on the streets of processions promoting a contrary view has the unsettling effect which forces the opinion to be debated. The underlying problems giving rise to the procession are thus brought into the open and a redress of grievances may result. The very physical presence of the demonstration is indicative of the possibility of violent consequences if the issues are not attended to. Historically, the use of the public assembly and procession has proved itself indispensable as a technique for propagation of unpopular minority views, from the demonstrations of the suffragettes in the United Kingdom to the civil rights movement in the United States. Important issues were brought to the public attention through these movements in a manner which could not be ignored and mass violence on the part of the demonstrators averted.'[3]

The right of 'peaceful assembly' is recognized in ICCPR 21 and in all three regional human rights instruments ('right to assembly freely' in AfCHPR 11, and 'without arms' in ACHR 15). Any restrictions on the exercise of this right must be in conformity with the law ('prescribed by law' in ECHR 11, and 'provided by law' in AfCHPR 11) and be necessary ('in a democratic society' in ICCPR 21, ECHR 11 and ACHR 15) in the interests of[4] national security, public safety, public order ('*ordre public*' in ICCPR 21, and 'prevention of disorder or crime' in ECHR 11), the protection of public health or morals ('ethics' in AfCHPR 11), or for the protection of the rights and freedoms of others. ECHR 11 alone authorizes the imposition of lawful restrictions on the exercise of this

[3] Matyszac, 'Order, the Daughter not the Mother of Liberty – Processions in the Constitution', cited by Gubbay CJ in *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282.

[4] The use of the expression 'in particular those enacted in the interest of . . .' in AfCHPR 11 suggests that, in the case of that instrument, the interests specified may not be intended to be exhaustive.

right by members of the armed forces, the police, and the administration of the state.[5]

Genuine, effective freedom of assembly cannot be reduced to a mere duty on the part of the state not to interfere with its exercise: a purely negative conception is not compatible with the object and purpose of this right. Positive measures are sometimes required to be taken, even in the sphere of relations between individuals if need be. However, while it is the duty of the state to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, it cannot guarantee this absolutely, and it has a wide discretion in the choice of the means to be used. The obligation which a state enters into is an obligation as to measures to be taken and not as to results to be achieved.[6]

## Interpretation

### *The right of peaceful assembly*

The freedom of assembly covers both private meetings and meetings in public thoroughfares.[7] It covers not only static meetings, but also

[5] On the application of restrictions on civil servants, see *De Freitas* v. *Permanent Secretary of Agriculture, Fisheries, Lands and Housing*, Privy Council on appeal from the Court of Appeal of Antigua and Barbuda, [1998] 3 LRC 62. While the preservation of the impartiality and neutrality of civil servants may justify some restraint on their freedom to participate in political matters, a proper balance needs to be struck between freedom of expression and the duty of a civil servant properly to perform his or her functions. Accordingly, a blanket prohibition on all civil servants from communicating to anyone any expression of view on any matter of political controversy is excessive. The court held that the interdiction of an extension officer in the ministry for having participated in demonstrations against government corruption, some of the allegations being directed at his own minister, was not 'reasonably justifiable in a democratic society'.

[6] *Platform 'Ärzte Für Das Leben'* v. *Austria*, European Court, (1988) 13 EHRR 204. By enacting articles 284 and 285 of the Austrian Criminal Code, which made it an offence for any person to disperse, prevent or disrupt a meeting that has not been prohibited, and ss.6, 13, and 14(2) of the Assembly Act, which empowered the authorities in certain cases to prohibit, bring to an end or disperse by force an assembly, which also applies to counter-demonstrations, the authorities had taken reasonable and appropriate measures to give effect to this right.

[7] *Rassemblement Jurassien & Unité Jurassienne* v. *Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93. See *Ramson* v. *Barker*, Court of Appeal of Guyana, (1982) 33 WIR 183: Where three persons were required by the police to remove themselves from their stationary position on a road, their freedom of assembly was not 'hindered'. Their presence at the particular location from which they were required to move was neither an essential nor even an optional prerequisite to the exercise of their right of assembly.

public processions, which are assemblies in motion. It is a freedom capable of being exercised not only by the individual participants of such an assembly, but also by those organizing it, including a corporate body.[8] When ICCPR 21 was being drafted, it was suggested by the United States that freedom of peaceful assembly should be protected only against 'governmental interference'. The general consensus, however, was that the individual should be protected against all kinds of interference in the exercise of this right.[9] The existence or otherwise of an 'assembly' is a question of fact.[10]

A demonstration is a form of assembly whose objective is to convey to the person or authority for whom a communication is intended the feelings of the group so demonstrating. It is an expression of one's feelings by outward signs, i.e. a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed. It may take the form of a mere wearing of a badge, or even a silent assembly. It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person are also a form of speech'.[11] A demonstration may annoy or give offence to persons who are opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. The right

[8] *Christians against Racism and Fascism* v. *United Kingdom*, European Commission, (1980) 21 *Decisions & Reports* 138.

[9] UN document A/2929, chapter VI, s.139.

[10] *Kivenmaa* v. *Finland*, Human Rights Committee, Communication No.412/1990, 31 March 1994. A gathering of about twenty-five members of an organization at the site of the welcoming ceremonies for a foreign head of state on an official visit, publicly announced in advance by the host state authorities, was not, in the circumstances of that case, an assembly. Although those persons distributed leaflets and raised a banner critical of the human rights record of the visiting head of state, they were under no obligation to have notified the police of an intended demonstration.

[11] *Kameshwar Prasad* v. *The State of Bihar*, Supreme Court of India, [1962] Supp. 3 SCR 369, (1962) AIR SC 1166: A government regulation which prohibited a civil servant from participating in any demonstration in connection with any matter pertaining to his conditions of service, violated article 19(1) of the Constitution of India which guaranteed to all citizens the right of assembly. See also *Ghosh* v. *Joseph*, Supreme Court of India, (1963) AIR SC 812.

to counter-demonstrate does not extend to inhibiting the exercise of the right to demonstrate.[12]

The protection of this right extends only in respect of a 'peaceful' assembly. The notion of peaceful assembly does not cover a demonstration where the organizers and participants have violent intentions which result in public disorder.[13] The possibility of violent counter-demonstrations, or the possibility of extremists with violent intentions, not members of the organizing association, joining the demonstration, cannot as such take away the right of peaceful assembly. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organizing it, such procession does not for that reason forfeit protection and, therefore, any restrictions placed on such an assembly must be in conformity with the law and for the purpose of protecting one or more of the specified interests.[14]

A meeting being held for peaceful political action may not be proscribed merely because the persons assembling may have committed crimes elsewhere, or because the meeting is being held under the auspices of an organization that advocates the employment of unlawful means to effect changes in society. The question, if the rights of free speech and assembly are not to be proscribed, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers but whether their utterances transcend the bounds of the freedom of speech. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against public peace or order, they may be prosecuted for their conspiracy or their violation of valid laws. But it is a different matter when the state, instead of prosecuting them for such offences, seizes upon mere participation in a peaceful assembly and a lawful public discussion as the basis of a criminal charge.[15]

[12] *Platform 'Ärzte Für Das Leben'* v. *Austria*, European Court, (1988) 13 EHRR 204.

[13] *G* v. *Germany*, European Commission, Application 13079/87, (1989) 60 *Decisions & Reports* 256. A sit-in on a public road is not a violent demonstration. But a conviction for unlawful coercion (blocking of a public road and obstructing traffic, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly) is not disproportionate to the aims pursued, namely prevention of disorder.

[14] *Christians against Racism and Fascism* v. *United Kingdom*, European Commission, (1980) 21 *Decisions & Reports* 138.

[15] *De Jonge* v. *Oregon*, United States Supreme Court, 299 US 353 (1937).

The presence at a meeting of uninvited police officers who take notes of its proceedings is incompatible with this right since such presence could act as a deterrent to the public to assemble together and may even stifle the meeting altogether.[16]

### *No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law*[17]

A requirement to notify the police of an intended demonstration in a public place sometime (say, six hours) before its commencement may be compatible with the permitted limitations. A requirement to pre-notify a demonstration will normally be for reasons of national security or public safety, public order, the protection of health or morals, or the protection of the rights and freedoms of others.[18] Such a procedure may

[16] *Khan* v. *The District Magistrate, Lahore and the Government of Pakistan*, Supreme Court of Pakistan, Pakistan Legal Decisions, 1965, W.P.Lahore, p.642. See also, (1966) 7(2) *Journal of the International Commission of Jurists* 284–6. Section 8 of the West Pakistan Maintenance of Public Order Ordinance 1960, which empowered a magistrate to depute one or more police officers or other persons to attend any public meeting for the purpose of causing a report to be made of the proceedings, was inconsistent with the constitutional guarantee of the freedom of assembly and association. The court also held that this particular meeting of the West Pakistan National Democratic Front, an association formed for the purpose of achieving democratization of the constitution, which was restricted to members of the executive committee, was a private and not a public one. See *Friedl* v. *Austria*, European Court, (1995) 21 EHRR 83: In the course of a peaceful demonstration organized with a view to drawing public attention to the plight of the homeless, the police took photographs, checked the identity, and recorded particulars of the participants. On a complaint by one of them, who claimed that his right to freedom of assembly was thereby violated, the government agreed to destroy all the photographs, and to pay compensation, including the costs of the action, to the complainant.

[17] The expression 'imposed in conformity with the law' in ICCPR 21 was preferred to the usual term 'prescribed by law' as allowing for legitimate administrative action: UN document A/2929 chapter VI, s.141.

[18] *Kivenmaa* v. *Finland*, Human Rights Committee, Communication No.412/1990, 31 March 1994. On 'notice' see *Francis* v. *Chief of Police of Saint Christopher, Nevis and Anguilla*, Court of Appeal of the West Indies Associated States, (1970) 15 WIR 1 (Public Meetings and Processions Act 1969, s.3), *Gunawardena* v. *Perera*, Supreme Court of Sri Lanka, 8 May 1983, *Decisions on Fundamental Rights,* 426 (Police Ordinance, s.77). Cf. *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282: Where s.6 (1) of the Law and Order (Maintenance) Act empowered the regulating authority to issue directions for the purpose of controlling the conduct of public processions within his area and the route by which and the times at which a public procession may pass, the discretionary power of the regulating authority is uncontrolled. He may issue a direction prohibiting the right to form a public procession

be necessary in order that the authorities are in a position to ensure the peaceful nature of a meeting or procession.[19] But regulations may be made only in aid of the right of assembly of each citizen; the state cannot make a rule which has the effect of prohibiting all meetings or processions. Nor does the power to regulate authorize the formulation of a rule to regulate the conduct, behaviour or actions of persons before an assembly is constituted.[20] But the term 'restrictions' includes measures – such as punitive measures – taken not before or during but after the exercise of this right.[21]

Although the use of a loudspeaker at a public meeting may be regarded as an adjunct to the exercise of this right, its use cannot reasonably be regarded as a *sine qua non*. A loudspeaker may serve to facilitate the exercise of this right by making it possible for a speaker to reach a larger audience than would otherwise be possible by the use of the human voice unassisted by any artificial aids, but that is the only advantage

upon a ground not related in any way to conditions of public safety or public order. There is no definition of the criteria to be used by him in the exercise of his discretion. Moreover, before imposing a ban on a public procession the regulating authority is not obliged to take into account whether the likelihood of a breach of the peace or public disorder could be averted by attaching conditions upon the conduct of the procession in the issuance of a permit relating, for instance, to time, duration and route. If the potential disorder could be prevented by the imposition of suitable conditions, then it is only reasonable that such a less stringent course of action be adopted than an outright ban. Accordingly, the provision is not 'reasonably justifiable in a democratic society' in the interests of public safety or public order.

[19] *Rassemblement Jurassien & Unité Jurassienne* v. *Switzerland*, European Commission, Application 8191/78, (1980) 17 *Decisions & Reports* 93.

[20] *Himat Lal Shah* v. *Commissioner of Police*, Supreme Court of India, (1973) 1 SCC 227. A provision in the Bombay Police Act 1951 which enabled the commissioner of police to make rules to regulate assemblies and processions was upheld, but a rule made by the commissioner which empowered him to refuse permission to hold a public meeting was invalidated.

[21] *Ezelin* v. *France*, European Court, (1991) 14 EHRR 362. A disciplinary penalty of a reprimand imposed by a court on an *avocat* who had participated in a procession was a restriction. The legal basis of this sanction lay in special rules governing the profession of *avocat* made by decree under a statute reforming certain court and legal professions. See also *Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282: Where s.6(6) of the Law and Order (Maintenance) Act provides that any person who contravenes, directs or takes part in a public procession for which a permit has not been obtained shall be guilty of an offence and may be arrested without a warrant, and shall be liable to a fine or to imprisonment, the holding of a public procession without a permit is criminalized irrespective of the likelihood or occurrence of any threat to public safety or public order, and even of any inconvenience to persons not participating.

which its use can give. Since the use of a loudspeaker is not essential to the exercise of this right, and since the unrestricted use of a noisy instrument at any time and in any place could well constitute a nuisance, a law which gives power to regulate the use of this instrument, and which, incidentally, may prohibit its use in circumstances which in the opinion of the person exercising the power may be necessary, cannot be regarded as 'hindering' the enjoyment of this right for the right remains in essence unaffected.[22]

An unfettered discretion to control the right of assembly is incompatible with this right since the exercise of a fundamental right should not be subject to the arbitrary control of an official.[23]

[22] *Francis* v. *Chief of Police of Saint Christopher, Nevis and Anguilla*, Court of Appeal of the West Indies Associated States, (1970) 15 WIR 1.

[23] *The Police* v. *Moorba*, Supreme Court of Mauritius, (1971) *The Mauritius Reports* 199. The Public Order Act 1970 empowered the commissioner of police to prohibit the holding or continuance of a public meeting in any area, premises or place on any particular day if such prohibition appeared to him to be necessary or expedient in the interests of public safety or public order. The discretion given to the commissioner was not an unfettered one. He could only prohibit a particular public meeting for specific reasons and for a limited time. A prosecution for contravention of his order was subject to the control of the director of public prosecutions. His power was also subject to the fundamental rights jurisdiction of the court. See also *Sa'ar Adv et al* v. *Minister of the Interior and of the Police*, Supreme Court of Israel, 34(2) *Piskei Din* 169: Although the Police Ordinance 1971 vested in the district police commander the authority to grant or refuse at his discretion a permit to hold an assembly without specifying the grounds on which his discretion ought to be exercised, the legitimate grounds for granting or refusing a permit were those falling within the ambit of the purpose for which the discretion was vested. It was apparent from the relevant provisions of the Police Ordinance that the purpose was the protection of public security and public order. Therefore, a permit may only be refused if the assembly or procession in question was likely to cause a breach of public order or endanger public peace; *Francis* v. *Chief of Police of Saint Christopher, Nevis and Anguilla*, Court of Appeal of the West Indies Associated States, (1970) 15 WIR 1: A discretion vested in the chief of police must be exercised 'with reason and justice and in keeping with the responsibilities of his office', and in the event of its abuse or misuse, will be subject to review by the court. Cf.*Re Munhumeso*, Supreme Court of Zimbabwe, [1994] 1 LRC 282: Although the rights to freedom of expression and assembly are primary and the limitations are secondary, s.6 (2) of the Law and Order (Maintenance) Act which requires a person who wishes to form a procession to first make application in that behalf to the regulating authority, and empowers such authority to issue a permit in writing authorizing such procession 'if satisfied that such procession is unlikely to cause or lead to a breach of the peace or public disorder', reverses this order. Its effect is to deny such rights unless a certain condition is satisfied, namely, that the public procession it is sought to form is 'unlikely to cause or lead to a breach of the peace or public disorder'. If there is the slightest possibility of it doing so, permission is refused.

*and which are necessary in a democratic society*[24]

The principle of proportionality is one of the factors to be taken into account when assessing whether a measure of interference is 'necessary'.[25] The proportionality principle demands that a balance be struck between the requirements of the interests sought to be protected and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The pursuit of a just balance must not, however, result in individuals being discouraged, for fear of disciplinary or other sanctions, from making clear their beliefs on such occasions.[26]

The concept of 'necessity' implies an imperative social requirement.[27] Therefore, a general ban of demonstrations can be justified only if there is a real danger of disorder which cannot be prevented by other less stringent measures. In such a situation, the authority must also take into account the effect of the ban on processions which do not constitute a

[24] The proposal that the limitations listed in ICCPR 21 be qualified by the words 'necessary in a democratic society' was first made by the representative of France. Its supporters thought that freedom of assembly could not be effectively protected if the states did not apply the limitations clause according to the principles recognized in a democratic society. To the objection that the word 'democracy' might be interpreted differently in various countries, one answer was that a democratic society might be distinguished by its respect for the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the Covenants on Human Rights: UN document A/2929, chapter VI, s.143.

[25] *Rassemblement Jurassien & Unité Jurassienne* v. *Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93. This principle was not infringed when, against the background of two referenda held to determine whether or not to constitute a new Swiss canton (Jura), the Executive Council of Canton Berne, having regard to 'the present tension which has arisen in a climate of provocation', in order to 'avoid clashes whose consequences would be unforeseeable', banned all political meetings within the municipal boundaries of Moutier on 2 and 3 April and from 15 to 17 April 1977. The bans in each case concerned specific demonstrations and were based on the situation obtaining at the time. The ban concerned only the territory of the municipality of Moutier and its duration, indicated in advance, was limited in time.

[26] *Ezelin* v. *France*, European Court, (1991) 14 EHRR 362. Such a balance had not been struck in the case of an *avocat* (and trade union leader) who was 'reprimanded' by the court for 'a breach of discretion amounting to a disciplinary offence', in that he had participated, by carrying a placard, in a demonstration of Guadeloupe independence movements and trade unions to protest against two court decisions imposing prison sentences and fines on three militants for criminal damage to public buildings, and for his failure to dissociate himself from the 'demonstrators' offensive and insulting acts'.

[27] *Rassemblement Jurassien & Unité Jurassienne* v. *Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93.

danger for the public order. It is only if the disadvantage of such processions being subjected to the ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects of the ban by a narrow circumscription of its scope in terms of territorial application and duration, that the ban can be regarded as 'necessary'.[28]

### *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*

When ICCPR 21 was being drafted, the Soviet Union proposed that only one fundamental restriction should be included in it, namely, that 'all the activities of societies, unions and other organizations of a fascist or anti-democracy nature shall be forbidden by law, subject to penalty'. In support of this proposal it was argued that the right of peaceful assembly should be recognized 'in the interest of democracy', and that should this right be exercised by anti-democratic groups, all the other rights recognized in the covenant might be jeopardized. On the other hand, it was contended that, as a matter of principle, to deny certain groups freedom of assembly merely on account of their opinions would be contrary to the principles of freedom of opinion and expression. It was also observed that terms such as 'fascist' and 'anti-democratic' were not clearly defined and could lead to abuse. If the activities of any group became a public danger, the laws for the protection of 'public order', 'national security' or 'the rights and freedoms of others' could be applied.[29]

[28] *Christians against Racism and Fascism* v. *United Kingdom*, European Commission, (1980) 21 *Decisions & Reports* 138. The Public Order Act 1936, while not excluding the possibility of imposing specific conditions for the holding of a particular procession, did not allow the prohibition of such a procession on an individual basis, but provided only for general measures such as a ban on all public processions, or on any class of public processions, in a certain area during a specified time. Accordingly, the law was designed to exclude any possibility of taking arbitrary measures against a particular procession. Cf. *Denmark et al* v. *Greece* (*The Greek Case* ), European Commission, (1976) 12 *Yearbook*, paragraphs 392–6: To prohibit the holding of political meetings in public, to subject indoor meetings to the discretion of the police and lectures to that of military authorities, without any clear prescription in law as to how that discretion is to be exercised, and without further control, is to create a police-state, which is the antithesis of a 'democratic society'.

[29] UN document A/2929, chapter VI, section 142.

The European Commission has invoked 'national security' to justify the prohibition by the police of a public meeting in Vienna that was expected to advocate the 'reunification' of Austria with Germany;[30] relied on 'public safety' as a ground for upholding a ban on all political meetings within a specified municipal area for a limited duration in time;[31] and accepted the 'prevention of public disorder' as a ground for the temporary ban in a metropolitan district on all demonstrations in the form of public processions.[32]

The concept of 'public order' refers to a practical situation. It may be invoked only if there are well-founded reasons to believe that there is 'a possibility of a practical disturbance likely to undermine public order'. It may not, under any circumstances, be applied in order to stifle the message planned to be put across in the course of a disturbance.[33] The threat to public order should arise from the nature of the demonstration.[34] In order to deny the right of procession, the police must prove the existence of a real and immediate danger of disturbance of public order.[35]

Where serious disruption to traffic is the reason for not permitting a demonstration, the authority concerned must state that reason and show why it is impossible to take the precautions needed to allow the exercise of the right of peaceful assembly.[36] The Supreme Court of Israel has observed that a balance has to be struck between the interests of those citizens wishing to hold an assembly or a procession, and the interests of those citizens whose right of passage over the streets will be impaired as a result of the assembly or procession. The court believed

[30] *H* v. *Austria,* European Commission, Application 9905/82, (1984) 36 *Decisions & Reports* 187.

[31] *Rassemblement Jurassien & Unité Jurassienne* v. *Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93.

[32] *Christians against Racism and Fascism* v. *United Kingdom*, European Commission, (1980) 21 *Decisions & Reports* 138. See also *G* v. *Germany*, European Commission, Application 13079/87, (1989) 60 *Decisions & Reports* 256.

[33] Decision of the Constitutional Court of Spain, 8 May 1995, Case No.66/1995, *Boletin Oficial del Estado* of 13 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 204.

[34] *Kameshwar Prasad* v. *The State of Bihar*, Supreme Court of India, [1962] Supp. 3 SCR 369, (1962) AIR SC 1166.

[35] *Sa'ar Adv. et al* v. *Minister of the Interior and of the Police*, Supreme Court of Israel, 34(2) Piskei Din 169 excerpted in (1982) 12 *Israeli Yearbook on Human Rights* 296.

[36] Decision of the Constitutional Court of Spain, 8 May 1995, Case No.66/1995, *Boletin Oficial del Estado* of 13 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 204.

that the residents of a city must expect the inconvenience caused to them by public events, and this inconvenience could not restrict the citizens' right to demonstrate. Consequently, the mere fact that an assembly or a procession disturbed to some extent the traffic on the streets could not serve as a ground for its total prohibition. The police may impose limits and restrictions on assemblies and processions with a view to minimizing the inconvenience caused thereby to the public. For instance, the licence might be restricted in such a manner that the procession would not be held at rush hours and would not spread across the entire street. It would be unreasonable, however, to require a procession to pass through an unbuilt area when it desired to proceed on main streets. 'Just as my right to demonstrate on city streets is limited by the right of free passage possessed by my fellow, my fellow's right of free passage is restricted by my right to hold an assembly or a procession. Roads and streets are made for walking and travel, but this is not their only purpose. They are also made for processions, parades, funerals and other such events.'[37]

The Supreme Court of Israel has rejected 'imposing a great burden on the police' as a ground for not allowing a procession to be held. While it is within the competence of the police to decide on priorities in the allotment of police manpower, the existence of the right to demonstrate should be taken into account in fixing such priorities. The court observed that it is the duty of the police to allocate its manpower as required for the maintenance of orderly life, which includes processions

[37] *Sa'ar Adv. et al* v. *Minister of the Interior and of the Police*, Supreme Court of Israel, 34(2) *Piskei Din* 169 excerpted in (1982) 12 *Israeli Yearbook on Human Rights* 296, per Barak J. See also Landau J: 'If we would accept traffic considerations as a legitimate ground, we would in practice put an end to the right to demonstrate on the streets, because any procession causes disturbance to traffic.' Lord Scarman has noted that the problem is more complex than a choice between two extremes – one, a right to protest whenever and wherever you will and the other, a right to continuous calm upon the streets unruffled by the noise and obstructive pressure of the protesting procession. 'A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens, who are not protesting, to go about their business and pleasure without obstruction or convenience. The fact that those who at any time are concerned to secure the tranquility of the streets are likely to be the majority must not lead us to deny the protesters their opportunity to march: the fact that the protesters are desperately sincere and are exercising a fundamental human right must not lead us to overlook the rights of the majority': *Report of the Inquiry into the Red Lion Square Disorders of 15 June 1974* (Cmnd 5919, 1975), paragraph 5.

and demonstrations, and for maintaining democratic order which includes the right to demonstrate. It is also unlawful for the police to provide protection to one procession but not to another because of the 'ideologic difference between their subjects'.[38]

[38] *Sa'ar Adv. et al* v. *Minister of the Interior and of the Police*, Supreme Court of Israel, 34(2) *Piskei Din* 169 'Protection of order during official events and demonstrations is the difficult task of the police, but the civil right to demonstrate should not be diminished because of the multiplicity of formal events and ceremonies', per Landau J.

# 23

# The right to freedom of association

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

20. (1) Everyone has the right to freedom of . . . association.
(2) No one may be compelled to belong to an association.

23. (4) Everyone has the right to form and to join trade unions for the protection of his interests.

#### International Covenant on Civil and Political Rights (ICCPR)

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 Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

8. (1) The States Parties to the present Covenant undertake to ensure:
   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.
   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
   (2) This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the state.
   (3) Nothing in this article shall authorize states parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

## *Regional instruments*

### American Declaration of the Rights and Duties of Man (ADRD)

22. Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labour union or other nature.

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

11. (1) Everyone has the right . . . to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police or of the administration of the state.

### American Convention on Human Rights (ACHR)

16. (1) Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes.

(2) The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

(3) The provisions of this Article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

### African Charter on Human and Peoples' Rights (AfCHPR)

10. (1) Every individual shall have the right to free association provided that he abides by the law.

(2) Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

*Related texts:*

European Social Charter, Articles I(5), (6); II,5; II,6.

ILO Conventions:

No. 11: Concerning the Rights of Association and Combination of Agricultural Workers 1921.

No. 87: Concerning Freedom of Association and Protection of the Right to Organize 1948.
No. 98: Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively 1949.
No. 135: Concerning Protection and Facilities to Be Afforded to Workers' Representatives in the Undertaking 1971.
No. 141: Concerning Organizations of Rural Workers and Their Role in Economic and Social Development 1974.
No. 151: Concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service 1978.
No. 154: Concerning the Promotion of Collective Bargaining 1981.

## Comment

The right to freedom of association recognizes the basic human desire to unite in order to pursue or achieve a common purpose, whether for political, religious, ideological, economic, labour, social, sports, cultural or professional objectives.[1] The right to form an association is an inherent part of this right. That individuals should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association.[2] Accordingly, 'when a man joins a trade union, he is exercising his right of freedom of association. The sportsman who joins a cricket club, the person who becomes a member of a lodge, and the sixth form boy who forms a debating society, are all exercising their right to freedom of peaceful association.'[3] At its core rests a rather simple proposition: the attainment

[1] ADHR 22, ACHR 16(1). When ICCPR 22 was being drafted, a proposal by the Soviet Union that 'all societies, unions and other organizations of a fascist or anti-democratic nature and their activity in whatever form shall be forbidden by law on pain of punishment' was rejected: UN document E/CN.4/SR.121, p.12.

[2] *Sidiropoulos* v. *Greece*, European Court, (1998) 27 EHRR 633.

[3] *Banton* v. *Alcoa Minerals of Jamaica Incorporated*, Supreme Court of Jamaica, (1971) 17 WIR 275, at 295, per Parnell J. See also *B* v. *M*, High Court of New Zealand, [1998] 2 LRC 11: A grandfather's ordinary social intercourse with his granddaughter is part of his freedom to associate with those he chooses; *Binta Salisu* v. *Salisu Lawal*, Court of Appeal of Nigeria, [1986] 2 NWLR 435: To force a wife back to her matrimonial home against her will is to violate her freedom of association; *Re Law on Non-profit Unions*, Supreme Court of Estonia, 10 May 1996, *Riigi Teataja* 1 1996, no.35, article 737, (1996) 2 *Bulletin on Constitutional Case-Law* 202: Freedom of association is also guaranteed to minors; Decision of the Constitutional

of individual goals, through the exercise of individual rights, is generally impossible without the aid and co-operation of others.[4] Uniting protects individuals from the vulnerability of isolation. It enables those who would otherwise be ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[5] Over a century ago, Alexis de Tocqueville articulated the fundamental nature of this right: 'The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.'[6]

ICCPR 22 and ECHR 11 recognize the right of 'everyone' to freedom of association with others ('right to associate freely' in ACHR 16, and 'right to free association' in AfCHPR 10), including the right to form and to join trade unions for the protection of his ('economic and social' in ICESCR 8) interests.[7] ACHR 16, while omitting a specific reference to trade unions, includes both 'economic' and 'labour' among the 'purposes' of association. UDHR 20(2) and AfCHPR 10(2) state explicitly

Court of Hungary, 21/1996, 17 May 1996, *Magyar Kozlony*, no.39/1996, (1996) 2 *Bulletin on Constitutional Case-Law* 222: The protection and care necessary for development justifies the exclusion or restriction by law or in court decisions of a child's membership in associations 'related to homosexuality'. Any restriction must correspond to the concrete risk of endangering the development of the child, for which purpose the age of the child and the nature of the association have to be evaluated together.

[4] See *Reference Re Public Service Employee Relations Act (Alberta)*, Supreme Court of Canada, [1987] 1 SCR 313, at 395, per McIntyre J.

[5] *Reference Re Public Service Employee Relations Act (Alberta)*, Supreme Court of Canada, [1987] 1 SCR 313, at 365–6, per Dickson CJ.

[6] Alexis de Tocqueville, *Democracy in America*, ed. J. P. Meyer, tr. G. Lawrence (London: Fontana Press, 1994) (1945), vol. I.

[7] One of the reasons why it was decided that trade unions should be specifically mentioned in ICCPR 22 was the belief that failure to do so could lead to an erroneous interpretation that the right to form and join trade unions was not a civil but only an economic or social right or vice versa (UN document A/2929, chapter VI, s.146). A Ukranian proposal to extend this right to include the right of trade unions to establish both national federations or confederations and the right of the latter to form or join international trade union organizations was not accepted for three reasons: such provision already existed in draft ICESCR 8(1)(b); ICCPR 22 was intended to ensure the right of the individual to join associations of every kind, be they political, civic, economic, social or cultural, and the proposed addition would change the nature of ICCPR 22 by placing primary stress on the rights of trade unions to the neglect of other associations; and the expression 'trade unions' covered both national and international unions (UN document A/5000, ss. 59, 65, 72).

that no one may be compelled to belong to (or join) an association (subject, in the case of the latter, to the 'obligation of solidarity'). AfCHPR 10 requires that a person exercising this right 'abide by the law'. Under the other instruments, any restrictions on the exercise of this right must be 'prescribed by law' ('established by law' in ACHR 16) and be 'necessary in a democratic society' in the interests of national security or public safety, public order (*ordre public* in ICCPR 22, 'prevention of disorder or crime' in ECHR 11), the protection of public health or morals, or the protection of the rights and freedoms of others.[8] ICCPR 22, ECHR 11 and ACHR 16 also permit the imposition of 'lawful restrictions' on the exercise of this right by members of the armed forces and the police (and 'of the administration of the state' in ECHR 11).[9] In respect of trade unions, ICESCR 8 recognizes the right of everyone to form and join the trade union' of his choice', as well as the right of trade unions to associate with each other, and to 'function freely' by establishing national federations or confederations, and the right of the latter to form or join international trade union organizations. ICESCR 8 specifically mentions the 'right to strike', provided that it is exercised in conformity with the laws of the particular country.

When ICCPR 22 was being drafted, the Commission on Human Rights rejected a proposal that the freedom of association, including trade union rights, should be protected only against governmental interference.[10] The Strasbourg institutions have likewise rejected the argument that the ECHR governs relations between the individual and the state but not between two or more individuals. While the ECHR fundamentally guarantees 'liberal' rights in relation to the state as the holder of public power, this does not imply that the state may not be obliged to protect individuals through appropriate measures taken against some forms of interference by other individuals, groups or organizations. While they themselves cannot, under the ECHR, be held responsible for any such acts which are in breach of the convention, the state may, under certain

[8] The general limitations on the right to freedom of association are the same as those on the right to freedom of assembly, excepting that, while the words 'imposed in conformity with the law' had been used in ICCPR 20, the words 'prescribed by law' are used in ICCPR 22 (UN document A/2929, chapter VI, s.150).

[9] In respect of ICCPR 22, a proposal to extend this qualification to 'members of the administration of the state' was not accepted (UN documents A/2929, chapter VI, s.151; E/CN.4/SR.326, p.7.

[10] UN document A/2929, chapter VI, s.148.

circumstances, be responsible for them.[11] Therefore, although the essential object of this right is to protect the individual against arbitrary interference by the public authorities with his or her exercise of the freedom of association, there may in addition be a positive obligation to secure the effective enjoyment of the right. A state may, in certain circumstances, be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the right.[12]

## Interpretation

### *the right to freedom of association with others*

The essence of this right is the freedom to associate. It is, therefore, an individual, and not a group, right. In the exercise of this right, a number of individuals may combine to form a group, but such individuals do not, by virtue of that fact, exhaust their enjoyment of the right. Freedom to associate implies not only the right to commence

[11] *Swedish Engine Drivers' Union* v. *Sweden*, European Commission, (1974) 1 EHRR 617. ECHR 11 may be legitimately extended to cover state responsibility in the sphere of labour-management relations; European Court, (1976) 1 EHRR 617: ECHR 11 is binding upon the 'state as employer', whether the latter's relations with its employees are governed by public or private law; *Schmidt and Dahlstrom* v. *Sweden*, European Commission, (1974) 15 *Yearbook* 576: There appeared to be no argument in support of the idea that employer attitudes with regard to terms of employment should be measured against differing standards under ECHR 11, according to whether a public or a private employer is concerned. In other words, the standards which ECHR 11 might provide for the conduct of the state as employer seem to be identical in substance with those which the state might be obliged under ECHR 11 to impose upon private employers. If some action taken by the state as an employer violates ECHR 11, then the same action taken by a private employer should also be considered a breach of ECHR 11 for which the state may be held responsible if it fails to secure, by legislation or otherwise, conformity of private employers' actions with the standards concerned. See also *Young, James and Webster* v. *United Kingdom*, European Court, (1979) 3 EHRR 20, at 28: It is well established now that apart from protecting the individual against state action, there are articles of the convention which oblige the state to protect individual rights even against the action of others. ECHR 11 is such a provision as far as dismissal on the basis of union activity or as a sanction for not joining a specific union is concerned; *Marckx* v. *Belgium*, European Court, (1979) 2 EHRR 330. Cf. *Alonzo* v. *Development Finance Corporation*, Court of Appeal of Belize, [1985] LRC (Const) 359: The fundamental rights and freedoms guaranteed by the Constitution of Belize, which include the right to freedom of association, 'were only intended to give protection to individuals against any contravention of those rights and freedoms by the state or some other public authority endowed by law with coercive powers.'

[12] *Gustafsson* v. *Sweden*, European Court, (1996) 22 EHRR 409.

an association, but also the right to continue that association.[13] But while the freedom of association protects the collective pursuit of common goals, such protection is afforded ultimately to further individual aspirations.[14]

## A mutual relationship

The significance of this right lies in the fact that freedom of thought and opinion and freedom of expression would be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.[15] It follows, therefore, that freedom of association must necessarily be mutual. There can be no right of an individual to associate with other individuals who are not willing to associate with him.[16] Conversely, persons forming an association have the right to continue to be associated with only those whom they voluntarily admit in the association.[17] The individual has the

[13] *Banton* v. *Alcoa Minerals of Jamaica Incorporated*, Supreme Court of Jamaica, (1971) 17 WIR 275, at 289, per Graham-Perkins J; *Re Public Service Employee Relations Act*, Supreme Court of Canada, [1987] 1 SCR 313, per McIntyre J; *X* v. *Ireland*, European Commission, Application 4125/69, (1971) 14 *Yearbook* 198: The freedom of association may include, in relation to trade unions, the right of workers' and employers' organizations to elect their representatives in full freedom and to organize their administration.

[14] *Lavigne* v. *Ontario Public Service Employees Union*, Supreme Court of Canada, (1991) 126 NR 161, at 184, per La Forest J. See Decision of the Constitutional Court of Hungary, 58/1997, 5 November 1997, *Magyar Kozlony*, no.95/1997, (1997) 3 *Bulletin on Constitutional Case-Law* 386: There is no constitutionally protected right to establish an organization which aims at committing crimes, or whose members commit crimes; Decision of the Constitutional Court of 'The former Yugoslav Republic of Macedonia', U.160/96, 18 December 1996, *Sluzben vesnik*, 1/97, (1996) 3 *Bulletin on Constitutional Case-Law* 435: This freedom may not be exercised for the violent destruction of the constitutional order or for violation of constitutional provisions.

[15] *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615.

[16] *Cheall* v. *Association of Professional, Executive, Clerical and Computer Staff*, House of Lords, United Kingdom, [1983] 1 All ER 1130, at 1136, per Lord Diplock.

[17] *Damyanti Naranga* v. *The Union of India*, Supreme Court of India, [1971] 3 SCR 840: Where the Hindu Sahitya Sammelan Act 1962 declared the Hindu Sahitya Sammelan, a registered society founded in 1910 by a group of educationists for the development of Hindi and its propagation throughout the country, to be an 'institution of national importance', and transformed the original *sammelan* (society) into a body corporate and provided, *inter alia*, for new categories of members and a new governing body to be constituted by the central government, the court declared the Act to be invalid. The admission of future members was no longer at the choice of the original members who had formed the association, and who had provided in its constitution that new members could only be admitted as a result of

right to choose with whom he wishes to have social, business or other relationships. He or she is free to choose a spouse, friends, business partner, employer or employee and, conversely, has the right to reject a relationship or to object to such relationship being forced on him or her against his or her will.[18] However, since the term 'association' presupposes a voluntary grouping for a common goal, the relationship between workers employed by the same employer cannot be understood as an association because it depends only on the contractual relationship between employee and employer.[19]

## Freedom not to associate

Freedom is characterized by the absence of coercion or constraint. Therefore, an individual may not be compelled to belong to an association. Indeed, the freedom of the individual to refrain from association is 'a necessary counterpart of meaningful association in keeping with

their choice by being elected by their working committee. Under the Act, persons, in whose admission the original members of the society had no hand, could become members and begin associating with them in the *sammelan*, without the original members having any right to object. Cf. *DAV College* v. *State of Punjab*, Supreme Court of India, [1971] Supp. SCR 688: the compulsory affiliation of colleges to a university did not contravene the right to freedom of association. See also *Ramburn* v. *Stock Exchange Commission*, Supreme Court of Mauritius, [1991] LRC (Const) 272. Where the Stock Exchange Act 1988 prohibited a stockbroker from carrying on business unless employed by a stockbroking company or as director of such a company, a stockbroker carrying on business on his own account may not invoke the right to freedom of association since he was 'not being forced to do anything', but may seek compensation for deprivation of property on the ground that he was being prevented by coercive legislation from exercising his trade or profession.

[18] *Attorney General* v. *Smith*, High Court of Barbados, (1986) 38 WIR 33, at 46. In 1972, a headmaster was appointed to a school by its governing body. By the Education Act 1981, which made provision for the central administration of education in Barbados, teachers in specified schools, including that school, were deemed to have been appointed in accordance with the provisions of the constitution relating to the appointment of public officers. A board of management replaced the school's governing body, and the teaching staff were notified that they had become public officers. In 1985, following his suspension by the board of management, the Governor-General acting on the advice of the public service commission confirmed his interdiction from the performance of his duties. The headmaster denied he had ever been employed by the public service commission or had consented to be so employed. The court refused to make any interim orders restraining the headmaster from continuing to perform his duties pending the decision on a claim for a permanent injunction.

[19] *Young, James and Webster* v. *United Kingdom*, European Commission, (1979) 3 EHRR 20, at 28.

democratic ideals'.[20] The argument that the right to join an association does not confer a right not to join one would, according to the Court of Appeal of Trinidad and Tobago, 'have the disastrous effect of divorcing the vital element of consent from this right and leaving it barren and meaningless'. In its view, the freedom to associate and the freedom not to associate 'ought to be considered as one integral freedom'.[21] The Inter-American Court has observed that 'it would be against all reason and an aberration to interpret the word freedom as "right" only and not as "the inherent power that man has to work in one way or another, or not to work" (*Real Academia Espanola, Vigesima Edicion*) according to his free will'.[22] The European Court has held that to compel a person by law to join an association such that it is fundamentally contrary to his own convictions to be a member of it, and to oblige him, on account of his membership of that association, to act in such a manner that the association in question can attain objectives of which he disapproves, is an infringement of his freedom of association. An individual does not

[20] *Lavigne* v. *Ontario Public Service Employees Union*, Supreme Court of Canada, (1991) 126 NR 161, at 184, per La Forest J. 'In some circumstances, forced association is arguably as dissonant with self-actualization through associational activity as is forced expression. For example, the compulsion to join the ruling party in order to have any real opportunity of advancement is a hallmark of a totalitarian state. Such compulsion might well amount to enforced ideological conformity, effectively depriving the individual of the freedom to associate with other groups whose values he or she might prefer.' (per McLachlin J).

[21] *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney General* v. *Prakash Seereeram*, Court of Appeal of Trinidad and Tobago, (1975) 27 WIR 329. The right to freedom of association was infringed by a law which deemed a cane farmer to be a member of the Trinidad Island-Wide Cane Farmers' Association (an association incorporated by law whose objects included the promotion of the interests of cane farmers and the cane farming industry). The law also authorized the deduction of certain monies by way of cess from the sums payable to the cane farmer for canes sold and delivered by him to a company that manufactured sugar, which sums were paid to the Accountant General who in turn passed it to the association. The right which the cane farmer enjoyed of resigning from the association was irrelevant. From the moment a cane farmer is deemed a member of the association his freedom of association is infringed and infringed completely, since nothing more needs to be done to perfect the infringement. That being so, it is impossible to say that the exercise thereafter of a right to resign is capable of preventing or avoiding what is already a *fait accompli*. The true mischief which results from the exercise of the right to resign is that a cane farmer with a contract continues to be burdened with the payment of cess notwithstanding his resignation. The whole of that cess finds its way thereafter into the coffers of the association for the promotion of its objects. The scheme therefore is one which enables the association to benefit from a financial contribution from that cane farmer even though he is not one of its members.

[22] *Compulsory Membership of Journalists' Association*, Inter-American Court, Advisory Opinion OC-5/85, 13 November 1985, per Judge Navia.

enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value.[23]

In the Commission on Human Rights, a proposal to add the sentence 'No one may be compelled to join an association' to ICCPR 22 was not accepted. It was recognized that this sentence, taken from UDHR 20, stressed an important aspect of the freedom of association, but the view was expressed that its application might not always be in the interest of trade unions.[24] Similar concern for the effective functioning of trade unions was expressed in the Third Committee too. A Somalian amendment to add the following sentence: 'No one may be compelled to join an association of any kind or to belong to it' was withdrawn, but only after several delegations had stressed the need to ensure that no one must be compelled to join organizations, such as political parties, against his will. In this connection, it was pointed out that the existing words: 'the right to freedom of association with others' was clearly designed to permit anyone to join or to refrain from joining, according to his wishes, and that the French version reading: *'le droit de s'associer librement avec d'autres'* expressed this intention particularly well.[25]

## Exempt associations

This right does not extend to associations which are a necessary and inevitable part of membership in a democratic community. For instance, a person may not object to association with government and its policies which the payment of taxes would seem to entail. In Justice Holmes' phrase, the state is 'the one club to which we all belong' and its activities will inevitably associate one with policies and groups with which one may not wish to be associated. Similarly, apart from membership in a family, the organization of society may compel a person to be associated with others in many activities and interests that justify state regulation of such associations. 'In short, there are certain associations which are

[23] *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615. See Decision of the Constitutional Tribunal of Portugal, 14 July 1993, No.445/93, Official Gazette of 13 August 1993, (1993) 2 *Bulletin on Constitutional Case-Law* 45: To empower a journalists' trade union to issue professional permits is to violate their freedom to form and join trade unions.

[24] UN document A/2929, chapter VI, section 145.

[25] UN document A/5000, sections 64, 69.

accepted because they are integral to the very structure of society. Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest.'[26] In other words, such associations are 'compelled by the facts of life'.[27]

The term 'association' possesses an autonomous meaning. A state may not, by classifying at its discretion an association as 'public' or 'para-administrative', remove it from the scope of this right.[28] But freedom of association does not prevent persons practising a profession, the exercise of which affects the general interest, from being, for that reason, incorporated, by or under the law, in a strictly regulated professional organization, in the public interest, to ensure the maintenance of professional standards. This is so even if, in order to organize this body, use has been made of some of the technical forms of an association.[29] Among bodies which have been held to be outside the scope of this right are: (a) a medical association which required medical practitioners to be entered on its register and to be subject to the authority of its organs;[30]

[26] *Lavigne* v. *Ontario Public Service Employees Union*, Supreme Court of Canada, (1991) 126 NR 161, at 189, per La Forest J.

[27] *International Association of Machinists* v. *Street*, United States Supreme Court, 367 US 740 (1961), at 776, per Douglas J.

[28] *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615. The fact that an association owes its existence to the will of parliament, or that the prefect supervises the way it operates is not sufficient to support the contention that it remains integrated within the structures of the state.

[29] *Le Compte, Van Leuven and De Meyere* v. *Belgium*, European Court, (1981) 4 EHRR 1; European Commission, 14 December 1979.

[30] *Le Compte, Van Leuven and De Meyere* v. *Belgium*, European Court, (1981) 4 EHRR 1; European Commission, 14 December 1979. The Belgian *Ordre des Médecins* is a public law institution created by statute with the object of ensuring 'compliance with rules of professional conduct and maintenance of the honour, discretion, probity and dignity of its members'. See also *Albert and Le Compte* v. *Belgium*, European Court, (1983) 5 EHRR 533. But ECHR 11 will be violated if the setting up of the *Ordre* prevented practitioners from forming together or joining professional associations. See also Decision of the Constitutional Court of Hungary, No.39/1997, 1 July 1997, *Magyar Kozlony*, no.58/1997, (1997) 2 *Bulletin on Constitutional Case-Law* 202; *X* v. *Denmark*, European Commission, Application 10053/82, (1983) 6 EHRR 350: Where the Danish Medicare Act provided that no one could work under the medicare reimbursement system as a chiropractor unless he or she was recognized by an association approved by the medicare authorities, the aim or purpose of the law fell within the notion of 'the protection of health': to create a sufficient and adequate system

(b) a lawyers' association;[31] (c) an architects association;[32] and (d) a co-operative nutmeg association and a nutmeg board established in Grenada under the Nutmeg Industry Ordinance.[33] But an automobile association which taxi drivers were compelled to join and which enjoyed some measure of regulation of their business was held to be primarily a private law association to protect the professional interests of its members.[34]

Three criteria have been identified by the Constitutional Court of Spain in order to determine whether compulsory membership of an association is constitutionally acceptable in the sense of being consistent with the freedom of association: (1) the compulsory membership of a body representing sectoral or professional interests must not entail a prohibition on or impediment to the freedom of association; (2) a compulsory membership requirement must be the exception, not the rule; and (3) compulsory membership of an association representing sectoral or professional interests must be justified either by constitutional

by which the lack of a formal public authorization was counterbalanced by a recognition by persons who were specialists in the field and based on fixed guidelines which contained an evaluation of the education of the applicant. In that way, the authorities could ensure adequate treatment and proper use of public funds.

[31] *A* v. *Spain*, European Commission, (1990) 66 *Decisions & Reports* 188; Decision of the Constitutional Court of Hungary, No.22/1994, (1994) 1 *Bulletin on Constitutional Case-Law* 31.

[32] *Revert and Legallais* v. *France*, European Commission, (1989) 62 *Decisions & Reports* 309.

[33] *Attorney General of Grenada* v. *Hamilton*, Court of Appeal of Grenada and West Indies Associated States, (1978) 24 WIR 558. The object of the law was to create a body corporate to safeguard and promote the interests of the nutmeg industry and in particular to market nutmegs and to regulate and control their export. The association constituted under that law was formed under a public act of a general public nature and for the economic welfare of the state.

[34] *Sigurjonsson* v. *Iceland*, European Court, (1993) 16 EHRR 462. A taxi driver complained against a requirement in the taxicab licence issued to him by the competent authority – the Committee for Taxicab Supervision – that he apply for membership of the Frami Automobile Association. He was informed that failure to do so could lead to suspension or revocation of his licence. Frami was an association formed by professional automobile drivers to (1) protect the professional interests of its members and promote solidarity among professional taxicab drivers; (2) determine, negotiate, and present demands relating to working hours, wages, and rates of its members; (3) seek to maintain limitations on the number of taxicabs; and (4) to represent its members before the public authorities. The court held that although Frami served the public interest and was not an employees' organization that represented its members in conflicts with their employer or engaged in collective bargaining and was not affiliated to the Icelandic Federation of Labour, it was nevertheless established under private law and must therefore be considered an 'association' for the purposes of ECHR 11.

provisions or by the nature of the public interests which the association served.[35]

## Requirement of recognition

The right to form an association may not be conditioned by a law that requires the recognition of that association by the government.[36] Similarly, if the conditions granting registration are tantamount to obtaining prior permission from the authorities for the establishing or functioning of a trade union, this will undeniably constitute an infringement of the principles of freedom of association.[37] While a state has a right to satisfy itself that an association's aims and activities are in conformity with the

[35] Decision of the Constitutional Court of Spain, 14 April 1994, Case No.113/1994, *Boletin Oficial del Estado* of 17 May 1994, (1994) 2 *Bulletin on Constitutional Case-Law* 163. The court held that the legal rules governing a sectoral association, the Chamber of Urban Property Ownership, did not meet these conditions.

[36] *Ghosh* v. *Joseph*, Supreme Court of India, [1963] Supp. 1 SCR 789, at 796. Rule 4B of the Central Civil Service (Conduct) Rules 1955, made under article 309 of the Constitution of India, provided that no government servant shall join or continue to be a member of any service association of government servants (a) which has not, within a period of six months from its formation, obtained the recognition of the government under the rules prescribed in that behalf, or (b) recognition in respect of which has been refused or withdrawn by the government under the rules. Rule 4B infringed the freedom of association and could not be saved by invoking the limitation clause since it virtually compelled a government servant to withdraw his membership of the service association as soon as recognition was withdrawn or if, after the association was formed, no recognition was accorded to it within six months.

[37] *International Confederation of Free Trade Unions* v. *China*, International Labour Organization, Case No.1500, 270th Report of the Committee on Freedom of Association (1989), paragraph 323. See also International Labour Organization, *Digest of Decisions and Principles of the Freedom of Association Committee*, 1985, paragraph 275. Cf. *Osawe* v. *Registrar of Trade Unions*, Supreme Court of Nigeria, [1985] 1 NWLR 755: A law which provided that 'no trade union shall be registered to represent workers or employers in a place where there already exists a trade union' was not an infringement of the freedom of association as it was a law passed in the interest of public order. It was designed to prune down proliferating trade unions. 'The proliferation of trade unions clearly lends itself to chaos in labour circles – a fact which has the tendency of destabilizing society by its tendency to wild-cat strikes and work-stoppages called by all sorts of disparate and unviable trade unions. It is, therefore, in the interest of public order that systematized, cohesive and responsible trade unions be established, for the good of society.' He added: 'An existing registered trade union has a vested right to cater for the interests of its members within its registered objects, rules and regulations. Such a registered trade union has a right – which the law courts should protect – that its organized labour be not thrown into confusion, to the detriment of its registered union, by mushroom unions, ostensibly aimed for the same purpose, springing up here and there. As is well known, many of those mushroom unions emerge after personality clashes in the leadership echelons – each leader wanting, in most cases, to carve out an empire of his own.' (per Aniagolu JSC).

rules laid down in legislation, it must do so in a manner compatible with its obligation to ensure to everyone the enjoyment of the right to freedom of association.[38]

### Achievement of objects

There is a real and clear distinction between freedom to associate and freedom to pursue the objectives for which the association exists. The first limb contains a fundamental right; the second does not.[39] Accordingly, the right to form an association does not guarantee the fulfilment of every object of the association so formed. It is not a necessary consequence of the right that an association shall effectively achieve the purpose for which it was formed without interference by law except on the prescribed grounds. For example, an association formed for carrying on a lawful business such as a joint stock company or a partnership is not guaranteed the right to pursue its trade and achieve its profit-making object subject only to such restrictions as may be imposed by law. This is because the freedom of association is an individual right, and an association can lay claim to this right only on the basis of its being an aggregation of individuals, i.e. the right of the individuals composing the association. 'As the stream can rise no higher than the source, associations of citizens cannot lay claim to rights not open to citizens, or claim freedom from restrictions to which the citizens composing it are subject.'[40]

### *including the right to form and join trade unions*

The right to form and join trade unions is an example, or a special aspect, of the more general right to freedom of association.[41] The phrase 'for the protection of his interests' pertains to 'the right to form and join trade unions' and not to freedom of association as a whole.[42] The right

[38] *Sidiropoulos* v. *Greece*, European Court, (1998) 27 EHRR 633.

[39] *Attorney General* v. *Alli*, Court of Appeal of Guyana, [1989] LRC (Const) 474.

[40] *All India Bank Employees Association* v. *National Industrial Tribunal*, Supreme Court of India, [1962] 3 SCR 269, at 288–9, per Ayyangar J. See also *Raghubar Dayal Jai Prakash* v. *The Union of India*, Supreme Court of India, [1962] 3 SCR 547.

[41] *Young, James and Webster* v. *United Kingdom*, European Court, (1981) 4 EHRR 38.

[42] *JB* v. *Canada*, Human Rights Committee, Communication No.118/1982, HRC 1986 Report, Annex IX.B, separate opinion of Ms Higgins and Messrs Lallah, Mavrommatis, Opsahl and Wako.

to form trade unions includes the right of trade unions to draw up their own rules, to administer their own affairs, to establish and join trade union federations or confederations,[43] and the right of the latter to form or join international trade union organizations. Two obligations are embodied in this right: one negative and the other positive. The first is the absence in the municipal law of any legislation or regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organizations. The second is to take adequate legislative or other measures to guarantee the exercise of this right, and in particular to protect workers' organizations from any interference on the part of employers.[44] In interpreting the meaning and scope of the notion of freedom of association in relation to trade unions, consideration may be had to the meaning given to this term in ILO Conventions No. 87 and No. 98. 'They reflect widely accepted labour law standards which are elaborated and clarified by the competent organs of the ILO.'[45]

### Effect of intimidation

Freedom of association includes, in relation to trade unions, elements other than the right to 'form' or to 'join' a trade union, such as the right of workers' and employers' organizations to elect their representatives in full freedom and to organize their administration. Threats of dismissal or other actions intended to bring about the relinquishment by an employee of the office of shop steward held by him may seriously restrict or impede the lawful exercise of this freedom.[46] Indeed, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, when it is directed against an employee who refuses to join a specific union, strikes at the very substance of the freedom of association.[47] Similarly, other acts of anti-union discrimination, such as dismissal, transfer, and compulsory retirement by reason of union membership or because of participation in union activities, will constitute a violation

[43] *Cheall* v. *United Kingdom*, European Commission, (1985) 42 *Decisions & Reports* 178.
[44] ESC, Committee of Independent Experts, Conclusions I, 31.
[45] *National Union of Belgian Police* v. *Belgium*, European Commission, 27 May 1974; *Swedish Engine Drivers' Union* v. *Sweden*, European Commission, (1974) 1 EHRR 578.
[46] *X* v. *Ireland*, European Commission, Application 4125/69, (1971) 14 *Yearbook* 198.
[47] *Young, James and Webster* v. *United Kingdom*, European Court, (1981) 4 EHRR 38. See also European Commission, (1979) 3 EHRR 20.

of this right.[48] Where a worker and trade union leader was subjected to various forms of harassment by the authorities from the beginning of his trade union involvement, including arrest and detention without trial, and subjection to torture and other cruel, inhuman or degrading treatment, this right was violated.[49] A threat of retaliatory measures against workers who have expressed their intention to hold a sit-in in pursuance of their legitimate economic and social interests is an interference with their trade union rights.[50]

Where an employee was required to resign from a trade union in order to qualify, under the terms of his letter of appointment issued by his employer, for promotion, the letter of appointment was inconsistent with the freedom of association. No employer can take away this right by imposing a term to the contrary in a contract of employment. Trade unions played a significant role as an integral part of the democratic structure of government, and restraints or limitations are permitted only in the most exceptional circumstances and on the specified grounds.[51] In Poland, a law which prohibited professional members of staff (i.e. all employees who performed control and supervisory functions) in the Supreme Chamber of State Control from being members of a trade union, was inconsistent with constitutional principles relating to freedom of association and of equality.[52]

[48] *Schmidt and Dahlstrom* v. *Sweden*, European Commission, (1974) 15 *Yearbook* 576. European Court (1976) 1 EHRR 632.

[49] *Delia Saldias de Lopez* v. *Uruguay*, Human Rights Committee, Communication No.52/1979, HRC 1981 Report, Annex XIX.

[50] *The Hong Kong Union of Post Office Employees et al* v. *United Kingdom/Hong Kong*, International Labour Organization, 277th Report of the Committee on Freedom of Association, 1991. When the Postmaster-General of Hong Kong warned the leaders of four postal workers' unions that their proposed action 'may invite the imposition of sanctions provided for under civil service regulations and article XVI of the Letters Patent', he was acting contrary to the principles of the freedom of association. Although no administrative or disciplinary measures appeared to have been taken, the mere fact that such a threat existed could be a powerful deterrent for the workers concerned, particularly in view of the broad and discretionary language of article XVI which provided for severe penalties.

[51] *Gunaratne* v. *People's Bank*, Supreme Court of Sri Lanka, [1987] LRC (Const) 383, at 395.

[52] Decision of the Constitutional Tribunal of Poland, 21 November 1995, Case No. K 12/95, *Ovzecznictwo Trybunalu Konstytucyjnego Zbior Urzedowy*, No.3, (1995) 3 *Bulletin on Constitutional Case-Law* 334. Cf. *Council of Civil Service Unions* v. *United Kingdom*, European Commission, (1987) 50 *Decisions & Reports* 228: While the prohibition imposed on staff at Government Communications Headquarters continuing to be members of any existing trade union was an interference by a public authority with the exercise of the rights guaranteed by ECHR 11(1), the restriction was justified under ECHR 11(2) as being a lawful

## 'Closed Shop' agreements

The right to freedom of association encompasses not only a positive right to form or join an association, but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association.[53] While leaving open whether the negative right is to be considered on an equal footing with the positive right, the European Court has held that, although compulsion to join a particular trade union may not always be contrary to this right, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association, will constitute an interference with that freedom.[54] Earlier, in a case arising out of a closed shop agreement in the United Kingdom, six judges of the European Court noted that trade union freedom involves freedom of choice: it implies that a person has a choice whether he will belong to a union or not and that, in the former case, he is able to choose the union. However, the possibility of choice, an indispensable component of freedom of association, is in reality non-existent where there is a trade union monopoly. The mere fact of being obliged to give reasons for one's refusal to join a trade union constitutes a violation of the freedom of association. They stressed that the 'negative aspect' of freedom of association 'is necessarily complementary to, a correlative of and inseparable from' its 'positive aspect'. Protection of the freedom would be incomplete if it extended to no more than the positive aspect. It is one and the same right that is involved.[55]

## *for the protection of his interests*

The freedom of association is not restricted to matters of organization; it also has a functional aspect. In the case of a trade union, that functional aspect is the right to engage in all forms of activities designed to defend,

restriction imposed on the exercise of these rights by members of the administration of the state.

[53] *Sigurjonsson* v. *Iceland*, European Court, (1993) 16 EHRR 462.

[54] *Gustafsson* v. *Sweden*, European Court, (1996) 22 EHRR 409; *Sibson* v. *United Kingdom*, European Court, (1994) 17 EHRR 193.

[55] *Young, James and Webster* v. United Kingdom, European Court, (1981) 4 EHRR 38, separate concurring opinion of Judges van der Meersch, Binderschedler-Robert, Liesch, Matscher, Farinha and Pettiti.

protect and promote workers' interests.[56] The recognition that trade unions needed to struggle for the protection of the civil rights as well as the economic and social interests of their members led to the use of the expression 'for the protection of his interests' in ICCPR 22 in preference to the more specific term used in ICESCR 8: 'for the protection of his economic and social interests'.[57]

The right to join a union 'for the protection of his interests' does not confer a general right to join the union of one's choice irrespective of the rules of the union. The unions remain free to decide, in accordance with their own rules, questions concerning admission to and expulsion from each union. The protection afforded is primarily against interference by the state. Nonetheless, for the right to join a union to be effective the state must protect the individual against any abuse of a dominant position by trade unions. Such abuse might occur, for example, where exclusion or expulsion was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of expulsion resulted in exceptional hardship such as job loss because of a closed shop.[58]

## Right to strike

The right to strike is one of the most important means by which trade union members protect their occupational interests.[59] Having examined its drafting history, the Human Rights Committee concluded that the right to strike, while it enjoys protection under the procedures and mechanisms of the ICESCR, was not included in the scope of ICCPR 22.[60] In a separate opinion, five members of the committee disagreed. In their view, ICCPR 22 guaranteed the broad right of freedom of association. There is no mention not only of the right to strike but also of the various other activities, such as holding meetings, or collective bargaining, that a trade unionist may engage in to protect his interests.

[56] Decision of the Constitutional Court of Spain, 19 June 1995, Case No.94/1995, *Boletin Oficial del Estado* of 24 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 209.

[57] UN document A/2929, chapter VI, section 147.

[58] *Cheall* v. *United Kingdom*, European Commission, (1985) 42 *Decisions & Reports* 178.

[59] *Schmidt and Dahlstrom* v. *Sweden*, European Court, (1976) 1 EHRR 632. Such a right is not expressly enshrined in ECHR 11, and may be subjected under national law to regulations of a kind that limits its exercise in certain instances.

[60] *JB et al* v. *Canada*, Communication No.118/1982, HRC 1986 Report, Annex IX.B.

However, the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes. Indeed, this is an inherent aspect of the right. Which activities are essential to the exercise of this right cannot be listed *a priori* and must be examined in their social context in the light of the other paragraphs of ICCPR 22.They noted that ICESCR 8 recognized 'the right to strike, provided that it is exercised in conformity with the laws of the particular country'. While this latter phrase gives rise to some complex legal issues, it suffices that the specific aspect of freedom of association which is touched on as an individual right in ICCPR 22 but dealt with as a set of distinctive rights in ICESCR 8, does not necessarily exclude the right to strike in all circumstances. They saw no reason for interpreting this common matter differently in the two covenants. They also referred to the ILO Committee on Freedom of Association which has held that the general prohibition of strikes for public employees was not in harmony with ILO Convention No.87 'since it constituted a considerable restriction on the opportunities open to trade unions to further and defend the interests of their members'.[61] Noting that ICCPR 22 also states that the purpose of joining a trade union is to protect one's interests, they concluded that they could not see that a manner of exercising a right which has, under certain leading and widely ratified international instruments, been declared to be in principle lawful, should be declared to be incompatible with ICCPR 22.[62]

An Industrial Relations Act which required a twenty-one-day cooling-off period and empowered the minister to refer any industrial dispute to compulsory arbitration, enforceable by penalties involving compulsory labour, had the effect of making most strikes illegal. Therefore, the right to strike, although recognized in theory, could not be exercised in practice.[63]

[61] *The International Confederation of Free Trade Unions* v. *China*, International Labour Organization, Case No.1500, 270th Report of the Committee on Freedom of Association, 1989: (a) 'strikes are one of the essential means that workers and their organizations should have to further and defend their economic and social interests'; (b) 'the arrest of strikers involves serious risks of abuse and serious threats to freedom of association'. See also 236th Report, Case No.1066 (Romania), paragraph 122; 217th Report, Case No.1034 (Brazil), paragraph 412.

[62] *JB et al* v. *Canada*, Communication No.118/1982, HRC 1986 Report, Annex IX.B. Individual Opinion of Ms Higgins and Messrs Lallah, Mavrommatis, Opsahl and Wako.

[63] Committee of Economic, Social and Cultural Rights, concluding observations (Mauritius), UN document E/C.12/1994/8 of 31 May 1994.

## Collective bargaining

Collective bargaining (or consultation machinery) is another of the means by which a trade union protects the economic and social interests of its members. It seems essential that a trade union should be able to make known its opinions on all matters concerning the profession it represents, including staffing and pecuniary status of staff and recruitment and promotion conditions, considering that the union is eminently suited for this purpose and directly concerned in these matters. Failure to recognize the existence of such a right, which falls within the more general framework of freedom to bargain collectively and which may form a stage in such bargaining, 'would be to condemn trade union action to sterility, and to deprive trade union organizations of an essential means of protecting the professional interests of their members'. Accordingly, the right to consultation and, at a more general level, the freedom to bargain collectively, are important, and even essential elements of trade union action falling within the scope of this right.[64]

Does the state have an 'obligation to consult' all trade unions without discrimination? A trade union which is not consulted by the government will not be able to carry out its activities under the same conditions as other unions. The effective functioning of a union depends on its representative strength, which in turn depends on the union's activities. The debarment of a union from consultation removes some of its attractiveness and prevents it from effectively defending its members' interests. But non-participation in consultation does not deprive a union of its other means of defending its members' interests, such as by lodging claims or requesting a hearing with the relevant governmental authorities. The European Court has held that while ECHR 11 does not guarantee to trade unions or their members a particular kind of treatment by the state, it safeguards the freedom to protect the occupational

[64] *National Union of Belgian Police* v. *Belgium*, European Commission, (1974) 1 EHRR 578. For decisions of national courts on the freedom of trade unions to enter into collective agreements with their members' employers, see *Attorney General of Guyana* v. *Alli*, Court of Appeal of Guyana, [1989] LRC (Const) 474: 'To say it is a right much prized in the trade union world is to state a truism; it constitutes the very quintessence of their being, their *raison d'être*'; *Reference Re Public Service Employee Relations Act (Alberta)*, Supreme Court of Canada, (1987) 38 DLR (4th) 161, [1987] 1 SCR 313; *Collymore* v. *Attorney General of Trinidad and Tobago*, Privy Council on appeal from the Court of Appeal of Trinidad and Tobago, [1969] 2 All ER 1207; *Joseph* v. *Attorney General of Antigua*, Court of Appeal, West Indies Associated States, (1980) 27 WIR 394; *Attorney-General* v. *Mohamed Ali*, Court of Appeal of Guyana, (1992) 41 WIR 176.

interests of trade union members by trade union action. It follows that the members of a trade union have a right, in order to protect their interests, that a trade union 'should be heard', and leaves to each state to choose the means to attain this end. Consultation, collective bargaining, and the conclusion of collective agreements are among such means.[65] However, the 'right to bargain collectively' appears to be a freedom and a capacity rather than a right against employers, or the state as an employer, and therefore a means of forcing employers to negotiate collective agreements. A general right against the state as the employer to have the agreed results of consultation incorporated in a formal agreement or to be accepted under all circumstances as a party to a collective agreement is not guaranteed.[66] Nor is the right not to enter into a collective agreement guaranteed.[67]

*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*

In assessing the necessity of a given measure, the European Court has identified a number of principles which must be observed. For example, the term 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'. Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society', and although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Finally, any restriction imposed on this right must be proportionate to the legitimate aim pursued.[68]

[65] *National Union of Belgian Police* v. *Belgium*, European Court, (1975) 1 EHRR 578; *Swedish Engine Drivers' Union* v. *Sweden*, European Court, (1976) 1 EHRR 617; *Trade Union X* v. *Belgium*, European Commission, Application 7361/76, (1979) 14 *Decisions & Reports* 40.

[66] *Swedish Engine Drivers' Union* v. *Sweden*, European Commission, (1974) 1 EHRR 578.

[67] *Gustafsson* v. *Sweden*, European Court, (1996) 22 EHRR 409.

[68] See *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615, at 687.

These principles were applied to a 1975 closed shop agreement concluded between British Rail and three trade unions which provided, *inter alia*, that membership of one of those unions was a condition of employment of British Rail's staff. The Trade Union and Labour Relations Act 1974 set out the circumstances in which a closed shop situation was to be regarded as existing, and laid down the basic rule that, if such a situation existed, the dismissal of an employee for refusal to join a specified union was to be regarded as fair for the purposes of the law on unfair dismissal. Three employees who had joined the staff of British Rail in 1958, 1972 and 1974 respectively, declined to comply with the agreement, for reasons which they stated, and were dismissed. In considering whether it was necessary to have required these existing employees of British Rail to join specified unions when the closed shop agreement was concluded, the European Court held that (a) the fact that British Rail's closed shop agreement may in a general way have produced certain advantages was not of itself conclusive as to the necessity of the interference complained of; (b) the mere fact that the applicants' standpoint was adopted by very few of their colleagues was not conclusive of the issue; and (c) the detriment suffered by the applicants went further than was required to achieve a proper balance between the conflicting interests of those involved. Accordingly, the court held that the restrictions complained of were not 'necessary in a democratic society'.[69]

The same principles apply to a political party, which is a form of association essential to the proper functioning of democracy, and which is not excluded from the protection afforded by this right merely because its activities are regarded by the authorities as undermining the

[69] *Young, James and Webster* v. *United Kingdom*, European Court, (1981) 4 EHRR 38. In determining (c), the court had regard to (i) the 1968 report of the Royal Commission on Trade Unions and Employers' Associations which considered that the position of existing employees in a newly introduced closed shop was one area in which special safeguards were desirable; (ii) recent surveys suggested that many closed shop arrangements did not require existing non-union employees to join a specified union; (iii) a substantial majority of union members themselves disagreed with the proposition that persons refusing to join a specified union for strong reasons should be dismissed from employment; and (iv) more than 95 per cent of British Rail employees were already members of the specified unions. All these factors suggested that the railway unions would in no way have been prevented from striving for the protection of their members' interests through the operation of the agreement with British Rail even if the legislation in force had not made it permissible to compel non-union employees to join a specified union.

constitutional structures of the state.[70] Where it was argued that the Socialist Party of Turkey was ideologically opposed to the nationalism of Ataturk, which was the most fundamental principle underpinning the Republic of Turkey, and advocated the creation of two nations: the Kurdish nation and the Turkish nation, thereby acting to the detriment of the unity of the Turkish nation and the territorial integrity of the state, the European Court noted that one of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group, solely because it seeks to debate in public the situation of part of the state's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a state is currently organized, provided that they do not harm democracy itself.[71]

[70] *United Communist Party* v. *Turkey*, European Court, (1998) 26 EHRR 121. The exceptions set out in ECHR 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association.

[71] *The Socialist Party* v. *Turkey*, European Court, (1998) 27 EHRR 51. The court accepted that phrases used by the leader of the party ('the Kurd has proved himself through the fight of impoverished peasants by linking his destiny to theirs'; 'by holding meetings with thousands of people in the towns and provinces, the Kurd had proved himself and broken down the barriers of fear'; 'sow courage, rather than watermelons'; 'the Kurdish people are standing up') were directed at citizens of Kurdish origin and constituted an invitation to them to rally together to assert certain political claims, but found no trace of any incitement to use violence or infringe the rules of democracy. The court noted that, read together, these statements put forward a political programme with the essential aim of establishing, in accordance with democratic rules, a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis. Although reference was made to the right of self-determination of the 'Kurdish nation' and its right to 'secede', these statements did not encourage secession from Turkey but sought rather to stress that the proposed federal system could not come about without the Kurds' freely given consent, which should be expressed through a referendum. The fact that such a political programme is considered incompatible with the current principles and structures of the Turkish state does not make it incompatible with the rules of democracy. See also *Sidiropoulos* v. *Greece*, European Court, (1998) 27 EHRR 633: Territorial integrity, national security and public order are not threatened by the activities of an association ('Home of Macedonian Civilization') whose aim is to promote a region's culture, even supposing that it also aims partly to promote the culture of a minority. The existence of minorities and different cultures in a

*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*

This qualification was not intended to deny the enjoyment and exercise of the right to the categories of persons mentioned, but to limit their choice of associations and particularly the extent to which they might engage in trade union activities.[72] The complete suppression of the right is not permitted.[73] The Constitutional Court of South Africa has held that a total ban on trade unions in the defence force clearly went beyond what was reasonable and justifiable to achieve the legitimate objective of a disciplined military force. While leaving open the question whether soldiers should be entitled to strike, undertake collective bargaining and engage in all the other legitimate activities of a trade union, the court observed that a blindly obedient soldier represented a greater threat to the constitutional order and the peace of the realm than one who regarded him or herself as a citizen in uniform, sensitive to his or her responsibilities and rights under the constitution.[74]

country is a historical fact that a 'democratic society' has to tolerate and even protect and support according to the principles of international law.

[72] UN document A/2929, chapter VI, section 151. To give effect to this meaning, the Third Committee revised the text of an earlier draft. See UN document A/5000, sections 62, 68, 72. See also ESC, Committee of Experts, Conclusions I, 31; Decision of the Constitutional Court of Spain, 17 October 1994, Case No.273/1994, *Boletin Oficial del Estado* of 22 November 1994, (1994) 3 *Bulletin on Constitutional Case-Law* 283. See also *Council of Civil Service Unions* v. *United Kingdom*, European Commission, (1987) 50 *Decisions & Reports* 228: The term 'lawful' means that the measures at issue must at least have been in accordance with national law. *Quaere*: whether the term 'lawful' also requires a prohibition of arbitrariness?

[73] ESC, Committee of Independent Experts, Conclusions II, 22. See *Ofek* v. *Minister of the Interior*, Supreme Court of Israel, H.C. 789/78, 33(3) *Piskei Din* 480, excerpted in (1982) 12 *Israeli Yearbook on Human Rights* 302: A standing order made by the inspector-general of police which forbade 'any organization of policemen designed to promote conditions of employment, wages, retirement and other social benefits of policemen' had no legal validity since it deprived policemen of their legal rights; Decision of the Court of Arbitration of Belgium, 15 July 1993, Case No.62/93, *Moniteur belge* of 5 August 1993, (1993) 2 *Bulletin on Constitutional Case-Law* 17: Where active members of the operational corps of the 'gendarmerie' are prohibited from resorting to any form of strike action, or from publicly manifesting their political opinions or engaging in political activities, they are nevertheless entitled to belong to or assist political parties or movements, bodies, organizations or associations pursuing political objectives since non-public forms of co-operation such as membership of a political party do not threaten the neutrality of the force or impair its preparedness.

[74] *South African National Defence Union* v. *Minister of Defence*, Constitutional Court of South Africa, [2000] 2 LRC 152.

*Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention*

A reference to the far more comprehensive ILO Convention was included in ICCPR 22 because it was felt that the failure to do so could be interpreted either as an indication that the United Nations had overlooked or underestimated the progress already achieved under international law in safeguarding trade union rights, or as relieving parties to that convention of their responsibility under it.[75]

[75] UN documents A/2929, chapter VI, s.152; A/5000, ss.70, 71.

# 24

# The right to family life

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

16. (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

#### International Covenant on Civil and Political Rights (ICCPR)

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.

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

10. The states parties . . . recognize that:

    (1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
    (2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

## *Regional instruments*

### American Declaration of the Rights and Duties of Man (ADRD)

6. Every person has the right to establish a family, the basic element of society, and to receive protection therefor.

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

12. Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

### ECHR Protocol 7 (ECHR P7)

5. Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent states from taking such measures as are necessary in the interests of the children.

### American Convention on Human Rights (ACHR)

17. (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

(2) The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
(3) No marriage shall be entered into without the free and full consent of the intending spouses.
(4) The states parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

## African Charter on Human and Peoples' Rights (AfCHPR)

18. (1) The family shall be the natural unit and basis of society. It shall be protected by the state.
(2) The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

### *Related texts:*

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 30 April 1956, 1(a).
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10 December 1962.
Convention on the Rights of the Child, 20 November 1989.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 19 December 1990.
Recommendations on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UNGA resolution 2018 (XX) of 1 November 1965.
ILO Convention (No.3) Concerning the Employment of Women before and after Childbirth 1919.
ILO Convention (No.103) Concerning Maternity Protection (revised) 1952.
European Social Charter 1961, I, 16; II, 16.

Declaration on Social Progress and Development, 11 December 1969, Article 4.

Declaration on the Rights of Mentally Retarded Persons, 20 December 1971, Principle 4.

Declaration on the Rights of Disabled Persons, 9 December 1975, Principle 9.

Declaration on the Rights of the Family, approved by the Executive Committee of the Inter-American Children's Institute, Santa Cruz, Bolivia, 30 June 1983, Articles 6 and 7.

## Comment

Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But they have more than personal significance because human beings are social beings whose humanity is expressed through their relationships with others. Entering into a marriage therefore is to enter into a relationship that has public significance as well.[1]

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends.[2] International and regional human rights instruments now recognize the family as 'the natural and fundamental group unit of society (ICCPR 23, ICESCR 10 and ACHR 17), or as the 'natural unit

[1] *Dawood* v. *Minister of Home Affairs*, Constitutional Court of South Africa, [2000] 5 LRC 147, per O'Regan J at 167.

[2] *Dawood* v. *Minister of Home Affairs*, Constitutional Court of South Africa, [2000] 5 LRC 147, per O'Regan J at 167.

and basis of society' (AfCHPR 18). The latter also refers to the family as 'the custodian of morals and traditional values recognized by the community'.

The specific rights relating to the family which are recognized are:

(a) the right of the family to protection by society and the state (by 'the state' in AfCHPR 18).
(b) the right of men and women of marriageable age to marry and to found ('raise' in ACHR 17) a family ('according to the national laws' in ECHR 12, and 'if they meet the conditions required by domestic laws' in ACHR 17).
(c) the right to marry only with the full and free consent of the parties thereto.
(d) equal rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.
(e) the right of children to protection in the event of dissolution of marriage ('solely on the basis of their own best interests' in ACHR 17).
(f) the right of mothers to special protection before and after childbirth (ICESCR 10).

The protection of the family and its members is also secured by ICCPR 17, ECHR 8, and ACHR 11 which prohibit any arbitrary or unlawful interference with the family, and by ICCPR 24 which specifically addresses the protection of the rights of the child.[3]

## Interpretation

### *The family is the natural and fundamental group unit of society*

The concept of the family may differ in some respects from state to state, and even from region to region within a state. It may not, therefore, be capable of a standard definition. But when a group of persons is regarded as a family under the legislation and practice of a state, such group is

[3] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports 1989, 177, separate opinion of Judge Evensen at 210: The principles of international law that protect the integrity of a person's family and family life are derived not only from conventional international law or customary international law but also from 'general principles of international law recognized by civilized nations'.

entitled to receive the protection of this right. While marriage is the recognized institution which leads to the foundation of a family, the Human Rights Committee has referred to such diverse concepts of the family as 'nuclear' and 'extended', and has recognized the existence of various forms of family such as unmarried couples and their children or single parents and their children.[4] The notion of 'family', therefore, is not confined solely to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside of marriage. A child born out of such a relationship is *ipso jure* part of that 'family' unit from the moment of its birth and by the very fact of its birth. There thus exists between the child and its parents a bond amounting to family life even if at the time of birth the parents are no longer cohabiting or if their relationship has then ended.[5] Although divorce legally ends a marriage, it does not dissolve the bond uniting the father – or mother – and child; this bond does not depend on the continuance of the parents' marriage.[6] For example, the real father, though not the man to whom the mother is married (but from whom she is living apart) when the child is born, is nevertheless entitled to recognize the child as his. It is not compatible with the notion of respect for family life to allow a father to create a legal tie with a child with whom he has a bond amounting to family life only if he marries the child's mother. Biological and social reality must prevail over a legal presumption.[7]

The words 'the family' do not refer solely to the family home as it exists during the marriage or cohabitation. The idea of the family necessarily embraces the relations between parents and children. However, some minimal requirements for the existence of a family are necessary, such as life together, economic ties, and a regular and intense relationship. While living together may be a requirement for such a relationship,

[4] Human Rights Committee, General Comment 19 (1990). See also *X* v. *Germany*, European Commission, Application 9519/81, (1984) 6 EHRR 599.

[5] *Keegan* v. *Ireland*, European Court, 26 May 1994. See also *Johnston* v. *Ireland*, European Court, (1986) 9 EHRR 203; *Berrehab* v. *Netherlands*, European Court, (1988) 11 EHRR 322; Regional Court of the Netherlands, The Hague, Decision KG/1992/182, 7 May 1992; Council of State, Judicial Division, Netherlands, Decision AB/1992/633, 1 May 1992.

[6] *Hendriks* v. *Netherlands*, Human Rights Committee, Communication No.210/1985, HRC 1988 Report, Annex VII.H; *Santacana* v. *Spain*, Human Rights Committee, Communication No.417/1990, HRC 1994 Report, Annex IX.P.

[7] *Kroon* v. *Neherlands*, European Court, (1994) 19 EHRR 263. See also Supreme Court of the Netherlands, Case No.8261, 17 September 1993, NJ 1994, 373, (1994) 2 *Bulletin on Constitutional Case-Law* 143.

exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* 'family ties'.[8] The term 'child' is not restricted to legitimate children. Therefore, the recognition of the unity of the family as a group requires the acceptance of the principle that young children, whether legitimate or illegitimate, should not be separated from that group.[9] Similarly, 'children' include adopted children and 'parents' include foster parents.[10]

The Canadian Supreme Court has held that the definition of 'spouse' in the Family Law Act 1990 should include an individual in a conjugal, same-sex relationship of a specific degree of duration since same-sex relationships are capable of being both conjugal and lengthy. Accordingly, same-sex partners who form intimate relationships of economic interdependence are entitled to benefit from a spousal support scheme in the event of a breakdown of that relationship.[11] Similarly, the Constitutional Court of Hungary has held that, while in Hungarian culture and law the institution of marriage was regarded traditionally as the union of a man and a woman, the enduring union of two persons may realize such values that it can claim legal acknowledgment irrespective of the sex of those living together.[12]

[8] *Kroon* v. *Neherlands*, European Court, (1994) 19 EHRR 263.

[9] *Minister of Home Affairs of Bermuda* v. *Fisher*, Privy Council on appeal from the Supreme Court of Bermuda, [1979] 3 All ER 21: A Jamaican mother of four illegitimate children born in Jamaica married a Bermudan who from the date of the marriage accepted all four children as children of his family. Four years later, the family took up residence in Bermuda and the children entered state schools. In the following year, the minister refused permission for the children to reside in Bermuda and ordered that they should leave on the ground that they did not 'belong to Bermuda'. Under s.11(5)(d) of the Constitution of Bermuda, a person is deemed to belong to Bermuda if that person, *inter alia*, is under the age of eighteen years and is the child, stepchild or an adopted child of a person possessing Bermudan status. Citing the UN Declaration on the Rights of the Child 1959 and ICCPR 24, the Privy Council disagreed with the minister's view that 'child' meant a legitimate child.

[10] Constitutional Court of Lithuania, Case No.4/95, 1 June 1995, *Valstybes Zinios* 47-1154 of 7 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 176: When legislation provided that 'upon the death of the former owner the right of ownership to his portion of existing real property is restored to his spouse and children', it meant that the same rights were enjoyed by adopted children as well.

[11] *Attorney General for Ontario* v. *M*, Supreme Court of Canada, [1999] 4 LRC 551.

[12] Constitutional Court of Hungary, Case No.14/1995(III.13), 13 March 1995, (1995) 1 *Bulletin on Constitutional Case-Law* 43: The cohabitation of persons of the same sex, is in all respects very similar to the cohabitation of partners in a domestic partnership, involving as it does a common household, as well as an emotional, economic and sexual relationship, and taking on all aspects of the relationship against third persons.

*and is entitled to protection by society and the State*

To ensure the required protection a state may need to adopt legislative, administrative or other measures. Since the right of the family to protection by society is also recognized, the state is obliged not only to give financial or other support to the activities of social institutions engaged in this task, but also to ensure that such activities are compatible with the international and relevant regional instruments.[13] The legal protection or measures a society or the state can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions. However, having regard to the twin principles of equal treatment of the sexes and the 'equal protection of the law', such protection must be equal, that is to say, not discriminatory, for example on the basis of sex. It follows also that the protection of a family cannot vary with the sex of the one or the other spouse.[14]

*The right of men and women of marriageable age to marry*

The condition of matrimony embodies the obligations to found a home, to cohabit, to have children, and to live together as a family unit.

[13] Human Rights Committee, General Comment 19 (1990).

[14] *Aumeeruddy-Cziffra et al* v. *Mauritius*, Human Rights Committee, Communication No.35/1978, HRC 1981 Report, Annex XIII: Prior to the enactment of the Immigration (Amendment) Act 1977 and the Deportation (Amendment) Act 1977, alien men and women married to Mauritian nationals enjoyed the same residence status, i.e. by virtue of their marriage alien spouses of both sexes had the right, protected by law, to reside in the country with their Mauritian husbands or wives. Under the new laws, alien husbands of Mauritian women lost their residence status in Mauritius and were required to apply for a residence permit which may be refused or revoked at any time by the Minister of the Interior, without the possibility of seeking redress before a court of law. These new laws did not affect the status of alien women married to Mauritian husbands, and they retained their legal right to residence in the country. While it might be justified for Mauritius to restrict the access of aliens to its territory and to expel them therefrom for security reasons, legislation which only subjected alien spouses of Mauritian women to those restrictions, but not alien spouses of Mauritian men, was discriminatory with respect to Mauritian women and could not be justified by security requirements, and breached ICCPR 2(1), 3 and 26 in relation to ICCPR 23. See also *Dawood* v. *Minister of Home Affairs*, Constitutional Court of South Africa, [2000] 5 LRC 147: The Aliens Control Act 1991, s.29(9)(b), which required an alien married to a South African resident to apply for an immigration permit from outside the country meant that the former was forced to choose between going abroad with his or her partner while the application was being considered, or remaining in South Africa alone. Many South African spouses will not even face this dilemma on account of their poverty or other circumstances and will have to remain in South Africa without their spouses. The right (and duty) to cohabit, a key aspect of the marriage relationship, is thereby restricted.

Marriage is a juristic act *sui generis*. 'It gives rise to a physical, moral and spiritual community of life – a consortium omnis vitae. It obliges the husband and wife to live together for life (more realistically, for as long as the marriage endures) and to confer sexual privileges exclusively upon each other. Conjugal love embraces three components: (i) eros (passion); (ii) philia (companionship); and (iii) agape (self-giving brotherly love). The duties of cohabitation, loyalty, fidelity mutual assistance and support, flow from marital relationship. To live together as spouses in community of life, to afford each other marital privileges, and to be ever faithful are the inherent commands which lie at the very heart of marriage.'[15]

## Minimum age and capacity

ICCPR 23, ECHR 12 and ACHR 17 leave it to states to determine the marriageable age. This could be the age of legal majority or of physical maturity.[16] But the prescribed age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law.[17] While prohibiting child marriages and the betrothal of young girls before the age of puberty, the United Nations has recommended that, except where a competent authority has granted a dispensation for serious reasons and in the interests of the intending spouses, the minimum age shall not be less than fifteen years.[18]

The essence of the right to marry is the formation of a legally binding association between a man and a woman. The European Court has emphasized that the right to marry guaranteed by ECHR 12 refers to the traditional marriage between persons of the opposite biological sex. The court drew support for this view from the understanding that ECHR 12 was mainly concerned to protect marriage as the basis of the family.[19] The exercise of the right to marry may be governed by law. But measures

[15] *Rattigan* v. *Chief Immigration Officer*, Supreme Court of Zimbabwe, [1994] 1 LRC 343, per Gubbay CJ.

[16] UN document A/2929, chapter VI, section 168.

[17] Human Rights Committee, General Comment 19 (1990).

[18] Recommendations on Consent to Marriage, Minimum Age for Marriages and Registration of Marriages, UNGA resolution 2018 (XX) of 1 November 1965; Convention on Consent to Marriage, Minimum Age for Marriages and Registration of Marriages 1962, Preamble; Convention on the Elimination of All Forms of Discrimination against Women 1979, Art. 16(2).

[19] *Rees* v. *United Kingdom*, European Court, (1986) 9 EHRR 56.

for the regulation of the right may not injure the substance of the right. Such laws may thus lay down formal rules concerning matters such as notice, publicity and the formalities whereby marriage is solemnized. They may also lay down rules of substance based on generally recognized considerations of public interest. Examples are rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy. Any legal provisions relating to marriage must be compatible with the full exercise of the other rights guaranteed by international and relevant regional instruments. For example, the right to freedom of thought, conscience and religion implies the possibility of both religious and civil marriages. For a state to require that a marriage celebrated in accordance with religious rites be conducted, affirmed, or registered also under civil law, is, therefore, not incompatible with the ICCPR 23.[20]

The law may not deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with their exercise of the right. Accordingly, a person deprived of his liberty remains in principle entitled to the right to marry, and any restriction or regulation on the exercise of that right must not be such as to injure its substance. The imposition by the state of any substantial period of delay on the exercise of this right by a prisoner is an injury to its substance, whether the delay results from the law governing the exercise of the right or from administrative action by prison authorities, or a combination of both.[21] A three-year prohibition on remarriage imposed by a court on a man following the dissolution of his third marriage, affected the very essence of the right to marry. Although stability of marriage is a legitimate aim in the public interest, a temporary prohibition is disproportionate to that aim, and will not preserve the rights of a future spouse who is not under age or insane, or of any children who may be born out of wedlock as a consequence thereof. Compelling a person to take time for reflection in order to protect him from himself is not of sufficient weight in the case of a person of full age and in possession of his mental faculties.[22] But the withdrawal of social security benefits upon contracting

[20] Human Rights Committee, General Comment 19 (1990).

[21] *Hamer* v. *United Kingdom*, European Commission, (1979) 4 EHRR 139.

[22] *F* v. *Switzerland*, European Court, (1987) 10 EHRR 411. See also *Sharara and Rinia* v. *Netherlands*, European Commission, (1985) 8 EHRR 307: Where an Egyptian citizen illegally residing in the Netherlands was arrested whilst posing for a wedding photograph

a marriage is not an interference with a person's ability to exercise her right to marry.[23] Nor is a clause embodied in an employment contract forbidding policemen from marrying for two years (Zölibatsklausel) an infringement of this right if the law does not prohibit policemen from marrying.[24]

## Aliens

The right to marry and to found a family, and the resulting right to be protected against interference with this right by the public authorities, applies not only to citizens, but also to aliens and stateless persons. When two aliens wish to marry, the authorities are obliged to facilitate the exercise of this right. But it may not be obligatory for aliens who intend to marry to comply with the same formalities for the conclusion of the marriage as those which are normally required of citizens.[25]

## Transsexuals

The European institutions have examined whether a transsexual who undergoes medical treatment and assumes the external form of the opposite sex, is entitled to exercise this right. The question has arisen because of the refusal of certain states to authorize the rectification of the birth certificate. The register of births, it has been contended by these states, records the sex of a person at the time of their birth. The fact that a person has subsequently 'changed' sex gives such person no right to have the 'new' sex mentioned in the register of births or birth certificate. To do so would be to falsify the document. The European Commission saw a clear trend in European legal systems towards legal acknowledgment of gender reassignment. It also found it significant that the medical profession has reached a consensus that transsexualism is an identifiable medical condition, gender dysphoria, in respect of

immediately before his marriage to a Dutch citizen was to take place, and was subsequently taken into custody under the Aliens Act, the right was not infringed because he was released from custody three days later and was married six days after his release. A delay of nine days cannot be regarded as substantial.

[23] *Staarman* v. *Netherlands*, European Commission, (1985) 42 *Decisions & Reports* 162.

[24] Bundesverwaltungsgericht, Federal Republic of Germany, Decision of 22 February 1962, (1962) *Neue Juristische Wochenschrift* 1532.

[25] Bundesverwaltungsgericht, Federal Republic of Germany, 1 BvR 636/68, (1971) *Neue Juristische Wochenschrift* 1509; (1971) *Neue Juristische Wochenschrift* 2121.

which gender reassignment treatment is ethically permissible and can be recommended for improving the quality of life and, moreover, is state funded in certain states. In view of these developments, a government's concerns about the difficulties in assimilating the phenomenon of transsexualism readily into existing legal frameworks cannot be of decisive weight. In the view of the commission, appropriate ways could be found to provide for transsexuals to be given prospective legal recognition of their gender reassignment without destroying the historical nature of the births register. To raise, in advance of any application to marry, an indirect objection based merely on the statements in the birth certificate and the general theory of the rectification of civil status certificates without examining the matter more thoroughly, is to fail to recognize a person's right to marry.[26]

The European Court held in 1986 that, in view of uncertainty as to the essential nature of transsexualism or the legitimacy of surgical intervention in such cases, a state was under no positive obligation to modify its system of birth registration in order to allow the register of births to be updated or annotated to record a new sexual identity or to provide a person with a copy birth certificate or a short-form certificate, excluding any reference to sex at all or sex at the time of birth.[27] Twelve years later, the court was still of the view that, while transsexualism raises complex scientific, legal, moral and social issues, there had been no noteworthy scientific developments to compel it to depart from its earlier decisions, nor a sufficiently broad European consensus on how to deal with the range of complex legal matters resulting from a change of sex. In its view, it still remained established that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures.[28]

In a powerful dissenting opinion in the European Court, Judge Martens has argued for full legal recognition of a transsexual's 'rebirth'. In his view, 'a man' and 'a woman' ought not to be understood only as a man and a woman in the biological sense. First, it cannot be assumed that

[26] *Van Oosterwijck* v. *Belgium*, European Commission, (1978) 21 *Yearbook* 476; *Horsham* v. *United Kingdom*, European Commission, (1997) 27 EHRR 163, at 172–87.

[27] *Rees* v. *United Kingdom*, European Court, (1986) 9 EHRR 56; *Cossey* v. *United Kingdom*, European Court, (1990) 13 EHRR 622.

[28] *Sheffield and Horsham* v. *United Kingdom*, European Court, (1998) 27 EHRR 163.

the stated purpose of the right to marry (to protect marriage as the basis of the family) can serve as a basis for its delimitation: under ECHR 12 it will certainly not be permissible for a state to provide that only those who can prove their ability to procreate are allowed to marry. Second, it is hardly compatible with the *modern*, open and pragmatic construction of the concept of 'family life' which has evolved in the court's case law, to base the interpretation of ECHR 12 merely on the *traditional* view according to which marriage was the pivot of a closed system of family law. On the contrary, that evolution calls for a more functional approach to ECHR 12 as well, an approach which takes into consideration the factual conditions of modern life. He argued that 'sex' must not necessarily be interpreted as 'biological sex'. It is far from self-evident that, when seeking a definition of what is meant by 'sex' in this context, one should choose that which depends on the situation obtaining when the would-be spouses were born, rather than when they want to marry, especially as the sexual condition of an individual is determined by several factors (viz. chromosomal, gonadal, genital, psychological) nearly all of which are (more or less) capable of changing. Only the chromosomal factor is not. He asked *why* this particular factor should be decisive? '*Why* should an individual who – although having since birth the chromosomes of a male – at the moment he wants to marry no longer has testes or a penis but, on the contrary, shows all the (outward) genital and psychological factors of a female (and who is socially accepted as such), nevertheless, for the purpose of determining whether that individual should be allowed to marry a man, be deemed to be still a man himself?'

Judge Martens also argued that marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not *essential* for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. 'That is because marriage is far more than a union which legitimates sexual intercourse and aims at procreating; it is a legal institution which creates a fixed legal relationship between both the partners and third parties (including the authorities); it is a societal bond, in that married people (as one learned writer put it) "represent to the world that their's is a relationship based on strong human emotions, exclusive commitment to each other and permanence"; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential

as the physical one.' ECHR 12 protects the right of all men and women (of marriageable age) to enter into that union and therefore the definition of what is meant by 'men and women' in this context should take into account all these features of marriage. In his view, a transsexual, after successful gender reassignment surgery, should be deemed to belong to the sex he has chosen and therefore should have the right to marry a person of the sex opposite to his chosen one.[29]

### *The right of men and women of marriageable age to found a family*

The right to found a family implies, in principle, the possibility to procreate and live together. Family planning policies, therefore, need to be compatible with this principle, other provisions of international and relevant regional instruments, and should, in particular, not be discriminatory or compulsory.[30] This means that programmes of non-voluntary sterilization or abortion, or the compulsory use of contraceptives, will be unacceptable. A requirement that no more than one child be had is also inconsistent with this principle since the right to found a family is not extinguished upon the birth of the first child. But the capacity to procreate is not an essential condition of marriage; nor is procreation an essential purpose of marriage. A family can be founded by the adoption of children.[31] The relationship between an adoptive parent and his

[29] *B* v. *France*, European Court, (1992) 16 EHRR 1. This view was endorsed in the dissenting opinions of ten judges in *Sheffield and Horsham* v. *United Kingdom*, European Court, (1998) 27 EHRR 163: 'We are convinced therefore in the light of the evolution of attitudes in Europe towards the legal recognition of the post-operative transsexual that the states' margin of appreciation in this area can no longer serve as a defence in respect of policies which lead inevitably to embarrassing and hurtful intrusions into the private lives of such persons. If the state can make exceptions in the case of driving licences, passports and adoptive parents, solutions can be found which respect the dignity and sense of privacy of post-operative transsexuals. As the commission has pointed out, it must be possible for the law to provide for transsexuals to be given prospective legal recognition of their new sexual identity without necessarily destroying the historical nature of the birth register as a record of fact. It is of relevance in this context that the applicants are not claiming that their former identity should, for all purposes, be completely effaced. In short, protecting the applicants from being required to make embarrassing revelations as to their sexual persona need not involve such a root and branch overhaul of the system of birth registration thought necessary in the *Rees* and *Cossey* judgments.'

[30] Human Rights Committee, General Comment 19 (1990).

[31] *Van Oosterwijck* v. *Belgium*, European Commission, (1979) 3 EHRR 581. See also *Hamer* v. *United Kingdom*, European Commission, (1979) 4 EHRR 139: It is for the parties to a marriage to decide whether or not they wish to enter an association in circumstances

adopted child is in principle of the same nature as the traditional family relationship.[32]

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down.[33] Therefore, where the existence of a family tie with a child has been established, the state must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his or her family.[34] The possibility to live

where they cannot cohabit; Constitutional Court of Hungary, Case No.14/1995 (III.13), 13 March 1995, *Magyar Kozlony*, No.20/1995, (1995) 1 *Bulletin on Constitutional Case-Law* 43: The ability to procreate and give birth to children is neither the defining element nor the condition of the notion of marriage. Cf. *Van Oosterwijck* v. *Belgium*, European Commission, (1979) 3 EHRR 581, separate opinion of five members who argued that, having regard to its social purpose, the right to marry required the physical capacity to procreate. They drew support from the references in ECHR 12 to marriageable age and to the different sex of the spouses which in their view was 'obviously intended to refer to the physical capacity to procreate', and from the preparatory documents for UDHR 16(1) from where the words '*age nubile*' in the French version of ECHR 12 were taken 'which makes it clear that the institution of marriage, whose essential purpose is the foundation of a family, requires in principle the capacity to procreate'. According to them, it followed that a state must be permitted to exclude from marriage persons whose sexual category itself implies a physical incapacity to procreate either absolutely (in the case of a transsexual) or in relation to the sexual category of the other spouse (in the case of individuals of the same sex). Such situations whose legal recognition might appear to the national legislator as distorting the essential nature of marriage and its social purpose (*finalité sociale*) justify allowing the State to refuse the right to marry. If this view is taken to its logical conclusion, neither the very elderly nor the physically infirm may be legally competent to marry.

[32] *X* v. *France*, European Commission, Application 9993/82, (1983) 31 *Decisions & Reports* 241, (1983) 5 EHRR 302. The European Commission, however, has refused to recognize a right to adopt children. See *X* v. *Belgium and Netherlands*, Application 6482/74, (1977) 7 *Decisions & Reports* 75: Where an unmarried man of Dutch nationality living in Belgium complained that Dutch law prevented him from adopting an abandoned child whom he had taken care of for several years, the commission declined to intervene: the existence of a couple was fundamental. The adoption of an adolescent by an unmarried person cannot lead to the existence of a family; *X and Y* v. *United Kingdom*, European Commission, Application 7229/75, (1978) 12 *Decisions & Reports* 32: ECHR 12 does not as such guarantee a right to integrate into a family a child who is not the natural child of the couple concerned. Where a couple of Indian origin who were citizens of the United Kingdom, and who were unable to have children, adopted in accordance with Indian law, while on a visit to India, a nephew who was resident in India, the decision of the British immigration authorities to refuse entry to the adopted child did not violate ECHR 12.

[33] *Eriksson* v. *Sweden*, European Court, (1989) 12 EHRR 183.

[34] *Keegan* v. *Ireland*, European Court, 26 May 1994. See also *Marckx* v. *Belgium*, European Court, (1979) 2 EHRR 330; *Johnston* v. *Ireland*, European Court, (1986) 9 EHRR 203.

together implies that appropriate measures be taken, both at the internal level and, as the case may be, in co-operation with other states, to ensure the unity or reunification of families, particularly when their members are separated for political, economic, or similar reasons.[35] But while the right to found a family is an absolute right, it does not mean that a person must at all times be given the actual possibility to procreate his descendants. The situation of a lawfully convicted person detained in prison falls under his own responsibility, and his right to found a family is not otherwise infringed.[36]

### *No marriage shall be entered into without the free and full consent of the intending spouses*

At the drafting stage of ICCPR 23, emphasis was laid on the fact that both partners to a marriage must give their consent.[37] The purpose of this principle is to ensure that marriage is entered into completely voluntarily and to prevent marriages contracted under duress or threats. The word 'free' is intended to eliminate any compulsion by the parents, the other spouse, the authorities, or by anyone else.[38]

### *States Parties . . . shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution*

Both in the Commission on Human Rights and in the Third Committee, opinion was sharply divided over the inclusion in ICCPR 23 of a provision concerning equal rights for men and women relating to marriage.[39] Finally, as a compromise between those who sought an express guarantee of the equality of spouses in marriage and those who recognized the complexity of the question and the difficulties which a categorical provision would cause to some governments, it was agreed to preface the paragraph with the expression: 'States Parties to the present Covenant

[35] Human Rights Committee, General Comment 19 (1990).

[36] *X* v. *Germany*, European Commission, Application No. 892/60 (1961) 4 *Yearbook* 240, (1961) 6 *Collection of Decisions* 17.

[37] UN document A/2929, chapter VI, section 169.

[38] Maya Kirilove Eriksson, 'Article 16' in Asbjorn Eide et al (eds.), *The Universal Declaration of Human Rights: a Commentary* (Norway: Scandinavian University Press, 1992), 243, at 246.

[39] See UN document A/2929, chapter VI, sections 155–162; A/5000, sections 81–4.

shall take appropriate steps to ensure'.[40] There was criticism also of the inclusion in ICCPR 23 of any reference to dissolution of marriage. It was pointed out, however, that the phrase referred to dissolution of marriage by the death of one of the partners as well as by divorce. It was not intended to imply that divorce was favourably regarded as a means of dissolving the marriage contract. It was important to ensure that, in countries where divorce was recognized, both spouses should enjoy equal rights in all matters relating thereto.[41]

Equality as to marriage requires that no sex-based discrimination may occur in respect of the acquisition or loss of nationality by reason of marriage. Similarly, each spouse has the right to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name. During marriage, the spouses have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children, and administration of assets.[42] This equality continues to be applicable to arrangements regarding legal separation or dissolution of marriage. Any discriminatory treatment in regard to the grounds and procedures for separation or divorce, custody of children, maintenance or alimony, visiting rights, or the loss or recovery of parental authority, is prohibited, subject of course to the paramount interest of the children.[43]

[40] UN document A/5000, section 84. On behalf of the fifteen sponsors of the amended version, the representative of the Philippines declared that this expression 'might be interpreted as permitting Contracting States to take appropriate measures progressively to assure the equality of the spouses as to marriage, during marriage and at its dissolution'.

[41] UN document A/2929, chapter VI, section 163. See *Johnston* v. *Ireland*, European Court, (1986) 9 EHRR 203, European Commission, (1986) 8 EHRR 214: In ECHR 12 where no reference is made to dissolution, the words 'right to marry' cover the formation of marital relationships but not their dissolution. Cf. the separate opinion of Judge De Meyer who argued that the absence of any possibility of seeking the dissolution of a marriage, in so far as neither spouse can remarry so long as his wife or husband is alive, constitutes a violation of the 'right to marry' as regards each of the spouses and each of the new partners.

[42] Human Rights Committee, General Comment 19 (1990). But see *Salem* v. *Chief Immigration Officer*, Supreme Court of Zimbabwe, [1994] 1 LRC 354: The primary duty of maintaining the household rested upon the husband. 'It is he who has to provide the matrimonial home as well as food, clothing, medical and dental care, and whatever else is reasonably required. He must do so on a scale commensurate with the social position, financial means and standard of living of the spouses. He cannot evade that responsibility by showing that his wife is receiving assistance from blood relations, friends or charitable institutions', per Gubbay CJ.

[43] Human Rights Committee, General Comment 19 (1990).

*In the case of dissolution, provision shall be made for the necessary protection of any children*

At the drafting stage of ICCPR 23, some representatives considered that provision should be made for the protection of all children, including those born out of wedlock, who might be affected by the dissolution of a marriage, while others were of the view that an article dealing with marriage should refer only to children of the marriage. After considerable discussion it was decided in the Third Committee, on the proposal of Ghana, India and the United Kingdom, to replace the words 'protection of any children of the marriage' with the expression 'necessary protection of any children'.[44] In the circumstances, a recent statement of the Human Rights Committee that 'the protection of the second sentence refers only to children of the *marriage* which is being dissolved,[45] appears to have been made without reference to the *travaux préparatoires*.

In the absence of special circumstances, it cannot be deemed to be in the 'best interests' of children virtually to eliminate one parent's access to them.[46] In fact, ICCPR 23(4) grants, barring exceptional circumstances, a right to regular contact between children and both parents.[47] The unilateral opposition of one parent generally does not constitute such an exceptional circumstance.[48]

*Special protection should be accorded to mothers during a reasonable period before and after childbirth*

The ILO Maternity Protection Convention prescribes at least twelve, weeks maternity leave, including a period of compulsory leave after confinement of not less than six weeks. During this period, the woman employee will be entitled to receive cash and medical benefits. It is not lawful for her employer to give her notice of dismissal during such period

[44] A/5000, sections 78, 85.

[45] *Santacana* v. *Spain*, Human Rights Committee, Communication No.417/1990, HRC 1994 Report, Annex IX.P.

[46] *Fei* v. *Colombia*, Human Rights Committee, Communication No.514/1992, HRC 1995 Report, Annex X.J.

[47] *Lippmann* v. *France*, Human Rights Committee, Communication No.472/1991, HRC 1996 Report, Annex IX.A.

[48] *Fei* v. *Colombia*, Human Rights Committee, Communication No.514/1992, HRC 1995 Report, Annex X.J.

of absence, or to give her notice of dismissal at such a time that the notice would expire during such absence.[49] She is entitled to resume her employment after her twelve-week absence on maternity leave.[50] If she is nursing her child, she is entitled to interrupt her work for that purpose at prescribed times.[51] Under the European Social Charter, (which requires 'sufficient time' to be provided for this purpose), working women who feed their children (breast-feeding or mixed-feeding) are entitled to two periods of rest a day for a year for the purpose of feeding. In cases where the employer has not provided a crecèhe or nursing room for mothers, these periods of rest are of one hour each (otherwise one-half hour) and entitle the mother to leave the premises. These periods are deemed to be hours of work and remunerated as such.[52]

[49] Articles 3, 4. [50] ESC, Committee of Independent Experts, Conclusions V, 76.
[51] ILO Maternity Protection Convention 1952, Art. 5.
[52] ESC Committee of Independent Experts, Conclusions I, 51.

# 25

# The rights of the child

## Texts

*International instruments*

### Universal Declaration of Human Rights (UDHR)

25. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

### International Covenant on Civil and Political Rights (ICCPR)

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.

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

10. The states parties . . . recognize that:

(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which

the paid employment of child labour should be prohibited and punishable by law.

*Regional instruments*

American Declaration of the Rights and Duties of Man (ADRD)

7. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.
30. It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honour their parents always and to aid, support and protect them when they need it.

American Convention on Human Rights (ACHR)

17. (5) The law shall recognize equal rights for children born out of wedlock and those born in wedlock.
19. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

African Charter on Human and Peoples' Rights (AfCHPR)

18. (3) The state shall . . . ensure protection of the rights of the woman and the child as stipulated in international declarations and conventions.

*Related texts:*

European Social Charter 1961, I (7), (17); II, Articles 7, 17.
Convention on the Rights of the Child 1989.
Geneva Declaration of the Rights of the Child 1924, adopted by the Assembly of the League of Nations.
Declaration of the Rights of the Child 1959.
Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples 1965.
Declaration on the Protection of Women and Children in Emergency and Armed Conflict 1974.
Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally 1986.

ILO Conventions:

No. 5: Fixing the Minimum Age for Admission of Children to Industrial Employment 1919.
No. 7: Fixing the Minimum Age for Admission of Children to Employment at Sea 1920.
No. 10: Concerning the Age for Admission of Children to Employment to Agriculture 1921.
No. 15: Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers 1921.
No. 33: Concerning the Age for Admission of Children to Non-Industrial Employment 1932.
No. 58: Fixing the Minimum Age for the Admission of Children to Employment at Sea (revised) 1936.
No. 59: Fixing the Minimum Age for Admission of Children to Industrial Employment (revised) 1937.
No. 60: Concerning the Age for Admission of Children to Non-Industrial Employment (revised) 1937.
No. 112: Concerning the Minimum Age for Admission to Employment as Fishermen 1959.
No. 123: Concerning the Minimum Age for Admission to Employment Underground in Mines 1965.
No. 138: Concerning Minimum Age for Admission to Employment 1973.
No. 6: Concerning the Night Work of Young Persons Employed in Industry 1919.
No. 20: Concerning Night Work in Bakeries 1925.
No. 79: Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations 1946.
No. 90: Concerning the Night Work of Young Persons Employed in Industry (revised) 1948.
No. 13: Concerning the Use of White Lead in Painting 1921.
No. 115: Concerning the Protection of Workers against Ionising Radiations 1960.
No. 136: Concerning Protection against Hazards of Poisoning Arising from Benzene 1971.
No. 16: Concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea 1921.
No. 73: Concerning the Medical Examination of Seafarers 1946.

No. 77: Concerning Medical Examination for Fitness for Employment in Industry of Children and Young Persons 1946.
No. 78: Concerning Medical Examination of Children and Young Persons for Fitness for Employment in Non-Industrial Occupations 1946.
No. 113: Concerning the Medical Examination of Fishermen 1959.
No. 124: Concerning Medical Examination of Young Persons for Fitness for Employment Underground in Mines 1965.

## Comment

The proposal for the inclusion in the ICCPR of a specific right relating to the child was first made in the Third Committee in 1962 by Poland. Yugoslavia co-sponsored the first draft of ICCPR 24, and the proposal received the enthusiastic support of non-Western states such as Chile, the United Arab Republic, Guatemala, Mauritania, Peru, Lebanon, Afghanistan, Brazil, Iran, Nigeria, Panama and the Congo Brazzaville.[1] Since the requirements of the child are in many respects different from those of the adult, it was argued that a separate article should be devoted to the subject. In particular, it was felt that children stood in need of special measures of protection.[2] The Declaration of the Rights of the Child had already recognized that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.[3] ICCPR 24 and ACHR 19 recognize the right of every child to such 'measures of protection' from the family, society and the state as are required by his or her status as a minor. ICESCR 10 requires protection from 'economic and social exploitation'. Additionally, ICCPR 24 requires that every child should (a) be registered immediately after birth; (b) shall have a name; and (c) shall acquire a nationality. While ECHR does not contain an equivalent provision, AfCHPR 18 requires conformity with the provisions of international instruments relating to the child. The Convention on the Rights of the Child, which was adopted unanimously by the General Assembly of the United Nations on 20 November 1989 and entered into

[1] UN document A/5365, sections 22, 23.
[2] UN document A/5365, sections 19, 20, 21; A/5655, sections 68, 69.
[3] Declaration of the Rights of the Child 1959, preamble.

force ten months later, now contains the most comprehensive statement of children's rights.

## Interpretation

### *Every child*

Although neither the term 'child' in ICCPR 24, nor the expression 'minor child' in ACHR 17, is defined, 'a child', for the purposes of the Convention on the Rights of the Child, means 'every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'.[4] While each state may determine in the light of the relevant social and cultural conditions, the age at which the child attains his majority in civil matters and assumes criminal responsibility; the age at which a child is legally entitled to work; the age at which a person is treated as an adult under labour law; and the age at which a 'juvenile' is considered adult for the purposes of ICCPR 10(2) and (3), the Human Rights Committee requires that the age for such purposes should not be set unreasonably low. In any event, a state cannot absolve itself from its obligations under the ICCPR relating to persons under the age of eighteen years notwithstanding that they have reached the age of majority under domestic law.[5]

### *without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth*

Although the general non-discrimination requirement in ICCPR 2 also applies to children, it was considered that, having regard to the importance of ensuring equality of treatment and of opportunity for all children, a special clause guaranteeing the rights of the child without any discrimination ought to be included, even at the risk of some repetition.[6] In particular, there was general agreement that children born out of wedlock should be protected from discrimination.[7] Accordingly, since the

[4] Article 1.

[5] Human Rights Committee, General Comment 17 (1989).

[6] UN document A/5365, section 23.

[7] UN document A/5365, sections 24, 75. In *Minister of Home Affairs* v. *Fisher* [1979] 3 All ER 21, the Privy Council, on appeal from the Supreme Court of Bermuda, held that the term 'child' in s.11(5)(d) of the Constitution of Bermuda was not restricted to legitimate children. In reaching this decision, the Judicial Committee was influenced by UDHR 25(2), the Declaration of the Rights of the Child, and by ICCPR 24(1).

non-discrimination clause contained in ICCPR 24 relates specifically to the measures of protection referred to in that provision, legislation and practice must ensure that such measures of protection are designed to remove all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between legitimate children and children born out of wedlock.[8]

*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*

The right to special measures of protection belongs to every child because of his status as a minor.[9] Therefore, the implementation of ICCPR 24 entails the adoption of special measures to protect children, in addition to those that states are required to take under ICCPR 2 to ensure that everyone enjoys the rights provided for in the covenant.[10] The latter include measures designed to afford minors greater protection than adults. For example, the death penalty cannot be imposed for crimes committed by persons under eighteen years of age; accused juvenile persons lawfully deprived of their liberty shall be separated from adults and are entitled to be brought as speedily as possible for adjudication; convicted juvenile offenders shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status, the aim being to foster reformation and social rehabilitation; and an exception may be made as to the right to publicize a judgment in a suit at law or a criminal case when the interest of the minor so requires.

Since the measures to be adopted are not specified in ICCPR 24 and it is for each state to determine them in the light of the protection needs of children in its territory and within its jurisdiction, the Human Rights Committee has noted that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the covenant, may also be economic, social and cultural. 'For example, every possible economic and social measure should be taken to reduce

[8] Human Rights Committee, General Comment 17 (1989).

[9] In the Third Committee it was stressed that children, in view of their weakness and immaturity, stood in need of special protective measures in fields covered by both covenants. While primary responsibility for the upbringing of the child rested with the family, legal protection was needed for children who were neglected, ill-treated, abandoned or orphaned. It was also noted that under modern conditions, society and the state assisted the family in providing for the child's development. See UN document A/5655, section 71.

[10] Human Rights Committee, General Comment 17 (1989).

infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means. In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the covenant. Particularly important are measures adopted to ensure that children do not take direct part in armed conflicts.'[11]

Among the dangers identified in the Convention on the Rights of the Child as being those to which children are especially vulnerable, and therefore need to be protected against, are discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of parents, legal guardians or family members (Article 2); separation from parents against their will (Article 9); illicit transfer (Article 11); physical or mental violence, injury or abuse, neglect or negligent treatment (Article 19); economic exploitation (Article 32); illicit use of narcotic drugs and psychotropic substances (Article 33); sexual exploitation and sexual abuse (Article 34); and the abduction of, the sale of, or traffic in, children (Article 35).

Responsibility for guaranteeing children the necessary protection lies with the family, society and the state. Although ICCPR 24 does not indicate how such responsibility is to be apportioned, it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the state concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognized in the covenant. However, since it is quite common for the father and mother to be gainfully employed outside the home, society, social institutions and the state need to discharge their responsibility to assist the family in ensuring the protection of the child. Moreover, in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the state should intervene to restrict parental authority and the child may be separated from his family when circumstances so require. If the marriage is dissolved, steps should be taken,

[11] Human Rights Committee, General Comment 17 (1989).

keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents. Special measures of protection, therefore, need to be taken to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.[12]

### *Every child shall be registered immediately after birth and shall have a name*

Every child has the right to be registered immediately after birth and to have a name. This provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality. Providing for the right to have a name is of special importance in the case of children born out of wedlock. The main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights recognized in the ICCPR.[13]

### *Every child has the right to acquire a nationality*

While the purpose of this provision is to prevent a child from being afforded less protection by society and the state because he or she is stateless, it does not necessarily oblige a state to confer its nationality on every child born in its territory. However, a state is required to adopt every appropriate measure, both internally and in co-operation with

[12] Human Rights Committee, General Comment 17 (1989). See *Drbal* v. *Czech Republic*, Human Rights Committee, Communication No.498/1992, HRC 1994 Report, Annex X.N, individual opinion of Bertil Wennegren: The failure of a court to deal in an appropriate way with a dispute regarding the custody of a child could work to the detriment of the best interests of the child and thereby raise an issue under ICCPR 24; *Laureano* v. *Peru*, Human Rights Committee, Communication No.540/1993, HRC 1996 Report, Annex VIII.P: Where a sixteen-year old girl was abducted by unknown armed men and the authorities did not investigate her disappearance, she did not benefit from the special measures of protection she was entitled to under ICCPR 24. See also *De Gallicchio* v. *Argentina*, Human Rights Committee, Communication No.400/1990, HRC 1995 Report, Annex X.B.

[13] Human Rights Committee, General Comment 17 (1989).

other states, to ensure that every child acquires a nationality at birth. In this connection, no discrimination with regard to nationality may be made under the law as between legitimate children and children born out of wedlock or of stateless parents, or based on the nationality status of one or both of the parents.[14]

[14] Human Rights Committee, General Comment 17 (1989). At the drafting stage there was agreement that every effort should be made to prevent statelessness among children. See UN document A/5365, section 25.

# 26

# The right to participate in public life

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right to equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

#### International Covenant on Civil and Political Rights (ICCPR)

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.

*Regional instruments*

## American Declaration of the Rights and Duties of Man (ADRD)

20. Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.
24. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.
32. It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.
33. It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien.

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

16. Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

## ECHR Protocol 1 (ECHR P1)

3. The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

## American Convention on Human Rights (ACHR)

23. (1) Every citizen shall enjoy the following rights and opportunities:
    (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
    (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret

ballot that guarantees the free expression of the will of the voters; and

(c) to have access, under general conditions of equality, to the public service of his country.

(2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph, exclusively on the basis of age, nationality, residence, language, education, civil and mental capacity, and conviction by a competent judge in criminal proceedings.

### African Charter on Human and Peoples' Rights (AfCHPR)

13. (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

(2) Every citizen shall have the right of equal access to the public service of his country.

*Related texts:*

Convention on the Political Rights of Women 1952, Articles I–III.

Convention on the Elimination of All Forms of Racial Discrimination 1965, Article 5.

Convention on the Elimination of All Forms of Discrimination against Women 1979, Articles 7, 8.

General Principles on Freedom and Non-Discrimination in the Matter of Political Rights, ECOSOC resolution 1786 (LIV).

The Montevideo Declaration on Democratic Culture and Governance, adopted by the International Conference on Democratic Culture and Development: Towards the Third Millennium in Latin America, organized by UNESCO and the Pax Institute, Uruguay, November 1990.

## Comment

The right to participate in public life is related to, but distinct from, the right of peoples to self-determination which is recognized in ICCPR 1. By virtue of the latter, peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution

or government. The former deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. In particular, it seeks to give effect to the principle expressed in UDHR 21 that the will of the people is the basis of the authority of government.[1] However, the provisions of ICCPR 1 may be relevant in the interpretation of the rights protected by ICCPR 25. Accordingly, some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation of minorities, in particular, indigenous peoples.[2]

ICCPR 25 and ACHR 23 recognize three distinct but related rights of citizens. They are (a) the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) the right and the opportunity 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; and (c) the right and the opportunity to have access, on general terms of equality, to public service in his country. ICCPR 25 requires that these rights and opportunities, which may be enjoyed without any of the distinctions mentioned in ICCPR 2, shall not be subjected to 'unreasonable restrictions'. ACHR 23 specifies the only grounds on which the exercise of these rights and opportunities may be regulated by law, namely, age, nationality, residence, language, education, civil and mental capacity, and conviction by a competent judge in criminal proceedings.

In ECHR P1, 3, the High Contracting Parties undertake to hold 'free elections at reasonable intervals by secret ballot' under conditions which will ensure the 'free expression of the opinion of the people' in the choice of 'the legislature'. Although this specific undertaking is narrower in scope than the right referred to in (b) above, in that it is confined to elections to the legislature and does not mention all the elements of that right either, the European Commission has determined that the undertaking to hold 'free elections' implies the recognition of universal suffrage and guarantees, in principle, the right to vote and the right to

[1] Human Rights Committee, General Comment 25 (1996).

[2] *Rehoboth Baster Community* v. *Namibia*, Human Rights Committee, Communication No. 760/1997, HRC 2000 Report, Annex IX.M, per individual concurring opinion of M. Scheinin.

be a candidate for election.[3] AfCHPR 13, on the other hand, recognizes the right of every citizen to 'participate freely' in the 'government' of his country, either 'directly or through freely chosen representatives' in accordance with law, as well as the right of 'equal access' to the public service of his country. Free elections are not referred to, but may be implied as being a prerequisite to the emergence of 'freely chosen representatives'.

In order to ensure the full enjoyment of the right to participate in public life, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the freedom of expression, the right of peaceful assembly, and the freedom of association, and the freedom to engage in political activity individually or through political parties or other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas. Indeed, the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the effective enjoyment of this right. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. The state must ensure that in their internal management, political parties respect the applicable provisions of ICCPR 25/ACHR in order to enable citizens to exercise their rights thereunder.[4]

## Interpretation

### *Every citizen*

The right to participate in public life is guaranteed, not to 'everyone' or to 'every human being', but to 'every citizen'. Its enjoyment, however, is not restricted to citizens; a state may choose to extend its application

[3] *Moureaux* v. *Belgium*, European Commission, (1983) 33 *Decisions & Reports* 97.
[4] Human Rights Committee, General Comment 25 (1996).

to others who live within its territory. Nor is this right enjoyed only by citizens of sovereign states; they apply with equal force to the inhabitants of non-self-governing colonial territories.[5]

### *shall have the right and the opportunity*

A citizen must be afforded the opportunity of exercising the right to seek election even when it is apparent that he will not be elected. Therefore, it is a violation of this right to tamper with the electoral register in order to prevent a person from seeking election to public office. In Cyprus, the leader of a political party with a very negligible following, who intended to contest the vacant office of President of the Republic, found that the entry in the electoral register relating to his name and identity card number had been altered, thereby preventing him from submitting his nomination paper. He testified to a conversation he had had with the returning officer in the course of which the latter informed him that all the other parties had agreed on a single candidate, thereby avoiding unnecessary expenditure on a election. Holding that the falsification of the register had prevented the applicant from being nominated as a candidate, the Supreme Court awarded damages payable by the state.[6]

The right to vote includes the right (or option) not to vote.[7] But when a voter in Austria complained that he was obliged by law to vote in the presidential election, though he could not support either of the two candidates who were seeking election, the European Commission advised him to deposit either a blank or a spoiled ballot paper.[8]

### *without any of the distinctions mentioned in ICCPR 2*

ICCPR 2 requires the state to respect and to ensure to all citizens the rights defined in this article 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.[9] The Human

[5] UN document A/5000, s.92.

[6] *Pitsillos* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1984) 1 CLR 780.

[7] *Pingouras* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1987) 2 CLR 18; [1989] LRC (Const) 201.

[8] *X* v. *Germany*, European Commission, Application 2728/66, (1967) 10 *Yearbook* 336.

[9] But see *Review of the Constitutionality of the Requirements of Knowledge of the Estonian Language*, Decision of the Supreme Court of Estonia, 5 February 1998, (1998) 1 *Bulletin on Constitutional*

Rights Committee has observed that if a distinction is drawn between those who are entitled to citizenship by birth and those who acquire it by naturalization, a question of compatibility with ICCPR 2 could arise.[10]

The right of equal access to elected offices is a right which belongs to all citizens of the country and does not depend on their membership of any political party or movement. A citizen who is not a member of a political party can also be elected to a seat in parliament.[11]

### *without unreasonable restrictions*

The use of the expression 'without unreasonable restrictions' to qualify the exercise of the right to participate in public life recognizes that the right to vote may be denied to certain categories of persons such as minors and the mentally ill, and that the right to be elected to public office and the right of access to public service may be subjected to certain qualifications.[12] But any conditions which apply to the exercise of this right should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen.[13]

The exercise of this right by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity

*Case-Law* 37: The enactment of a requirement of knowledge of the Estonian language for candidates to the *Riigikogu* and to the representative bodies of local government is justified.

[10] Human Rights Committee, General Comment 25 (1996).

[11] Decision of the Constitutional Court of the Slovak Republic, 7 January 1998, (1998) 1 *Bulletin on Constitutional Case-Law* 111.

[12] UN documents A/2929, chap.VI, s.177; A/5000, s.93. A commentator has warned, however, that there may be cases in which it is not easy to distinguish between reasonable restrictions and improper discrimination: 'In states where a large majority of the population is able to read and write and where sufficient educational facilities are available, a literacy test before exercising the right to vote may be reasonable and legitimate. If, however, a literacy test has the consequence of excluding an entire racial group from the right to participate in elections – as in certain South American states – and especially if there is evidence that such expulsion is its purpose, the test would be illegal as a measure of racial discrimination': Karl Josef Partsch, 'Freedom of Conscience and Expression, Political Freedom' in Louis Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), 209.

[13] Human Rights Committee, General Comment 25 (1996).

may be a ground for denying a person the right to vote or to hold office.[14] The question whether restrictions are reasonable or unreasonable has to be considered objectively. Regard must be had to the nature of the public affairs the conduct of which is involved and the nature of the restrictions on the right and the opportunity to participate and any reason for such restrictions. What may be considered reasonable or unreasonable restrictions in one era may be different from those in quite a different era.[15]

The Federal Court of Appeal in Canada has prescribed two central criteria which have to be satisfied in order to determine whether a restriction imposed by law is reasonable (and, in the Canadian context, 'demonstrably justified in a free and democratic society'). First, the objective which the restriction is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, once a sufficiently significant objective is recognized, then the party invoking it must show that the means chosen are reasonable (and demonstrably justified). This involves a proportionality test where the interests of society are balanced with those of the individual. Three important components of the proportionality test are: (i) The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. (ii) The means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question. (iii) There must be a proportionality between the effects of the measures which are responsible for limiting the right or freedom, and the objective which has been identified as of 'sufficient importance'. Applying this test, the court examined a provision in the Canada Elections Act which enumerated the persons who were not qualified to vote at an election. In its view, the chief electoral officer and his assistant, and the returning officer for each electoral district had been excluded to guarantee the fairness of the electoral process: the referee, umpire and linesmen ought not to take part in the game. The exclusion of judges was aimed not at the fairness of elections but at the appearance of impartiality and freedom from partisanship of those who were called upon to decide disputes between

[14] Human Rights Committee, General Comment 25 (1996).

[15] *Secretary for Justice* v. *Chan Wah*, Court of Final Appeal, Hong Kong SAR, [2000] 3 HKLRD 641.

the state and its citizens. The exclusion of persons suffering from mental disease had for its purpose a guarantee of an absolute minimum of intellectual capacity in those who exercised the franchise. A disqualification imposed by law for corrupt or illegal practices was manifestly a punitive provision attaching to past conduct related to the electoral process.[16]

## The right and opportunity to vote

The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as a minimum age. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership may not be a condition of eligibility to vote, nor a ground of disqualification. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension must be proportionate to the offence and the sentence.[17]

A residence requirement is not an unreasonable restriction. Declaring inadmissible a complaint by a United Kingdom citizen residing in Paris who had not been permitted to participate in national parliamentary elections, while diplomats and servicemen living abroad could if they wished, the European Commission observed that the reasons justifying the residence requirement were: first, the assumption that a non-resident citizen is less directly or continuously interested in, and has less day-to-day knowledge of its problems; secondly, the impracticability for parliamentary candidates of presenting the different electoral issues to citizens abroad so as to secure a free expression of opinion; thirdly, the need to prevent electoral fraud, the danger of which is increased in uncontrolled postal votes; and finally, the link between the right of representation in the parliamentary vote and the obligation to pay taxes, not always imposed on those in voluntary and continuous residence abroad. It was legitimate to distinguish diplomats and servicemen from those who had chosen to leave their country and take up residence abroad. The former were not living abroad voluntarily but had been sent to a country other than their own by their government in the performance of services to be rendered to their country. They therefore remained closely linked to their country and under the control of their government, and

[16] *Belczowski* v. *Canada*, Federal Court of Appeal of Canada, (1992) 90 DLR (4th) 330.
[17] Human Rights Committee, General Comment 25 (1996).

that special situation explained why they were not regarded as being non-residents although physically outside their country.[18]

A Uruguayan law which prohibited, for a period of fifteen years, the right to engage in any activity of a political nature, including the right to vote, by persons who had previously been candidates for elective office on the list of Marxist or pro-Marxist political parties or groups which were declared illegal by decrees made some time after those elections, violated this right. The measure applied 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, violence. Apart from the requirement in ICCPR 2 that no one may be subjected to such sanctions merely because of his or her political opinions, the principle of proportionality requires that a measure as harsh as the deprivation of all political rights for a period of fifteen years be specifically justified.[19]

In Hong Kong, the restriction imposed by the government on directorate officers in the civil service serving as members of the Selection Committee (the body established by the People's Republic of China to select the Chief Executive and the members of the provisional legislature

[18] *X* v. *United Kingdom*, European Commission, Application 7566/76, (1978) 9 *Decisions & Reports* 121. Electoral rolls must be brought up to date: Decision of the Constitutional Court of Turkey, Case No.1994/78, 16 November 1994, (1994) 3 *Bulletin on Constitutional Case-Law* 295; 'Place of residence' means not only 'permanent place of residence', but also 'principal place of residence'. Temporary stays of citizens outside their place of residence do not justify striking them from the register of their place of permanent or principal residence. For this reason, the absence of citizens at the time of registration for the electoral roll may not be used as a reason for refusing to register them on the electoral roll of the corresponding constituency: Decision of the Constitutional Court of Russia, 24 November 1995, (1995) 3 *Bulletin on Constitutional Case Law* 343.

[19] *Silva* v. *Uruguay*, Human Rights Committee, Communication No.34/1978, HRC 1981 Report, Annex XII; *Massera* v. *Uruguay*, Human Rights Committee, Communication No.R.1/5, HRC 1979 Report, Annex VII; *Weismann de Lanza* v. *Uruguay*, Human Rights Committee, Communication No.8/1977, HRC 1980 Report, Annex VI; *Pietraroia* v. *Uruguay*, Human Rights Committee, Communication No.R.10/44, HRC 1981, Annex XVI. The European Commission, however, has upheld the validity of laws enacted after World War II which sought to deprive persons of the right to vote for extraordinarily long periods. See *X* v. *Netherlands*, Application 6573/74, (1975) 1 *Decisions & Reports* 87: a law which deprived the applicant for life of the right to vote in consequence of a conviction of 'uncitizenlike conduct' pronounced by a special Dutch court after the war; *X* v. *Belgium*, Application 8701/79, (1980) 18 *Decisions & Reports* 250: a person who had, in 1948, been convicted by a Belgian military court and sentenced to twenty years' imprisonment for collaboration with the enemy, and had thereby been permanently deprived of the right to vote. Both these cases concerned persons who had been convicted in wartime of offences against public safety.

of the Hong Kong Special Administrative Region) was both reasonable and rational. The directorate officers are a well-recognized class of civil servants. The government has been consistent in treating them separately from other civil servants in terms of their right to join political organizations, to participate in political activities, to nominate candidates for election or to indicate their support for candidates to the legislative council in any other ways, in order to maintain their political neutrality. Service on the Selection Committee was a high-profile political activity. Given the colonial government's stance on the provisional legislative council, a senior civil servant would find himself in an invidious position of conflict of interest if he sat on the Selection Committee. In all democratic societies, the general principle has always been that civil servants, particularly senior civil servants, should remain neutral and apolitical so that there is no perception or accusation of bias, or conflict of interest and that they are seen to be loyal to the government of the day.[20]

Is it unreasonable to deny prisoners the franchise? The Human Rights Committee has stated that persons who are deprived of their liberty but who have not been convicted should not be excluded from exercising the right to vote.[21] In Canada, the Federal Court was unable to assign any legitimate legislative purpose to a law that purported to exclude 'every person undergoing punishment as an inmate in any penal institution for the commission of any offence'. It rejected the submission that the exclusion of prisoners satisfied three objectives: (a) to affirm and maintain the sanctity of the franchise; (b) to preserve the integrity of the voting process; and (c) to punish offenders. The court found the legislation to be both too broad and narrow. 'It is too broad in that the exclusion catches not only the crapulous murderer but also the fine defaulter who is in prison for no better reason than his inability to pay.' The same was true of the alleged objective relating to the integrity of the process since it 'catches those who are serving their sentences in an open prison setting where they live in the midst of their communities; it fails to catch those who, from illness or incapacity, are institutionalized and unable to participate fully in the democratic process. It also entirely overlooks those who through disinterest or distraction do not so participate.'

[20] *Senior Non-Expatriate Officers' Association v Secretary for the Civil Service*, High Court of the Hong Kong SAR, (1996) 7 HKPLR 91.

[21] Human Rights Committee, General Comment 25 (1996).

With regard to the alleged objective of punishment, 'the legislation bore no discernible relationship to the quality or nature of the conduct being punished. Indeed, it was difficult not to conclude that, if it was imposing punishment, such punishment was for imprisonment rather than for the commission of an offence.'[22]

The Human Rights Committee has emphasized that the state must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of this right.[23]

Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods such as

[22] *Belczowski* v. *Canada*, Federal Court of Appeal of Canada, (1992) 90 DLR ($4^{th}$) 330, per Hugessen JA. See also *August* v. *The Electoral Commission*, Constitutional Court of South Africa, [2000] 1 LRC 608: It is unconstitutional, in the absence of any disqualifying legislative provision, to preclude prisoners from registering as voters and/or voting in the general elections; *Woods* v *Minister of Justice, Legal and Parliamentary Affairs*, Supreme Court of Zimbabwe, [1994] 1 LRC 359, at 362, per Gubbay: 'The view no longer holds firm that by reason of his crime a prisoner sheds all basic rights at the prison gate. Rather he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the corrections system.' Cf. *H* v. *Netherlands*, Application 9914/82, (1983) 37 *Decisions & Reports* 242, where the European Commission upheld the Netherlands Electoral Law which denied the right to vote for a period of three years to any person sentenced to a term of imprisonment exceeding one year, regardless of the nature of the offence (the applicant's conviction had resulted from his unconditional anti-militarist stance) and without exception. The commission noted that several states parties to the ECHR had enacted similar legislation and that it was, therefore, bound to recognize that each state, in the exercise of its margin of appreciation, may restrict the right to vote in respect of convicted persons. (*Note*: The language of ECHR PI, 3 is significantly different from that of ICCPR 25).

[23] Human Rights Committee, General Comment 25 (1996).

photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.[24]

### The right and opportunity to be elected

The imposition of a minimum age for election to the legislature is not an unreasonable restriction on the right to be elected. The European Commission upheld a provision in the Belgian Constitution which required candidates seeking election to the House of Representatives to have reached the age of twenty-five years and prospective Senators to be not less than forty years of age. The former 'can obviously not be regarded as an unreasonable or arbitrary condition, or one likely to interfere with the free expression of the opinion of the people in the choice of the legislature'. As for the latter, 'in a bicameral system it is not arbitrary to arrange things so that one House is composed of those who by virtue of their age have acquired greater political experience'.[25] The imposition of a residence requirement for candidates may serve to ensure that candidates have a sufficient connection with the territory. But there is no rational basis for imposing a ten-year residential requirement.[26]

A restriction that seeks to guarantee the democratic decision-making process by avoiding conflicts of interest is reasonable. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the protected right.[27] The Human Rights Committee upheld a Netherlands law which stated that membership of the municipal council is incompatible with employment as a civil servant in subordination to local authorities. Accordingly, a person who at the time of his election to the council was serving as a police officer subordinated for matters of public order to the mayor, who was himself accountable to the council for measures taken in that regard, was validly excluded.[28]

[24] Human Rights Committee, General Comment 25 (1996).

[25] *W, X, Y, and Z* v. *Belgium*, European Commission, Applications 6745–6, (1975) 18 *Yearbook* 236.

[26] *R* v. *Apollonia Liu, ex parte Lau San-ching*, High Court of the Hong Kong SAR, 22 February 1995. See also Decision of the Constitutional Court of the Czech Republic, IV.US 420/2000, 10 October 2000, (2000) 3 *Bulletin on Constitutional Case-Law* 474.

[27] Human Rights Committee, General Comment 25 (1996).

[28] *Debreczeny* v. *Netherlands*, Human Rights Committee, Communication No.500/1992, HRC 1995 Report, Annex X.H. The committee explained why a similar restriction did not apply

The exclusion of certain categories of holders of public office, including salaried public servants and members of staff of public law entities and public undertakings, from standing for election and being elected in any constituency where they have performed their duties for more than three months in the three years preceding the elections (despite a candidate's prior resignation) serves a dual purpose: (i) ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates); and (ii) protecting the electorate from pressure from such officials who, because of their position, are called upon to take many, sometimes important, decisions and enjoy substantial prestige in the eyes of the ordinary citizen.[29]

The rule whereby the clergy of recognized religions are ineligible for, and prohibited from, standing in municipal elections is based on legitimate and objective criteria. The purpose of the ineligiblity is to ensure that voters can form their opinion unhindered and express themselves freely by avoiding the dangers associated with the special spiritual relations between the clergy and members of religious communities.[30] However, the prohibition on contemporaneous membership of former spouses in the same municipal council is incompatible with the principle of electoral equality.[31]

A restriction common to some European states where elections are conducted on the basis of proportional representation is that a minimum number of signatures is required for the presentation of an electoral list. For example, in Austria, an electoral proposal must be signed by at least three members of the regional parliament or be supported by at least 200 officially certified signatures. The European Commission observed that such a requirement 'which can easily be satisfied by any political party with a reasonable chance of success' does not hinder the free expression of the people in the choice of the legislature.[32] Similarly,

to volunteer firemen and to teaching staff. In the case of the former it was the absence of income dependency, and in the case of the latter it was the lack of direct supervision by the municipal authority.

[29] *Gitonas* v. *Greece*, European Court, (1997) 26 EHRR 691.

[30] Decision of the State Council of Greece, 29 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 164.

[31] Decision of the Federal Constitutional Court of Germany, 16 January 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 31.

[32] *X* v. *Austria*, European Commission, Application 7008/75, (1976) 6 *Decisions & Reports* 120. See Decision of the Constitutional Court of Slovenia, U-1–336/96, 4 March 1999,

the commission approved a German requirement that a political party seeking recognition must have a democratically elected party executive, a written programme, and a proposal supported by 500 members of the electorate. These conditions 'serve the purpose of constituting the political process as a public one'.[33] However, the Human Rights Committee has cautioned that if a candidate is required to have a minimum number of supporters for nomination, this requirement should be reasonable and not act as a barrier to candidacy.[34]

Electoral rules according to which political parties which had not obtained at least 5 per cent of the votes cast: (a) did not participate in the allocation of seats; (b) did not receive a refund of the deposit which all the parties had to pay; and (c) were not reimbursed their advertising expenses, have also been upheld. These rules 'all shared a common entirely legitimate objective, namely, to favour the formation of currents of thought sufficiently representative'.[35] An election subsidy does not constitute a limitation of the right to stand as a candidate. It confers upon political parties which have taken part in the election and have obtained a certain minimum percentage of the votes a right to compensation for the costs of the election campaign. The purpose of this system is to make the parties more independent of sources of money which might unduly influence their political actions. Whether the subsidy is paid at all and what amount is paid to any particular party depends on its success in the election and therefore reflects the real importance of the party concerned. It follows that neither the subsidy nor the way in which it is allotted to the various parties can be said to be a condition which does not ensure the free expression of the opinion of the people.[36]

(1999) 1 *Bulletin on Constitutional Case-Law* 107: The demand for a specific number of signatures of support only excludes from the candidature procedure non-serious candidates and candidates who have no chance of success.

[33] *Association X, Y and Z* v. *Germany*, European Commission, Application 6850/74, (1976) 5 *Decisions & Reports* 90.

[34] Human Rights Committee, General Comment 25 (1996).

[35] *Tete* v. *France*, European Commission, (1987) 54 *Decisions & Reports* 52.

[36] *Association X, Y and Z* v. *Germany*, European Commission, Application 6850/74, (1976) 5 *Decisions & Reports* 90. See Decision of the Constitutional Court of Slovenia, U-1–367/96, 11 March 1999, (1999) 1 *Bulletin on Constitutional Case-Law* 109: The exclusion from state financing of political parties that did not win seats in the elections to the National Assembly signifies an impermissible discrimination against these parties and thus a violation of the equality of voting rights. While legislation may determine a threshold for obtaining funds from the state budget, this threshold may only be such that it excludes only those political

The Human Rights Committee has noted that the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy.[37]

Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the protected right. The grounds for the removal of elected office holders should be established by law based on objective and reasonable criteria and incorporating fair procedures.[38]

The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination, this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to ICCPR 5(1), political opinion may not be used as a ground to deprive any person of the right to stand for election.[39]

### *to take part in the conduct of public affairs, directly or through freely chosen representatives*

The 'conduct of public affairs' is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration,

parties that did not have a realistic chance of obtaining at least one seat. The legislator thus prevents running for the sole purpose of obtaining funds from the state budget. On the role of political parties in the conduct of elections, see the Inter-American Commission, Report No.21/94, Case 10,804(b), Guatemala, 22 September 1994.

[37] Human Rights Committee, General Comment 25 (1996).

[38] Human Rights Committee, General Comment 25 (1996).

[39] Human Rights Committee, General Comment 25 (1996).

and the formulation and implementation of policy at international, national, regional and local levels.[40] The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs are established by the constitution and other laws.[41] Since societies were constantly evolving, it is for each jurisdiction to decide the modalities best suited to meet the changing conditions of its own society which at the same time comply with ICCPR 25. A new constitutional order will require that the issue be judged in the context of that new order.[42]

Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. Citizens also participate directly in the conduct of public affairs when they adopt or change their constitution or decide public issues through a referendum or other electoral process. Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government.[43] These include 'consultative and advisory bodies'.[44] Where a mode of direct participation by citizens is established, no distinction may be made between citizens as regards their participation on the grounds mentioned in ICCPR 2(1), and no unreasonable restrictions may be imposed.[45] Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, a directly affected group, large or small, does not have

[40] This includes the village level: *Secretary for Justice* v.*Chan Wah*, Court of Final Appeal, Hong Kong SAR, [2000] 3 HKLRD 641.

[41] Human Rights Committee, General Comment 25 (1996). During the drafting of this article, the broad expression 'to take part in the conduct of public affairs' was preferred to the more restrictive term 'to take part in the government of the state' (UN Document A/2929, chap.VI, s.172).

[42] *Chan Shu Ying* v. *Chief Executive of the HKSAR*, Court of First Instance, Hong Kong SAR, [2000] 1 HKLRD 405.

[43] Human Rights Committee, General Comment 25 (1996).

[44] *Chan Wah* v. *Hang Hau Rural Committee*, Court of Appeal of the Hong Kong SAR, [2000] 1 HKLRD 411.

[45] Human Rights Committee, General Comment 25 (1996). A proposal that 'all organs of authority' should be constituted by direct suffrage was also rejected. Therefore, indirect elections are permitted (UN document A/2929, chap.VI, s.172). See also Decision of the Constitutional Court of Spain, 17 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 212.

the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of this right.[46] But persons within a category covered by the same modality of participation have equal rights.[47]

Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes established by laws which are in accordance with ICCPR 25.[48]

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association. Private members' Bills are an appropriate means of provoking political debate. Bills submitted by individual members are not only a means by which legislators share in the law-making power of the legislature, but also instruments that serve the representative function characteristic of that institution. They are effective instruments in the hands of different political groups, enabling them to force the plenary legislature to express an opinion on the expediency of the initiative in question, and thus

[46] *Grand Chief Donald Marshall* v. *Canada*, Human Rights Committee, Communication No.205/1986, HRC 1991 Report, Annex IX.A. This issue arose in the context of a series of constitutional conferences which were convened by the Canadian government to discuss matters relating to aboriginal self-government, and whether and in what form a general aboriginal right to self-government should be entrenched in the constitution. In accordance with previous practice, the elected leaders of the federal and the ten provincial governments participated in these conferences. But as an exception to the general rule, the prime minister invited representatives of four national associations to represent the interest of approximately 600 aboriginal groups. The Human Rights Committee held that, in the light of the composition, nature and scope of activities of constitutional conferences in Canada, they constituted a 'conduct of public affairs'. But the failure of the government to separately invite representatives of a particular tribal society to the conferences did not infringe the rights of the members of that society.

[47] *Chan Wah* v. *Hang Hau Rural Committee*, Court of Appeal of the Hong Kong SAR, [2000] 1 HKLRD 411.

[48] Human Rights Committee, General Comment 25 (1996). See also Decision of the Constitutional Court of Spain, 17 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 212.

oblige the various political forces to take a stand in public. Accordingly, a refusal by the legislature to examine a private members' Bill strikes at the very heart of representation since, by preventing the legislators who tabled the Bill from lawfully exercising their right of initiative, it also affects citizens' rights to be represented and to participate indirectly in public affairs.[49]

In the Hong Kong Special Administrative Region of China, it has been held that there can be compliance with this right through participation in institutions which, while not possessed of legislative, executive or administrative powers, do have the power by way of open debate, consultations and advice to have a real influence on public affairs such as a merely advisory body. However, that did not mean that there must exist a body at all levels through which the conduct of such affairs would take place. In respect of municipal affairs, Hong Kong had chosen to place executive and administrative powers in the hands of the Government. Legislative power remained with the Legislative Council which now had taken on additional powers to approve finance for municipal affairs and to scrutinize the workings of the Government in respect of those affairs. In addition, the District Councils were able to debate local needs and to influence the Government in the formulation and implementation of policies to meet those needs. The Government considered the District Councils an integral part of the machinery of Hong Kong's regional and local governance. Through the Legislative Council and the District Councils, the requirements of ICCPR 25 had been met.[50]

*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*

The right to vote and to be elected is an application of the general rule previously enunciated, namely, that every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives.[51] When ICCPR 25 was being drafted, a proposal that

[49] Decision of the Constitutional Court of Spain, Case No.124/1995, 18 July 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 213.

[50] *Chan Shu Ying* v. *Chief Executive of the HKSAR*, Court of First Instance, Hong Kong SAR, [2000] 1 HKLRD 405.

[51] UN Document A/2929, chap.VI, s.172.

every citizen shall have the right to vote and to be elected 'to all organs of authority' was rejected on the ground that in most countries not all organs of authority were elective. Therefore, the right to vote and to be elected in the manner specified arises whenever an organ of authority is to be constituted by an election.[52] The right to vote at elections and referenda must be established by law.[53]

### genuine periodic elections

Genuine periodic elections in accordance with ICCPR 25 are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of the electors. The rights and obligations provided for in ICCPR 25 should be guaranteed by law.[54]

The term 'genuine' election suggests a choice between competing candidates or political parties. The submission of one candidate or a single list for approval at an election will, therefore, not result in a genuine election. The term 'genuine' also suggests an election at which the voters have the opportunity to express their choice without fear or coercion. Each citizen must have the right to vote, to cast that vote in private, and to have that vote honestly counted and recorded. The term 'election' has both a wide and a narrow meaning. In the narrow sense it means the final selection of a candidate, which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, it connotes the entire procedure to be gone through to return a candidate to the legislature.[55]

There is no obligation to introduce a specific electoral system, such as proportional representation or majority voting with one or two ballots.[56] Any system operating in a state must be compatible with the protected right and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote must apply, and

[52] UN Document A/2929, chap.VI, s.173.
[53] Human Rights Committee, General Comment 25 (1996).
[54] Human Rights Committee, General Comment 25 (1996).
[55] *Ponnuswami* v. *Returning Officer, Namakkal Constituency*, Supreme Court of India, AIR 1952: SC 64.
[56] *Mathieu-Mohin and Clerfayt* v. *Belgium*, European Court, (1987) 10 EHRR 1.

within the framework of each state's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.[57]

### universal and equal suffrage

'Equal suffrage' suggests that each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency. Therefore, the authority charged with creating an electoral map should commence with the proposition that, to the extent that it is reasonable and feasible, the voter population of each constituency should be approximately equal. Proceeding from the initial premise of equality, such authority may consider such factors as geography, demography and communities of interest.

A different approach has been adopted in Canada, where the Canadian Charter of Rights and Freedoms guarantees to its citizens not 'equal suffrage', but merely 'the right to vote'. A majority of judges of the Supreme Court held that the purpose of 'the right to vote' is not equality of voting power *per se*, but the right to 'effective representation'. In a representative democracy, each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. McLachlin J spoke for the majority when she outlined the conditions of effective representation: The first is relative parity of

[57] Human Rights Committee, General Comment 25 (1996). Thus, genuine elections are those which reveal and give effect to the freely expressed will of the people. Sham elections designed temporarily to quell internal dissent or to distract international scrutiny obviously do not meet these standards. Nor do restricted elections, which do not include the nation's principal policy-making offices. Rather, elections must be calculated to bring about the transfer of power to prevailing candidates in accordance with a pre-arranged formula which is acceptable to the people, whether by plurality, majority or super-majority. It is for the people themselves, through elected or representative transitional bodies, to determine whether this will be accomplished through a majoritarian framework (so-called single-member constituency or 'first past the post' systems), through proportional representation (party-list voting), or through some other election system: Centre for Human Rights, *Human Rights and Elections* (New York: United Nations, 1994), paragraphs 76–7.

voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced. The result will be uneven and unfair representation. But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors. First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that legislative assemblies effectively represent the diversity of the social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed. It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced.[58]

According to the Constitutional Court of Slovenia, the principle of the equality of the right to vote requires that all voters have the same number of votes and that all votes have in advance the same possibility of being taken into consideration when election results are established (i.e. in the allocation of seats). However, it is not necessary for all votes to have the same impact on the election results or for the election system to ensure full proportionality between the number of votes won and seats allocated. Furthermore, the principle of equality of the right to vote does not require all political parties to win the same number of votes to gain one seat; it suffices that political parties (more precisely, candidates or lists of candidates) are guaranteed equal possibilities in advance for obtaining a seat or seats. The conformity of the electoral

[58] *The Attorney General for Saskatchewan* v. *Carter*, Supreme Court of Canada, [1991] 2 SCR 158.

system with the constitutional principle of the equality of the right to vote must be reviewed in terms of the equality of voters at the time when their votes are cast, not at the time when representative seats are allocated.[59]

In the Hong Kong Special Administrative Region of China, where the legislature is partly constituted by members elected from 'functional constituencies', the High Court has recognized that the right to equal suffrage requires every permanent resident to have the same voting power and to be accorded votes of equal weight in such election,[60] and that the concept of equal voting power can only be satisfied by a system which accords to each voter the same number of votes – the 'one person, one vote' principle. The court held, however, that the concept of equal voting power does not require constituencies to be of exactly the same size. The fact that the right of equal suffrage may be subjected to reasonable restrictions means that constituencies may vary considerably in size, if constituencies representing different sectional interests of varying sizes can be said to contribute to the better government of Hong Kong as a whole.[61] Accordingly, a restriction on the right of all voters to have the same number of votes cannot be regarded as reasonable if the system which accords more votes to some voters than to others does so by reference to distinctions based on their status.[62]

### secret ballot

The voter is entitled to cast his ballot in secret. If he is unable, due to illiteracy or physical infirmity, to mark the ballot paper himself, this requirement will not prevent him from seeking the assistance of a friend or neighbour to mark his ballot paper in his presence and according to his wishes.

### guaranteeing the free expression of the will of the electors

All the conditions set out above in respect of an election are designed to secure, in the final analysis, the free expression of the will of the

[59] Decision of the Constitutional Court of Slovenia, U-1–354/96, 9 March 2000, (2000) 1 *Bulletin on Constitutional Case-Law* 127; Decision of the Constitutional Court of Slovenia, U-1–106/95, 25 January 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 74.

[60] *Re Lee Mui Ling*, High Court of Hong Kong, 21 April 1995, unreported.

[61] *Re Lee Mui Ling*, High Court of Hong Kong, 21 April 1995, unreported.

[62] *Re Lee Mui Ling*, High Court of Hong Kong, 21 April 1995, unreported.

electors. That, in essence, is what an election is about. It means that an election must involve no pressure in favour of one or more candidates and that, in making his choice, the elector must not be unduly induced to vote for a particular party. In other words, electors must be subjected to no constraints regarding the choice of candidates or parties.[63] The Human Rights Committee has stressed that elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose the government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters must be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections must be respected and implemented.[64]

An independent electoral authority is required to be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws. Measures must be taken to guarantee the requirement of the secrecy of the vote during elections, including absentee voting where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with ICCPR 25. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of

[63] *X* v. *United Kingdom*, European Commission, Application 7140/75, (1977) 7 *Decisions & Reports* 95; *The Liberal Party* v. *United Kingdom*, European Commission, (1980) 4 EHRR 106; *Mathieu-Mohin and Clerfayt* v. *Belgium*, European Court (1987), 10 EHRR 1.

[64] Human Rights Committee, General Comment 25 (1996).

the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.[65]

Where a judicial tribunal has jurisdiction to rectify the results of an election, it must be able to determine and reallocate to the various candidates the exact number of votes which investigation reveals to have been irregularly cast or counted.[66]

### *to have access, on general terms of equality, to public service in his country*

This phrase was intended to prevent 'certain privileged groups from monopolizing the public service'. It does not prevent regulation of such matters as age or qualifications.[67] This right does not entitle every citizen to obtain guaranteed employment in the public service.[68] To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of this right on any of the grounds set out in ICCPR 2.[69]

The right of access to the public service which ICCPR 25 protects is on 'general terms of equality'. That means two things: First, identical treatment for all officers is not required. Secondly, equality of treatment for all officers is not required. Thus, if the vast majority of officers are treated equally with all but a few officers in certain identifiable groups,

[65] Human Rights Committee, General Comment 25 (1996).

[66] Decision of the Constitutional Council of France, 98-2562/2568, 3 February 1999, (1999) 1 *Bulletin on Constitutional Case-Law* 53.

[67] UN Document A/5000, s.96.

[68] *Kall* v. *Poland*, Human Rights Committee, Communication No.552/1993, HRC 1997 Report, Annex VI.J.

[69] Human Rights Committee, General Comment 25 (1996).

that does not necessarily mean that their right of access to the public service on general terms of equality has been restricted.[70]

This right is not violated by laws which introduce incompatibility between positions in different branches of the legislative, executive and judicial powers and also between positions of employees in bodies and services of local self-government and administration units and positions of members of a representative body of that unit.[71] The state must ensure that there is no discrimination on the ground of political opinion or expression both in respect of access to public service and in respect of those who hold positions in the public service.[72] A requirement that candidates for the state police must come from families of 'unquestioned morality' is not a reasonable one. It refers to value judgments and family behaviour patterns whose connections with the candidate are arbitrary in today's circumstances.[73]

A law designed to provide redress is not incompatible with this right. During twelve years of military authoritarianism in Uruguay, several public servants were dismissed on the authority of Institutional Act No.7 of 1977 on ideological, political, or trade union grounds or for purely arbitrary reasons. Legislation enacted by the first elected parliament following the end of military rule provided that all such officials should be reinstated in their respective posts. Examining the complaint of a lawyer who had sought employment in the public service but had been told that only former public employees dismissed under Act No.7 were being

[70] *The Association of Expatriate Civil Servants of Hong Kong* v. *The Chief Executive of the HKSAR*, Court of First Instance, Hong Kong SAR, [1998] 1 HKLRD 615: It was reasonably open to the Chief Executive to conclude that there were valid and rational grounds for treating police officers and judicial officers differently from other public servants in relation to the right to be legally represented at a disciplinary hearing. The mere fact that there might be other groups of officers who should be given similar preferential treatment does not make the restriction on legal representation imposed on public officers unreasonable. In any event, the preferential treatment accorded to judicial officers and police officers was such that sensible and fair-minded people would recognize a genuine need for the preferential treatment, the preferential treatment was both rational and rationally connected to the need which justified it, and the preferential treatment was proportionate to that need, and was no more extensive than was necessary to achieve the objective which made the preferential treatment necessary.

[71] Decision of the Constitutional Court of Croatia, U-1-952/1996, (1998) 3 *Bulletin on Constitutional Case-Law* 400.

[72] *Adimayo Aduayom* v. *Togo*, Human Rights Committee, Communication Nos.422–4/1990, HRC 1996 Report, Annex VIII.C.

[73] Decision of the Constitutional Court of Italy, Judgment No.108, 23/31 March 1994, (1994) 1 *Bulletin on Constitutional Case Law* 35.

admitted to the public service at that stage, the Human Rights Committee held that, taking into account the social and political situation in the country during the years of military rule, in particular the dismissal of many public servants pursuant to Act No.7, the enactment by the new democratic government of the new law was a measure of redress which was, therefore, not incompatible with the reference to 'general terms of equality' in ICCPR 25(c).[74]

[74] *Stalla Costa* v. *Uruguay*, Human Rights Committee, Communication No.198/1985, HRC 1987 Report, Annex VIII.E.

# 27

# The right to equality

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

#### International Covenant on Civil and Political Rights (ICCPR)

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.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

2. All persons are equal before the law . . .

#### American Convention on Human Rights (ACHR)

24. All persons are equal before the law, consequently, they are entitled, without discrimination, to equal protection of the law.

#### African Charter on Human and Peoples' Rights (AfCHPR)

3. (1) Every individual shall be equal before the law.
   (2) Every individual shall be entitled to equal protection of the law.

*Related texts:*

United Nations Declaration on the Elimination of All Forms of Racial Discrimination, UNGA resolution 1904 (XVIII) of 20 November 1963.

International Convention on the Elimination of All Forms of Racial Discrimination 1965 (4 January 1969).

Declaration on the Elimination of Discrimination against Women, UNGA resolution 2263 (XXII) of 7 November 1967.

International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 (18 July 1976).

Convention on the Elimination of All Forms of Discrimination against Women 1979 (3 September 1981).

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA resolution 36/55 of 25 November 1981.

International Convention against Apartheid in Sports 1985.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA resolution 47/135 of 18 December 1992.

ILO Convention No.100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951 (23 May 1953).

ILO Convention No.111 Concerning Discrimination in Respect of Employment and Occupation 1958 (15 June 1960).

UNESCO Convention against Discrimination in Education 1960 (22 May 1962).

Protocol Instituting a Conciliation and Good Offices Commission to Be Responsible for Seeking a Settlement of Any Disputes Which May Arise between States Parties to the Convention against Discrimination in Education 1962 (24 October 1968).

UNESCO Declaration on Race and Racial Prejudice, 27 November 1978.

## Comment

ICCPR 26 encapsulates three related concepts: equality before the law; equal protection of the law; and equal and effective protection against discrimination. It does not merely duplicate the guarantee in ICCPR 2, but provides in itself an autonomous right. Its application, therefore, is not limited to those rights which are provided for in the ICCPR. It

prohibits discrimination in law and in fact in any field regulated and protected by public authorities. It is concerned, therefore, with obligations imposed on the state in regard to legislation. When a state legislates, it must comply with the requirements of this article that the content and application of such legislation should not be discriminatory.[1]

In respect of certain rights, the ICCPR expressly requires the state to take measures to guarantee equality. For example, ICCPR 23(4) stipulates that a state shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of a state to make certain that spouses have equal rights. In relation to children, ICCPR 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the state.

ICCPR 26 does not prohibit all differences of treatment. Equality before the law and the equal protection of the law do not mean identity or abstract symmetry of treatment.[2] Distinctions need to be made for different classes and groups of persons, and a classification based on reasonable and objective criteria is permitted.[3] As Holmes J has observed, 'We must remember that the machinery of government could not work if it were not allowed a little play in its joints.'[4] For example, the blind ought to be prohibited from driving vehicles, and the young should be compelled to attend school up to a certain age. These are two illustrations of different applications of law to groups in society which do not offend this principle. Similarly, a system of progressive taxation, under which persons with higher incomes fall into a higher tax bracket and pay a greater percentage of their income for taxes is not inconsistent with the principle since the distinction between higher and lower incomes

[1] Human Rights Committee, General Comment 18 (1989). See also UN document A/2929, chap.VI, s.180; *Broeks* v. *Netherlands*, Human Rights Committee, Communication No.172/1984, HRC 1987 Report, Annex VIII.B.

[2] *The State of West Bengal* v. *Anwar Ali Sarkar*, Supreme Court of India, [1952] SCR 284 and AIR 1952 SC 75, per Chandrasekhara Aiyar J. See also *Apostolides* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1984) 3 CLR 233: 'equal before the law' does not convey the notion of exact arithmetical equality.

[3] *Foin* v. *France*, Human Rights Committee, Communication No.666/1995, HRC 2000 Report, Annex IX.C.

[4] *Bain Peanut Co.* v. *Pinson*, United States Supreme Court, 282 US 499 (1930), at 501.

is objective and the purpose of more equitable distribution of wealth is reasonable and compatible with the aims of the ICCPR.[5]

The principle of equality sometimes requires a state to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination. For example, where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it constitutes legitimate differentiation.[6]

The primary mission of an equality provision is the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. An analysis of a complaint should focus on uncovering and understanding the negative impacts of a legislative distinction (including a legislative omission) on the affected individual or group, rather than on whether the distinction had been made on an enumerated or analogous ground. Integral to an inquiry into whether a legislative distinction

[5] See *Sprenger* v. *Netherlands*, Human Rights Committee, Communication No.395/1990, HRC 1992 Report, Annex IX.P, Individual opinion of Messrs Ando, Herndl and Ndiaye. On the subject of taxation, see *Hanzmann* v. *Austria*, European Commission, (1989) 60 *Decisions & Reports* 194: Difference in taxation between, on the one hand, civil servants who work in their own country but live abroad and, on the other hand, civil servants who either work and live in their own country or work and live abroad, is a distinction that has an objective and reasonable justification; *Antoniades* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1979) 3 CLR 641: Absolute equality in taxation cannot be obtained, and is not really required by the principle of equality. In matters of taxation, the state is allowed to pick and choose districts, objects, persons, methods, and even rates of taxation. A state does not have to tax everything in order to tax something; *Apostolou* v. *The Republic of Cyprus*, Supreme Court of Cyprus, [1985] LRC (Const) 851: a distinction between the self-employed and employees is reasonable. See also *Srinivasa Theatre* v. *Government of Tamil Nadu*, Supreme Court of India, [1993] 4 LRC 192: A distinction between cinemas located inside and outside a five kilometre radius of corporation or special grade municipality areas was not an unreasonable one. The former enjoyed certain advantages, namely, an ability to benefit from the large and affluent floating population on their doorstep and to show first-run films, while the latter had a smaller floating population and generally showed second-run films. Cf. Decision of the Constitutional Court of the Czech and Slovak Federal Republic, 8 October 1992: Where the tax on old-age pensions was increased by 100–132 per cent, it was not possible to describe as proportionate such a substantial increase in respect of only one category of the population.

[6] Human Rights Committee, General Comment 18 (1989).

is discriminatory is an appreciation of both the social vulnerability of the affected individual or group and the nature of the interest which is affected in terms of its importance to human dignity and personhood. Although the presence of enumerated and analogous grounds might be an indicia of discrimination or raise a presumption of discrimination, it is in the appreciation of the nature of the individual or group that is being negatively affected that they should be examined.[7]

## Interpretation

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law*

ICCPR 26 as originally drafted provided that all persons are equal before the law. In the Third Committee, it was urged by India, that the clause be strengthened by the addition of the words: 'and are entitled without discrimination to equal protection of the law'. Thus amended, the clause would be identical with the first sentence of UDHR 7.[8] The concept 'equal before the law' is borrowed from article 7 of the French Declaration of the Rights of Man and of the Citizen 1789 which asserted that the law 'should be the same for all, whether it protects or punishes', and that all were 'equal in its sight'. The concept 'equal protection of the law' mirrors the Fourteenth Amendment to the United States Constitution, and is 'a pledge of the protection of equal laws';[9] that is, laws that operate alike on all persons under like circumstances.

### Equal before the law

The notion of equality is one that 'springs directly from the oneness of the human family and is linked to the essential dignity of the individual'. No person or group has a right to privileged treatment, nor may a

[7] *Vriend* v. *Alberta*, Supreme Court of Canada, [1983] 3 LRC 483, per L'Heureux-Dube J. See *Benner* v. *Secretary of State of Canada*, Supreme Court of Canada, [1997] 2 LRC 469: The Citizenship Act 1985 was discriminatory and violated the right to equality because: (i) there was a lack of equal benefit of the law because only a person with a Canadian mother had to undergo checks and swear on oath, and (ii) access to Canadian citizenship was restricted in different degrees depending on the gender of the applicant's Canadian parent, which had nothing to do with the values of personal safety, nation-building or national security underlying the Act.

[8] UN document A/5000, s.108.

[9] *Yick Wo* v. *Hopkins*, United States Supreme Court, 118 US 356 (1886), at 369.

person or group be characterized as inferior and treated with hostility or otherwise subjected to discrimination.[10] Dicey explained the concept thus: 'With us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without any legal justification as any other citizen.'[11] Conversely, every citizen is entitled to equality of treatment from public officials in the exercise of their powers, duties and functions.

The expression 'all persons are equal before the law' does not refer to the substance of the law itself, but to the conditions under which the law may be applied. It is intended to ensure equality, not identity, of treatment, and does not preclude reasonable differentiations between individuals or groups of individuals.[12] The courts would accept the constitutionality of legislation providing for differential treatment if reasonable classifications were made, rationally connected with the legitimate object of the statute. To treat people as equal who were not might lead to the abrogation of rights instead of the protection of them.[13]

The following are examples of the application of this concept:

(a) When an immigration officer in Trinidad and Tobago, consistently and repeatedly treated applications made by a particular shipping agent on behalf of persons of foreign nationality seeking permission to enter and/or remain in the country, less favourably than the same or similar applications made by other shipping agents, equality before the law was denied. This right 'is designed among other things to strike down "curry-favour" and other unfair practices on the part of those who manage and/or operate the wheels of government and quasi-governmental organs.'[14]

[10] *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica*, Inter-American Court, Advisory Opinion OC-4/84, 19 January 1984, para 55.

[11] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), 10th edn (London: Macmillan, 1959), 193.

[12] UN document A/2929, chap.VI, s.179.

[13] *Mwellie* v. *Ministry of Works, Transport and Communication*, High Court of Namibia, [1995] 4 LRC 184: In general, statutes of limitation and the laying down of different periods of prescription therein as a result of reasonable classification were not *per se* unconstitutional, since they were founded on grounds of public policy for the protection of the individual, provided that a party was given a reasonable time within which to bring his action. See also *Stubbings* v. *United Kingdom*, European Court, (1996) 23 EHRR 213.

[14] *Smith* v. *L.J. Williams Ltd*, Court of Appeal of Trinidad and Tobago, (1981) 32 WIR 395, per Bernard J.

(b) In Sri Lanka, the allocation by the University Grants Commission of more places in a university to candidates who had sat the examination in April in relation to those who had sat in August resulted in unjustified preferential treatment of eligible candidates from one source as against those from the other source.[15]

(c) In Canada, the conviction under the Indian Act of an Indian for being intoxicated off a reserve when under the Liquor Ordinance, which was of general application (a person was guilty of an offence only if he was found in an intoxicated condition in a public place), meant that an Indian who was intoxicated even in his own home 'off a reserve' was guilty of an offence whereas other citizens might become intoxicated anywhere other than in a public place without thereby committing any offence at all. This resulted in an individual or group of individuals being treated more harshly than another on account of his race.[16]

(d) The provisions of the Canadian National Defence Act which authorized the trial by service tribunals of military personnel charged with criminal offences committed in Canada contrary to the Narcotic Control Act or the Criminal Code did not infringe the right to 'equality before the law' since the recognition of the military as a class within society in respect of which special legislation dealing with legal rights and remedies, including special courts and methods of trial, existed, fulfilled a socially desirable objective. The all-embracing reach of the questioned provisions of the National Defence Act go far beyond any reasonable or required limit. While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada so far as it relates to members of the armed services serving in Canada.[17]

[15] *Perera* v. *University Grants Commission*, (1980) 1 *Decisions on Fundamental Rights Cases* 103. See also *The State of Andhra Pradesh* v. *Balaram*, Supreme Court of India, AIR (1972) SC 1375; *Roshan Lal* v. *The Union of India*, Supreme Court of India, AIR (1967) SC 1889; *The State of J & K* v. *Khosha*, Supreme Court of India, AIR (1974) SC 1; *Rita Kumar* v. *The Union of India,* Supreme Court of India, AIR (1973) SC 1050.

[16] *R* v. *Drybones*, (1969) 9 DLR (3d) 473. See also *Attorney-General of Canada* v. *Canard,* Supreme Court of Canada, (1975) 52 DLR (3d) 548, where Laskin CJ in a dissenting judgment held that s.43 of the Indian Act, which disqualified an Indian, whether male or female, from being an administrator or administratrix of his or her deceased spouse's estate, created an inequality before the law by reason of race.

[17] *Mackay* v. *The Queen*, 18 July 1980: 'The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject

(e) The requirement under French law of a length of twelve months for military service and of twenty-four months for national alternative service, based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions, did not satisfy the requirement that the difference in treatment be based on reasonable and objective criteria.[18]

(f) In Cyprus, where four persons were charged before the assize court with obtaining money by false pretences, but the prosecution of two of them was discontinued by the Attorney General by the filing of a *nolle prosequi*, the discontinuance of criminal proceedings was related to the mode of treatment of the offenders and was taken into consideration in assessing the sentence to be imposed on the persons who were prosecuted.[19]

## Equal protection of the law

'Equal protection of the law' means that in its content and in its application the law must be the same for all those who are equally situated. A discriminatory purpose or intention is a relevant factor, but is not a necessary condition. A legal distinction need not be motivated by a desire to disadvantage an individual or group. It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law. The main consideration is the impact of the law on the individual or the group concerned.[20]

to a military code which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. His right to rely upon the special pleas of "autrefois convict" or "autrefois acquit" is altered for, while if convicted of an offence in a civil court he may not be tried again for the same offence in a military court, his conviction in a military court does not bar a second prosecution in a civil court. His right to apply for bail is virtually eliminated.'

[18] *Foin* v. *France*, Human Rights Committee, Communication No.666/1995, HRC 2000 Report, Annex IX.C; *Maille* v. *France*, Human Rights Committee, Communication No.689/1996, HRC 2000 Report, Annex IX.F; *Venier and Nicholas* v. *France*, Human Rights Committee, Communication Nos. 690–1/1996, HRC 2000 Report, Annex IX.G.

[19] Decision of the Supreme Court of Cyprus, 6789, 4 July 2000, (2000) 2 *Bulletin on Constitutional Case-Law* 239. Cf. *De Groot* v. *Netherlands*, Human Rights Committee, Communication No.578/1994, HRC 1995 Report, Annex XI.K: The absence of prosecution against one person does not render the prosecution of another involved in the same offence necessarily discriminatory in the absence of specific circumstances revealing a deliberate policy of unequal treatment before the law.

[20] *Eldridge* v. *Attorney General of British Columbia*, Supreme Court of Canada, [1998] 1 LRC 351. In this respect the Canadian courts have adopted a different path than the US Supreme Court which requires a discriminatory intent in order to ground an equal protection claim under the Fourteenth Amendment.

> If it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him, before he can claim relief on the basis of his fundamental rights, to assert and prove that in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class.[21]

The Supreme Court of Mauritius thought it should, before finding a rule to be discriminatory, look for any 'notion of bias and hardship'. The court held that the exclusion of women from jury service did not constitute discrimination since that notion of bias and hardship was absent in the differentiation. The court took judicial notice that there were a number of factors which may be legitimately invoked in favour of such differentiation, and which all pertain to the condition of women not only generally but also in the special context of the Mauritian community.

> The framers of those laws may have thought and may still think that the Mauritian woman's status, her place and role in the home and family, and social conditions prevailing in this country are incompatible with a service which, as our law has stood and still stands, may require that they be kept away from home for sometimes long periods, sleeping in hotels, and unable to move about except under the vigilant eyes of court ushers. It seems questionable to us that such an obligation would cause much distress to many Mauritian women, and arouse a deep resentment among many of their male relatives. Those circumstances would provide, in our judgment, an objective and reasonable justification, if any was needed for the distinction made by the impugned legislation.[22]

A neutral law of general application may give rise to a claim of discrimination where it adversely affected an individual or group but not others to whom the law applied. Where the medicare system in British Columbia applied equally to the deaf and hearing population and did not single out deaf persons for different treatment, the failure of the

[21] *The State of West Bengal* v. *Anwar Ali Sarkar*, Supreme Court of India, [1952] SCR 284, per Mukherjee J. See also *Zwaan-de Vries* v. *Netherlands*, Human Rights Committee, Communication No.182/1984, HRC 1987 Report, Annex VIII.D; *Simunek* v. *The Czech Republic*, Human Rights Committee, Communication No.516/1992, HRC 1995 Report, Annex X.K: A politically motivated differentiation is unlikely to be compatible with ICCPR 26. But an act which is not politically motivated may still contravene it if its effects are discriminatory.

[22] *Jaulim* v. *Director of Public Prosecutions*, Supreme Court of Mauritius, (1976) *The Mauritius Reports* 96.

medical services commission and hospitals to provide sign language interpretation services to facilitate effective communication between deaf persons and their physicians rendered deaf persons unable to benefit from the legislation to the same extent as hearing persons and thus discriminated against them. The provision of sign language interpretation services could not be viewed as an ancillary service, such as transportation to hospital or cosmetic procedures, which were not publicly funded, but rather as a means to ensure that deaf persons received the same quality of medical care as the hearing population. The failure to provide such services resulted in deaf persons receiving inferior medical treatment.[23] Therefore, while every difference in treatment between individuals under the law will not necessarily result in inequality, identical treatment may frequently produce serious inequality.[24]

The Supreme Court of Canada has drawn a distinction between direct discrimination and the concept referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'No Catholics or no women or no blacks employed here.' On the other hand, the concept of adverse effect discrimination arises where an employer for genuine business reasons adopts a rule of standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.[25] Adverse effects discrimination is especially relevant in the case of disability.

The failure of a statutory body to establish and implement a fair and objective procedure, which accords with specific guidelines and criteria prescribed in advance, will violate the equal protection of the law.[26] In Cyprus, a requirement in the income tax law that a 'wife must

[23] *Eldridge* v. *Attorney General of British Columbia*, Supreme Court of Canada, [1998] 1 LRC 351.

[24] *Andrews* v. *Law Society of British Columbia*, Supreme Court of Canada, [1989] 1 SCR 143.

[25] *Ontario Human Rights Commission* v. *Simpsons-Sears*, Supreme Court of Canada, [1985] 2 SCR 53.

[26] *Rathnayake* v. *Sri Lanka Rupavahini Corporation*, Supreme Court of Sri Lanka, [1999] 4 LRC 8: a statutory body responsible for the broadcasting schedule on the national television channel, with authority to determine whether a telefilm submitted to it was suitable for

live with her husband' for him to be entitled to a tax deduction was a denial of the equal protection of the law since a husband who provided for his estranged wife was treated differently from other married men who lived under the same roof with their wives.[27] In Sri Lanka, the 'Job Bank Scheme' which envisaged the nomination for employment of 1,000 persons by each member of parliament from among the unemployed in his electorate was held to 'destroy or makes illusory' this right.

> The Job Bank Scheme enables the MP to confer a privilege upon the one thousand persons arbitrarily selected by him from a large class of persons, all of who stand in the same relation to the privilege granted, and between whom and the person not so favoured, no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from the privilege.

Since no directions had been given as to the principles of selection, and as the scheme committed the selection to the unfettered and absolute discretion of the MP, discrimination was inherent in the scheme.[28] Also in Sri Lanka, the failure to hold a poll in respect of five provincial councils resulted in the denial of the equal protection of the law to voters in those provinces vis-à-vis voters in the other four provinces which polled.[29]

The equal protection concept was not infringed when legislation in Malaysia disqualified any lawyer of less than seven years, standing from being elected to the Bar Council;[30] when the parliament in Mauritius provided that offences which if committed in Mauritius would be tried by two magistrates, shall be triable by a single magistrate if committed in

screening and, if so, the time for screening. See also *Sugumar Balakrishnan* v. *Pengarah Imigresen Negeri Sabah*, Court of Appeal of Malaysia, [2000] 1 LRC 301.

[27] *Christodoulides* v. *The Republic of Cyprus*, Supreme Court of Cyprus, (1987) 3 CLR 1039.

[28] *Palihawadana* v. *The Attorney General*, Supreme Court of Sri Lanka, (1979) 1 *Decisions on Fundamental Rights Cases* 1, per Sharvananda J. The petition, however, was dismissed on the ground that the petitioner lacked locus standi.

[29] *Karunathilaka* v. *Commissioner of Elections*, Supreme Court of Sri Lanka, [1999] 4 LRC 380.

[30] *Malaysian Bar* v. *The Government of Malaysia*, Supreme Court of Malaysia, [1988] LRC (Const) 428. Salleh Abas LP, who dissented, argued that the exclusion of lawyers of less than seven years' standing embodied a classification without any reasonable basis. If a person admitted as an advocate and solicitor of the High Court was entitled to practise immediately upon his admission, there appeared to be no plausible justification for providing for such person as a class or group to be without representation in respect of that class or group on their professional governing and other related bodies until and unless he had attained the status of an advocate and solicitor of not less than seven years' standing.

Rodriguez;[31] by the creation of an offence which, as a matter of biological fact, can only be committed by one of the sexes;[32] or when in determining entitlement to unemployment benefits, a distinction was drawn between unemployed substitute judges who were not civil servants on leave and those who were.[33]

The jurisprudence of the Indian Supreme Court suggests that an impugned statute may fall into one or other of the following classes:[34]

1. A statute may itself indicate the persons or things to whom or to which its provisions are intended to apply, and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances. (The court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute.)[35]
2. A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. (The court will strike down the law as an instance of naked discrimination.)[36]
3. A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the

[31] *Police* v. *Rose*, Supreme Court of Mauritius, (1976) *The Mauritius Reports* 79: It was unrealistic to insist on 'a procustean equality between all the scattered islets forming a small country with limited resources in finance, personnel and transport.'

[32] *R* v. *Hess*, Supreme Court of Canada, (1990) 2 SCR 906: Just as a provision proscribing self-induced abortion cannot be characterized as discriminatory, subjecting only males to prosecution for having sexual intercourse with a female person under the age of fourteen years did not constitute discrimination.

[33] *Pons* v. *Spain*, Human Rights Committee, Communication No.454/1991, HRC 1996 Report, Annex VIII.E.

[34] These different classes are summarized in *Dalmia* v. *Tendolkar*, Supreme Court of India, AIR 1958 SC 538.

[35] *Chiranjitlal Chowdhri* v. *The Union of India*, Supreme Court of India, [1950] SCR 869; *The State of Bombay* v. *Balsara*, Supreme Court of India, [1951] SCR 682; *Kedar Nath Bajoria* v. *The State of West Bengal*, Supreme Court of India, [1954] SCR 30; *Seyed Mohamed & Co* v. *The State of Andhra*, Supreme Court of India, [1954] SCR 1117; *Budhan Choudhry* v. *The State of Bihar*, Supreme Court of India, [1955] 1 SCR 1045.

[36] *Ameerunnissa Begum* v. *Mahboob Begum*, Supreme Court of India, [1953] SCR 404; *Ram Prasad Narayan Sahi* v. *The State of Bihar*, Supreme Court of India, AIR 1953 SC 215.

discretion of the government to select and classify persons or things to whom its provisions are to apply. (The court will strike down the law only if it does not lay down any principle or policy for guiding the exercise of discretion by the government in the matter of selection or classification.)[37]

4. A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the government in the matter of such selection or classification. (The court will uphold such law as constitutional.)[38]
5. A statute may not make a classification of the persons or things to whom its provisions are intended to apply and may leave it to the discretion of the government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the government in the matter of such selection or classification. (The executive action but not the statute will be condemned as unconstitutional.)[39]

*In this respect, the law shall prohibit 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*

## In this respect

In the Third Committee, Britain and Greece proposed the insertion of the phrase 'In this respect' to indicate that what this sentence seeks to do is not to prohibit all forms of discrimination, particularly in private relations, but only discrimination in respect of the twin principles of 'equality before the law' and 'equal protection of the law'. The object

[37] *The State of West Bengal* v. *Anwar Ali Sarkar*, Supreme Court of India, [1952] SCR 284; *Dwarka Prasad Laxmi Narain* v. *The State of Uttar Pradesh*, Supreme Court of India, [1954] SCR 803; *Dhirendra Krishna Mandal* v. *The Superintendent and Remembrancer of Legal Affairs*, Supreme Court of India, [1955] 1 SCR 224.

[38] *Kathi Raning Rawat* v. *The State of Saurashtra*, Supreme Court of India, [1952] SCR 435.

[39] *Kathi Raning Rawat* v. *The State of Saurashtra*, Supreme Court of India, [1952] SCR 435.

was to link the first and second sentences; the second being an explanation and amplification of the basic principle stated in the first. The amendment was opposed on the ground that each of the two sentences contained a distinct principle; the second sentence being the only provision in the ICCPR that prohibited all discrimination. By the insertion of the proposed phrase, the effectiveness of the second sentence would be reduced because the prohibition of discrimination would then only apply to the field of equality before the law. The proposal was adopted by a roll-call vote of thirty-six to thirty with eleven abstentions.[40]

### on any ground such as

The use of the expression 'on any ground such as' means that the prohibition of discrimination is open-ended as regards possible grounds of discrimination. In fact, the Commission on Human Rights considered the expressions 'discrimination on any ground' and 'other status' to be sufficiently open-ended not to require any further enumeration of grounds in this article. Accordingly, proposals to add 'economic or other opinion' and 'educational attainment' were not voted upon as being unnecessary.[41]

The open-ended nature of this prohibition is illustrated in a judgment of the Supreme Court of Botswana. Section 15(3) of the Constitution defines the expression 'discriminatory' to mean

> affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such

[40] UN document A/5000, s.111.

[41] UN document A/2929, chap.VI, s.181. See also Anne F. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' [1990] 11 (1–2) *Human Rights Law Journal* 1, at 5. Cf. *B* v. *Netherlands*, Human Rights Committee, Communication No.273/1989, HRC 1989 Report, Annex XI.F, where the distinction drawn was between physiotherapists who had been directly notified of the lack of certain insurance obligations and those physiotherapists who had not been directly notified. The committee stated that 'the authors have not claimed that their different treatment was attributable to their belonging to any identifiable distinct category which could have exposed them to discrimination on account of any of the grounds enumerated or "other status" referred to in article 26'. If the committee was suggesting that an impugned distinction should be brought within one of the enumerated grounds or 'other status', it appears to have overlooked the fact that the expression 'on any ground such as' militates against such a restricted interpretation of this article. Bayefsky describes this approach of the committee as 'resorting to a distorted interpretation of the text of the covenant and an arbitrary distinction between enumerated and other grounds or a contrived definition of "other status"'.

> description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The High Court rejected a submission that since sex was not mentioned, discrimination on the basis of sex was not a breach of the constitution; section 15(3) was not a restrictive definition, but merely gave examples of the different kinds of discrimination sought to be prohibited. Horwitz J observed that it could not be accepted that the word 'sex' was omitted because Botswana believed there should be discrimination against women. The prohibited discriminatory laws were those which made adverse distinctions against certain persons. A construction which did not do violence to the language of that section and was in harmony with international conventions on non-discrimination to which Botswana was a party should be preferred to a narrow construction that would permit unrestricted discrimination on the basis of sex. It was difficult if not impossible to accept that Botswana would deliberately discriminate against women while internationally supporting non-discrimination.[42]

### race

Discrimination on the ground of race was established where, in Kenya, six Asians who held stalls, as monthly tenants, in the municipal market in Nairobi, were served with notices to quit. The notices were issued pursuant to a decision of the city council to the effect that 'so as to accelerate the Africanization of the City Market, the present stall-holders who are non-Africans be given three months' notice to terminate their tenancies with this council and that the officers be authorized to invite applications from suitable Africans for the tenancies of such stalls'.[43] In South Africa it was held that to differentiate, in the matter of charging for electricity, between the residents of townships which were historically black areas

[42] *Dow* v. *Attorney General*, Supreme Court of Botswana, [1992] LRC (Const) 623. In *R* v. *O*, (1972) 6 CCC (2nd) 385 the Supreme Court of British Columbia held that although s.1(b) of the Canadian Bill of Rights 1960 recognized the right to 'equality before the law and protection of the law' without discrimination by reason of 'race, national origin, colour, religion or sex', that section was not limited in its effect to inequalities in the law which resulted only from the enumerated subjects.

[43] *Madhwal* v. *City Council of Nairobi*, High Court of Kenya, [1968] EA 406.

and whose residents were still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents were still overwhelmingly white, constituted indirect discrimination on the grounds of race notwithstanding the fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race. Race and geography were inextricably linked as a consequence of apartheid and the application of a geographical standard, although seemingly neutral, might in fact be racially discriminatory. It followed that the application of geographical differentiation clearly discriminated in substance between black residents and white residents on grounds of race.[44]

In Sierra Leone, the independence constitution recognized as a citizen every person who, having been born in Sierra Leone, and one of whose parents or grandparents had also been born in Sierra Leone, was on independence day (26 April 1961) a British citizen. John Joseph Akar was one such person, having been born of an indigenous Sierra Leone mother and a Lebanese father who had been born and bred in Senegal, had never been to Lebanon, and had lived in Sierra Leone for over fifty years. In 1962 the constitution was amended, with retrospective effect, to provide that only a 'person of negro-African descent' was entitled to be a citizen. This expression was defined to mean a person whose father and father's father were negroes of African descent. Where only one parent was a negro of African descent, a person otherwise eligible for citizenship could apply to be registered as a citizen but would be disqualified from seeking election to the legislature until he had resided continuously in Sierra Leone for twenty-five years after such registration. The Privy Council held the adoption of the word 'negro' involved a description by race, and that the effect of the constitutional amendment was discriminatory. It offended against the letter and flouted the spirit of the constitution.[45]

## colour

In the United States, a state statute which made it a criminal offence for a white person and a Negro of opposite sexes, not married to each other, to habitually live in and occupy at night the same room denied the equal

[44] *City Council of Pretoria* v. *Walker*, Constitutional Court of South Africa, [1984] 4 LRC 203.
[45] *Akar* v. *Attorney-General of Sierra Leone*, Privy Council on appeal from the Supreme Court of Sierra Leone, [1969] 3 All ER 384.

protection of the law. An interracial couple made up of a white person and a Negro was treated differently from any other couple. No couple other than a Negro and a white person could be convicted under that statute.[46]

### sex

Sex includes orientation, as the common denominator for the grounds 'race', 'colour' and 'sex' are biological or genetic factors. Accordingly, a Tasmanian law that criminalized sexual contact between consenting men without at the same time criminalizing such contacts between women denied equal protection of the law.[47] So did the application of a criminal sanction to acts of consensual sexual activity (in the instant case, sodomy) between adult males which amounted to prima facie unfair discrimination.[48] In Hungary, the criminal code infringed the principle of equality when it declared 'unnatural' sexual intercourse between siblings of the same sex to be unlawful, while 'unnatural' intercourse between siblings of different sexes was not.[49] In Canada, sexual orientation was the basis of differentiation when the obligation to provide spousal support beyond married persons was extended by the Family Law Act to include individuals in conjugal opposite-sex relationships of some permanence, but omitted same-sex relationships which were capable of being both conjugal and lengthy.[50] The Aliens Control Act 1991 which allowed the 'spouse' of a South African citizen to apply for and

[46] *McLaughlin* v. *State of Florida*, United States Supreme Court, 379 US 184 (1964).

[47] *Toonen* v. *Australia*, Human Rights Committee, Communication No.488/1992, HRC 1994 Report, Annex IX.EE, individual opinion of Bertil Wennergren.

[48] *State* v. *K*, High Court of South Africa, [1998] 1 LRC 248. See also *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*, Constitutional Court of South Africa, [1998] 3 LRC 648, per Sachs J: 'What was really being punished by the anti-sodomy laws was deviant conduct simply because it was deviant and not, as was usually the case, because it was violent, dishonest, treacherous or in some other way disturbed the public peace or provoked injury. Moreover, the repression was for its perceived symbolism rather than because of its proven harm. The effect was that all homosexual desire was tainted and the whole gay and lesbian community was marked with deviance and perversity thereby directly engaging the equality interest. Because of its sexual non-conformity, a significant group of the population was persecuted, marginalized and turned in on itself.' Cf. *Banana* v. *State*, Supreme Court of Zimbabwe, [2000] 4 LRC 621: The criminalization of sodomy was not discrimination on the ground of gender. The real discrimination was against homosexual men in favour of heterosexual men, which was not discrimination on the ground of gender.

[49] Decision of the Constitutional Court of Hungary, 20/1999, 25 June 1999, (1999) 3 *Bulletin on Constitutional Case-Law* 389.

[50] *Attorney General for Ontario* v. *M*, Supreme Court of Canada, [1999] 4 LRC 551.

subsequently gain authorization for an immigration permit discriminated against South African citizens who were in permanent same-sex life partnerships with non-citizens.[51] However, in New Zealand, freedom from discrimination did not require equal legislative recognition of heterosexual and same-sex marriages.[52]

A differentiation of sex, placing married women at a disadvantage compared with married men, is not reasonable. Accordingly, a Netherlands law which required a married woman to prove that she was a breadwinner in order to receive unemployment benefits, a condition which did not apply to men, was not reasonable.[53] Similarly, to levy contributions from unmarried childless men aged forty-five or over under the Child Benefits Act, but not from similarly situated women, constituted a difference in treatment between persons in similar situations, based on gender.[54] In Austria, where family law imposed equal rights and duties on both spouses, but the Pension Act provided that a widower was entitled to a pension only if he did not have any other form of income, whereas the widow could receive a pension regardless of her income, men and women, whose social circumstances were similar, were being treated differently, merely on the basis of sex.[55] Provisions which establish a lower compulsory retirement age for female teachers than male teachers infringes this right.[56] A Peruvian law which provides that when a woman is married only the husband is entitled to represent the matrimonial property before the courts denies her equality before the courts on the ground of sex.[57]

In Tanzania, under Haya customary law, females may inherit clan land which they may hold in usufruct, i.e. for their lifetime, but they

[51] *National Coalition for Gay and Lesbian Equality* v. *Minister of Home Affairs*, Constitutional Court of South Africa, [2000] 4 LRC 292. The words 'or partner, in a permanent same-sex life partnership' were therefore to be read-in after the word 'spouse'.

[52] *Quilter* v. *Attorney General*, Court of Appeal of New Zealand, [1998] 3 LRC 119.

[53] *Broeks* v. *Netherlands*, Human Rights Committee, Communication No.172/1984, HRC 1987 Report, Annex VIII.B. See also *Zwaan-de Vries* v. *Netherlands*, Human Rights Committee, Communication No.182/1984, HRC 1987 Report, Annex VIII.D.

[54] *Van Raalte* v. *Netherlands*, European Court, (1997) 24 EHRR 503.

[55] *Pauger* v. *Austria*, Human Rights Committee, Communication No.415/1990, HRC 1992 Report, Annex IX.R.

[56] Decision of the Constitutional Court of Poland, K 27/99, 28 March 2000, (2000) 2 *Bulletin on Constitutional Case-Law* 327.

[57] *Avellanal* v. *Peru*, Human Rights Committee, Communication No.202/1986, HRC 1989 Report, Annex X.C.

had no power to sell it. A male member of the clan may sell land but, if he sells it without the consent of the clan members, other clan members may redeem that clan land. The land returns to the clan and becomes the property of the man who repays the purchase price. Accordingly, males and females did not enjoy equal rights to inherit and sell clan land.[58] In Botswana, provisions in the Citizenship Act which prevented a female citizen married to an alien from passing Botswana citizenship to her two children born during the marriage were discriminatory in their effect to women.[59] In Zambia, a woman who was refused entry into a bar of the Intercontinental Hotel in Lusaka on the ground that she was unaccompanied (the hotel policy being to exclude women unaccompanied by men from entering the bar) had been discriminated against on the basis of gender.[60] In India, the Foreign Service (Conduct and Discipline) Rules required a woman to obtain permission in writing of the government before marriage, and enabled the government to require a woman to resign at any time after marriage if the government was satisfied that her family and domestic commitments would hamper her duties as a member of the service. Krishna Iyer J observed that if the family and domestic commitments of a woman member of the service were likely to come in the way of her efficient discharge of duties, a similar situation could well arise in the case of a male member, particularly in the context of nuclear families, intercontinental marriages and unconventional behaviour.[61] But the Aliens Act of Namibia which, while allowing a wife to assume on marriage her husband's surname required a husband to complete various formalities and obtain official authorization to assume his wife's surname, served to ensure that people might change their surnames only with govenmental authority and after due notice of such change had been properly published. The differentiation was designed to ensure legal security and certainty of identity

[58] *Ephrahim* v. *Pastory*, [1990] LRC (Const) 757. Mwalusanya J added: 'From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land and self-acquired land of their father's is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field but not the elite women in town who chant jejune slogans years on end on women's lib but without delivering the goods.'

[59] *Attorney General* v. *Dow*, Court of Appeal of Botswana, (1993) 19 *Commonwealth Law Bulletin* 52.

[60] *Longwe* v. *Intercontinental Hotels*, High Court of Zambia, [1993] 4 LRC 221.

[61] *Muthamma* v. *The Union of India*, Supreme Court of India, [1980] 1 SCR 668.

and was enacted in the interests of the state and the public at large. Moreover, such differentiation had a minimal effect on the Namibian community.[62]

## language

In Ceylon (now Sri Lanka), the government refused to pay an increment to a Tamil-speaking civil servant who had been recruited in the English medium since he had not passed a test in the Sinhala language. The requirement that he should pass such a test as a condition precedent to his being paid the increment was imposed by a treasury circular implementing the Official Language Act 1956. The District Court of Colombo held that the Act which declared Sinhala, the language of the majority Sinhalese community, to be the one official language of the country had the effect of making persons of the minority Tamil community liable to disabilities to which persons of the Sinhalese community were not made liable, in violation of article 29 of the 1946 Constitution. Accordingly, the Act was declared void.[63]

In Namibia, where the constitution declares English to be the only official language, but allows parliament to provide for the use of other languages, it was argued that the lack of such language legislation had resulted in Afrikaans-speaking persons being denied the possibility of using their language when dealing with public authorities. Reference was made to a government circular instructing civil servants not to reply to written or oral communications in the Afrikaans language. By a majority decision, the Human Rights Committee held that the circular was intentionally targeted against the Afrikaans speakers. Five members of the committee who dissented were of the view that the effect of the circular was to give the Afrikaans language, which had previously been the official language, the same status as other tribal languages, and that consequently, the Afrikaans language had not been singled out

[62] *Muller* v. *President of the Republic of Namibia*, Supreme Court of Namibia, [2000] 1 LRC 654.

[63] *Kodeeswaran* v. *Attorney-General of Ceylon* (1964, unreported). See also the decision of the Privy Council on appeal from the Supreme Court on the ancillary question whether a civil servant had a right of action against the Crown for salary due in respect of services which he had rendered: [1970] AC 1111. Section 29 provided, *inter alia*, that no law shall confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions. The judgment of the District Court did not, however, take effect in view of the replacement of the 1946 Constitution by the 1972 Constitution which gave constitutional status to the Official Language Act of 1956.

for unfavourable treatment as against other languages spoken in the country.[64]

## religion

Legislation requiring workers to be protected from injury and electric shock by the wearing of hard hats was reasonable and was directed towards objective purposes, even in the case of a person of the Sikh religion who was required by his faith to wear a turban.[65] A rule requiring employees to be available for work on Friday evenings and Saturdays discriminated against those observing a Saturday sabbath. Though this rule was neutral on its face in that it applied equally to all employees, it was nevertheless discriminatory.[66] The refusal to appoint a Jehovah's Witness to a post of chartered accountant, even though he had passed the relevant qualifying examination, following his being found guilty by a military court for refusing to enlist in the army for religious reasons, contravened the right not to be discriminated against according to one's religious beliefs. A conviction for refusing to wear the military uniform could not imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession.[67]

The ICCPR does not oblige states to fund schools which are established on a religious basis. However, if a state chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. A member of the Jewish faith living in the province of Ontario in Canada who had enrolled his children in a private Jewish day school complained that Roman Catholic schools were the only non-secular schools receiving full and direct public funding from the state while other schools had to fund through private sources, including the charging of tuition fees. The state argued that the privileged treatment of Roman Catholic schools was enshrined in the constitution, and that as Roman Catholic schools were incorporated as a

[64] *Rehoboth Baster Community* v. *Namibia*, Human Rights Committee, Communication No.760/1997, HRC 2000 Report, Annex IX.M.

[65] *Bhinder* v. *Canada*, Communication No.208/1986, HRC 1990 Report, Annex IX.E.

[66] *Ontario Human Rights Commission* v. *Simpsons-Sears*, Supreme Court of Canada, [1985] 2 SCR 53.

[67] *Thilimmenos* v. *Greece*, European Court, (2000) 31 EHRR 411.

distinct part of the public school system, the differentiation was between private and public schools, not between private Roman Catholic schools and private schools of other denominations. The Human Rights Committee found that the difference in treatment could not be considered reasonable and objective. It was not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. A Jewish parent is compelled to send his children to a private religious school, not because he wishes a private non-government dependent education for his children, but because the publicly funded religious school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith.[68]

### political or other opinion

Under the Netherlands Conscription Act, Jehovah's Witnesses automatically qualified for exemption from military service on the ground that 'membership of Jehovah's Witnesses constitutes strong evidence that the objections to military service are based on genuine religious convictions'. The Human Rights Committee held that the exemption of one group of conscientious objectors and not others could not be considered reasonable.[69]

### national or social origin

The Human Rights Committee, by a majority decision, approved the extradition by Canada, which had abolished the death penalty, to the United States, which still retained it, of a person who was wanted on a charge of first-degree murder, an offence punishable by death. In a dissenting opinion, Christine Chanet characterized the Canadian government's action as 're-establishing the death penalty by proxy'. She observed that Canada thereafter limited its application to a certain category of persons: those who were extraditable to the United States. Accordingly, by deliberately exposing such persons to the application of the

[68] *Waldman* v.*Canada*, Human Rights Committee, Communication No.694/1996, HRC 2000 Report, Annex IX.H.

[69] *Brinkhof* v. *Netherlands*, Human Rights Committee, Communication No.402/1990, 27 July 1993.

death penalty in that country, Canada was discriminating against such persons on the basis of their national origin.[70]

property, birth, or other status

'Other status' has been interpreted to include:

(a) Marriage: But the distinction drawn in Netherlands legislation between married and unmarried couples in respect of a disability allowance was based on objective and reasonable criteria. A married person was obliged to provide for his or her spouse's maintenance; the spouse was jointly liable for debts incurred in respect of common property; and a married person required the permission of the spouse for certain financial transactions. The decision to enter into a legal status by marriage lay entirely with the cohabiting persons. By choosing not to enter into marriage, such persons do not, in law, assume the full extent of the duties and responsibilities incumbent on married couples. Consequently, they do not receive the full benefits provided for in Netherlands law for married couples. The differentiation did not constitute discrimination.[71] Similarly, the fact that a life annuity awarded following a fatal industrial accident is paid to the victim's surviving spouse in the case of a married couple but not to the victim's surviving cohabiting partner in the case of an unmarried couple does not violate the principle of equality and non-discrimination. The differential treatment concerned is based on an objective criterion, namely, the fact that the legal situation of married and unmarried couples differs in terms both of their mutual obligations and of their economic rights.[72]
(b) Membership of the Civil Service. Accordingly, the denial of severance pay to a long-standing civil servant who was dismissed by the government constituted a violation of ICCPR 26.[73]
(c) A pupil of a private school was regarded as having the 'status' to make a complaint that under Swedish law he was not entitled to receive an education allowance, whereas pupils of public schools

[70] *Cox* v. *Canada*, Human Rights Committee, Communication No. 539/1993, HRC 1995 Report, Annex VIII.M.
[71] *Danning* v. *Netherlands*, Human Rights Committee, Communication No.180/1984, HRC 1987 Report, Annex VIII.C.
[72] Decision of the Court of Arbitration of Belgium, 138/2000, 21 December 2000, (2000) 3 *Bulletin on Constitutional Case-Law* 453.
[73] *Valenzuela* v. *Peru*, Human Rights Committee, Communication No.309/1988, 14 July 1993.

did. The Human Rights Committee held, however, that although Swedish law recognized both private and public education, the state was not obliged to provide the same level of subsidy to both public and private schools, particularly since the private system was not subject to state supervision.[74] Similarly, the government did not violate ICCPR 26 by denying subsidies for textbooks and meals to parents of children attending a private school. A decision to choose private education was not imposed by the state, but reflected a free choice recognized and respected by the state. Such free decision, however, entailed certain consequences, notably payment of tuition, transport, textbooks and school meals.[75]

(d) Illegitimacy: The Child Care Act 1983, by dispensing with a father's consent for the adoption of an 'illegitimate' child, violated the right to equality and the right not to be discriminated against. Consent to an adoption should be given by both parents of the child irrespective of whether the parents were married to each other or whether the child was 'legitimate' or 'illegitimate'.[76]

(e) Nationality: Accordingly, differences in pension entitlements of former members of the French army, based on whether they were French nationals or not, was a violation of ICCPR 26.[77] A law enacted in 1991 in the Czech and Slovak Republic endorsed the rehabilitation of citizens who had left the country under Communist pressure and laid down conditions for restitution or compensation for loss of property. It provided that those who had their property turned into state ownership were entitled to restitution but only if they were citizens of the Czech and Slovak Republic and were permanent residents

[74] *Blom* v. *Sweden*, Human Rights Committee, Communication No.191/1985, 4 April 1988, HRC 1988 Report, Annex VII.E.

[75] *Lindgren et al.* v. *Sweden*, Human Rights Committee, Communication Nos.298–9/1988, HRC 1991 Report, Annex IX.E. Cf. *Vashi* v. *State of Maharashtra* [1989] LRC (Const) 942, where the High Court of Bombay held that the policy of the government to extend financial grants to private institutions of higher education which met prescribed standards was discriminatory to the extent that while grants had been provided to private institutions with faculties in the arts, science, commerce, engineering and medicine, no grants were made to any of the thirty-eight private law colleges which were recognized as meeting the required standards.

[76] *Fraser* v. *Children's Court, Pretoria North*, Constitutional Court of South Africa, [1997] 2 LRC 449.

[77] *Gueye* v. *France*, Human Rights Committee, Communication No.196/1985, HRC 1989 Report, Annex X.B.

in its territory. The Human Rights Committee held that the preconditions for restitution and compensation were not compatible with ICCPR 26. The original entitlement to property was not predicated either on citizenship or residence.[78] The refusal of the Linz Employment Agency to pay a Turkish national an advance on his pension in the form of emergency assistance because he did not have Austrian nationality was not based on any objective and reasonable justification. The applicant was legally resident in Austria and worked there at certain times, paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals. He was accordingly in a like situation to Austrian nationals as regards his entitlements thereto.[79] The decision of a university to place a moratorium on promotions of expatriate staff while promoting staff members with South African citizenship constituted a gross violation of the freedom from discrimination.[80] Similarly, a provision that only South African citizens could be appointed to permanent teaching positions discriminated unfairly between permanent residents and South African citizens. Foreign citizens in all countries formed minorities with little political muscle who were therefore vulnerable to having their interests overlooked and their rights to equal concern and respect violated. Moreover, citizenship itself was a personal attribute which was difficult to change and not typically within the control of the individual. It followed that differentiation between citizens and non-citizens constituted discrimination.[81]

(f) Economic status: If a person seeking the protection of the law in order to assert his rights which the law guaranteed found that his indigency prevented him from doing so because he could not afford either the necessary legal counsel or the costs of the proceedings, he was being discriminated against. By reason of his economic status he was not receiving equal protection before the law.[82]

[78] *Simunek* v. *The Czech Republic*, Human Rights Committee, Communication No. 516/1992, HRC 1995 Report, Annex X.K.

[79] *Gaygusuz* v. *Austria*, European Court, (1996) 23 EHRR 364.

[80] *Balaro* v. *University of Bophuthatswana*, Supreme Court of South Africa, [1996] 1 LRC 12.

[81] *Larbi-Odam* v. *Council for Education*, Constitutional Court of South Africa, [1998] 2 LRC 505. Cf. *Public Prosecutor* v. *Taw Cheng Kong*, Court of Appeal of Singapore, [2000] 2 LRC 17: The classification between citizens and non-citizens is not arbitrary or unreasonable.

[82] *Exceptions to the Exhaustion of Domestic Remedies*, Inter-American Court, Advisory Opinion OC-11/90, 10 August 1990.

(g) Disability: The failure of the medical services commission and hospitals to provide sign language interpretation where it is necessary for effective communication denies deaf persons the equal benefit of the law and discriminates against them in comparison with hearing persons.[83]

(h) HIV status: Applicants or employees who were rendered incapable, due to ailment, of performing their normal job functions or who posed a risk to other persons at the workplace (for example, by having some contagious disease which could be transmitted through normal activities at the workplace), could reasonably and justifiably be denied employment or discontinued from employment inasmuch as such classification had intelligible differentia which had a clear nexus with the object to be achieved, viz. to ensure the capacity of such persons to perform normal job functions and to safeguard the interests of other persons at the workplace. However, a person who, while having some ailment, did not cease to be capable of performing the normal job functions and who did not pose any threat to the interests of other persons at the workplace during his normal activities could not be included in this class. Inclusion of such a person therein merely on the ground of his having an ailment was arbitrary and unreasonable. Accordingly, a rule which denied employment to HIV-infected persons merely on the ground of their HIV status irrespective of their ability to perform the job requirements and irrespective of the fact that they posed no threat to others at the workplace was clearly arbitrary and unreasonable.[84]

[83] *Eldridge* v. *Attorney General of British Columbia*, Supreme Court of Canada, [1998] 1 LRC 351.

[84] *X* v. *Y Corp*, High Court of Bombay, [1999] 1 LRC 688. See also *Hoffmann* v. *South African Airways*, Constitutional Court of South Africa, [2001] 2 LRC 277: The employment policy of South African Airways which required the exclusion from employment as cabin attendants of all those who were HIV-positive was discriminatory; *Makuto* v. *State*, Court of Appeal of Botswana, [2000] 5 LRC 183: Where the Penal Code provided for higher prison sentences for HIV positive offenders convicted of rape, the different treatment on the sole basis of a person's HIV status did amount to discrimination.

# 28

# The rights of minorities

## Texts

*International instruments*

International Covenant on Civil and Political Rights (ICCPR)

27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

*Related texts:*

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA resolution 47/135 of 18 December 1992.[1]

ILO Convention (No.107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957.

ILO Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries 1989.

The Framework Convention for the Protection of National Minorities, Council of Europe, 1994.

## Comment

The UDHR does not contain any reference to the rights of minorities. The main trend after the Second World War was to eliminate the

[1] See Asbjorn Eide, *Commentary on the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2001/2 of 2 April 2001.

concept of minorities rather than to protect them. The UN Charter and the UDHR both focused on the human rights of individuals and not on group protection for minorities. Any protection for the latter was through the non-discrimination principle.[2] But in the resolution adopting the UDHR, the General Assembly, recognizing that it could not remain indifferent to the 'fate of minorities', referred pending proposals in the Commission on Human Rights and its Sub-Commission for thorough study and later action.[3] Work on the formulation of standards, however, proceeded at an exceedingly slow pace. Twenty years were to elapse before minority rights were acknowledged in ICCPR 27, as individual rights expressed in negative terms. Another twenty-five years later, the General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

At a very early stage in the drafting of the ICCPR it was agreed that, notwithstanding the general prohibition of discrimination, differential treatment might be granted to minorities in order to ensure them real equality of status with the majority population.[4] ICCPR 27 therefore, establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy.[5] The objective, according to the Human Rights Committee, is the survival and continued development of the cultural, religious and social identity of the minorities concerned, and thereby the enrichment of the fabric of society as a whole. The enjoyment of the right recognized by ICCPR 27 does not prejudice the sovereignty and territorial integrity of a state. But one or other aspect of the right – for example, the enjoyment of a particular culture – may consist in a way of life which is closely associated with territory and use

[2] *Re The School Education Bill 1995*, Constitutional Court of South Africa, [1996] 3 LRC 197, at 225, per Sachs J.

[3] Gudmundur Alfredson, 'Minority Rights and a New World Order', Donna Gomien (ed.), *Broadening the Frontiers of Human Rights* (Oslo: Scandinavian University Press, 1993), 55, at 59.

[4] UN document A/2929, chap.VI, s.183.

[5] Human Rights Committee, General Comment 23 (1994). For the reasons why 'rights of minorities' under ICCPR 27 are considered as individual rights, see Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991), 35.

of its resources. This may particularly be true of members of indigenous communities.[6]

Attempts at defining the term 'minority' have generally not been successful mainly because, in the final analysis, who constitutes a minority is essentially a matter of self-definition. The definition which is widely accepted appears to be that which was formulated by Capotorti:[7]

> A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

## Interpretation

### *In those States in which ethnic, religious or linguistic minorities exist*

ICCPR 27 confers the right on persons belonging to minorities which 'exist' in a state. It is not relevant to determine the degree of permanence that the term 'exists' connotes. The minorities need not be nationals or citizens, or even permanent residents. Thus, migrant workers or even visitors constituting such minorities are entitled not to be denied the exercise of the right. The existence of an ethnic, religious or linguistic

[6] Human Rights Committee, General Comment 23 (1994). But see UN document A/5000, s.121: In the Third Committee it was argued that the indigenous population could not be regarded as a minority, but should be treated as a vital part of the nation and should be assisted in attaining the same levels of development as the remainder of the population.

[7] Francesco Capotorti, *Study on the Rights of Persons*. The Permanent Court of Arbitration, in its Advisory Opinion of 31 July 1930 in connection with the emigration of Greco-Bulgarian communities, [1930] PCIJ, Series B, No.17, at 19, defined a minority community thus:

> By tradition, which plays so important a part in Eastern countries, the 'community' is a group of persons in a given country or locality, having a race, religion, language and traditions of their own and united by the identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

minority in a state does not depend upon a decision by that state, but requires to be established by objective criteria.[8]

*persons belonging to such minorities shall not be denied the right, in community with the other members of their group*

A person will normally be considered as 'belonging' to a minority community if such person has been born into it, has kept ties with the community, and wishes to maintain those ties. When a thirty-two year old Canadian, Sandra Lovelace, who was born and registered as 'Maliseet Indian', and who lived with her parents on a reserve, married a non-Indian, she lost her rights and status as an Indian under the Indian Act. She also lost the right to the use and benefits, in common with other members of the band to which she originally belonged, of the land allotted to the band.[9] Following her divorce, she and her children wished to return to live on the reserve. But as she was no longer a member of the band and no longer an Indian under the Indian Act, she was not entitled in law to do so. The Human Rights Committee held that the rights under ICCPR 27 had to be secured to 'persons belonging' to the minority. She was ethnically an Indian and had only been absent from her home reserve for a few years during the existence of her marriage,

[8] Human Rights Committee, General Comment 23 (1994). This view is different to that expressed in the Commission on Human Rights when ICCPR 27 was being drafted. There it was generally agreed that this article should cover only separate or distinct groups, well-defined and long-established on the territory of a state. It was then considered necessary not to encourage the creation of new minorities or obstruct the process of assimilation. It was felt that such tendencies could be dangerous for the unity of the state. In the Third Committee, many delegations representing countries of immigration expressed their anxiety that persons of similar background who entered their territories voluntarily, through a gradual process of immigration, might be regarded as minorities, thus endangering the national integrity of the receiving states. While the newcomers could use their own language and follow their own religion, they ought to become part of the national fabric. It was emphasized that the provisions of this article should not be invoked to justify attempts which might undermine the national unity of any state. See UN documents A/2929, chap.VI, ss. 184, 186; A/5000, s.120.

[9] The consequences of her loss of status included loss of the right to possess, or reside on, lands on a reserve; the right to return to the reserve after leaving; the right to inherit possessory interest in land from parents or others; and the right to be buried on a reserve. She also lost the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and her identity.

so she was entitled to be regarded as 'belonging' to this minority. To prevent her recognition as belonging to the band was an unjustifiable denial of her rights under ICCPR 27, particularly when construed and applied in the light of other provisions such as ICCPR 12, 17 and 13, and also 2, 3, and 26, as the case may be. Her right of access to her native culture and language 'in community with the other members' of her group had also been interfered with, because there was no place outside the reserve where such a community existed.[10]

ICCPR 27, though expressed in negative terms, recognizes the existence of a 'right' and requires that it shall not be denied. Consequently, a state is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are required not only against the acts of the state itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the state.[11]

The right protected under ICCPR 27 is an individual right, but it depends in turn on the ability of the minority group to maintain its culture, religion or language. Accordingly, positive measures by a state may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. Such positive measures must respect the provisions of ICCPR 2(1) and 26 both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of this right, they may constitute a legitimate differentiation under the ICCPR, provided that they are based on reasonable and objective criteria.[12]

[10] *Lovelace* v. *Canada*, Human Rights Committee, Communication No.24/1977, HRC 1981 Report, Annex XVIII.

[11] Human Rights Committee, General Comment 23 (1994).

[12] Human Rights Committee, General Committee 23 (1994). This view is in contrast to that which was expressed when ICCPR 27 was being drafted. A proposal that 'the state shall ensure to national minorities the right' was rejected. It was argued that, under such a text which imposed a positive obligation on the state, minority consciousness could be artificially awakened or stimulated. The formula 'the persons belonging to such minorities shall not be denied the right', which was adopted, was believed to imply that the obligations of the state would be limited to permitting the free exercise of the rights of minorities. See UN document A/2929, chap.VI, s.188.

*to enjoy their own culture, to profess and practise their own religion, or to use their own language*

Culture, religion and language are the principal defining characteristics of a minority.

## Culture

Difficult issues arise as to how the culture of a minority which is protected by the ICCPR is to be defined, and what role economic activities have in that culture. Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. Economic activities may, therefore, come within the ambit of this right if they are an essential element of the culture of the community.[13] Indigenous communities can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. But where a group defines their culture almost solely in terms of the economic activity of grazing cattle, and cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture, their claim is essentially an economic rather than a cultural claim and does not draw the protection of ICCPR 27.[14]

This right may include such traditional activities as fishing or hunting and living in reserves protected by law.[15] The enjoyment of this right may require positive legal measures of protection and measures to ensure the

[13] *Lansman* v. *Finland* (*No.2*), Human Rights Committee, Communication No.671/1995, HRC 1997 Report, Annex VI.S.

[14] *Rehoboth Baster Community* v. *Namibia*, Human Rights Committee, Communication No.760/1997, HRC 2000 Report, Annex IX.M, individual concurring opinion of Elizabeth Evatt and Cecilia Medina Quiroga.

[15] What is protected is not necessarily the *traditional* means of livelihood of national minorities. They are not precluded from adapting these methods with the help of modern technology. *Lansman* v. *Finland (No.1)*, Human Rights Committee, Communication No.511/1992, HRC 1995 Report, Annex X.I. See also *Rehoboth Baster Community* v. *Namibia*, Human Rights Committee, Communication No.760/1997, HRC 2000 Report, Annex IX.M.

effective participation of members of minority communities in decisions which affect them.[16] A threat to the way of life and culture of a minority, whether by historical inequities or more recent developments, will, therefore, constitute a violation of this right. In Canada, the Lubicon Lake Band, a Cree Indian Band living within the borders of the province of Alberta, submitted that it was a self-identified, relatively autonomous, socio-cultural and economic group. Its members had continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory was relatively inaccessible, they had had, until recently, little contact with non-Indian society. Band members spoke Cree as their primary language; many did not speak, read or write English. The Band continued to maintain its traditional culture, religion, political structure and subsistence economy. They complained that the Canadian government had allowed the provincial government of Alberta to appropriate their territory for the benefit of private corporate interests (e.g., leases for oil and gas exploration), thereby destroying the environmental and economic base of the Band and its aboriginal way of life. The Human Rights Committee held that the activities permitted by the Canadian government constituted a threat to the way of life and culture of the Lubicon Lake Band.[17]

Since the regulation of economic activity is normally a matter for the state, if it can be shown that a restriction upon the right of an individual member of a minority has a reasonable and objective justification and is necessary for the continued viability and welfare of the minority as a whole, such restriction will be upheld. In Sweden, a citizen of Sami ethnic origin whose family had been active in reindeer breeding for over 100 years complained that a 1971 Swedish statute deprived him of membership in the Sami village, thereby preventing him from exercising his traditional Sami right to reindeer husbandry. Under the Reindeer Husbandry Act, a Sami who engaged in any other profession for a period of three years lost his status and his name was removed from the rolls of the village. The Act was designed to improve the living conditions of the reindeer-herding Sami who derived their primary income from that

[16] Human Rights Committee, General Comment 23 (1994).

[17] *Ominayak* v. *Canada*, Human Rights Committee, Communication No.167/1984, HRC 1990 Report, Annex IX.A. Cf. *G and E* v. *Norway,* European Commission, Application 9278/81, (1983) 35 *Decisions & Reports* 30.

vocation by restricting their number. The Human Rights Committee found no violation of this right since Kitok was permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.[18]

A state may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so must be assessed by reference to the obligations it has undertaken under ICCPR 27. Therefore, measures whose impact amount to a denial of the right of persons belonging to a minority to enjoy their cultures will not be compatible with such obligations. But measures that have a certain limited impact on the way of life of such persons will not necessarily amount to a denial of this right. A contract signed by the Central Forestry Board and a private company to allow for four years the quarrying of stone in ten hectares of land in an area that was traditionally used for reindeer hunting and herding by reindeer breeders of Sami ethnic origin did not reveal a breach of this right. The arrangements made for quarrying did not substantially impact on reindeer husbandry.[19] Similarly, the logging of forests in an area covering approximately 3,000 hectares of land, which had commenced after consultation with herdsmen's committees, did not appear to threaten the survival of reindeer husbandry.[20]

## Religion

ICCPR 27 imposes a positive obligation on the state to promote religious instruction in minority religions. Providing such education as an optional arrangement within the public education system is one permissible arrangement to that end. Providing for publicly funded education in minority languages for those who wish to receive such education is not discriminatory, although care must of course be taken that possible distinctions between minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities, a state may legitimately base itself on whether there is a constant demand for

[18] *Kitok* v. *Sweden*, Communication No.197/1985, HRC 1988 Report, Annex VII.G.

[19] *Lansman* v. *Finland (No.1)*, Human Rights Committee, Communication No.511/1992, HRC 1995 Report, Annex X.I.

[20] *Lansman* v. *Finland (No.2)*, Human Rights Committee, Communication No.671/1995, HRC 1997 Report, Annex V.I.S.

such education. For many religious minorities the existence of a fully secular alternative within the public school system is sufficient, as the communities in question may wish to arrange for religious education outside school hours and outside school premises. If demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education.[21]

## Language

The right of individuals belonging to a linguistic minority to use their own language among themselves, in private and in public, is distinct from other language rights protected under the ICCPR. It should be distinguished from the general right to freedom of expression protected under ICCPR 19, which is available to all persons, irrespective of whether they belong to minorities or not. It should also be distinguished from the particular right which ICCPR 14(3)(f) confers on an accused person to interpretation where he cannot understand or speak the language used in court, and which does not, in any other circumstances, confer on an accused person the right to use or speak the language of his choice in court proceedings.[22] Where a French citizen whose mother tongue was Breton complained about the refusal of the French Postal Administration to issue him postal cheques in that language, and against fiscal authorities who had refused to take into consideration information provided by him in Breton, thereby making him liable to pay taxes which did not take into account tax-deductible professional expenses, the Human Rights Committee rejected his communication on the ground that domestic remedies had not been exhausted.[23] One of the members, however, observed that the ICCPR was indifferent to the centralized or decentralized character of the state, or to the existence or non-existence of an official language. In his view, ICCPR 27 did not demand of the state that it

[21] *Waldman* v. *Canada*, Human Rights Committee, Communication No.694/1996, HRC 2000 Report, Annex IX.H, individual concurring opinion of Martin Scheinin, HRC 2000 Report, Annex IX.H.

[22] Human Rights Committee, General Comment 23 (1994).

[23] *C.L.D.* v. *France*, Human Rights Committee, Communication No.228/1987, HRC 1988 Report, Annex VIII.E.

require the postal administration to issue postal cheques in a language other than the official language, nor did it stipulate that the authorities should accept information provided in another language.[24] In Belgium, the constitutional obligation of taking the oath in Dutch, imposed on all members of the Flemish Council including French-speaking members, did not restrict this right.[25]

[24] Individual opinion of Birame Ndiaye. This view appeared to be shared by five other members, Vojin Dimitrijevic, Rosalyn Higgins, Andreas Mavrommatis, Fausto Pocar and Bertil Wennergren.

[25] Decision of the Court of Arbitration of Belgium, Case No.90/1994, 22 December 1994, (1994) 3 *Bulletin on Constitutional Case-Law* 215.

# 29

# The rights relating to work

## Texts

### *International instruments*

### Universal Declaration of Human Rights (UDHR)

23. (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.
    (2) Everyone, without any discrimination, has the right to equal pay for equal work.
    (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

24. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

6. (1) The States Parties . . . recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
   (2) The steps to be taken by a State Party . . . to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

7. The States Parties . . . recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
   (a) Remuneration which provides all workers, as a minimum, with:
      (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
      (ii) A decent living for themselves and their families in accordance with the provisions of the . . . Covenant;
   (b) Safe and healthy working conditions;
   (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
   (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

## *Regional instruments*

### American Declaration of the Rights and Duties of Man (ADRD)

14. (1) Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit.
   (2) Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.
15. Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit.

### European Social Charter (ESC)

I. (1) Everyone shall have the opportunity to earn his living in an occupation freely entered upon.
   (2) All workers have the right to just conditions of work.
   (3) All workers have the right to safe and healthy working conditions.
   (4) All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.

## American Convention on Human Rights: Additional Protocol (ACHR AP)

6. (1) Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.
   (2) The states parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance and the development of technical and vocational training projects, in particular those directed to the disabled. The states parties also undertake to implement and strengthen programmes that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.
7. (1) The states parties . . . recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable and satisfactory conditions, which the states parties undertake to guarantee in their internal legislation, particularly with respect to:
   (a) remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;
   (b) the right of every worker to follow his vocation and to devote himself to the activity that best fulfils his expectations and to change employment in accordance with the pertinent national regulations;
   (c) the right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;
   (d) stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;
   (e) safety and hygiene at work;
   (f) the prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding

compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;

(g) a reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or night work;

(h) rest, leisure and paid vacations as well as remuneration for national holidays.

### African Charter on Human and Peoples' Rights (AfCHPR)

15. Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.

*Related texts:*

European Social Charter, Articles II.1, II.2, II.3, II.4.

Selected ILO Conventions:

No. 2: Concerning Unemployment 1919.
No. 26: Concerning the Creation of Minimum Wage-Fixing Machinery 1928.
No. 29: Concerning Forced or Compulsory Labour 1930.
No. 47: Concerning the Reduction of Hours of Work to Forty a Week 1935.
No. 100: Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951.
No. 105: Concerning the Abolition of Forced Labour 1957.
No. 111: Concerning Discrimination in Respect of Employment and Occupation 1958.
No. 117: Concerning Basic Aims and Standards of Social Policy 1962.
No. 122: Concerning Employment Policy 1964.
No. 132: Concerning Annual Holidays with Pay (revised) 1970.
No. 155: Concerning Occupational Safety and Health and the Working Environment 1981.
No. 156: Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities 1981.
No. 158: Concerning Termination of Employment at the Initiative of the Employer 1982.

No. 168: Concerning Employment Promotion and Protection against Unemployment 1988.
No. 171: Concerning . . . Night Work 1990.

## Comment

ICESCR 6, ACHR AP 6(1) and AfCHPR 15 recognize the right to work, which includes, except in the case of the latter, not only the right to free choice of employment, but also the right of everyone to the opportunity to gain one's living by work (or activity) which is freely chosen or accepted. ESC recognizes these two elements without specifically referring to the right to work. While a state is not obliged to 'guarantee' or 'ensure' work for all its citizens, it is required to take steps with a view to achieving progressively as high and stable a level of employment as possible. Even in the context of an open economy the state is obliged to pursue the objective of full employment. The obligation is one as to means rather than as to results. To abandon that objective in favour of an economic system that provides for a permanent pool of unemployed is an infringement of this right. What is required is the existence of a planned policy of employment.[1]

ICESCR 6(2) and ACHR AP 6(2), which are implementation clauses, describe some of the measures which may be adopted to secure the full realization of this right. In the pursuit of full employment, the state is obliged to ensure that no discrimination takes place at any stage on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The prohibition of discrimination is immediate and absolute and may, therefore, require appropriate legislation. Special measures may, however, be necessary to help those individuals who are at a disadvantage in seeking work either because of regional imbalance, disparities based on sex, or because of age.[2]

ICESCR 7 and ACHR AP 7 oblige a state to take steps with a view to achieving progressively the enjoyment by everyone of just and favourable (and 'satisfactory' in ACHR AP 7 and 'equitable and satisfactory' in AfCHPR 15) conditions of work. By reason of ICESCR 2(2) and ACHR

[1] ESC Committee of Independent Experts, Conclusions I, 13–14; II, 3.
[2] ESC Committee of Independent Experts, Conclusions IV, General Introduction.

AP 3, the state is obliged to ensure, immediately and absolutely, that this right will be exercised without discrimination of any kind. In particular, women may not be provided with conditions of work inferior to those enjoyed by men, and will be entitled to receive the same pay as men do.[3] Where the state is not itself the employer, the implementation of this right may require legislation prescribing the minimum standards and mechanisms of enforcement.

In relation to work, several principles have been established: free choice of employment (ICESCR 7, ESC I,1 and ACHP AP 6); protection against unemployment (UDHR 23) and unjustified dismissal (ACHR AP 7); fair wages (ICESCR 7, ESC I,4 and ACHR AP 7); equal remuneration for work of equal value (ICESCR 7, ESC II,4) or equal pay for equal work (UDHR 23, ACHR AP 7 and AfCHPR 15);[4] safe and healthy working conditions (ICESCR 7, ESC I,3 and ACHR AP 7); equal opportunity to be promoted solely on seniority and competence (ICESCR 7) or qualifications, competence, integrity and seniority (ACHR AP 7); rest, leisure, and reasonable limitation of working hours (UDHR 24, ICESCR 7, ACHR AP 7, ESC II,2); periodic holidays with pay (UDHR 24, ICESCR 7, ESC II,2 and ACHR AP 7) and remuneration for public holidays (ICESCR 7, ESC II,2 and ACHR AP 7).

## Interpretation

### *the right to work*

The right to work implies a right not to work. A legally enforceable duty to work is, therefore, inconsistent with this right. It also implies a right not to be arbitrarily prevented from working. A law which requires a woman to obtain the permission of her husband in order to work or travel abroad is, accordingly, incompatible with this right.[5] So is the duty of a female civil servant to resign on marriage, and the fact that

[3] The Committee on Economic, Social and Cultural Rights has noted, for example, that in the agricultural sector of the Mauritian economy, for work of the same value, women are paid lower wages than men on the stated assumption that their productivity is lower in such labour-intensive work. See Concluding Observations (Mauritius), UN document E/C.12/1994/20, p.38.

[4] The former contemplates equal pay for comparable work, while a common pay scale may satisfy the latter.

[5] Committee on Economic, Social and Cultural Rights, Concluding Observations (Islamic Republic of Iran), UN document E/C.12/1993/19, p.34.

married women cannot enter the civil service.[6] Access to and conditions of employment should be based strictly on objective criteria relating to work in accordance with the ICESCR and ILO Convention No.111. Discrimination in employment on the ground of political opinion is, therefore, prohibited.[7]

### *work which he freely chooses or accepts*

The free choice of employment implies the prohibition of forced labour and the absence of any discrimination in matters relating to employment.[8] An unnecessarily long waiting time for a qualifying state examination is a violation of the right to choose one's occupation freely.[9] It is also not acceptable to specify 'political' good conduct as a condition of taking up an occupation.[10] The introduction of the condition that owners of transport companies should not have a criminal record infringes the freedom to conduct a business activity and the right to work.[11]

The coercion of any worker to carry out work against his wishes, and without his freely expressed consent, infringes this right. The same applies to the coercion of any worker to carry out work he had previously freely agreed to do, but which he subsequently no longer wanted to carry out.[12] A law which enables a public servant or other person responsible for a public service to be sentenced to penal servitude in the event of 'unwarranted refusal or failure to perform, or unwarranted delay in performing the duties of his office or service or in the event of any interruption or abandonment of the service with intent to disturb its regularity, or having the effect of so doing', is, if its application is not confined to an essential service, contrary to the principle that forced labour is prohibited. An essential service is one whose interruption will

[6] ESC Committee of Independent Experts, Conclusions I, 66.
[7] Committee on Economic, Social and Cultural Rights, Concluding Observations (Germany), UN document E/C.12/1993/19, p.50.
[8] ESC Committee of Independent Experts, Conclusions 1,15.
[9] Decision of the Federal Constitutional Court of Germany, 3 May 1999, (2000) 2 *Bulletin on Constitutional Case-Law* 270.
[10] Decision of the Constitutional Court of Italy, 311/1996, 18 July 1996, (1996) 2 *Bulletin on Constitutional Case-Law* 231.
[11] Decision of the Constitutional Tribunal of Poland, K 33/98, 26 April 1999, (1999) 2 *Bulletin on Constitutional Case-Law* 247.
[12] ESC Committee of Independent Experts, Conclusions III, 5.

jeopardize the existence or well-being of the whole or part of the community, and does not, therefore, include services such as public savings banks, transport operations and tourist offices.[13] A law which enables certain breaches of discipline by seamen to be punished by imprisonment (involving an obligation to perform labour), and foreign seamen to be forcibly conveyed on board ships to perform their duties, may contravene the right of a person to gain his living by work which he freely chooses or accepts.[14]

### *fair wages*

Wages should be equitable, just and reasonable.[15] Prisoners may not be remunerated for their work below the minimum wage provided for other categories of employees.[16] A statutory provision according to which the compensation payable to an employee reinstated in his post following the overturning of the termination of an employment contract is calculated on the basis of the average salary paid over the course of the last three months preceding the termination, is contrary to the right to work and the principle of equality. Compensation has to be equal to the total amount which he would have received if he had worked.[17]

[13] ESC Committee of Independent Experts, Conclusions IV, 7–8. *Lansman* v. *Finland (No. 2)* Human Rights Committee, Communication No.671/1995 HRC 1997 Report, Annex VI. S.

[14] Committee on Economic, Social and Cultural Rights, Concluding Observations (Mauritius), UN document E/C.12/1994/8 of 31 May 1994.

[15] It has been suggested that the term 'fair wages' implies that the basic level of pay for each particular occupation should reflect the nature and circumstances of the work undertaken. Certain objective criteria such as the level of skill, the amount of responsibility, the amount of disruption to family life, the value of the productive output to the economy, and the health and safety risks involved should be taken into account in determining whether the wages of a particular occupation could be said to be 'fair'. This would mean that wage-rates should reflect, to a large extent, the value of the employment undertaken, but it would also mean that workers employed in dangerous occupations or who work unsociable hours should be afforded sufficient remuneration to act as a recompense for the disruption to their family life or health: M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on Its Development* (Oxford: Clarendon Press, 1995), 233. *Lansman* v. *Finland (No. 1)*: Human Rights Committee, Communication No. 511/199, HRC 1995 Report, Annex X. 1.

[16] Decision of the Constitutional Tribunal of Poland, K 7/96, 7 January 1997, (1997) 1 *Bulletin on Constitutional Case-Law* 68.

[17] Decision of the Constitutional Court of Romania, 160/1999, 19 October 1999, (2000) 1 *Bulletin on Constitutional Case-Law* 108.

*equal remuneration for work of equal value*

Equality of pay may be ensured either by means of legislation and regulations or by collective agreements.[18] In particular, (i) legislation must prescribe that men and women workers must receive equal pay not only for equal work but also for work of equal value; (ii) any clauses of collective agreements or individual contracts which contravene this principle must be declared null and void; (iii) the protection of this right must be ensured through adequate remedies; and (iv) workers must enjoy effective protection from measures of retaliation arising from their claim for equal pay, notably protection against dismissal.[19] The requirement that a worker should also receive a fair wage sufficient for a decent standard of living for himself and his family suggests that this right may not be infringed if a worker with a family receives a higher wage than a worker who is single, irrespective of their sexes.

*a decent living*

A worker is entitled to remuneration sufficient for a 'decent living' for himself and his family. The term 'decent living' is required to be read in the context of other provisions of the ICESCR. In this regard, ICESCR 11 appears to be particularly relevant. That article recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions. In determining what is 'decent living', account must be taken of the fact that the socio-economic status of the worker and his family changes, and that his basic needs, which at first are centred on the provision of purely basic material necessities such as food and housing, subsequently move towards concerns of a more advanced and complex nature, such as educational facilities and cultural and social benefits.[20]

In interpreting the concept 'decent standard of living' in ESC I,4, the Committee of Independent Experts at first took account of the fundamental social, economic and cultural needs of workers and their families in relation to the stage of development reached by the society in which

[18] ESC Committee of Independent Experts, Conclusions I, 28.
[19] ESC Committee of Independent Experts, Conclusions VIII, 66.
[20] ESC Committee of Independent Experts, Conclusions I, 26.

they lived, and of the economic and social situation in the country which was being considered. In a given country and at a given time, the wage paid to the largest number of workers was taken as representative of the wage level in that country. If the representative wage thus defined were the point of reference, any lower wage which deviated from that to an excessive extent was not considered as sufficient to permit a 'decent standard of living in the society under consideration'. At a later stage, the committee arrived at a similar result by applying the 'decency threshold' which was either approximately 66 per cent of disposable national income per head or around 68 per cent of the national average wage. The committee cautioned, however, that in the application of this method (which could only be valid for countries with a more or less comparable economic and social structure) a certain number of weighting factors must be taken into account. These include substantial social benefit payments, family and housing subsidies, educational and cultural subsidies, tax concessions, an excessive widening of income distribution, and an effort on the part of the government of a country to ensure sustained progress in the social field for workers.[21]

### *safe and healthy working conditions*

To ensure safe and healthy working conditions a state may need to issue safety and health regulations, provide for the enforcement of such regulations by measures of supervision, and consult, as appropriate, employers' and workers' organizations on measures intended to improve industrial safety and health.[22] This requirement is applicable to employed as well as to self-employed persons.[23] In respect of the latter, the state should impose a duty of self-protection.[24]

### *equal opportunity for promotion*

Seniority and competence are the only considerations to be taken into account in determining whether a person should be promoted to an

[21] ESC Committee of Independent Experts, Conclusions V, 25–6. *Waldman* v. *Canada*, Human Rights Committee 2000 Report, Annex IX.H.
[22] European Social Charter, Article II, 3.
[23] ESC Committee of Independent Experts, Conclusions II, 12.
[24] ESC Committee of Independent Experts, Conclusions IV, 21–2.

appropriate higher level of employment. When read with ICESCR 2(2), which prohibits discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, it may be argued that in certain circumstances the adoption of a quota system or other measure designed to redress a historic imbalance or grant relief to a disadvantaged group may not be inconsistent with this right.

### *rest, leisure, reasonable limitation of working hours, periodic holidays with pay and remuneration for public holidays*

The word 'rest' is intended to guarantee a real cessation of activities, giving the individual a possibility to regain his strength, while 'leisure' should make it possible for the individual to cultivate his mind and interests.[25] A right to leisure appears to impose a corresponding obligation on the state to provide adequate facilities for leisure. It is not consistent with this right to allow a worker to forego his weekly rest period in exchange for a lump-sum in compensation.[26] Workers in dangerous or unhealthy occupations are entitled to reduced working hours or additional paid holidays. This allows for a reduced accumulation of physical and mental fatigue and a reduction in the exposure to risk, while at the same time granting workers longer periods of rest.[27] But the award of increased pay to such workers without a reduction in working hours is not acceptable.[28] A worker must receive payment for work performed in special circumstances and outside normal working hours (i.e. overtime). The rate of such payment must be higher than the normal wage rate.[29]

To require the annual holiday to be taken after the twelve months for which it is due has fully elapsed is not incompatible with this right.[30] A worker may not waive his right to the annual holiday, even in consideration of an extra payment by the employer. The need to protect the worker as fully as possible makes such a waiver incompatible with

[25] Goran Melander, 'Article 24' in Asbjorn Eide *et al.* (ed.), *The Universal Declaration of Human Rights: a Commentary* (Oslo: Scandinavian University Press, 1992), 379, at 380.
[26] ESC Committee of Independent Experts, Conclusions I, 172.
[27] ESC Committee of Independent Experts, Conclusions V, 15–16; VI, 14.
[28] ESC Committee of Independent Experts, Conclusions III, 4.
[29] ESC Committee of Independent Experts, Conclusions I, 28.
[30] ESC Committee of Independent Experts, Conclusions I, 20.

this right, even with the free consent of the worker concerned. However, the payment of a lump-sum to an employee at the end of his employment in compensation for the paid holiday to which he was entitled but which he had not taken, is permissible.[31] Six, nine, ten or seventeen public holidays with pay have been considered to be reasonable.[32]

[31] ESC Committee of Independent Experts, Conclusions I, 170.
[32] ESC Committee of Independent Experts, Conclusions I, 19.

# 30

# The rights relating to social security

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

25. (1) Everyone has . . . the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

#### International Covenant on Economic, Social and Cultural Rights (ICESCR)

9. The States Parties . . . recognize the right of everyone to social security, including social insurance.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

26. Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

European Social Charter (ESC)

I (12) All workers and their dependants have the right to social security.
(13) Anyone without adequate resources has the right to social and medical assistance.
(14) Everyone has the right to benefit from social welfare services.

American Convention on Human Rights: Additional Protocol (ACHR AP)

I (4) Every elderly person has the right to social protection.

African Charter on Human and Peoples' Rights (AfCHPR)

18 (4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

*Related texts:*

Selected ILO Conventions:

Nos. 24 and 25: Concerning Sickness Insurance, 1927 and 1933.
Nos. 37 and 38: Concerning Invalidity Insurance, 1933.
Nos. 39 and 40: Concerning Compulsory Widows' and Orphans' Insurance, 1933.
No. 42: Concerning Workmen's Compensation for Occupational Diseases (revised) 1934.
No. 102: Concerning Minimum Standards of Social Security 1952.
No. 118: Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security 1962.
No. 121: Concerning Benefits in the Case of Employment Injury 1964.
No. 128: Concerning Invalidity, Old-Age and Survivors' Benefits 1967.
No. 130: Concerning Medical Care and Sickness Benefits 1969.
No. 157: Concerning Maintenance of Social Security Rights 1982.

## Comment

ICESCR 9 provides generally that states parties 'recognize the right of everyone to social security', without specifying the type or level of protection to be guaranteed. However, the term 'social security' implicitly

covers all the risks involved in the loss of means of subsistence for reasons beyond a person's control.[1] UDHR 22, which first enunciated the right to social security, defined it in terms of insurance against unemployment, sickness, disability, widowhood, old age, and 'other lack of livelihood in circumstances beyond his control'. Similarly, ADRD 26 mentions unemployment, old age, 'and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living' as being the circumstances that trigger the need for social security. ESC II, 12 requires the social security system to be maintained at 'a satisfactory level' at least equal to that required for ratification of ILO Convention No.102.

## Interpretation

### *Social security*

The right to social security presupposes the establishment and maintenance of a social security system. Under the European Social Charter, the existence of a social security system is acknowledged only if the system meets several conditions which are appraised as a whole: (i) the system must cover certain major risks; (ii) the system must offer effective benefits in the most important branches; and (iii) the system must cover a significant percentage of the population.[2] Since the state is required to guarantee social security benefits, the legislature may not reduce the expenditure on social security. To do so is to withdraw the underlying state guarantees.[3] The suspension of payment of a state retirement pension to a person sentenced by a court to serve a term of imprisonment

[1] Committee on Economic, Social and Cultural Rights, General Comment 6 (1995). See also Vladimir Kartashkin, "Economic, Social and Cultural Rights" in K. Vasak and P. Alston (eds.) *The International Dimensions of Human Rights* (Westport, Connecticut: Greenwood Press, 1982), vol. I, 111, at 113: To determine the substantive content of this right, it is appropriate to refer to the conventions in the field of social security adopted by the International Labour Organization. They define the contingencies against which social security schemes should provide protection, the persons to be covered in respect of each of those contingencies, and the minimum level at which benefits should be provided. They also provide guidelines for the financing of social security schemes.

[2] *Social Protection in the European Social Charter*, Social Charter monographs, No.7, (Strasbourg: Council of Europe Publishing, 2000 (2nd edition)), 21–4.

[3] Decision of the Constitutional Court of Hungary, Case No.56/1995, 15 September 1996, (1995) 3 *Bulletin on Constitutional Case-Law* 311.

constitutes an inadmissible restriction of the right to social security.[4] Since any form of discrimination in the application of this right is prohibited, a foreign migrant worker cannot be excluded from unemployment benefits to which national workers are entitled if he meets the statutory conditions governing such benefits.[5]

The right to social security includes the duty of the state to guarantee minimum conditions of subsistence. Accordingly, the state is obliged to provide accommodation for the homeless if human life is in imminent danger. The obligation to provide shelter, however, is not identical with ensuring the right to housing in a broader sense. Therefore, the state is only required to provide a roof if human life is directly threatened by lack of accommodation.[6] The right to social security does not depend on age; the right is guaranteed for all citizens in need, irrespective of the age group to which a person belongs.[7]

### *Social insurance*

The state must take appropriate measures to establish general regimes of compulsory old-age insurance, starting at a particular age, to be prescribed by national law.[8] In order to give effect to ICESCR 9, the state should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons, who, when reaching the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income.[9]

Where there is social insurance legislation providing benefits covering certain risks, the fact that there are substantial gaps in it and many benefits are very low, creates a serious doubt as to whether such a

[4] Decision of the Constitutional Court of Russia, 16 October 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 340.

[5] Decision of the Constitutional Court of Spain, Case No.130/1995, 11 September 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 366.

[6] Decision of the Constitutional Court of Hungary, 42/2000, 8 November 2000, (2000) 3 *Bulletin on Constitutional Case-Law* 499.

[7] Decision of the Constitutional Court of Ukraine, 1–20/99, 2 June 1999, (1999) 2 *Bulletin on Constitutional Case-Law* 289.

[8] Committee on Economic, Social and Cultural Rights, General Comment 6 (1995).

[9] Committee on Economic, Social and Cultural Rights, General Comment 6 (1995).

measure could be termed a social security system.[10] In order to give effect to ICESCR 9, the state must guarantee the provision of survivors' or orphans' benefits on the death of the breadwinner who was covered by social security or receiving a pension.[11] The payment of an allowance in respect of temporary unfitness for work for a fixed period only, in practice leaves unemployed people with no material assistance from the state if their temporary unfitness for work extends beyond that period. This is contrary to the constitutional guarantees concerning social security.[12]

[10] ESC Committee of Independent Experts, Conclusions III, 62.
[11] Committee on Economic, Social and Cultural Rights, General Comment 6 (1995).
[12] Committee on Economic, Social and Cultural Rights, General Comment 6 (1995).

# 31

# The right to an adequate standard of living

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

#### International Covenant on Economic, Social and Cultural Rights (ICESCR)

11. (1) The States Parties . . . recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

(2) The States Parties . . , recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

*Regional instruments*

American Convention on Human Rights: Additional Protocol (ACHR AP)

12. (1) Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.

(2) In order to promote the exercise of this right and eradicate malnutrition, the states parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international co-operation in support of the relevant national policies.

*Related texts:*

Declaration of the Rights of the Child, UNGA resolution 1386 (XIV) of 29 November 1959, Principle 4.

Declaration on Social Progress and Development, UNGA resolution 2542 (XXIV) of 11 December 1969, Part II, Article 10(f).

Vancouver Declaration on Human Settlements, adopted by the United Nations Conference on Human Settlements, 1976, section III(8), chapter II(A.3).

Declaration on the Right to Development, UNGA resolution 41/128 of 4 December 1986, Article 8.1.

Draft Declaration on Rights of Indigenous Persons, Articles 20, 23.

ILO Recommendation (No.115) on Workers' Housing 1961.

ILO Convention (No.117) Concerning Basic Aims and Standards of Social Policy 1962.

International Convention on the Elimination of All Forms of Racial Discrimination 1965, Article 5(e)(iii).

Convention on the Elimination of All Forms of Discrimination against Women 1979, Article 14.2(h).

Convention on the Rights of the Child 1989, Article 27.3.

Convention Relating to the Status of Refugees 1951, Article 21.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, Article 43.1.

## Comment

ICESCR 11 requires the state to take steps with a view to achieving progressively an adequate standard of living for everyone. This includes ensuring access to adequate food, adequate clothing, adequate housing, and the continuous improvement of living conditions. It has been suggested that this concept be interpreted to encompass, as a minimum, the 'basic needs' of the individual.[1] These include, firstly, certain minimum requirements of a family for private consumption: adequate food, shelter and clothing, as well as certain household equipment and furniture; and secondly, essential services provided by and for the community at large, such as safe drinking water, sanitation, public transport and health, educational and cultural facilities.[2] ACHR AP 12 recognizes the right to 'adequate nutrition' but does not refer to either clothing or housing.

While the state obligation is progressive in nature, discrimination of any kind at any stage in respect of access to adequate food, clothing and housing, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status, with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of this right, is prohibited.

## Interpretation

### *everyone*

The term 'everyone' can reasonably apply, with regard to each state, to the persons for which that state is responsible. The term cannot include foreigners who, although present on the territory, have been ordered to leave, after it has been established that the conditions of their residence were not or were no longer complied with.[3] The reference to 'himself and his family' in ICESCR 11(1) does not imply any limitation upon the applicability of this right to individuals or to female-headed households.[4] It merely reflects assumptions as to gender roles and economic

[1] M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on Its Development* (Oxford: Clarendon Press, 1995), 305.
[2] ILO, World Employment Conference 1976.
[3] Decision of the Court of Arbitration of Belgium, Judgment No.51/94, 29 June 1994, (1994) 2 *Bulletin on Constitutional Case-Law* 111.
[4] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).

activity patterns commonly accepted in 1966 when the ICESCR was adopted.[5]

### *right to adequate food*

The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or the means for its procurement. The right to adequate food is not interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, the state has a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in ICESCR 11(2), even in times of natural or other disasters.[6] This right is indivisably linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.[7]

The core content of the right to adequate food implies: (a) the availability[8] of food in a quantity and quality sufficient to satisfy the dietary needs[9] of individuals, free from adverse substances,[10] and acceptable

[5] Committee on Economic, Social and Cultural Rights, General Comment 4 (1991).

[6] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).

[7] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).

[8] 'Availability' refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.

[9] 'Dietary needs' implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary consumption and intake.

[10] 'Free from adverse substances' sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain. Care must also be taken to identify and avoid or destroy naturally occurring toxins.

within a given culture;[11] and (b) the accessibility[12] of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.[13]

The right to adequate food, like any other human right, imposes three types or levels of obligations on the state: the obligations to respect, to protect, and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires the state not to take any measures that result in preventing such access. The obligation to protect requires measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the state must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, the state has the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.[14]

In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a state to comply. Should the state argue that resource

[11] 'Cultural or consumer acceptability' implies the need to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

[12] 'Accessibility' encompasses both economic and physical accessibility. The former implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes. The latter implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

[13] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).

[14] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).

constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the state has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. A state claiming that it is unable to carry out its obligations for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.[15]

Violations of the right to food can occur through the direct action of the state or other entities insufficiently regulated by the state. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is proactive; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of the state to take into account its international legal obligations regarding the right to food when entering into agreements with other states or with international organizations.[16]

Accordingly, this right is not recognized when a state abolishes subsidies on rice and flour without replacing them by a system that would guarantee food security for the most vulnerable groups of the population.[17] Food embargoes or similar measures which endanger conditions for food production and access to food in other countries are inconsistent with this right; food may not be used as an instrument of political and economic pressure. Similarly, food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the

[15] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).
[16] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).
[17] Committee on Economic, Social and Cultural Rights, Concluding Observations (Mauritius), UN document E/C.12/1994/20, p.40. Strategies such as an Old Age Security Programme and a Guaranteed Income Supplement have a positive effect in dealing with the poverty rate among elderly couples: Committee on Economic, Social and Cultural Rights, Concluding Observations (Canada), UN document E/C.12/1993/19, p.29.

needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.[18]

### Freedom from hunger

ICESCR 11(2), which is an implementation clause dealing with a 'sub-norm' of the right to adequate food, namely freedom from hunger, was included at the instance of the Director-General of the Food and Agricultural Organization. The use of the word 'fundamental' underscores the urgency of dealing with the problem of hunger which, unlike the concept of 'adequate food', is concerned with the issue of survival. The state is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

## *right to adequate clothing*

The right to adequate clothing has not been the subject of comment by the Committee on Economic, Social and Cultural Rights, nor has it been examined by any commentators.

## *right to adequate housing*

Individuals as well as families[19] are entitled to adequate housing regardless of factors such as age, economic status, group or other affiliation or status. In particular, the enjoyment of this right may not be subject to any form of discrimination.[20] The right to housing is not to be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally

[18] Committee on Economic, Social and Cultural Rights, General Comment 12 (1999).

[19] The concept of 'family' must be understood in a wide sense.

[20] In examining the report submitted by Canada, the Committee on Economic, Social and Cultural Rights noted that there was widespread discrimination in housing against people with children, people on social assistance, people with low incomes, and people who were indebted. See Concluding Observations (Canada), UN document E/C.12/1993/19, p.30.

linked to other human rights and to the fundamental principles upon which the ICESCR is premised. This 'the inherent dignity of the human person' from which the rights in the ICESCR are said to derive requires that the term 'housing' be interpreted so as to take account of a variety of other considerations; most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in ICESCR 11(1) must be read as referring not just to housing but to adequate housing.[21]

The concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of ICESCR 11. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) *Legal security of tenure.* Tenure takes a variety of forms, including rental (public and private) accommodation, co-operative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land and property. Notwithstanding the type of tenure, an individual should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. Consequently, the state is required to take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.
(b) *Availability of services, materials, facilities and infrastructures.* An adequate house must contain certain facilities essential for health,

[21] Committee on Economic, Social and Cultural Rights, General Comment 4 (1991). Adequate shelter means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost: United Nations Global Strategy for Shelter to the Year 2000, UN document A/43/8/Add.1. See also *Shanti Star Builders* v. *Naryan Khimalal Totame*, Supreme Court of India, Civil Appeal No.2598 of 1989, AIR 1990 SC 630; (1990) 1 SCC 520: What is contemplated is suitable accommodation which would allow a human being to grow in every aspect – physical, mental and intellectual.

security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

(c) *Affordability.* Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by the state to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. The state should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by the state to ensure the availability of such materials.

(d) *Habitability.* Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.

(e) *Accessibility.* Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other such groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.

(f) *Location*. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

(g) *Cultural adequacy*. The way housing is constructed, the building materials used, and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured.[22]

## Forced evictions

The term 'forced evictions' is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the international human rights instruments.[23] The practice

[22] Committee on Economic, Social and Cultural Rights, General Comment 4 (1991). See also letter addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to Mr Wally M'Dow, Assistant Secretary-General, UN Centre for Human Settlements (HABITAT), UN document E/C.12/1995/11 of 21 July 1995, on the question whether international human rights law recognizes a right to adequate housing.

[23] Committee on Economic, Social and Cultural Rights, General Comment 7 (1997). Although the practice of forced evictions might appear to occur primarily in heavily populated urban areas, it also takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements. Other instances of forced evictions occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games. In all of these contexts,

of forced evictions, without consultation, compensation, or adequate resettlement, is inconsistent with the obligation to respect and ensure the right to adequate housing.[24] Whenever an inhabited dwelling is either demolished or its inhabitants evicted, the government is under an obligation to ensure that adequate alternative housing is provided. In this context, 'adequacy' requires relocation within a reasonable distance from the original site, and in a setting which has access to essential services such as water, electricity, drainage and garbage removal. Similarly, persons who are housed in conditions which threaten their life and health should, to the maximum of available resources, be adequately rehoused.[25]

Legislation against forced evictions is an essential basis upon which to build a system of effective protection of the right to adequate housing. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the ICESCR and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must apply to all agents acting under the authority of the state or who are accountable to it, while punishing forced evictions carried out, without appropriate safeguards, by private persons or bodies. Appropriate procedural protection and due process are especially pertinent in relation to forced evictions. These include: (i) an opportunity for genuine consultation with those affected; (ii) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (iii) information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (iv) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (v) all persons carrying out the eviction to be properly identified; (vi) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (vii) provision

the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts and omissions attributable to the state.

[24] Committee on Economic, Social and Cultural Rights, Concluding Observations (Kenya), UN document E/C.12/1993/19, p.27; Concluding Observations (Nicaragua), UN document E/C.12/1993/19, p.44.

[25] Committee on Economic, Social and Cultural Rights, Concluding Observations (Dominican Republic), UN document E/C.12/1994/20, p.61.

for legal remedies; and (viii) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.[26]

*continuous improvement of living conditions*

This phrase was included in this article on the proposal of Yugoslavia, and was designed to give the right to an adequate standard of living a 'dynamic character'.[27]

[26] Committee on Economic, Social and Cultural Rights, General Comment 7 (1997).
[27] UN document E/CN.4/SR.223.

# 32

# The right to health

## Texts

### *International instruments*

### Universal Declaration of Human Rights (UDHR)

25. (1) Every person has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services . . .

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

12. (1) The States Parties . . . recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties . . . to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

*Regional instruments*

## American Declaration of the Rights and Duties of Man (ADRD)

11. Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

## European Social Charter (ESC)

I (11) Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

## American Convention on Human Rights: Additional Protocol (ACHR AP)

10. (1) Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

(2) In order to ensure the exercise of the right to health, the states parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

(a) primary health care, that is, essential health care made available to all individuals and families in the community;

(b) extension of the benefits of health services to all individuals subject to the state's jurisdiction;

(c) universal immunization against the principal infectious diseases;

(d) prevention and treatment of endemic, occupational and other diseases;

(e) education of the population on the prevention and treatment of health problems; and

(f) satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

11. (1) Everyone shall have the right to live in a healthy environment and to have access to basic public services.

(2) The states parties shall promote the protection, preservation and improvement of the environment.

African Charter on Human and Peoples' Rights (AfCHPR)

16. (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
(2) States Parties . . . shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

## Comment

None of the international or regional instruments have adopted the definition of health contained in the preamble to the constitution of the World Health Organization, which conceptualizes health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'. However the reference in ICESCR 12 to 'the highest attainable standard of physical and mental health' (and in ESC 1(11), ACHR AP 10, and AfCHPR 16 to 'the highest possible standard of health attainable', 'the highest level of physical, mental and social well-being', and 'the best attainable state of physical and mental health', respectively) is not confined to the right to health care. On the contrary, the drafting history and the express wording of ICESCR 12 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.[1] ACHR AP 11 alone recognizes a separate right 'to live in a healthy environment'.

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

[1] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).

ICESCR 12, are: (a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; (b) to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; to provide essential drugs; (e) to ensure equitable distribution of all health facilities, goods and services; and (f) to adopt and implement a national health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.[2]

Under ESC I (11), a country may be considered as fulfilling its obligations if it provides evidence of the existence of a medical and health system comprising the following elements: (1) public health arrangements making generally available medical and paramedical practitioners and adequate equipment consistent with meeting its main health problems; such arrangements must ensure proper medical care for the whole population and the prevention and diagnosis of disease; (2) special measures to protect the health of mothers, children and old people; (c) general measures aimed in particular at the prevention of air and water pollution, protection from radioactive substances, noise abatement, food control and environmental hygiene, and the control of alcoholism and drugs; (4) a system of health education; (5) measures such as vaccination, disinfection, and the control of epidemics, providing the means of combating epidemic and endemic diseases; and (6) the bearing by collective bodies of all, or at least a substantial part, of the cost of the health services.[3]

## Interpretation

### *highest attainable standard of health*

The notion of 'the highest attainable standard of health' takes into account both the individual's biological and socio-economic preconditions

[2] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000). The strategy and plan of action shall be devised and periodically revised, on the basis of a participatory and transparent process, and shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored. The process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

[3] ESC Committee of Independent Experts, Conclusions 1, 59.

and a state's available resources. There are a number of aspects which cannot be addressed solely within the relationship between the state and individuals; in particular, good health cannot be ensured by a state, nor can the state provide protection against every possible cause of human ill health. Thus genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.[4]

Since the ICESCR was adopted in 1966, the world health situation has changed dramatically, and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict. Moreover, formerly unknown diseases, such as Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account in interpreting ICESCR 12.[5]

The right to health, as defined in ICESCR 12, is an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular state party:

(a) *Availability.* Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in

[4] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).
[5] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).

sufficient quantity within the state. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the developmental level of the state. They will include, however, the underlying determinants of health referred to above, as well as hospitals, clinics, and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs.

(b) *Accessibility.* Health facilities, goods and services have to be accessible to everyone without discrimination. Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility.

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

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

This non-exhaustive catalogue of examples provides guidance in defining the action to be taken by the state. They are generic examples of measures arising from the broad definition of the right to health contained in ICESCR 12, and illustrate the content of that right, as exemplified below.[6]

### *Right to maternal, child and reproductive health*

'The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child' in ICESCR 12(2)(a) may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services

[6] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).

and access to information, as well as to resources necessary to act on that information.[7]

### *Right to healthy natural and workplace environments*

'The improvement of all aspects of environmental and industrial hygiene' in ICESCR 12(2)(b) comprises, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment. ICESCR 12(2)(b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.[8]

### *Right to prevention, treatment and control of diseases*

'The prevention, treatment and control of epidemic, endemic, occupational and other diseases' in ICESCR 12(2)(c) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equality. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to individual and joint efforts by the state to, *inter alia*, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of

[7] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).
[8] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).

immunization programmes and other strategies of infectious disease control.[9]

### *Right to health facilities, goods and services*

'The creation of conditions which would assure to all medical attention in the event of sickness' in ICESCR 12(2)(d), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.[10]

A total, blanket refusal by a regional administration in Italy to pay any of the cost of treatment in any case where the patient had not requested prior authorization to use indirect assistance – with no provision for any exceptions even in a serious, urgent case that could not be treated in any other manner – was held not to constitute effective protection of health.[11] But in South Africa, where the constitution required the state to take reasonable measures, within its available resources, to achieve the progressive realization of the right of access to health care services, the court upheld the refusal of a state hospital to admit to the dialysis programme a patient in the final stages of chronic renal failure who was also suffering from ischaemic heart disease and cerebrovascular disease. Under guidelines which had been drawn up and adopted because of the shortage of resources, the primary requirement for admission to the programme was that the patient had to be eligible for a kidney transplant, which he was not because he was not free of vascular or cardiac disease. The establishment of guidelines to assist the renal clinics to make the

[9] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).
[10] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000).
[11] Decision of the Constitutional Court of Italy, 509/2000, 13 November 2000, (2000) 3 *Bulletin on Constitutional Case-Law* 506.

agonizing choices which had to be made and the use of available dialysis machines in accordance with the guidelines had resulted in more patients benefiting than would have been the case if they were used to keep alive persons with chronic renal failure. Moreover, the outcome of treatment was also likely to be more beneficial because it was directed to curing patients and not simply to maintaining them in a chronically ill condition.[12]

[12] *Soobramoney* v. *Minister of Health*, Constitutional Court of South Africa, [1998] 2 LRC 524.

# 33

# The right to education

## Texts

### *International instruments*

### Universal Declaration of Human Rights (UDHR)

26. (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

13. (1) The States Parties . . . recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic and religious groups, and further the activities of the United Nations for the maintenance of peace.

(2) The States Parties . . . recognize that, with a view to achieving the full realization of this right:
   (a) Primary education shall be compulsory and available free to all;
   (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
   (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
   (d) Fundamental education shall be encouraged as far as possible for those who have not received or completed the whole period of their primary education;
   (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

(3) The States Parties . . . undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

(4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

14. Each State Party . . . which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

### International Covenant on Civil and Political Rights (ICCPR)

18. (4) The states parties . . . 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.

## *Regional instruments*

### American Declaration of the Rights and Duties of Man (ADRD)

12. Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.

Every person has the right to receive, free, at least a primary education.

### European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1 (ECHR P1)

2. No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

### European Social Charter (ESC)

I (9) Everyone has the right to appropriate facilities for vocational guidance with a view to helping him to choose an occupation suited to his personal aptitude and interests.

(10) Everyone has the right to appropriate facilities for vocational training.

## American Convention on Human Rights (ACHR)

12. (4) Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

## ACHR: Additional Protocol (ACHR AP)

13. (1) Everyone has the right to education.
    (2) The States Parties . . . agree that education should be directed towards the full development of the human personality and human dignity, and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.
    (3) The States Parties . . . recognize that in order to achieve the full exercise of the right to education:
        (a) primary education should be compulsory and accessible to all without cost;
        (b) secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
        (c) higher education should be made equally accessible to all on the basis of individual capacity, by every appropriate means and, in particular, by the progressive introduction of free education;
        (d) basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary education;
        (e) programmes of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.
    (4) In conformity with the domestic legislation of the states parties, parents should have the right to select the type of

education to be given to their children, provided that it conforms to the principles set forth above.

(5) Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the states parties.

African Charter on Human and Peoples' Rights (AfCHPR)

17. (1) Every individual shall have the right to education.

*Related texts:*

Convention Relating to the Status of Refugees 1951, Articles 4 and 22.
UNESCO Convention against Discrimination in Education 1960.
International Convention on the Elimination of All Forms of Racial Discrimination, 1965 Articles 5 and 7.
Convention on the Elimination of All Forms of Discrimination against Women 1967, Article 10.
Convention on the Rights of the Child 1989, Articles 17, 28, 29 and 30.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, Articles 12, 30, 43 and 45.
World Declaration on Education for All 1990.

## Comment

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments that a state can make. But the importance of education is not just practical; a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[1]

[1] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999).

ICESCR 13, ECHR P1 2, ACHR AP 13, and AfCHPR 17 recognize that everyone has the right to education. ICESCR 13 and ACHR AP 13 prescribe the normative content of education: respect for human rights and fundamental freedoms, ideological pluralism, understanding, tolerance, friendship among all nations and all racial, ethnic and religious groups, and the maintenance of peace. The object of education is the full development of the human personality and human dignity. These two instruments also impose on the state an obligation to provide financial and other resources to enable this right to be realized. Individual freedom in education is protected by recognizing the right of individuals and bodies to establish and direct educational institutions (ICESCR 13 and ACHR AP 13); the right of parents to choose for their children schools other than those established by public authorities (ICESCR 13, ECHR P1 2, and ACHR AP 13); and the right of parents to ensure the religious and moral education of their children in conformity with their own convictions (ICCPR 18, ICESCR 12, ECHR P1 2, and ACHR 12). The state obligation to respect these rights is immediate and absolute. Discrimination of any kind in matters related to education is prohibited.

## Interpretation

### *The right of everyone to education*

The right to education is enjoyed both by adults and by children, including children of asylum seekers despite their status as 'illegal immigrants',[2] but it does not mean that a child is entitled to a place at a particular state school.[3] None of the instruments specify the language in which education must be conducted. However, the right to education will be meaningless if it does not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be.[4] It may be inconsistent with this right if the only languages spoken by the large majority of the population

[2] Committee on Economic, Social and Cultural Rights, Concluding Observations (United Kingdom), UN document E/C.12/1994/20, p.57.

[3] Decision of the State Council, Liechtenstein, 25 October 2000, (2000) 3 *Bulletin on Constitutional Case-Law* 516.

[4] *Belgian Linguistic Case*, European Court, (1968) 1 EHRR 252.

in a state are not used in the educational system.[5] Instruction on sex, pregnancy, birth and venereal disease, whether in physical or biological terms, or in terms of human love and responsibilities, is 'education'. The purpose of sex education is to give the children objective information of biological and other facts of human life. While such teaching may bring up questions of ethics and morals, its principal purpose is not to provide an education aimed at imposing a certain morality upon the children.[6]

The right to education by its very nature calls for regulation by the state. The regulations may vary in time and place according to the needs and resources of the community and of individuals. But such regulations must not injure the substance of the right to education nor conflict with other recognized human rights.[7] For the right to education to be effective, it is necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in the state, and in one form or another, official recognition of the studies which he or she has completed.[8]

While requiring that primary education shall be free, ICESCR 13 and ACHR AP 13 contemplate the 'progressive introduction of free education' both at secondary and higher levels. However, the Constitutional Court of the Czech Republic has observed that the right to a free education means that the state shall bear the costs of establishing schools and school facilities and also of their operation. This primarily means that no tuition fees may be charged. It cannot mean that the state will bear all the costs arising in connection with the implementation of the right to education. The specification of the extent to which schoolbooks and fundamental materials will be provided free of charge by the government cannot be subordinated to the notion of free education. Accordingly, the right to a cost-free education does not

[5] Committee on Economic, Social and Cultural Rights, Concluding Observations (Mauritius), UN document E/C.12/1994/8 of 31 May 1995. The committee noted its concern that Kreol and Bhojpuri, which were the languages spoken by the large majority, were not being used in the educational system.

[6] *Kjeldsen, Busk, Madsen and Pedersen* v. *Denmark*, European Commission (1975) 15 *Yearbook* 482.

[7] *Belgian Linguistic Case*, European Court, (1968) 1 EHRR 252.

[8] *Belgian Linguistic Case*, European Court, (1968) 1 EHRR 252.

relieve students and/or their parents or other persons responsible for them from the obligation to contribute towards textbooks and fundamental materials.[9]

### *The right to academic freedom and institutional autonomy*

The Committee on Economic, Social and Cultural Rights has noted that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the state or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.[10]

The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the state. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.[11]

[9] Decision of the Constitutional Court of the Czech Republic, Case No.PL.US 25/94, 13 June 1995, (1995) 2 *Bulletin on Constitutional Case-Law* 151.

[10] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999).

[11] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999).

### *The right to primary education*

Primary education is required to be compulsory and available free to all. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the state are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the requirement that primary education be provided without charge to the child, parents or guardians, is unequivocal.[12] The provision of 'free' primary education is not conditional on the availability of resources. Accordingly, the obligation to ensure that primary education shall be compulsory and free to all applies to all situations, including those in which local communities are unable to furnish buildings, or individuals are unable to afford the costs associated with attendance at school.[13]

### *The right to secondary education*

Secondary education is required to be made generally available and accessible to all. ICESCR 13 and ACHR AP 13 refer to secondary education 'in its different forms', thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings.[14] Accordingly, the establishment and maintenance of different educational systems or institutions is not considered as 'discrimination' if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level. If separate educational systems are established for pupils of the two sexes, they must offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study. Similarly, separate educational systems for religious or linguistic reasons may be established provided that participation in such systems or attendance at such institutions is

[12] Committee on Economic, Social and Cultural Rights, General Comment 11 (1999).
[13] Committee on Economic, Social and Cultural Rights, Concluding Observations (Kenya), UN document E/C.12/1993/19, p.27.
[14] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999).

optional and the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.[15] But widespread government-encouraged and costly private tuition in a highly competitive school system will render access to secondary and tertiary education more difficult for the poor segments of the population.[16]

### *The right to higher education*

Higher education is required to be made equally accessible to all on the basis of capacity. Therefore, the only criteria for admission to tertiary institutions is 'capacity'. The capacity of an individual is assessed by reference to all his or her relevant expertise and experience.[17] Where a medical student failed to pass the prescribed examinations within the prescribed time limit, and was thereupon excluded from medical school, his right to education was not infringed.[18] Nor was the right infringed when a student was excluded from a tertiary institution because of his poor attendance at compulsory tutorials. In view of limited facilities for higher education, it is not incompatible with this right to restrict access thereto to those students who have attained the academic level required to most benefit from the courses offered.[19]

The reintroduction of fees at the tertiary level of education constitutes a deliberately retrogressive step.[20] It violates the right to higher education if applicants for admission to higher educational institutions are requested to present a document certifying the lack of a criminal record (good-conduct certificate).[21]

[15] UNESCO Convention against Discrimination in Education 1960.
[16] Committee on Economic, Social and Cultural Rights, Concluding Observations (Mauritius), UN document E/C.12/1994/8 of 31 May 1994.
[17] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999).
[18] *X* v. *Austria*, European Commission, Application 5492/72, (1973) 44 *Collection of Decisions* 63.
[19] *Patel* v. *United Kingdom*, European Commission, (1980) 4 EHRR 256; *X* v. *United Kingdom*, European Commission, Application 8874/80, (1980) 4 EHRR 252.
[20] Committee on Economic, Social and Cultural Rights, Concluding Observations (Mauritius), UN document E/C.12/1994/8 of 31 May 1994.
[21] Decision of the Constitutional Court of Hungary, Case No.12/1996, 22 March 1996, (1996) 1 *Bulletin on Constitutional Case-Law* 37.

### *The right of parents to choose for their children schools other than those established by the public authorities*

Schools established other than by public authorities must conform to such minimum standards as may be prescribed by the state. These minimum standards may relate to issues such as admission, curricula, and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in the relevant instrument.[22] The right to determine the mode of a child's education is an integral part of the right of custody. It may not be exercised by a parent from whom that custody has been withdrawn by an order of court.[23]

### *The right of parents to ensure the religious and moral education of their children in conformity with their own convictions*

In its ordinary meaning the word 'convictions', taken on its own, is not synonymous with the words 'opinions' and 'ideas'. It is more akin to the term 'beliefs', and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[24] The state is therefore enjoined to respect parents' convictions, be they religious or philosophical, throughout the entire state education programme.[25] That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the 'functions' assumed by the state.[26] For example, the imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.[27] Accordingly, parents' views on the existence of corporal punishment as a disciplinary measure in the schools attended by their children constitute 'philosophical convictions'. They relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person,

[22] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999).
[23] *X* v. *Sweden*, European Commission, Application 7911/77, (1978) 12 *Decisions & Reports* 192.
[24] *Campbell and Cosans* v. *United Kingdom*, European Court, (1982) 4 EHRR 293.
[25] See *Kjeldsen, Busk, Madsen and Pedersen* v. *Denmark*, European Court, (1976) 1 EHRR 711.
[26] *Valsamis* v. *Greece*, European Court, (1996) 24 EHRR 294.
[27] *Valsamis* v. *Greece*, European Court, (1996) 24 EHRR 294.

the propriety or otherwise of the infliction of corporal punishment, and the exclusion of the distress which the risk of such punishment entailed.[28]

The education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.[29] It is in the discharge of a natural duty towards their children – parents being primarily responsible for the 'education and teaching' of their children – that parents may require the state to respect their religious and philosophical (or moral) convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education. However, the state is not thereby prevented from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. Parents may not, therefore, object to the integration of such teaching or education in the school curriculum. Many subjects taught at school do have, to a greater or lesser extent, some religious or philosophical complexion or implications. But the state, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting the parents' religious and philosophical (or moral) convictions. That is the limit that must not be exceeded.[30]

Under no circumstances may a person or group of persons be compelled to receive religious instruction inconsistent with his or their convictions.[31]

[28] *Campbell and Cosans* v. *United Kingdom*, European Court, (1982) 4 EHRR 293. In the view of the Committee on Economic, Social and Cultural Rights, corporal punishment is inconsistent with the fundamental guiding principle of international human rights enshrined in the preambles to the UDHR, ICCPR and ICESCR: the dignity of the individual: Committee on Economic, Social and Cultural Rights, General Comment 13 (1999). See also *Valsamis* v. *Greece*, European Court, (1996) 24 EHRR 294: The penalty of suspension (for one day), which cannot be regarded as an exclusively educational measure and may have some psychological impact on the pupil on whom it is imposed, is nevertheless of limited duration and does not require the exclusion of the pupil from the school premises.

[29] *Campbell and Cosans* v. *United Kingdom*, European Court, (1982) 4 EHRR 293.

[30] *Kjeldsen* et al. v. *Denmark*, European Court, (1976) 1 EHRR 711.

[31] UDHR, Art.18.

### *The right of individuals and bodies to establish and direct educational institutions*

This right implies that private individuals may, with no prior authorization, organize the provision of education in accordance with their own way of thinking as regards both the form and the content of such education. It includes the freedom to select the staff who will be called upon to fulfil specific educational objectives.[32] This right is also enjoyed by 'bodies', i.e. legal persons or entities, and includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education.[33] For example, persons who wish to have educational institutions based on a special culture, language or religion which is common, have the freedom to set up such institutions based on that commonality.[34] But the education given in such institutions must observe the prescribed normative content, and conform to such minimum standards as may be laid down by the state. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the state has an obligation to ensure that the exercise of this right does not lead to extreme disparities of educational opportunity for some groups in society.[35]

While the right to establish and direct educational institutions entitles education authorities to organize and propose teaching based on specific pedagogic or educational concepts, without reference to any given denominational or non-denominational philosophy, while remaining eligible for public funding, it does not prevent the legislature from taking measures to ensure the quality and equivalent standard of education provided with public funds. Accordingly, this right is not infringed where a decree makes a school's authority to issue legally valid certificates

[32] Decision of the Court of Arbitration of Belgium, Judgment No.18/93, 4 March 1993, (1993) 1 *Bulletin on Constitutional Case-Law* 10.

[33] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999).

[34] *Re The School Education Bill 1995 (Gauteng)*, Constitutional Court of South Africa, [1996] 3 LRC 197.

[35] Committee on Economic, Social and Cultural Rights, General Comment 13 (1999). While members of national minorities may conduct their own educational activities, including the maintaining of schools and the use or teaching of their own language, this right may not be exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty. The standard of education shall not be lower than the general standard, and attendance at such schools shall be optional: UNESCO Convention against Discrimination in Education 1960.

and diplomas contingent on the achievement of certain minimum objectives which, without attempting to interfere with the school's own teaching methods, are designed to guarantee and improve the quality of education.[36]

The right to establish a private school implies the right to subsidies by the state if it cannot be realized without such assistance. The state may, however, pay a subsidy only after a certain period during which the school has been run successfully.[37] Conditions for grants for private education, in particular that co-management bodies be set up, consisting of associations representing pupils and students, teachers and employees and in certain cases, representatives of social, economic and cultural groups, do not infringe the freedom to establish schools, nor do they prevent organizing authorities from freely determining the school's religious or philosophical nature, its teaching methods or orientation.[38]

[36] Decision of the Court of Arbitration, Belgium, 76/96, 18 December 1996, (1996) 3 *Bulletin on Constitutional Case-Law* 332.

[37] Decision of the Federal Constitutional Court of Germany, Judgment No.1 BvR 682/88 and 1 BvR 712/88, 9 March 1994, (1994) 1 *Bulletin on Constitutional Case-Law* 26.

[38] Decision of the Court of Arbitration of Belgium, Case No.85/95, 14 December 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 287.

# 34

# The right to cultural life

## Texts

### *International instruments*

### Universal Declaration of Human Rights (UDHR)

27. (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
    (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

15. (1) The States Parties . . . recognize the right of everyone:
        (a) To take part in cultural life;
        (b) To enjoy the benefits of scientific progress and its application;
        (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
    (2) The steps to be taken by the States Parties . . . to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
    (3) The States Parties . . . undertake to respect the freedom indispensable for scientific research and creative activity.
    (4) The States Parties . . . recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

*Regional instruments*

American Declaration of the Rights and Duties of Man (ADRD)

13. Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

American Convention on Human Rights: Additional Protocol (ACHR AP)

14. (1) The states parties . . . recognize the right of everyone:
    (a) to take part in the cultural and artistic life of the community;
    (b) to enjoy the benefits of scientific and technological progress;
    (c) to benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.
    (2) The steps to be taken by the states parties . . . to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.
    (3) The states parties . . . undertake to respect the freedom indispensable for scientific, research and creative activity.
    (4) The states parties . . . recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

African Charter on Human and Peoples' Rights (AfCHPR)

17. (2) Every individual may freely take part in the cultural life of his community.

*Related texts:*

Declaration of the Principles of International Cultural Co-operation, proclaimed by the General Conference of UNESCO, 4 November 1966.

## Comment

ICESCR 15 and ACHR AP 13 protect both the right of everyone to participate in the cultural life of the community and enjoy the benefits of scientific progress and its application, as well as the right of authors to benefit from the moral and material interests resulting from their scientific, literary or artistic productions. The latter, which constitutes protection of intellectual property[1] rights, appears to have been regarded as necessary in order to encourage and stimulate authors to create, and thereby enrich the cultural life of the community.

Neither ICESCR 15 nor ACHR AP 13 have yet been interpreted by a court or applied by the competent monitoring bodies, nor has the former been the subject of a general comment by the Committee on Economic, Social and Cultural Rights. Meanwhile, the emergence of new technologies such as computers and the internet, the considerable expansion of matters now protected by intellectual property law and the globalization of intellectual property regimes themselves, and a situation in which copyright and patents are being increasingly held not by the individual inventor but by his or her employer or a larger corporate body, have all contributed towards creating a complex maelstrom.

## Jurisprudence

*freedom indispensable for scientific research and creative activity*

This freedom is seriously curtailed by intimidation or by measures such as the need for academics to obtain official research and travel clearance.[2] The Committee on Economic, Social and Cultural Rights has expressed its grave concern at the negative implications for this right of the issuance of *fatwahs*. While appreciating that *fatwahs* are issued by the religious authorities and not by state organizations *per se*, the question of state responsibility clearly arose in circumstances in which the state did not take whatever measures were available to it to remove clear threats to the enjoyment of this right. Referring to the case of an author, Salman Rushdie, the committee called upon the Government of Iran to affirm

[1] Intellectual property law encompasses three areas: copyright, patent and trademark law.

[2] Committee on Economic, Social and Cultural Rights, Concluding Observations (Kenya), UN document E/C.12/1993/6 of 3 June 1993.

that it rejected the acceptability, in terms of its international human rights obligations, of the issuance of such *fatwahs*. It also requested the government to assure the committee that if such a *fatwah* were carried out in Iran, or elsewhere by an Iranian citizen, the government would ensure the criminal prosecution of the individual concerned.[3]

[3] Concluding Observations (Iran), UN document E/C.12/1993/7 of 9 June 1993.

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# The right to property

## Texts

### *International instruments*

#### Universal Declaration of Human Rights (UDHR)

17. (1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

### *Regional instruments*

#### American Declaration of the Rights and Duties of Man (ADRD)

23. Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and his home.

#### European Convention on Human Rights and Fundamental Freedoms, Protocol 1 (ECHR P1)

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interests and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

### American Convention on Human Rights (ACHR)

21. (1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
    (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interests, and in the cases and according to the forms established by law.
    (3) Usury and any other form of exploitation of man by man shall be prohibited by law.

### African Charter on Human and Peoples' Rights (AfCHPR)

14. The right to property shall be guaranteed. It may only be encroached upon in the interests of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

*Related texts:*

International Convention on the Elimination of All Forms of Racial Discrimination 1965 (4 January 1969), Article 5.

Declaration on the Elimination of Discrimination against Women, UNGA resolution 2263 (XXII) of 7 November 1967, Article 6.

Convention on the Elimination of All Forms of Discrimination against Women 1979 (3 September 1981), Articles 15, 16.

ILO Convention (No.107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957.

ILO Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries 1989.

## Comment

The right to own property, alone as well as in association with others, is recognized in UDHR 17, but was omitted in both ICCPR and ICESCR. The subject was debated at length when the covenants were being drafted, but it was not possible to reach agreement on an acceptable text. While none questioned the right of the individual to own property, there

was considerable disagreement on several aspects of the subject including the concept of property and the restrictions to which the right should be subjected. There were also differences of opinion on the formulation of the right to compensation in the event of expropriation. But while the right to property, as such, is not protected under the covenants, a confiscation of private property or the failure by a state to pay compensation for such confiscation could still entail a breach of ICCPR 26 if the relevant act or omission was based on discriminatory grounds.[1]

Other international instruments drafted by the UN General Assembly do, however, recognize the right to property. For example, under Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965, states parties undertake to guarantee to everyone, without distinction as to race, colour, or national or ethnic origin, equality before the law in the enjoyment of 'the right to own property alone as well as in association with others', and also 'the right to inherit'. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women 1979 recognizes the same right for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property.[2] At the regional level, the 'right to property' is guaranteed in AfCHPR 14, while 'the peaceful enjoyment of his possessions' and 'the right to the use and enjoyment of his property' are recognized in ECHR P1 1 and ACHR 21 respectively.

ECHR P1 1 guarantees in substance the right to property.[3] It comprises three distinct rules. The first, which is of a general nature, enunciates the principle of peaceful enjoyment of property. The second covers deprivation of possessions and prohibits it except in the 'public interest' ('for reasons of public utility or social interests' in ACHR 21), and that too subject to 'the conditions provided by law and by the general

[1] *Simunek* v. *The Czech Republic*, Human Rights Committee, Communication No.516/1992, HRC 1995 Report, Annex X.K.

[2] Articles 15, 16.

[3] The right to the 'peaceful enjoyment of his possessions' is in substance a guarantee of the right of property'. In fact, according to the *travaux préparatoires*, the drafters continually spoke of 'right of property' or 'right to property' to describe the subject-matter of successive drafts which were the forerunners of ECHR P1 1. See *Marckx* v. *Belgium*, European Court, (1979) 2 EHRR 330.

principles of international law' ('in the cases and according to the forms established by law' in ACHR 21). The third recognizes that the state is entitled to control the use of property in accordance with the 'general interest' ('in the interests of society' in ACHR 21), or 'to secure the payment of taxes or other contributions or penalties',[4] by enforcing such laws as it deems necessary for the purpose. However, these rules are not 'distinct' in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must therefore be construed in the light of the general principle enunciated in the first rule.[5]

AfCHPR 14 guarantees the right to property, but does not distinguish between its deprivation and control of its use. It prohibits any encroachment on the right except 'in the interests of public need or in the general interest of the community' and in accordance with the provisions of 'appropriate laws'. Only ACHR 21 specifically requires the 'payment of just compensation'.

## Interpretation

### *property*

In the national jurisprudence of several countries, 'property' has been given a wide and liberal construction,[6] to include not only concrete rights of property but also abstract rights such as the right of management of a company,[7] and choses in action such as a debt by a banker

[4] The compulsory exaction or acquisition of money cannot be said to be by way of penalty unless the individual from whom it is exacted is in breach of the law: *Astaphan & Co (1970) Ltd* v. *Comptroller of Customs*, Court of Appeal of Dominica, [1999] 2 LRC 569. For an imposition to be properly designated as 'tax', qualifying as an exception to the protection against compulsory acquisition of property, the imposition has to be (i) a compulsory and not an optional contribution; (ii) imposed by the legislature or other competent public authority: (iii) imposed upon the public as a whole or a substantial sector thereof; and (iv) raising the revenue which was to be utilized for the public benefit and to provide a service in the public interest: *Nyambirai* v. *National Social Security Authority*, Supreme Court of Zimbabwe, [1996] 1 LRC 64.

[5] *Matos E Silva* v. *Portugal*, European Court, (1996) 24 EHRR 573.

[6] *Inland Revenue Commissioners* v. *Lilleyman*, British Caribbean Court of Appeal, Guyana, (1964) 7 WIR 496. The words 'any interest in or right over property of any description' are words of emphasis only, showing that 'property' is to be construed in its widest sense.

[7] *Attorney-General* v. *Lawrence,* Court of Appeal of St Christopher and Nevis, (1983) 31 WIR 176, [1985] LRC (Const) 921.

to his customer.[8] It includes money,[9] a contract,[10] a judgment debt,[11] a cost of living allowance and increment,[12] as well as mills, machinery and stocks.[13] The deduction of money by way of cess from sums paid for canes sold and delivered was not a tax but a deprivation of property.[14] However, not included within the concept of 'property' was a driver's licence',[15] the right of a public officer not to be transferred against his will,[16] the right to attend one's school of choice,[17] or the 'liberty' to open a restaurant, which a person shares with the rest of the population of the country.[18] Neither the removal by the police of a car which was parked illegally and the resulting temporary loss of use by its owner, nor the statutory obligation to pay a reasonable sum in respect of removal and custody charges infringed the owner's right to the enjoyment of his property.[19] The constitutional protection against the compulsory

[8] *Attorney-General* v. *Jobe*, Privy Council on appeal from the Court of Appeal of The Gambia, [1985] LRC (Const) 556.

[9] *Lilleyman* v. *Inland Revenue Commissioners*, Supreme Court of British Guyana, (1964) 13 WIR 224. See also *State of Bihar* v. *Kameshwar Singh*, Supreme Court of India, [1952] SCR 889; *Hawaldar* v. *Government of Mauritius*, Supreme Court of Mauritius, (1978) *The Mauritius Reports* 37.

[10] *Shah* v. *Attorney-General (No. 2)*, High Court of Uganda, [1970] EA 523.

[11] *Shah* v. *Attorney-General (No.2)*, High Court of Uganda, [1970] EA 523. The court declined to give the term 'property' a limited connotation, and held that it applied to 'personal' as well as 'tangible' property. See also *Agneessens* v. *Belgium*, European Commission, (1988) 58 *Decisions & Reports* 63.

[12] *Caesar* v. *Minister of Finance*, High Court of Trinidad and Tobago, 1987, unreported.

[13] *Dwarkadas Shrinivas of Bombay* v. *The Sholapur Spinning and Weaving Co Ltd*, Supreme Court of India, AIR 1954 SC 119.

[14] *Trinidad Islandwide Cane Farmers' Association Inc* and A. G v. *Seereeram*, Court of Appeal of Trinidad and Tobago, (1975) 27 WIR 329.

[15] *Southwell* v. *Attorney General*, Court of Appeal of St Christopher and Nevis, [2001] 1 LRC 53.

[16] *Harrikissoon* v. *Attorney General*, Privy Council on appeal from the Court of Appeal of Trinidad and Tobago, [1980] AC 265.

[17] *Sumayyah Mohammed* v. *Moraine*, High Court of Trinidad and Tobago, [1996] 3 LRC 475.

[18] *Grape Bay Ltd* v. *Attorney General*, Privy Council on appeal from the Court of Appeal of Bermuda, [2002] 1 LRC 167. A law which prohibited the operation of certain restaurants which were operated in such a manner, whether by distinctive name, design, or packaging, which reasonably suggested a connection with any restaurant or group of restaurants which operated outside Bermuda, did not constitute a deprivation of property in respect of a company formed with the principal purpose of obtaining the necessary permits to open several restaurants under a franchise agreement with McDonald's. There was no existing business of which the company was deprived. Neither had there been what amounted in substance to an acquisition of that business by a public authority.

[19] *Alleyne-Forte* v. *Attorney General*, Privy Council on appeal from the Court of Appeal of Trinidad and Tobago, [1997] 4 LRC 338. A person whose car was removed could

acquisition of any property or interest or right therein, did not apply to contingent rights and interests which could be extinguished but could not be acquired because they had not yet come into existence. For example, the right of public servants to receive bonuses, a contingent right not vesting until pay day, was incapable of acquisition. Therefore, a decision to postpone, reduce or withhold the annual bonus did not constitute a deprivation of property.[20]

The concept of 'possessions' in ECHR P1 1 also has an autonomous meaning which is not limited to ownership of physical goods. Certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions'.[21] For example, unchallenged rights over a land for almost a century and the revenue derived from working it, may qualify as 'possessions'.[22] Others include the right to hunt,[23] a company share,[24] a licence to serve alcoholic beverages,[25] and the right to practise a profession.[26] A claim for fees may be considered as property only when such claim has in a particular matter, come into existence on the ground of services rendered and on the basis of existing regulations. The mere expectation that the existing regulations on fees will not be changed in the future cannot be considered as a property

always challenge the lawfulness of the police action in court proceedings and recover the charges paid and obtain damages if there was any unauthorized interference with his car.

[20] *Chairman of the Public Service Commission* v. *Zimbabwe Teachers Association*, Supreme Court of Zimbabwe, [1997] 1 LRC 479.

[21] *Iatridis* v. *Greece*, European Court, (1999) 30 EHRR 97.

[22] *Matos E Silva* v. *Portugal*, European Court, (1996) 24 EHRR 573.

[23] *Chassagnou* v. *France*, European Court, (1999) 29 EHRR 615.

[24] *Bramelid and Malmstrom* v. *Sweden,* European Commission, (1982) 5 EHRR 249. A company share 'is an object of a complex nature: it certifies the fact of membership and the rights which are attached to it (notably the right to vote), it represents part of the capital of the company and also constitutes, to some degree, a title to property in the fortune of the company'. Cf. *Government of Mauritius* v. *Union Flacq Sugar Estates Co Ltd,* Privy Council on appeal from the Supreme Court of Mauritius, [1993] 1 LRC 616: While the property owned by a shareholder is his share, the right of a shareholder to vote his share in general meetings of the company is not an interest in or right over the property of the company and is not property in its own right. No cases were referred to in this judgment.

[25] *Tre Traktorer Aktiebolag* v. *Sweden*, European Court, (1989) 13 EHRR 309.

[26] *Van Marle* v. *Netherlands,* European Court, (1986) 8 EHRR 483. See also *X* v. *Germany*, European Commission, Application 4653/70, (1974) 17 *Yearbook* 148: The fact that counsel receives a fee from the state less than that obtainable for the same work in private practice does not mean that he is deprived of any property; there was no property right accruing to him until the grant of legal aid.

right.[27] In so far as the making of contributions to a pension fund may have created a property right, there is no interference with this right when the pension claims are reduced in accordance with legal provisions which were already in force when the contributions were paid.[28] The right to dispose of property by donation or will is one of the attributes of the right to property.[29]

### *Deprivation of property*

All property of whatsoever nature is protected against arbitrary deprivation. Deprivation means divesting, keeping out of enjoyment or causing loss (for example, by taking away, by destruction, or by causing extinguishment) of a right.[30] The concept of 'deprivation' covers not only formal expropriation, but also de facto expropriation, i.e. a measure which can be assimilated to a deprivation of property. The withdrawal of a permit to exploit a gravel pit on one's land may constitute a deprivation of property since it would seriously affect its value, but where the aim of the revocation is the preservation of nature in the general interest, the measure will be considered as a control of the use of property.[31] But a law enacted after a plaintiff obtained judgment against the government in a suit founded upon a contract, which had the effect of denying the judgment holder the benefit of his judgment, deprived the

[27] *X* v. *Germany*, European Commission, Application 8410/78, (1979) 18 *Decisions & Reports* 216. The claim related to a notary's fees.

[28] *X* v. *Austria*, European Commission, Application 7624/76, (1980) 19 *Decisions & Reports* 100. See also *Muller* v. *Austria*, European Commission, (1975) 3 *Decisions & Reports* 25.

[29] *Marckx* v. *Belgium*, European Commission, 10 December 1977.

[30] *Shah* v. *Attorney-General (No.2)*, High Court of Uganda, [1970] EA 523. But a street-widening scheme which resulted in the imposition of restrictions or limitations on the right of property, and particularly on the use of such property for purposes of building development, which were absolutely necessary in the interest of town and country planning, did not constitute a deprivation of property: *Sofroniou* v. *Municipality of Nicosia*, Supreme Court of Cyprus, (1976) 6 JSC 874.

[31] *Fredin* v. *Sweden*, European Court, (1991) 13 EHRR 784; European Commission, (1989) 13 EHRR 142. See also *Allgemeine Gold- Und Silberscheideanstalt* v. *United Kingdom*, European Court, (1986) 9 EHRR 1: Forfeiture is an interference with the right to property, but prohibition on importation is a control of the use of property. Accordingly, the forfeiture of smuggled Krugerrands did not involve a deprivation of property since it formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins; *Hakansson and Sturesson* v. *Sweden*, European Court, (1990) 13 EHRR 1: Compulsory resale of an agricultural estate bought at a compulsory auction had as its aim the rationalization of agriculture.

judgment holder of his ascertained rights, thus constituting deprivation of property without compensation.[32]

The levy of compulsory savings on the emoluments of every employed individual to be utilized for works of development and for the issue of bonds therefor repayable with interest after six years constitutes a forced loan and not a tax. A forced loan cannot be imposed where the effect of such imposition would result in deprivation of property without compensation. Even if the bonds could be regarded as compensation, such compensation was neither prompt nor adequate, and there was no provision for access to court or a right of appeal.[33] But a requirement that every importer of certain goods should deposit 50 per cent of the c.i.f. value of the goods with a bank, with no interest payable on the deposit, did not constitute a forced loan or a compulsory taking of possession or acquisition of property. It was a temporary restriction on the importer's trade or business activities, and may have diminished his property to that extent, but the element of compulsion was non-existent in the process.[34] Similarly, where an aircraft was seized by customs and excise officers at an international airport as being liable to forfeiture under the Customs and Excise Management Act, and was delivered back to the owners on the same day on payment of a penalty in the form of a banker's draft, the seizure amounted to a temporary restriction on the use of the aircraft and did not involve a transfer of ownership.[35]

## Public interest

A deprivation of property is in the public interest when it is for a legitimate purpose, when it is appropriate to the achievement of that purpose and when, by virtue of compensation reasonably related to the value of the property, it strikes a fair balance between the demands of the general interest and the requirements of the individual's fundamental rights.[36] Compulsory transfer of property from one individual to another may, in principle, be considered to be in the public interest if the taking is effected in pursuance of legitimate social policies. An example is the

[32] *Shah* v. *Attorney-General (No.2),* High Court of Uganda, [1970] EA 523.

[33] *Lilleyman* v. *Inland Revenue Commissioners*, Supreme Court of British Guyana, (1964) 13 WIR 224.

[34] *Hawaldar* v. *Government of Mauritius*, Supreme Court of Mauritius, (1978) *The Mauritius Reports* 37.

[35] *Air Canada* v. *United Kingdom*, European Court, (1995) 20 EHRR 150.

[36] *Marinucci* v. *Italy,* European Commission, (1988) 60 *Decisions & Reports* 44.

compulsory transfer of title in real property from lessors to lessees in order to reduce the concentration of land ownership. The fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the public interest. But the taking of property effected in pursuance of legitimate social, economic or other policies may be in the public interest even if the community at large has no direct use or enjoyment of the property taken. An example would be the enhancement of social justice within the community.[37]

The right to property does not afford protection against progress or provide compensation for a business which is lost as a result of technological advance. Where following a change in the method of loading sugar for export (from loading in bags to bulk loading direct from container lorries to ships at a new deep-water terminal), the Mauritius Sugar Terminal Corporation Act established a new corporation with a monopoly in the storage and loading of sugar for export, and the business conducted by a company of storing sugar and loading it by dockers and stevedores became redundant, there was no arbitrary deprivation of property.[38]

### *Control of use vs. right to peaceful enjoyment of property*

The right to property does not preclude restrictions on the use of land so long as they serve objectives of general interest and do not constitute a disproportionate and intolerable interference with the rights of the owner, impinging on the substance of the right. In other words, an interference with the use and enjoyment of property must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[39] For instance, a prohibition on the new planting of vines introduced for a limited period did not deprive the owner of his property,

[37] *James* v. *United Kingdom*, European Court, (1986) 8 EHRR 123.

[38] *Société United Docks* v. *Government of Mauritius*, Supreme Court of Mauritius, [1985] LRC (Const) 801.

[39] *Sporrong and Lonnroth* v. *Sweden*, European Court, (1982) 5 EHRR 35. See also *The Bahamas District of the Methodist Church in the Caribbean and the Americas* v. *Symonette*, Privy Council on appeal from the Supreme Court of the Bahamas, [2000] 5 LRC 196.

since he remained free to dispose of it or to put it to other uses which were not prohibited.[40] Similarly, the issuing of a building prohibition during the planning procedure constituted an important measure to facilitate the planning.[41] But an expropriation permit issued by the government authorizing the city administration to expropriate the relevant property if necessary for the redevelopment of the city, which remained in force for eight years, and a prohibition on construction which was in force for twelve years, created a situation which upset the fair balance which should be struck between the protection of the right to property and the requirements of the general interest. Although the expropriation permits left intact in law the owner's right to use and dispose of his possessions, they nevertheless in practice significantly reduced the possibility of its exercise. They also affected the very substance of ownership in that they recognized before the event that any expropriation would be lawful and authorized the city authorities to expropriate whenever they found it expedient to do so. The right of property thus became precarious and defeasible.[42]

There must be a reasonable relationship of proportionality between the means employed and the aim pursued.[43] Where an eviction order obtained by a landlord was suspended on four separate occasions in

[40] *Hauer* v. *Land Rheinland-Pfalz*, Court of Justice of the European Communities, (1979) 3 EHRR 140.

[41] *Jacobsson* v. *Sweden*, European Court, (1989) 12 EHRR 56; European Commission (1987) 11 EHRR 562. See also *Pine Valley Developments Ltd* v. *Ireland*, European Court, (1991) 14 EHRR 319.

[42] *Sporrong and Lonnroth* v. *Sweden*, European Court, (1982) 5 EHRR 35. See also *Matos E Silva* v. *Portugal*, European Court, (1996) 24 EHRR 573: A declaration that a designated land was needed for a public purpose (a nature reserve for animals) and would be expropriated with a view to building an aquacultural research station on it, pursued a public interest, i.e. town and country planning for the purposes of protecting the environment. But where such declaration remained in force for thirteen years, it hindered the owner's ordinary enjoyment of his rights for an inordinately long period during which no progress had been made in the proceedings. The long period of uncertainty during which the owner's ability to deal with and use his possessions had been greatly reduced, upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions. Cf. *Davies* v. *Minister of Land, Agriculture and Water Development*, Supreme Court of Zimbabwe, [1997] 1 LRC 123: The designation of rural land as land identified by the government for compulsory acquisition, with the consequence that such land could not be sold, disposed of or leased without the prior written consent of the minister, did not constitute a deprivation of property. Compulsory acquisition did not occur at the stage of designation, even though designation might be a prelude thereto.

[43] *James* v. *United Kingdom*, European Court, (1986) 8 EHRR 123.

accordance with the government policy of postponing, suspending or staggering the enforcement of eviction orders against residential tenants, the state was 'controlling the use' of the property. The suspension had the reasonable aim of preventing a large number of people potentially all becoming homeless at the same time. But the landlord, who was disabled, unemployed, diabetic and needed the flat, was not treated fairly by the state because it failed to have regard to his various 'declarations of necessity' for the flat for part of the period in question and failed to apply any of the relevant exceptions to the suspension of enforcement decrees.[44] Similarly, the refusal by the authorities to comply with a court judgment quashing an eviction order served on a cinema operator was incompatible with the right to peaceful enjoyment of possessions.[45] Where a Greek Cypriot who owned property in northern Cyprus was prevented by Turkish occupying forces from returning to it, the continuous denial of access could not, in the exceptional circumstances of that case, be regarded as either a deprivation of property or a control of use, but was clearly an interference with the peaceful enjoyment of possessions.[46]

Compensation terms are material to the assessment whether a contested measure respects the requisite fair balance between the demands of the community and the requirements of the protection of the land owner's fundamental rights, and notably whether it does not impose a disproportionate burden on him. In this connection, while ECHR P1 1 does not guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement of the full market value, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under ECHR P1 1.[47] Statutory rent restrictions imposed on dwelling-houses

[44] *Scollo* v. *Italy*, European Court, (1996) 22 EHRR 514. See also *Immobiliare Saffi* v. *Italy*, European Court, (1999) 30 EHRR 756.

[45] *Iatridis* v. *Greece*, European Court, (1999) 30 EHRR 97.

[46] *Loizidou* v. *Turkey*, European Court, (1996) 23 EHRR 513.

[47] *Papachelas* v. *Greece*, European Court, (1999) 30 EHRR 923. In the system applied in this instance following the expropriation of land to build a major road, the compensation was in every case reduced by an amount equal to the value of an area fifteen metres wide, without the owners concerned being allowed to argue that in reality the effect of the works concerned either had been of no benefit – or less benefit – to them or had caused them to sustain varying degrees of loss. This system, which was too inflexible and took no account of the diversity of situations, ignoring as it did the differences due in particular to the nature of the works and the layout of the site, amounted to a breach of ECHR P1 1.

have long been features of many societies which maintain proper respect for the rights and freedoms of the individual, including the right to enjoy property. The legislature of such a society considers that it is reasonably justifiable to limit the income which a landlord derives from his investment in order to limit the rent which a tenant must pay for his home. Rent restrictions are justified by the need to prevent a landlord exploiting a shortage of housing accommodation, although rent restriction legislation could also prove a blunt weapon that benefits a tenant who can afford a higher rent and causes hardship to a poor landlord.[48]

### *Compensation*

The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property is taken but should be borne by the public as a whole.[49] The object of compensation is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived. Compensation prima facie means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it.[50]

[48] *Morgan* v. *Attorney-General*, Privy Council on appeal from the Court of Appeal of Trinidad and Tobago, (1987) 36 WIR 396, [1988] LRC (Const) 468. See also *X* v. *Austria*, European Commission, Application 8003/77, (1979) 3 EHRR 285; *Mellacher* v. *Austria*, European Court, (1989) 12 EHRR 391; European Commission, (1988) 12 EHRR 97.

[49] *Grape Bay Ltd* v. *Attorney General*, Privy Council on appeal from the Court of Appeal of Bermuda, [2002] 1 LRC 167. See also *Attorney General* v. *Theodore*, Dominica, Eastern Caribbean Court of Appeal, [2001] 1 LRC 13.

[50] *Nelungaloo Pty Ltd* v. *The Commonwealth*, High Court of Australia, [1948] 75 *Commonwealth Law Reports* 495, at 571–2, per Dixon J. See also *James* v. *United Kingdom*, European Court, (1986) 8 EHRR 123; *Scotts of Greenock Ltd and Lithgows Limited* v. *United Kingdom*, European Commission, (1987) 12 EHRR 147.

Adequate compensation once paid to a person whose property has been compulsarily acquired may not be eroded in any way. A special tax equal to the amount paid as compensation would have the effect of making the constitutional right completely illusory.[51] A law which confers on a minister a discretion to order that compensation may in certain circumstances be paid over a ten-year period is inconsistent with a constitutional requirement that property shall not be compulsorily acquired except under a law that provides for payment of reasonable compensation within a reasonable time.[52] The acquisition of property without the payment of compensation constitutes a deprivation.[53]

[51] *Commissioner of Taxes* v. *C W (Pvt) Ltd,* High Court of Zimbabwe, [1990] LRC (Const) 544.

[52] *San José Farmers Co-operative Society Ltd* v. *Attorney General*, Court of Appeal, Belize, 25 September 1991, (1994) 20 *Commonwealth Law Bulletin* 46–7.

[53] *Poiss* v. *Austria*, European Court, (1987) 10 EHRR 231: the applicant's land was provisionally allocated to other landowners or used for communal purposes and no compensation in kind as stipulated by law was received. See also *Erkner and Hofauer* v. *Austria,* European Court, (1987) 9 EHRR 464.

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