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Volume I

COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES

Note by the Secretariat

This document contains a compilation of the general comments or general recommendations adopted, respectively, by the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child. The Committee on Migrant Workers has not yet adopted any general comments.

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II. GENERAL COMMENTS* ADOPTED BY THE HUMAN RIGHTS COMMITTEE**

Introduction***

The introduction to document CCPR/C/21/Rev.1 (General comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights; date: 19 May 1989) explains the purpose of the general comments as follows:

> "The Committee wishes to reiterate its desire to assist States parties in fulfilling their reporting obligations. These general comments draw attention to some aspects of this matter but do not purport to be limitative or to attribute any priority between different aspects of the implementation of the Covenant. These comments will, from time to time, be followed by others as constraints of time and further experience may make possible.
>
> "The Committee so far has examined 77 initial reports, 34 second periodic reports and, in some cases, additional information and supplementary reports. This experience, therefore, now covers a significant number of the States which have ratified the Covenant, at present 87. They represent different regions of the world with different

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* For the nature and purpose of the general comments, see *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex VII, introduction. For a description of the history of the method of work, the elaboration of general comments and their use, ibid., *Thirty-ninth Session, Supplement No. 40* (A/39/40 and Corr.1 and 2), paragraphs 541-557. For the text of the general comments already adopted by the Committee, ibid., *Thirty-sixth Session, Supplement No. 40* (A/36/40), annex VII; ibid., *Thirty-seventh Session, Supplement No. 40* (A/37/40), annex VI, ibid., *Thirty-eighth Session, Supplement No. 40* (A/38/40), annex VI; ibid., *Thirty-ninth Session, Supplement No. 40* (A/39/40 and Corr.1 and 2), annex V; ibid., *Fortieth Session, Supplement No. 40* (A/40/40), annex VI; ibid., *Forty-first Session, Supplement No. 40* (A/41/40), annex VI; ibid., *Forty-third Session, Supplement No. 40* (A/43/40), annex VI; ibid., *Forty-fourth Session, Supplement No. 40* (A/44/40), annex VI; ibid., *Forty-fifth Session, Supplement No. 40* (A/45/40), annex VI; ibid., *Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI; ibid., *Forty-ninth Session, Supplement No. 40* (A/49/40), annex V; and ibid., *Fiftieth Session, Supplement No. 40* (A/45/40), annex V; and ibid., *Fifty-third Session, Supplement No. 40* (A/53/40), annex VII. Also issued in documents CCPR/C/21/Rev.1 and Rev.1/Add.1-9.

** For document references, see annex 2.

*** See *Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex VII.

political, social and legal systems and their reports illustrate most of the problems which may arise in implementing the Covenant, although they do not afford any complete basis for a worldwide review of the situation as regards civil and political rights.

"The purpose of these general comments is to make this experience available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights. These comments should also be of interest to other States, especially those preparing to become parties to the Covenant and thus to strengthen the cooperation of all States in the universal promotion and protection of human rights."

Thirteenth session (1981)

General comment No. 1: Reporting obligation

[General comment No. 1 has been replaced by general comment No. 30]

States parties have undertaken to submit reports in accordance with article 40 of the Covenant within one year of its entry into force for the States parties concerned and, thereafter, whenever the Committee so requests. Until the present time only the first part of this provision, calling for initial reports, has become regularly operative. The Committee notes, as appears from its annual reports, that only a small number of States have submitted their reports on time. Most of them have been submitted with delays ranging from a few months to several years and some States parties are still in default despite repeated reminders and other actions by the Committee. The fact that most States parties have nevertheless, even if somewhat late, engaged in a constructive dialogue with the Committee suggests that the States parties normally ought to be able to fulfil the reporting obligation within the time limit prescribed by article 40 (1) and that it would be in their own interest to do so in the future. In the process of ratifying the Covenant, States should pay immediate attention to their reporting obligation since the proper preparation of a report which covers so many civil and political rights necessarily does require time.

Thirteenth session (1981)

General comment No. 2: Reporting guidelines

1. The Committee has noted that some of the reports submitted initially were so brief and general that the Committee found it necessary to elaborate general guidelines regarding the form and content of reports. These guidelines were designed to ensure that reports are presented in a uniform manner and to enable the Committee and States parties to obtain a complete picture of the situation in each State as regards the implementation of the rights referred to in the Covenant. Despite the guidelines, however, some reports are still so brief and general that they do not satisfy the reporting obligations under article 40.

2. Article 2 of the Covenant requires States parties to adopt such legislative or other measures and provide such remedies as may be necessary to implement the Covenant. Article 40 requires States parties to submit to the Committee reports on the measures adopted by them, on the progress made in the enjoyment of the Covenant rights and the factors and difficulties, if any, affecting the implementation of the Covenant. Even reports which were in their form generally in accordance with the guidelines have in substance been incomplete. It has been difficult to understand from some reports whether the Covenant had been implemented as part of national legislation and many of them were clearly incomplete as regards relevant legislation. In some reports the role of national bodies or organs in supervising and in implementing the rights had not been made clear. Further, very few reports have given any account of the factors and difficulties affecting the implementation of the Covenant.

3. The Committee considers that the reporting obligation embraces not only the relevant laws and other norms relating to the obligations under the Covenant but also the practices and decisions of courts and other organs of the State party as well as further relevant facts which are likely to show the degree of the actual implementation and enjoyment of the rights recognized in the Covenant, the progress achieved and factors and difficulties in implementing the obligations under the Covenant.

4. It is the practice of the Committee, in accordance with Rule 68 of its Provisional Rules of Procedure, to examine reports in the presence of representatives of the reporting States. All States whose reports have been examined have cooperated with the Committee in this way but the level, experience and the number of representatives have varied. The Committee wishes to state that, if it is to be able to perform its functions under article 40 as effectively as possible and if the reporting State is to obtain the maximum benefit from the dialogue, it is desirable that the States representatives should have such status and experience (and preferably be in such number) as to respond to questions put, and the comments made, in the Committee over the whole range of matters covered by the Covenant.

Thirteenth session (1981)

General comment No. 3: Article 2 (Implementation at the national level)

1. The Committee notes that article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles (e.g. article 3 which is dealt with in general comment No. 4 below), but in principle this undertaking relates to all rights set forth in the Covenant.

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

Thirteenth session (1981)

General comment No. 4: Article 3 (Equal right of men and women to the enjoyment of all civil and political rights)

1. Article 3 of the Covenant requiring, as it does, States parties to ensure the equal right of men and women to the enjoyment of all civil and political rights provided for in the Covenant, has been insufficiently dealt with in a considerable number of States reports and has raised a number of concerns, two of which may be highlighted.

2. Firstly, article 3, as articles 2 (1) and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws. Hence, more information has generally been required regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations under article 3 and to ascertain what progress is being made or what factors or difficulties are being met in this regard.

3. Secondly, the positive obligation undertaken by States parties under that article may itself have an inevitable impact on legislation or administrative measures specifically designed to regulate matters other than those dealt with in the Covenant but which may adversely affect rights recognized in the Covenant. One example, among others, is the degree to which immigration laws which distinguish between a male and a female citizen may or may not adversely affect the scope of the right of the woman to marriage to non-citizens or to hold public office.

4. The Committee, therefore, considers that it might assist States parties if special attention were given to a review by specially appointed bodies or institutions of laws or measures which inherently draw a distinction between men and women insofar as those laws or measures adversely affect the rights provided for in the Covenant and, secondly, that States parties should give specific information in their reports about all measures, legislative or otherwise, designed to implement their undertaking under this article.

5. The Committee considers that it might help the States parties in implementing this obligation, if more use could be made of existing means of international cooperation with a view to exchanging experience and organizing assistance in solving the practical problems connected with the insurance of equal rights for men and women.

Thirteenth session (1981)

General comment No. 5: Article 4 (Derogations)

[General comment No. 5 has been replaced by general comment No. 29]

1. Article 4 of the Covenant has posed a number of problems for the Committee when considering reports from some States parties. When a public emergency which threatens the life of a nation arises and it is officially proclaimed, a State party may derogate from a number of rights to the extent strictly required by the situation. The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds. The State party is also under an obligation to inform the other States parties immediately, through the Secretary-General, of the derogations it has made including the reasons therefor and the date on which the derogations are terminated.

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

3. The Committee holds the view that measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and of the reasons therefor and, further, to fulfil their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.

Sixteenth session (1982)

General comment No. 6: Article 6 (Right to life)

1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except

in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially 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. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.

3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent 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.

4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

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

6. While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”. The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States’ reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

7. The Committee is of the opinion that the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant.

The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.

Sixteenth session (1982)

General comment No. 7: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)

[General comment No. 7 has been replaced by general comment No. 20]

1. In examining the reports of States parties, members of the Committee have often asked for further information under article 7 which prohibits, in the first place, torture or cruel, inhuman or degrading treatment or punishment. The Committee recalls that even in situations of public emergency such as are envisaged by article 4 (1) this provision is non-derogable under article 4 (2). Its purpose is to protect the integrity and dignity of the individual. The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court; and measures of training and instruction of law enforcement officials not to apply such treatment.

2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment. In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article. Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority. For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10 (1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person.

3. In particular, the prohibition extends to medical or scientific experimentation without the free consent of the person concerned (art. 7, second sentence). The Committee notes that the reports of States parties have generally given little or no information on this point. It takes the view that at least in countries where science and medicine are highly developed, and even for peoples and areas outside their borders if affected by their experiments, more attention should be given to the possible need and means to ensure the observance of this provision. Special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent.

Sixteenth session (1982)

General comment No. 8: Article 9 (Right to liberty and security of persons)

1. Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect.

3. Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement “to trial within a reasonable time or to release” under paragraph 3. Pre-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention.

4. Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.

Sixteenth session (1982)

General comment No. 9: Article 10 (Humane treatment of persons deprived of their liberty)

[General comment No. 9 has been replaced by general comment No. 21]

1. Article 10, paragraph 1 of the Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. However, by no means all the reports submitted by States parties have contained information on the way in which this paragraph of the article is being implemented. The Committee is of the opinion that it would be desirable for the reports of States parties to contain specific information on the legal measures designed to protect that right. The Committee also considers that reports should indicate the concrete measures being taken by the competent State organs to monitor the mandatory implementation of national legislation concerning the humane treatment and respect for the human dignity of all persons deprived of their liberty that paragraph 1 requires.

The Committee notes, in particular, that paragraph 1 of this article is generally applicable to persons deprived of their liberty, whereas paragraph 2 deals with accused as distinct from convicted persons, and paragraph 3 with convicted persons only. This structure quite often is not reflected in the reports, which mainly have related to accused and convicted persons. The wording of paragraph 1, its context - especially its proximity to article 9, paragraph 1, which also deals with all deprivations of liberty - and its purpose support a broad application of the principle expressed in that provision. Moreover, the Committee recalls that this article supplements article 7 as regards the treatment of all persons deprived of their liberty.

The humane treatment and the respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. While the Committee is aware that in other respects the modalities and conditions of detention may vary with the available resources, they must always be applied without discrimination, as required by article 2 (1).

Ultimate responsibility for the observance of this principle rests with the State as regards all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions.

2. Subparagraph 2 (a) of the article provides that, save in exceptional circumstances, accused persons shall be segregated from convicted persons and shall receive separate treatment appropriate to their status as unconvicted persons. Some reports have failed to pay proper attention to this direct requirement of the Covenant and, as a result, to provide adequate information on the way in which the treatment of accused persons differs from that of convicted persons. Such information should be included in future reports.

Subparagraph 2 (b) of the article calls, inter alia, for accused juvenile persons to be separated from adults. The information in reports shows that a number of States are not taking

sufficient account of the fact that this is an unconditional requirement of the Covenant. It is the Committee's opinion that, as is clear from the text of the Covenant, deviation from States parties' obligations under subparagraph 2 (b) cannot be justified by any consideration whatsoever.

3. In a number of cases, the information appearing in reports with respect to paragraph 3 of the article has contained no concrete mention either of legislative or administrative measures or of practical steps to promote the reformation and social rehabilitation of prisoners, by, for example, education, vocational training and useful work. Allowing visits, in particular by family members, is normally also such a measure which is required for reasons of humanity. There are also similar lacunae in the reports of certain States with respect to information concerning juvenile offenders, who must be segregated from adults and given treatment appropriate to their age and legal status.

4. The Committee further notes that the principles of humane treatment and respect for human dignity set out in paragraph 1 are the basis for the more specific and limited obligations of States in the field of criminal justice set out in paragraphs 2 and 3 of article 10. The segregation of accused persons from convicted ones is required in order to emphasize their status as unconvicted persons who are at the same time protected by the presumption of innocence stated in article 14, paragraph 2. The aim of these provisions is to protect the groups mentioned, and the requirements contained therein should be seen in that light. Thus, for example, the segregation and treatment of juvenile offenders should be provided for in such a way that it promotes their reformation and social rehabilitation.

Nineteenth session (1983)

General comment No. 10: Article 19 (Freedom of opinion)

1. Paragraph 1 requires protection of the "right to hold opinions without interference". This is a right to which the Covenant permits no exception or restriction. The Committee would welcome information from States parties concerning paragraph 1.

2. Paragraph 2 requires protection of the right to freedom of expression, which includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice". Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.

3. Many State reports confine themselves to mentioning that freedom of expression is guaranteed under the Constitution or the law. However, in order to know the precise regime of freedom of expression in law and in practice, the Committee needs in addition pertinent

information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right.

4. Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these 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 subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes.

Nineteenth session (1983)

General comment No. 11: Article 20

1. Not all reports submitted by States parties have provided sufficient information as to the implementation of article 20 of the Covenant. In view of the nature of article 20, States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. However, the reports have shown that in some States such actions are neither prohibited by law nor are appropriate efforts intended or made to prohibit them. Furthermore, many reports failed to give sufficient information concerning the relevant national legislation and practice.

2. Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of article 20, paragraph 1, do not prohibit 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. For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy.

Twenty-first session (1984)

General comment No. 12: Article 1 (Right to self-determination)

1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination 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 States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

2. Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely "determine their political status and freely pursue their economic, social and cultural development". The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.

3. Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties' reports should contain information on each paragraph of article 1.

4. With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.

5. Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to "dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence". This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that "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". The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under 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 to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

Twenty-first session (1984)

General comment No. 13: Article 14 (Administration of justice)

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in

particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that “everyone shall be entitled to a fair and public hearing”. Paragraph 3 of the article elaborates on the requirements of a “fair hearing” in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (subpara. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

12. Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that 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. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most

States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

Twenty-third session (1984)

General comment No. 14: Article 6 (Right to life)

1. In its general comment No. 6 [16] adopted at its 378th meeting on 27 July 1982, the Human Rights Committee observed that the right to life enunciated in the first paragraph of article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency. The same right to life is enshrined in article 3 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. It is basic to all human rights.

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

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

4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are 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.

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

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

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

Twenty-seventh session (1986)

General comment No. 15: The position of aliens under the Covenant

1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.

3. A few constitutions provide for equality of aliens with citizens. Some constitutions adopted more recently carefully distinguish fundamental rights that apply to all and those granted to citizens only, and deal with each in detail. In many States, however, the constitutions are drafted in terms of citizens only when granting relevant rights. Legislation and case law may also play an important part in providing for the rights of aliens. The Committee has been informed that in some States fundamental rights, though not guaranteed to aliens by the Constitution or other legislation, will also be extended to them as required by the Covenant. In certain cases, however, there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens.

4. The Committee considers that in their reports States parties should give attention to the position of aliens, both under their law and in actual practice. The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. The position of aliens would thus be considerably improved. States parties should ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction.

5. The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

6. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.

7. Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

8. Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3. Since such restrictions must, inter alia, be consistent with the other rights recognized in the Covenant, a State party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country (art. 12, para. 4).

9. Many reports have given insufficient information on matters relevant to article 13. That article is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (arts. 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law may apply. Normally an alien who is expelled must be allowed to leave for any country that agrees to take him. The particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (art. 26).

10. Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require. Discrimination may not be made between different categories of aliens in the application of article 13.

Thirty-second session (1988)

General comment No. 16: Article 17 (Right to privacy)

1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.

2. In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established in the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.

3. The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

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

5. Regarding the term “family”, the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term “home” in English, “manzel” in Arabic, “zhùzhái” in Chinese, “domicile” in French, “zhilische” in Russian and “domicilio” in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms “family” and “home”.

6. The Committee considers that the reports should include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference allowed by the law. It is also indispensable to have information on the authorities which are entitled to exercise control over such interference with strict regard for the law, and to know in what manner and through which organs persons concerned may complain of a violation of the right provided for in article 17 of the Covenant. States should in their reports make clear the extent to which actual practice conforms to the law. State party reports should also contain information on complaints lodged in respect of arbitrary or unlawful interference, and the number of any findings in that regard, as well as the remedies provided in such cases.

7. As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual’s private life the knowledge of which is essential in the interests of society as understood under the Covenant. Accordingly, the Committee recommends that States should indicate in their reports the laws and regulations that govern authorized interferences with private life.

8. Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

9. States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.

10. The gathering and holding of personal information on computers, 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. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

11. Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system.

Thirty-fifth session (1989)

General comment No. 17: Article 24 (Rights of the child)

1. Article 24 of the International Covenant on Civil and Political Rights recognizes the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor. Consequently, the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. The reports submitted by States parties often seem to underestimate this obligation and supply inadequate information on the way in which children are afforded enjoyment of their right to a special protection.

2. In this connection, the Committee points out that the rights provided for in article 24 are not the only ones that the Covenant recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant. In enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protection than adults. Thus, as far as the right to life is concerned, the death penalty cannot be imposed for crimes committed by persons under 18 years of age. Similarly, if lawfully deprived of their liberty, accused juvenile persons shall be separated from adults and are entitled to be brought as speedily as possible for adjudication; in turn, 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. In other instances, children are protected by the possibility of the restriction - provided that such restriction is warranted - of a right recognized by the Covenant, such as the right to publicize a judgement in a suit at law or a criminal case, from which an exception may be made when the interest of the minor so requires.

3. In most cases, however, the measures to be adopted are not specified in the Covenant 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 Committee notes in this regard 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 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 the right to freedom of opinion and expression. Moreover, the Committee wishes to draw the attention of States parties to the need to include in their reports information on measures adopted to ensure that children do not take a direct part in armed conflicts.

4. The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. In this respect, States should indicate in their reports the age at which the child attains his majority in civil matters and assumes criminal responsibility. States should also indicate the age at which a child is legally entitled to work and the age at which he is treated as an adult under labour law. States should further indicate the age at which a child is considered adult for the purposes of article 10, paragraphs 2 and 3. However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.

5. The Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth. In this connection, the Committee notes that, whereas non-discrimination in the enjoyment of the rights provided for in the Covenant also stems, in the case of children, from article 2 and their equality before the law from article 26, the non-discrimination clause contained in article 24 relates specifically to the measures of protection referred to in that provision. Reports by States parties should indicate how legislation and practice ensure that measures of protection are aimed at removing 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.

6. Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the Covenant 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 party 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, reports by States parties should indicate how society, social institutions and the State are discharging 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, 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. The Committee considers it useful that reports by States parties should provide information on the special measures of protection adopted 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.

7. Under article 24, paragraph 2, every child has the right to be registered immediately after birth and to have a name. In the Committee's opinion, 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 provided for in the Covenant. Reports by States parties should indicate in detail the measures that ensure the immediate registration of children born in their territory.

8. Special attention should also be paid, in the context of the protection to be granted to children, to the right of every child to acquire a nationality, as provided for in article 24, paragraph 3. While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal 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. The measures adopted to ensure that children have a nationality should always be referred to in reports by States parties.

Thirty-seventh session (1989)

General comment No. 18: Non-discrimination

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the

Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Thirty-ninth session (1990)

General comment No. 19: Article 23 (The family)

1. Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family. In addition, article 24 of the Covenant specifically addresses the protection of the rights of the child, as such or as a member of a family. In their reports, States parties often fail to give enough information on how the State and society are discharging their obligation to provide protection to the family and the persons composing it.

2. The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, “nuclear” and “extended”, exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.

3. Ensuring the protection provided for under article 23 of the Covenant requires that States parties should adopt legislative, administrative or other measures. States parties should provide detailed information concerning the nature of such measures and the means whereby their effective implementation is assured. In fact, since the Covenant also recognizes the right of the family to protection by society, States parties’ reports should indicate how the necessary protection is granted to the family by the State and other social institutions, whether and to what extent the State gives financial or other support to the activities of such institutions, and how it ensures that these activities are compatible with the Covenant.

4. Article 23, paragraph 2, of the Covenant reaffirms the right of men and women of marriageable age to marry and to found a family. Paragraph 3 of the same article provides that no marriage shall be entered into without the free and full consent of the intending spouses. States parties' reports should indicate whether there are restrictions or impediments to the exercise of the right to marry based on special factors such as degree of kinship or mental incapacity. The Covenant does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law. In this connection, the Committee wishes to note that such legal provisions must be compatible with the full exercise of the other rights guaranteed by the Covenant; thus, for instance, the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages. In the Committee's view, however, for a State to require that a marriage, which is celebrated in accordance with religious rites, be conducted, affirmed or registered also under civil law is not incompatible with the Covenant. States are also requested to include information on this subject in their reports.

5. The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.

6. Article 23, paragraph 4, of the Covenant provides that States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

7. With regard to equality as to marriage, the Committee wishes to note in particular that no sex-based discrimination should occur in respect of the acquisition or loss of nationality by reason of marriage. Likewise, the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name should be safeguarded.

8. During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.

9. Thus, any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection. States parties should, in particular, include information in their reports concerning the provision made for the necessary protection of any children at the dissolution of a marriage or on the separation of the spouses.

Forty-fourth session (1992)

General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)

1. This general comment replaces general comment No. 7 (the sixteenth session, 1982) reflecting and further developing it.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.

6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to

such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.

10. The Committee should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.

11. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that 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 cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee 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.

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

13. States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment,

specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, 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.

14. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

Forty-fourth session (1992)

General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)

1. This general comment replaces general comment No. 9 (the sixteenth session, 1982) reflecting and further developing it.

2. Article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.

3. Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected 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 for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule 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.

5. States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and 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).

6. The Committee recalls that reports should provide detailed information on national legislative and administrative provisions that have a bearing on the right provided for in article 10, paragraph 1. The Committee also considers that it is necessary for reports to specify what concrete measures have been taken by the competent authorities to monitor the effective application of the rules regarding the treatment of persons deprived of their liberty. States parties should include in their reports information concerning the system for supervising penitentiary establishments, the specific measures to prevent torture and cruel, inhuman or degrading treatment, and how impartial supervision is ensured.

7. Furthermore, the Committee recalls that reports should indicate whether the various applicable provisions form an integral part of the instruction and training of the personnel who have authority over persons deprived of their liberty and whether they are strictly adhered to by such personnel in the discharge of their duties. It would also be appropriate to specify whether arrested or detained persons have access to such information and have effective legal means enabling them to ensure that those rules are respected, to complain if the rules are ignored and to obtain adequate compensation in the event of a violation.

8. The Committee recalls that the principle set forth in article 10, paragraph 1, constitutes the basis for the more specific obligations of States parties in respect of criminal justice, which are set forth in article 10, paragraphs 2 and 3.

9. Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons.

10. As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.

11. In a number of cases, the information furnished by the State party contains no specific reference either to legislative or administrative provisions or to practical measures to ensure the re-education of convicted persons. The Committee requests specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside.

12. In order to determine whether the principle set forth in article 10, paragraph 3, is being fully respected, the Committee also requests information on the specific measures applied during detention, e.g., how convicted persons are dealt with individually and how they are categorized, the disciplinary system, solitary confinement and high-security detention and the conditions under which contacts are ensured with the outside world (family, lawyer, social and medical services, non-governmental organizations).

13. Moreover, the Committee notes that in the reports of some States parties no information has been provided concerning the treatment accorded to accused juvenile persons and juvenile offenders. Article 10, paragraph 2 (b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant. The text also provides that cases involving juveniles must be considered as speedily as possible. Reports should specify the measures taken by States parties to give effect to that provision. Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status insofar as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation. Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. In that regard, States parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987).

Forty-eighth session (1993)

General comment No. 22: Article 18 (Freedom of thought, conscience or religion)

1. The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 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. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.

4. The freedom to manifest religion or belief may be exercised “either individually or in community with others and in public or private”. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such 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. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

5. The Committee observes that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.

6. The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1. The Committee

notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

7. In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its general comment No. 11 [19], States parties are under the obligation to enact laws to prohibit such acts.

8. Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that 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 protecting morals must be based on principles not deriving exclusively from a single tradition. 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. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.

9. The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. The measures contemplated by article 20, paragraph 2 of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups. The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination.

Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the right to freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.

10. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.

Fiftieth session (1994)

General comment No. 23: Article 27 (Rights of minorities)

1. Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these 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. The Committee observes that this article 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 under the Covenant.

2. In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant. Further, in reports submitted by States parties under article 40 of the Covenant, the obligations placed upon States parties under article 27 have sometimes been confused with their duty under article 2.1 to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under article 26.

3.1. The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.[1]

3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources.[2] This may particularly be true of members of indigenous communities constituting a minority.

4. The Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not.[3] Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2. Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

5.3. The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.[4]

6.1. Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party 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, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States 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. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant 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 the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.[5] The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

8. The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the

Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

Notes

[1] See *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40* (A/39/40), annex VI, general comment No. 12 (21) (art. 1), also issued in document CCPR/C/21/Rev.1; ibid., *Forty-fifth Session, Supplement No. 40*, (A/45/40, vol. II, annex IX, section A, communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*), views adopted on 26 March 1990.

[2] See ibid., *Forty-third Session, Supplement No. 40* (A/43/40), annex VII, section G, communication No. 197/1985 (*Kitok v. Sweden*), views adopted on 27 July 1988.

[3] See ibid., *Forty-second Session, Supplement No. 40* (A/42/40), annex VIII, section D, communication No. 182/1984 (*F.H. Zwaan-de Vries v. the Netherlands*), views adopted on 9 April 1987; ibid., section C, communication No. 180/1984 (*L.G. Danning v. the Netherlands*), views adopted on 9 April 1987.

[4] See ibid., *Forty-fifth Session, Supplement No. 40*, (A/45/40), volume II, annex X, section A, communication No. 220/1987 (*T.K. v. France*), decision of 8 November 1989; ibid., section B, communication No. 222/1987 (*M.K. v. France*), decision of 8 November 1989.

[5] See notes 1 and 2 above, communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*), views adopted on 26 March 1990, and communication No. 197/1985 (*Kitok v. Sweden*), views adopted on 27 July 1988.

Fifty-second session (1994)

General comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant

1. As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. It is important for States parties to know exactly what obligations they, and other States parties, have in fact undertaken. And the Committee, in the performance of its duties under either article 40 of the Covenant or under the

Optional Protocols, must know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.

2. For these reasons the Committee has deemed it useful to address in a general comment the issues of international law and human rights policy that arise. The general comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.

3. It is not always easy to distinguish a reservation from a declaration as to a State's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. 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.[1] Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

4. The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "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." Paragraphs 2 and 3 provide for certain procedural obligations.

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance.[2] It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant 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 for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant 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. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (art. 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (art. 2 (2)).

10. The Committee has further examined whether categories of reservations may offend the “object and purpose” test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, 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 (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 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, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the

prohibition of torture and arbitrary deprivation of life are examples.[3] While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends 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 Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee 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 Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol 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 contained in the Covenant, made under the

first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant 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 first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14. The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence ratione temporis. At the same time, 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 first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject-matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol.

15. The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty.[4] It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 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 military nature committed during wartime. Two procedural obligations are incumbent upon States parties wishing to avail themselves of such a reservation. Article 2, paragraph 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. Article 2, paragraph 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 (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the Reservations to the Genocide Convention Case (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, 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, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established

objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

Notes

[1] Article 2 (1) (d), Vienna Convention on the Law of Treaties 1969.

[2] Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in *The Reservations to the Genocide Convention Case* of 1951.

[3] Reservations have been entered to both article 6 and article 7, but not in terms which reserve a right to torture or to engage in arbitrary deprivation of life.

[4] The competence of the Committee in respect of this extended obligation is provided for under article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

Fifty-seventh session (1996)[1 2]

General comment No. 25: Article 25 (Participation in public affairs and the right to vote)

1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.

2. The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.

3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of “every citizen”. State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.

4. Any conditions which apply to the exercise of the rights protected by article 25 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. The exercise of these rights 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 may be a ground for denying a person the right to vote or to hold office.

5. The conduct of public affairs, referred to in paragraph (a), 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, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.

6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). 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. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.

7. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 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 which must be established by laws that are in accordance with paragraph (b).

8. 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.

9. Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with paragraph (b) 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 electors. The rights and obligations provided for in paragraph (b) should be guaranteed by law.

10. The right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. 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 should not be a condition of eligibility to vote, nor a ground of disqualification.

11. States 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 article 25 rights by an informed community.

12. 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 photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice. States parties should indicate in their reports the manner in which the difficulties highlighted in this paragraph are dealt with.

13. State reports should describe the rules governing the right to vote, and the application of those rules in the period covered by the report. State reports should also describe factors which impede citizens from exercising the right to vote and the positive measures which have been adopted to overcome these factors.

14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

15. 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. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.

16. 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 rights protected by paragraph (b). The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures.

17. 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 paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

18. State reports should describe the legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. Reports should describe conditions for nomination, e.g. age limits, and any other qualifications or restrictions. State reports should indicate whether there are restrictions which preclude persons in public-service positions (including positions in the police or armed services) from being elected to particular public offices. The legal grounds and procedures for the removal of elected office holders should be described.

19. In conformity with paragraph (b), 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 government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should 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 should be respected and implemented.

20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures 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 article 25 of the Covenant. 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 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.

21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 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 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.

22. State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. Reports should describe the electoral system and explain how the different political views in the community are represented in elected bodies. Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law. The practical implementation of these guarantees in the period covered by the report should be explained.

23. Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. 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 their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.

24. State reports should describe the conditions for access to public service positions, any restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes. Reports should also indicate how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent.

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and 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.

26. 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 rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.

27. Having regard to the provision of article 5, paragraph 1, of the Covenant, any rights recognized and protected by article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.

Notes

[1] Adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996.

[2] The number in parenthesis indicates the session at which the general comment was adopted.

Sixty-first session (1997)*

General comment No. 26: Continuity of obligations

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant 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.

2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41 (2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee 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 Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits States parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.

3. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the “International Bill of Human Rights”.

* Contained in document A/53/40, annex VII.

As such, the Covenant 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.

4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding 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 Covenant.

5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

Sixty-seventh session (1999)*

General comment No. 27: Article 12 (Freedom of movement)

1. Liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the Covenant, as is often shown in the Committee's practice in considering reports from States parties and communications from individuals. Moreover, the Committee in its general comment No. 15 ("The position of aliens under the Covenant", 1986) referred to the special link between articles 12 and 13.[1]

2. The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.

3. States parties should provide the Committee in their reports with the relevant domestic legal rules and administrative and judicial practices relating to the rights protected by article 12, taking into account the issues discussed in the present general comment. They must also include information on remedies available if these rights are restricted.

Liberty of movement and freedom to choose residence (para. 1)

4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, 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. In that connection, the Committee has held that an alien who

* Contained in document CCPR/C/21/Rev.1/Add.9.

entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12.[2] Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3.[3] It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.

5. The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.

6. The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.

7. Subject to the provisions of article 12, paragraph 3, 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. Lawful detention, however, affects more specifically the right to personal liberty and is covered by article 9 of the Covenant. In some circumstances, articles 12 and 9 may come into play together.[4]

Freedom to leave any country, including one's own (para. 2)

8. 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. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State.[5]

9. In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality.[6] Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere.[7] It is no justification for the State to claim that its national would be able to return to its territory without a passport.

10. The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave

which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.

Restrictions (para. 3)

11. Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant (see paragraph 18 below).

12. The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. article 5, paragraph 1); 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.

14. Article 12, paragraph 3, clearly indicates that 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.

15. 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. States should 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.

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions 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 minorities communities.[8]

17. A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take 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 the 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. In the light of these practices, States parties should make sure that all restrictions imposed by them are in full compliance with article 12, paragraph 3.

18. The application of the restrictions permissible under article 12, paragraph 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 the Covenant if the rights enshrined in article 12, 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 article 12.

The right to enter one's own country (para. 4)

19. 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 the country (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.

20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country".[9] 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, that is, 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 there

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 national entity, whose nationality is being denied them. The language of article 12, paragraph 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. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context 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. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party 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.

Notes

[1] HRI/GEN/1/Rev.3, 15 August 1997, p. 20 (para. 8).

[2] Communication No. 456/1991, *Celepli v. Sweden*, paragraph 9.2.

[3] General comment No. 15, paragraph 8, in HRI/GEN/1/Rev.3, 15 August 1997, p. 20.

[4] See, for example, communication No. 138/1983, *Mpandajila v.* Zaire, paragraph 10; communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, paragraph 10; communication Nos. 241/1987 and 242/1987, *Birhashwirwa/Tshisekedi v. Zaire*, paragraph 13.

[5] See general comment No. 15, paragraph 9, in HRI/GEN/1/Rev.3, 15 August 1997, p. 21.

[6] See communication No. 106/1981, *Montero v. Uruguay*, paragraph 9.4; communication No. 57/1979, *Vidal Martins v.* Uruguay, paragraph 7; communication No. 77/1980, *Lichtensztejn v. Uruguay*, paragraph 6.1.

[7] See communication No. 57/1979, *Vidal* Martins *v. Uruguay*, paragraph 9.

[8] See general comment No. 23, paragraph 7, in HRI/GEN/1/Rev.3, 15 August 1997, p. 41.

[9] See communication No. 538/1993, *Stewart v. Canada*.

Sixty-eighth session (2000)

General comment No. 28: Article 3 (The equality of rights between men and women)[1]

1. The Committee has decided to update its general comment on article 3 of the Covenant and to replace general comment No. 4 (thirteenth session, 1981), in the light of the experience it has gathered in its activities over the last 20 years. The present revision seeks to take account of the important impact of this article on the enjoyment by women of the human rights protected under the Covenant.

2. Article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.

3. The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women. States parties must provide information regarding the actual role of women in society so that the Committee may ascertain what measures, in addition to legislative provisions, have been or should be taken to give effect to these obligations, what progress has been made, what difficulties are encountered and what steps are being taken to overcome them.

4. States parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.

5. Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.

6. In order to fulfil the obligation set forth in article 3, States parties should take account of the factors which impede the equal enjoyment by women and men of each right specified in the Covenant. To enable the Committee to obtain a complete picture of the situation of women in each State party as regards the implementation of the rights in the Covenant, this general

comment identifies some of the factors affecting the equal enjoyment by women of the rights under the Covenant and spells out the type of information that is required with regard to these rights.

7. The equal enjoyment of human rights by women must be protected during a state of emergency (art. 4). States parties which take measures derogating from their obligations under the Covenant in time of public emergency, as provided in article 4, should provide information to the Committee with respect to the impact on the situation of women of such measures and should demonstrate that they are non-discriminatory.

8. Women are particularly vulnerable in times of internal or international armed conflicts. States parties should inform the Committee of all measures taken during these situations to protect women from rape, abduction and other forms of gender-based violence.

9. In becoming parties to the Covenant, States undertake, in accordance with article 3, to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant, and in accordance with article 5, nothing in the 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 provided for in article 3, or at limitations not covered by the Covenant. Moreover, there shall be no restriction upon or derogation from the equal enjoyment by women of all fundamental human rights recognized or existing pursuant to law, conventions, regulations or customs, on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

10. When reporting on the right to life protected by article 6, States parties should provide data on birth rates and on pregnancy- and childbirth-related deaths of women. Gender-disaggregated data should be provided on infant mortality rates. States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions. States parties should also report on measures to protect women from practices that violate their right to life, such as female infanticide, the burning of widows and dowry killings. The Committee also wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.

11. To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape. The States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization. In States parties where the practice of genital mutilation exists information on its extent and on measures to eliminate it should be provided. The information provided by States parties on all these issues should include measures of protection, including legal remedies, for women whose rights under article 7 have been violated.

12. Having regard to their obligations under article 8, States parties should inform the Committee of measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, inter alia, as domestic or other kinds of personal service. States parties where women and children are recruited, and from which they are taken, and States parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women's and children's rights.

13. States parties should provide information on any specific regulation of clothing to be worn by women in public. The Committee stresses that such regulations may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.

14. With regard to article 9, States parties should provide information on any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house (see general comment No. 8, paragraph 1).

15. As regards articles 7 and 10, States parties must provide all information relevant to ensuring that the rights of persons deprived of their liberty are protected on equal terms for men and women. In particular, States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards. States parties should also report about compliance with the rule that accused juvenile females shall be separated from adults and on any difference in treatment between male and female persons deprived of liberty, such as access to rehabilitation and education programmes and to conjugal and family visits. Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.

16. As regards article 12, States parties should provide information on any legal provision or any practice which restricts women's right to freedom of movement, for example the exercise of marital powers over the wife or of parental powers over adult daughters; legal or de facto requirements which prevent women from travelling, such as the requirement of consent of a third party to the issuance of a passport or other type of travel documents to an adult woman. States parties should also report on measures taken to eliminate such laws and practices and to protect women against them, including reference to available domestic remedies (see general comment No. 27, paragraphs 6 and 18).

17. States parties should ensure that alien women are accorded on an equal basis the right to submit arguments against their expulsion and to have their case reviewed, as provided in article 13. In this regard, they should be entitled to submit arguments based on gender-specific violations of the Covenant such as those mentioned in paragraphs 10 and 11 above.

18. States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, States parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication No. 202/1986, *Ato del Avellanal v. Peru*, Views of 28 October 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters. States parties should report on whether certain categories of women are denied the enjoyment of the presumption of innocence under article 14, paragraph 2, and on the measures which have been taken to put an end to this situation.

19. The right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status. This right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be treated as objects to be given, together with the property of the deceased husband, to his family. States must provide information on laws or practices that prevent women from being treated or from functioning as full legal persons and the measures taken to eradicate laws or practices that allow such treatment.

20. States parties must provide information to enable the Committee to assess the effect of any laws and practices that may interfere with women's right to enjoy privacy and other rights protected by article 17 on the basis of equality with men. An example of such interference arises where the sexual life of a woman is taken into consideration in deciding the extent of her legal rights and protections, including protection against rape. Another area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. In these instances, other rights in the Covenant, such as those of articles 6 and 7, might also be at stake. Women's privacy may also be interfered with by private actors, such as employers who request a pregnancy test before hiring a woman. States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference.

21. States parties must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice - including the freedom to change religion or belief and to express one's religion or belief - will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination. These freedoms, protected by article 18, must not be subject to restrictions other

than those authorized by the Covenant and must not be constrained by, inter alia, rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others. Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion; States parties should therefore provide information on the status of women as regards their freedom of thought, conscience and religion, and indicate what steps they have taken or intend to take both to eliminate and prevent infringements of these freedoms in respect of women and to protect their right not to be discriminated against.

22. In relation to article 19, States parties should inform the Committee of any laws or other factors which may impede women from exercising the rights protected under this provision on an equal basis. As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.

23. States are required to treat men and women equally in regard to marriage in accordance with article 23, which has been elaborated further by general comment No. 19 (1990). Men and women have the right to enter into marriage only with their free and full consent, and States have an obligation to protect the enjoyment of this right on an equal basis. Many factors may prevent women from being able to make the decision to marry freely. One factor relates to the minimum age for marriage. That age should be set by the State on the basis of equal criteria for men and women. These criteria should ensure women's capacity to make an informed and uncoerced decision. A second factor in some States may be that either by statutory or customary law a guardian, who is generally male, consents to the marriage instead of the woman herself, thereby preventing women from exercising a free choice.

24. Another factor that may affect women's right to marry only when they have given free and full consent is the existence of social attitudes which tend to marginalize women victims of rape and put pressure on them to agree to marriage. A woman's free and full consent to marriage may also be undermined by laws which allow the rapist to have his criminal responsibility extinguished or mitigated if he marries the victim. States parties should indicate whether marrying the victim extinguishes or mitigates criminal responsibility and, in the case in which the victim is a minor, whether the rape reduces the marriageable age of the victim, particularly in societies where rape victims have to endure marginalization from society. A different aspect of the right to marry may be affected when States impose restrictions on remarriage by women that are not imposed on men. Also, the right to choose one's spouse may be restricted by laws or practices that prevent the marriage of a woman of a particular religion to a man who professes no religion or a different religion. States should provide information on these laws and practices and on the measures taken to abolish the laws and eradicate the practices which undermine the right of women to marry only when they have given free and full consent. It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.

25. To fulfil their obligations under article 23, paragraph 4, States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children's religious and moral education, the capacity to transmit to children the parent's nationality, and the ownership or administration of property,

whether common property or property in the sole ownership of either spouse. States parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary. Also, States parties should ensure that no sex-based discrimination occurs in respect of the acquisition or loss of nationality by reason of marriage, of residence rights, and of the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name. Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family.

26. States parties must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children. Determination of the need to maintain contact between children and the non-custodial parent should be based on equal considerations. Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.

27. In giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children, and to ensure the equal treatment of women in these contexts (see general comment No. 19, paragraph 2). Single-parent families frequently consist of a single woman caring for one or more children, and States parties should describe what measures of support are in place to enable her to discharge her parental functions on the basis of equality with a man in a similar position.

28. The obligation of States parties to protect children (art. 24) should be carried out equally for boys and girls. States parties should report on measures taken to ensure that girls are treated equally to boys in education, in feeding and in health care, and provide the Committee with disaggregated data in this respect. States parties should eradicate, both through legislation and any other appropriate measures, all cultural or religious practices which jeopardize the freedom and well-being of female children.

29. The right to participate in the conduct of public affairs is not fully implemented everywhere on an equal basis. States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women’s participation in the conduct of public affairs and in public office, including appropriate affirmative action. Effective measures taken by States parties to ensure that all persons entitled to vote are able to exercise that right should not be discriminatory on the grounds of sex. The Committee requires States parties to provide statistical information on the percentage of women in publicly elected office, including the legislature, as well as in high-ranking civil service positions and the judiciary.

30. Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.

31. The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields. Discrimination against women in areas such as social security laws (communications Nos. 172/84, *Broeks v. Netherlands*, Views of 9 April 1987; 182/84, *Zwaan de Vries v. the Netherlands*, Views of 9 April 1987; 218/1986, *Vos v. the Netherlands*, Views of 29 March 1989) as well as in the area of citizenship or rights of non-citizens in a country (communication No. 035/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted 9 April 1981) violates article 26. The commission of so-called "honour crimes" which remain unpunished constitutes a serious violation of the Covenant and in particular of articles 6, 14 and 26. Laws which impose more severe penalties on women than on men for adultery or other offences also violate the requirement of equal treatment. The Committee has also often observed in reviewing States parties' reports that a large proportion of women are employed in areas which are not protected by labour laws and that prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value. States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services. States parties should report on all these measures and provide information on the remedies available to victims of such discrimination.

32. The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. States should report on any legislation or administrative practices related to membership in a minority community that might constitute an infringement of the equal rights of women under the Covenant (communication No. 24/1977, *Lovelace v. Canada*, Views adopted July 1981) and on measures taken or envisaged to ensure the equal right of men and women to enjoy all civil and political rights in the Covenant. Likewise, States should report on measures taken to discharge their responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women. In their reports, States parties should pay attention to the contribution made by women to the cultural life of their communities.

Note

[1] Adopted by the Committee at its 1834th meeting (sixty-eighth session), on 29 March 2000.

Seventy-second session (2001)

General comment No. 29: Article 4: Derogations during a state of emergency*

1. Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to

* Adopted at the 1950th meeting, on 24 July 2001.

derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant. In this general comment, replacing its general comment No. 5, adopted at the thirteenth session (1981), the Committee seeks to assist States parties to meet the requirements of article 4.

2. Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.

3. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.[1]

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant.[2] Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the

Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.[3]

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

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

7. Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18,

paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party.[4]

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

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

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

11. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., arts. 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., arts. 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international

law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

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

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

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

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

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

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

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

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

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

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

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

derogation from one or more provisions of the Covenant, and States parties have sometimes neglected to submit a notification of territorial or other changes in the exercise of their emergency powers.[10] Sometimes, the existence of a state of emergency and the question of whether a State party has derogated from provisions of the Covenant have come to the attention of the Committee only incidentally, in the course of the consideration of a State party's report. The Committee emphasizes the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.

Notes

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

[2] See, for instance, articles 12 and 19 of the Covenant.

[3] See, for example, concluding observations on Israel (1998), CCPR/C/79/Add.93, paragraph 11.

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

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

[6] Reference is made to reports of the Secretary-General to the Commission on Human Rights submitted pursuant to Commission resolutions 1998/29, 1996/65 and 2000/69 on minimum humanitarian standards (later: fundamental standards of humanity), E/CN.4/1999/92, E/CN.4/2000/94 and E/CN.4/2001/91, and to earlier efforts to identify fundamental rights applicable in all circumstances, for instance the Paris Minimum Standards of Human Rights

Norms in a State of Emergency (International Law Association, 1984), the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the final report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1), the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), the Turku (Åbo) Declaration of Minimum Humanitarian Standards (1990), (E/CN.4/1995/116). As a field of ongoing further work reference is made to the decision of the 26th International Conference of the Red Cross and Red Crescent (1995) to assign the International Committee of the Red Cross the task of preparing a report on the customary rules of international humanitarian law applicable in international and non-international armed conflicts.

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

8 See article 7 (1) (d) and 7 (2) (d) of the Rome Statute.

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

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

Seventy-fifth session (2002)

General comment No. 30: Reporting obligations of States parties under article 40 of the Covenant*

1. States parties have undertaken to submit reports in accordance with article 40 of the Covenant within one year of its entry into force for the States parties concerned and, thereafter, whenever the Committee so requests.

2. The Committee notes, as appears from its annual reports, that only a small number of States have submitted their reports on time. Most of them have been submitted with delays ranging from a few months to several years and some States parties are still in default, despite repeated reminders by the Committee.

3. Other States have announced that they would appear before the Committee but have not done so on the scheduled date.

4. To remedy such situations, the Committee has adopted new rules:

(a) If a State party has submitted a report but does not send a delegation to the Committee, the Committee may notify the State party of the date on which it intends to consider the report or may proceed to consider the report at the meeting that had been initially scheduled;

(b) When the State party has not presented a report, the Committee may, at its discretion, notify the State party of the date on which the Committee proposes to examine the measures taken by the State party to implement the rights guaranteed under the Covenant:

(i) If the State party is represented by a delegation, the Committee will, in presence of the delegation, proceed with the examination on the date assigned;

(ii) If the State party is not represented, the Committee may, at its discretion, either decide to proceed to consider the measures taken by the State party to implement the guarantees of the Covenant at the initial date or notify a new date to the State party.

For the purposes of the application of these procedures, the Committee shall hold its meetings in public session if a delegation is present, and in private if a delegation is not present, and shall follow the modalities set forth in the reporting guidelines and in the rules of procedure of the Committee.

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* Adopted on 16 July 2002 at its 2025th meeting. This general comment replaces general comment No. 1.

5. After the Committee has adopted concluding observations, a follow-up procedure shall be employed in order to establish, maintain or restore a dialogue with the State party. For this purpose and in order to enable the Committee to take further action, the Committee shall appoint a Special Rapporteur, who will report to the Committee.

6. In the light of the report of the Special Rapporteur, the Committee shall assess the position adopted by the State party and, if necessary, set a new date for the State party to submit its next report.

Eightieth session (2004)

General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*

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

2. While article 2 is couched in terms of the obligations of State parties towards individuals as the right-holders under the Covenant, every State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the "rules concerning the basic rights of the human person" are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State party to a treaty being obligated to every other State party to comply with its undertakings under the treaty. In this connection, the Committee reminds States parties of the desirability of making the declaration contemplated in article 41. It further reminds those States parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States parties can assert their interest in the performance of other States parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States parties the view that violations of Covenant rights by any State party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

3. Article 2 defines the scope of the legal obligations undertaken by States parties to the Covenant. A general obligation is imposed on States parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 9

* Adopted on 29 March 2004 at its 2187th meeting.

and 10 below). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States parties are required to give effect to the obligations under the Covenant in good faith.

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

5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its general comment No. 24 that reservations to article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.

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

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

8. The article 2, paragraph 1, obligations are binding on States parties and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are

amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

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

10. States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. As indicated in general comment No. 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.

11. As implied in general comment No. 291, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

12. Moreover, the article 2 obligation requiring that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where

there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

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

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

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

16. Article 2, paragraph 3, requires that States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate,

reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

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

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

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

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

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

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General Comment No. 32

Article 14: Right to equality before courts and tribunals and to a fair trial

I. GENERAL REMARKS

1. This general comment replaces general comment No. 13 (twenty-first session).

2. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.

3. Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph 1. Paragraphs 2 – 5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted. States parties to the Covenant, in their reports, should clearly distinguish between these different aspects of the right to a fair trial.

4. Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are

interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.

5. While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.[1]

6. While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.[2] Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency,[3] except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.[4] Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.[5]

II. EQUALITY BEFORE COURTS AND TRIBUNALS

7. The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.[6]

8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.

9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in

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[1] General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 8.
[2] General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 15.
[3] Ibid, paras. 7 and 15.
[4] Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15.
[5] General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 11.
[6] Communication No. 1015/2001, *Perterer v. Austria,* para. 9.2 (disciplinary proceedings against a civil servant); Communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition).

procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence.[7] This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[8]

10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.[9]

11. Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.[10] In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.[11]

12. The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.[12]

13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds**,** not entailing actual disadvantage or other unfairness to the defendant.[13] There is no equality of arms if, for instance**,**

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[7] Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea,* para. 9.4.
[8] Communication No. 202/1986, *Ato del Avellanal v. Peru*, para. 10.2 (limitation of the right to represent matrimonial property before courts to the husband, thus excluding married women from suing in court). See also general comment No. 18 (1989) on non-discrimination*,* para. 7.
[9] Communications No. 377/1989, *Currie v. Jamaica*, para. 13.4; No. 704/1996, *Shaw v. Jamaica*, para. 7.6; No. 707/1996, *Taylor v. Jamaica*, para. 8.2; No. 752/1997, *Henry v. Trinidad and Tobago*, para. 7.6; No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.10.
[10] Communication No. 646/1995, *Lindon v. Australia*, para. 6.4.
[11] Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.2.
[12] Communication No. 450/1991, *I.P. v. Finland,* para. 6.2.
[13] Communication No. 1347/2005, *Dudko v. Australia,* para. 7.4.

only the prosecutor, but not the defendant, is allowed to appeal a certain decision.[14] The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.[15] In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.

14. Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases,[16] objective and reasonable grounds must be provided to justify the distinction.

III. FAIR AND PUBLIC HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

15. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[17]

16. The concept of determination of rights and obligations "in a suit at law" (*de caractère civil/de carácter civil*) is more complex. It is formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, are equally authentic, and the *travaux préparatoires* do not resolve the discrepancies in the various language texts. The Committee notes that the concept of a "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.[18] The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons,[19] the determination of social security benefits[20] or the pension rights of soldiers,[21] or procedures regarding the use of public land[22] or the taking

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[14] Communication No. 1086/2002, *Weiss v. Austria,* para. 9.6. For another example of a violation of the principle of equality of arms see Communication No. 223/1987, *Robinson v. Jamaica*, para. 10.4 (adjournment of hearing).
[15] Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.
[16] E.g. if jury trials are excluded for certain categories of offenders (see concluding observations, *United Kingdom of Great Britain and Northern Ireland,* CCPR/CO/73/UK (2001), para. 18) or offences.
[17] Communication No. 1015/2001*, Perterer v. Austria,* para. 9.2.
[18] Communication No. 112/1981, *Y.L. v. Canada*, paras. 9.1 and 9.2.
[19] Communication No. 441/1990, *Casanovas v. France*, para. 5.2.
[20] Communication No. 454/1991, *Garcia Pons v. Spain*, para. 9.3
[21] Communication No. 112/1981, *Y.L. v. Canada*, para. 9.3.
[22] Communication No. 779/1997, *Äärelä and Näkkäläjätvi v. Finland*, paras. 7.2 – 7.4.

of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17. On the other hand, the right to access a court or tribunal as provided for by article 14, paragraph 1, second sentence, does not apply where domestic law does not grant any entitlement to the person concerned. For this reason, the Committee held this provision to be inapplicable in cases where domestic law did not confer any right to be promoted to a higher position in the civil service,[23] to be appointed as a judge[24] or to have a death sentence commuted by an executive body.[25] Furthermore, there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control, such as disciplinary measures not amounting to penal sanctions being taken against a civil servant,[26] a member of the armed forces, or a prisoner. This guarantee furthermore does not apply to extradition, expulsion and deportation procedures.[27] Although there is no right of access to a court or tribunal as provided for by article 14, paragraph 1, second sentence, in these and similar cases, other procedural guarantees may still apply.[28]

18. The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example**,** as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.

19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.[29] The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from

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[23] Communication No. 837/1998, *Kolanowski v. Poland*, para. 6.4.
[24] Communications No. 972/2001, *Kazantzis v. Cyprus*, para. 6.5; No. 943/2000, *Jacobs v. Belgium*, para. 8.7, and No. 1396/2005, *Rivera Fernández v. Spain*, para. 6.3.
[25] Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.4.
[26] Communication No. 1015/2001*, Perterer v. Austria,* para. 9.2 (disciplinary dismissal).
[27] Communications No. 1341/2005*, Zundel v. Canada*, para. 6.8, No. 1359/2005, *Esposito v. Spain*, para. 7.6**.**
[28] See para. 62 below.
[29] Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[30] A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.[31] It is necessary to protect judges against conflicts of interest and intimidation**.** In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.[32] The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.[33]

21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.[34] Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.[35]

22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional,[36] i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where

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[30] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.
[31] Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.
[32] Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.
[33] Communication No. 933/2000, *Mundyo Busyo et al v. Democratic Republic of Congo*, para. 5.2.
[34] Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.
[35] Idem.
[36] Also see Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 64 and general comment No. 31 (2004) on the *Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* para. 11.

with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.[37]

23. Some countries have resorted to special tribunals of "faceless judges" composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives[38] from the proceedings;[39] restrictions of the right to a lawyer of their own choice;[40] severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado;[41] threats to the lawyers;[42] inadequate time for preparation of the case;[43] or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant.[44] Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.[45]

24. Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence,[46] or is exposed to other manifestations of hostility with similar effects.

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[37] See communication No. 1172/2003, *Madani v. Algeria,* para. 8.7.
[38] Communication No. 1298/2004, *Becerra Barney v. Colombia*, para.7.2.
[39] Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5.
[40] Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.
[41] Communication No.577/1994, *Polay Campos v. Peru*, para. 8.8; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5.
[42] Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.
[43] Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3.
[44] Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5; Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3; Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.
[45] Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8 ; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.
[46] Communication No. 770/1997, *Gridin v. Russian Federation*, para. 8.2.

Expressions of racist attitudes by a jury[47] that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.

26. Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.[48] It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[49] The same standard applies to specific instructions to the jury by the judge in a trial by jury.[50]

27. An important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision.[51] Where such delays are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.[52]

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.[53] The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations,[54] or to pre-trial decisions made by prosecutors and other public authorities.[55]

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for

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[47] See Committee on the Elimination of Racial Discrimination, communication No. 3/1991, *Narrainen v. Norway,* para. 9.3.
[48] Communications No. 273/1988, *B.d.B. v. The Netherlands*, para. 6.3; No. 1097/2002, *Martínez Mercader et al v. Spain*, para. 6.3.
[49] Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, para. 8.6.
[50] Communication No. 253/1987, *Kelly v. Jamaica,* para. 5.13; No. 349/1989, *Wright v. Jamaica*, para. 8.3.
[51] Communication No. 203/1986, *Mũnoz Hermoza v. Peru*, para. 11.3 ; No. 514/1992, *Fei v. Colombia*, para. 8.4 .
[52] See e.g. Concluding observations, *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006), para. 21, *Central African Republic*, CCPR//C/CAF/CO/2 (2006), para. 16.
[53] Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 6.2.
[54] Communication No. 301/1988, *R.M. v. Finland*, para. 6.4.
[55] Communication No. 819/1998, *Kavanagh v. Ireland*, para. 10.4.

instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

IV. PRESUMPTION OF INNOCENCE

30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.[56] Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.[57] The denial of bail[58] or findings of liability in civil proceedings[59] do not affect the presumption of innocence.

V. RIGHTS OF PERSONS CHARGED WITH A CRIMINAL OFFENCE

31. The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.[60] Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant.[61] The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law,[62] or the individual is publicly named as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.[63]

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[56] Communication No. 770/1997, *Gridin v. Russian Federation*, paras. 3.5 and 8.3.
[57] On the relationship between article 14, paragraph 2 and article 9 of the Covenant (pre-trial detention) see, e.g. concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 and Argentina, CCPR/CO/70/ARG (2000), para. 10.
[58] Communication No. 788/1997, *Cagas, Butin and Astillero v. Philippines*, para. 7.3.
[59] Communication No. 207/1986, *Morael v. France*, para. 9.5; No. 408/1990, *W.J.H. v. The Netherlands*, para. 6.2; No. 432/1990, *W.B.E. v. The Netherlands*, para. 6.6.
[60] Communication No. 1056/2002, *Khachatrian v. Armenia*, para. 6.4.
[61] Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.8.
[62] Communications No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4 and 253/1987, *Kelly v. Jamaica*, para. 5.8.
[63] Communication No. 16/1977, *Mbenge v. Zaire*, para. 14.1.

32. Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.[64] In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase.[65] What counts as "adequate time" depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial.[66] A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[67] There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed**.**[68]

33. "Adequate facilities" must include access to documents and other evidence; this access must include all materials[69] that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim. If the accused does not speak the language in which the proceedings are held, but is represented by counsel who is familiar with the language**,** it may be sufficient that the relevant documents in the case file are made available to counsel[70]

34. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[71] Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.

35. The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the

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[64] Communications No. 282/1988, *Smith v. Jamaica ,* para. 10.4; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.
[65] See communication No. 451/1991, *Harward v. Norway*, para. 9.5.
[66] Communication No. 1128/2002, *Morais v. Angola*, para. 5.6. Similarly Communications No. 349/1989, *Wright v. Jamaica*, para. 8.4; No. 272/1988, *Thomas v. Jamaica,* para. 11.4; No. 230/87, *Henry v. Jamaica,* para. 8.2; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.
[67] Communication No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4.
[68] Communications No. 913/2000, *Chan v. Guyana*, para. 6.3; No. 594/1992, *Phillip v. Trinidad and Tobago*, para. 7.2.
[69] See concluding observations, Canada, CCPR/C/CAN/CO/5 (2005)**,** para. 13.
[70] Communication No. 451/1991, *Harward v. Norway*, para. 9.5.
[71] Communications No. 1117/2002, *Khomidova v. Tajikistan*, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, para. 8.5.

circumstances of each case,[72] taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.[73] This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.[74] All stages, whether in first instance or on appeal must take place "without undue delay."

36. Article 14, paragraph 3 (d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.[75]

37. Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for by article 14, paragraph 3 (d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.[76]

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[72] See e.g. communication No. 818/1998, *Sextus v Trinidad and Tobago,* para. 7.2 regarding a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay. In communication No. 537/1993, *Kelly v. Jamaica*, para. 5.11, an 18 months delay between charges and beginning of the trial did not violate art. 14, para. 3 (c). See also communication No. 676/1996, *Yasseen and Thomas v. Guyana*, para. 7.11 (delay of two years between a decision by the Court of Appeal and the beginning of a retrial) and communication No. 938/2000, *Siewpersaud, Sukhram, and Persaud v. Trinidad v Tobago*, para. 6.2 (total duration of criminal proceedings of almost five years in the absence of any explanation from the State party justifying the delay).

[73] Communication No. 818/1998, *Sextus v. Trinidad and Tobago,* para. 7.2.

[74] Communications No. 1089/2002, *Rouse v. Philippines,* para.7.4; No. 1085/2002, *Taright, Touadi, Remli and Yousfi v. Algeria*, para. 8.5.

[75] Communications No. 16/1977, *Mbenge v. Zaire*, para. 14.1; No. 699/1996, *Maleki v. Italy*, para. 9.3.

[76] Communication No. 1123/2002, *Correia de Matos v. Portugal*, paras. 7.4 and 7.5.

38. Third, article 14, paragraph 3 (d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned "in the interest of justice"[77] as is the existence of some objective chance of success at the appeals stage.[78] In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.[79] Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. Unlike in the case of privately retained lawyers,[80] blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case,[81] or absence during the hearing of a witness in such cases[82] may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[83] There is also a violation of this provision if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.[84]

39. Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7,[85] it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it.

40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings.[86] This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in

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[77] Communication No. 646/1995, *Lindon v. Australia*, para. 6.5.
[78] Communication No. 341/1988, *Z.P. v. Canada,* para. 5.4.
[79] Communications No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.4; No. 964/2001, *Saidova v. Tajikistan*, para. 6.8; No. 781/1997, *Aliev v. Ukraine*, para. 7.3; No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 58.
[80] Communication No. 383/1989, *H.C. v. Jamaica*, para. 6.3.
[81] Communication No. 253/1987, *Kelly v. Jamaica,* para. 9.5.
[82] Communication No. 838/1998, *Hendricks v. Guyana,* para. 6.4. For the case of an absence of an author's legal representative during the hearing of a witness in a preliminary hearing see Communication No. 775/1997, *Brown v. Jamaica*, para. 6.6.
[83] Communications No. 705/1996, *Taylor v. Jamaica*, para. 6.2 ; No. 913/2000, *Chan v. Guyana*, para. 6.2; No. 980/2001, *Hussain v. Mauritius*, para. 6.3.
[84] Communication No. 917/2000, *Arutyunyan v. Uzbekistan*, para. 6.3.
[85] See para. 6 above.
[86] Communication No. 219/1986, *Guesdon v. France*, para. 10.2.

principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.[87]

41. Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.[88] Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred,[89] and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.[90]

VI. JUVENILE PERSONS

42. Article 14, paragraph 4, provides that in the case of juvenile persons, procedures should take account of their age and the desirability of promoting their rehabilitation. Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection. In criminal proceedings they should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation. Detention before and during the trial should be avoided to the extent possible.[91]

43. States should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age. It is important to establish a minimum age below which children and juveniles shall not be put on trial for criminal offences; that age should take into account their physical and mental immaturity.

44. Whenever appropriate**,** in particular where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator**,** counselling or community service or educational programmes, should be considered, provided they are compatible with the requirements of this Covenant and other relevant human rights standards.

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[87] Idem.

[88] Communications No. 1208/2003, *Kurbonov v. Tajikistan,* paras. 6.2 – 6.4; No. 1044/2002, *Shukurova v. Tajikistan*, paras. 8.2 – 8.3; No. 1033/2001, *Singarasa v. Sri Lanka,* para. 7.4; ; No. 912/2000, *Deolall v. Guyana*, para. 5.1; No. 253/1987, *Kelly v. Jamaica,* para. 5.5.

[89] Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15. On the use of other evidence obtained in violation of article 7 of the Covenant, see paragraph 6 above.

[90] Communications No. 1033/2001, *Singarasa v. Sri Lanka,* para. 7.4; No. 253/1987, *Kelly v. Jamaica,* para. 7.4.

[91] See general comment No. 17 (1989) on article 24 (Rights of the child), para. 4.

VII. REVIEW BY A HIGHER TRIBUNAL

45. Article 14, paragraph 5 of the Covenant provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. As the different language versions (crime, *infraction*, *delito*) show, the guarantee is not confined to the most serious offences. The expression "according to law" in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognised by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out,[92] as well as which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal.[93] However, the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.[94]

46. Article 14, paragraph 5 does not apply to procedures determining rights and obligations in a suit at law[95] or any other procedure not being part of a criminal appeal process, such as constitutional motions.[96]

47. Article 14, paragraph 5 is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court[97] or a court of final instance,[98] following acquittal by a lower court, according to domestic law**,** cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.[99]

48. The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[100] A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.[101] However, article 14, paragraph 5

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[92] Communications No. 1095/2002, *Gomaríz Valera v. Spain*, para. 7.1; No. 64/1979, *Salgar de Montejo v. Colombia*, para.10.4.
[93] Communication No. 1089/2002, *Rouse v. Philippines,* para. 7.6.
[94] Communication No. 230/1987, *Henry v. Jamaica*, para. 8.4.
[95] Communication No. 450/1991, *I.P. v. Finland*, para. 6.2.
[96] Communication No. 352/1989, *Douglas, Gentles, Kerr v. Jamaica*, para. 11.2.
[97] Communication No. 1095/2002, *Gomariz Valera v. Spain*, para. 7.1.
[98] Communication No. 1073/2002, *Terrón v Spain*, para. 7.4.
[99] Idem.
[100] Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, para. 7.5; No. 623-627/1995, *Domukovsky et al. v. Georgia*, para.18.11; No. 964/2001, *Saidova v. Tajikistan*, para. 6.5; No. 802/1998, *Rogerson v. Australia*, para. 7.5; No. 662/1995, *Lumley v. Jamaica*, para. 7.3.
[101] Communication No. 701/1996, *Gómez Vázquez v. Spain*, para. 11.1.

does not require a full retrial or a "hearing",[102] as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.[103]

49. The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal,[104] also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.[105] The effectiveness of this right is also impaired, and article 14, paragraph 5 violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision.[106]

50. A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor.[107]

51. The right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d), but at the same time also of article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.[108] The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.[109]

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[102] Communication No. 1110/2002, *Rolando v. Philippines*, para. 4.5; No. 984/2001, *Juma v. Australia*, para. 7.5; No. 536/1993, *Perera v. Australia*, para. 6.4.

[103] E.g. communications No. 1156/2003, *Pérez Escolar v. Spain*, para. 3; No. 1389/2005, *Bertelli Gálvez v. Spain*, para. 4.5.

[104] Communications No. 903/1999, *Van Hulst v. Netherlands*, para. 6.4; No. 709/1996, *Bailey v. Jamaica*, para. 7.2; No. 663/1995, *Morrison v. Jamaica*, para. 8.5.

[105] Communication No. 662/1995, *Lumley v. Jamaica*, para. 7.5.

[106] Communications No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.5; No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.3; No. 750/1997, *Daley v. Jamaica*, para. 7.4; No. 665/1995, *Brown and Parish v. Jamaica*, para. 9.5; No. 614/1995, *Thomas v. Jamaica*, para. 9.5; No. 590/1994, *Bennet v. Jamaica*, para. 10.5.

[107] Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 836/1998, *Gelazauskas v. Lithuania,* para. 7.2.

[108] Communication No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 5.8.

[109] See communications No. 750/1997, *Daley v Jamaica*, para. 7.5; No. 680/1996, *Gallimore v Jamaica*, para. 7.4; No. 668/1995, *Smith and Stewart v. Jamaica*, para.7.3. See also Communication No. 928/2000, *Sooklal v. Trinidad and Tobago*, para. 4.10.

VIII. COMPENSATION IN CASES OF MISCARRIAGE OF JUSTICE

52. According to paragraph 6 of article 14 of the Covenant, compensation according to the law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.[110] It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time.

53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgement becomes final,[111] or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.[112]

IX. *NE BIS IN IDEM*

54. Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem.* This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction.

55. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.[113]

56. The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial.[114] Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.

57. This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the

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[110] Communications No. 963/2001, *Uebergang v. Australia*, para. 4.2; No. 880/1999, *Irving v. Australia*, para. 8.3; No. 408/1990, *W.J.H. v. Netherlands*, para. 6.3.
[111] Communications No. 880/1999; *Irving v. Australia*, para. 8.4; No. 868/1999, *Wilson v. Philippines*, para. 6.6.
[112] Communication No. 89/1981, *Muhonen v. Finland*, para. 11.2.
[113] See United Nations Working Group on Arbitrary Detention, Opinion No. 36/1999 (Turkey), E./CN.4/2001/14/Add. 1, para. 9 and Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add. 1, para. 30.
[114] Communication No. 277/1988, *Terán Jijón v. Ecuador*, para. 5.4.

Covenant.[115] Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States.[116] This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.[117]

X. RELATIONSHIP OF ARTICLE 14 WITH OTHER PROVISIONS OF THE COVENANT

58. As a set of procedural guarantees, article 14 of the Covenant often plays an important role in the implementation of the more substantive guarantees of the Covenant that must be taken into account in the context of determining criminal charges and rights and obligations of a person in a suit at law. In procedural terms, the relationship with the right to an effective remedy provided for by article 2, paragraph 3 of the Covenant is relevant. In general, this provision needs to be respected whenever any guarantee of article 14 has been violated.[118] However, as regards the right to have one's conviction and sentence reviewed by a higher tribunal, article 14, paragraph 5 of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 when invoking the right to access a tribunal at the appeals level.[119]

59. In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).[120]

60. To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violate**s** both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3 (g) prohibiting compulsion to testify against oneself or confess guilt.[121]

61. If someone suspected of a crime and detained on the basis of article 9 of the Covenant is charged with an offence but not brought to trial, the prohibitions of unduly delaying trials as provided for by articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant may be violated at the same time.[122]

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[115] Communication No. 1001/2001, *Gerardus Strik v. The Netherlands*, para. 7.3.
[116] Communications No. 692/1996, *A.R.J. v. Australia*, para. 6.4; No. 204/1986, *A.P. v. Italy*, para. 7.3.
[117] See, e.g. Rome Statute of the International Criminal Court, article 20, para. 3.
[118] E.g. Communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 823/1998, *Czernin v. Czech Republic,* para. 7.5.
[119] Communication No. 1073/2002, *Terrón v. Spain*, para. 6.6.
[120] E.g. communications No. 1044/2002, *Shakurova v. Tajikistan,* para. 8.5 (violation of art. 14 para. 1 and 3 (b), (d) and (g)); No. 915/2000, *Ruzmetov v. Uzbekistan,* para.7.6 (violation of art. 14, para. 1, 2 and 3 (b), (d), (e) and (g)); No. 913/2000, *Chan v. Guyana*, para. 5.4 (violation of art. 14 para. 3 (b) and (d)); No. 1167/2003, *Rayos v. Philippines*, para. 7.3 (violation of art. 14 para. 3(b)).
[121] Communications No. 1044/2002, *Shakurova v. Tajikistan,* para. 8.2; No. 915/2000, *Ruzmetov v. Uzbekistan,* paras. 7.2 and 7.3; No. 1042/2001, *Boimurodov v. Tajikistan*, para. 7.2, and many others**.** On the prohibition to admit evidence in violation of article 7, see paragraphs. 6 and 41 above.
[122] Communications No. 908/2000, *Evans v. Trinidad and Tobago,* para. 6.2; No. 838/1998, *Hendricks v. Guayana*, para. 6.3, and many more.

62. The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14[123] and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.[124] All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.

63. The way criminal proceedings are handled may affect the exercise and enjoyment of rights and guarantees of the Covenant unrelated to article 14. Thus, for instance, to keep pending, for several years, indictments for the criminal offence of defamation brought against a journalist for having published certain articles, in violation of article 14, paragraph 3 (c), may leave the accused in a situation of uncertainty and intimidation and thus have a chilling effect which unduly restricts the exercise of his right to freedom of expression (article 19 of the Covenant).[125] Similarly, delays of criminal proceedings for several years in contravention of article 14, paragraph 3 (c), may violate the right of a person to leave one's own country as guaranteed in article 12, paragraph 2 of the Covenant, if the accused has to remain in that country as long as proceedings are pending.[126]

64. As regards the right to have access to public service on general terms of equality as provided for in article 25 (c) of the Covenant, a dismissal of judges in violation of this provision may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary.[127]

65. Procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26, or disregard the equal right of men and women, in accordance with article 3, to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that "all persons shall be equal before the courts and tribunals," but may also amount to discrimination.[128]

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[123] Communication No. 1051/2002 *Ahani v. Canada*, para. 10.9. See also communication No. 961/2000, *Everett v. Spain,* para. 6.4 (extradition), 1438/2005, *Taghi Khadje v. Netherlands*, para. 6.3.
[124] See communication No. 961/2000, *Everett v. Spain*, para. 6.4.
[125] Communication No. 909/2000, *Mujuwana Kankanamge v. Sri Lanka*, para. 9.4.
[126] Communication No. 263/1987, *Gonzales del Rio v. Peru,* paras. 5.2 and 5.3.
[127] Communications No. 933/2000, *Mundyo Busyo et al. v. Democratic Republic of Congo,* para. 5.2.; No. 814/1998, *Pastukhov v. Belarus,* para. 7.3.
[128] Communication No. 202/1986, *Ato del Avellanal v. Peru,* paras. 10.1 and 10.2.

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The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights

1. The Optional Protocol to the International Covenant on Civil and Political Rights was adopted and opened for signature, ratification or accession by the same act of the United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966, that adopted the Covenant itself. Both the Covenant and the Optional Protocol entered into force on 23 March 1976.

2. Although the Optional Protocol is organically related to the Covenant, it is not automatically in force for all States parties to the Covenant. Article 8 of the Optional Protocol provides that States parties to the Covenant may become parties to the Optional Protocol only by a separate expression of consent to be bound. A majority of States parties to the Covenant has also become party to the Optional Protocol.

3. The preamble to the Optional Protocol states that its purpose is "further to achieve the purposes" of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, "to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant." The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.

4. Article 1 of the Optional Protocol provides that a State party to it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. It follows that States parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.

5. Article 2 of the Optional Protocol requires that individuals who submit communications to the Committee must have exhausted all available domestic remedies. In its response to a communication, a State party, where it considers that this condition has not been met, should specify the available and effective remedies that the author of the communication has failed to exhaust.

6. Although not a term found in the Optional Protocol or Covenant, the Human Rights Committee uses the description "author" to refer to an individual who has submitted a communication to the Committee under the Optional Protocol. The Committee uses the term "communication" contained in article 1 of the Optional Protocol instead of such terms as "complaint" or "petition", although the latter term is reflected in the current administrative structure of the Office of the High Commissioner for Human Rights, where communications under the Optional Protocol are initially handled by a section known as the Petitions Team.

7. Terminology similarly reflects the nature of the role of the Human Rights Committee in receiving and considering a communication. Subject to the communication being found admissible, after considering the communication in the light of all written information made available to it by the individual author and by the State party concerned, "the Committee shall forward its views to the State party concerned and to the individual."[1]

8. The first obligation of a State Party, against which a claim has been made by an individual under the Optional Protocol, is to respond to it within the time limit of six months set out in article 4 (2). Within that time limit, "the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State." The Committee's Rules of Procedure amplify these provisions, including the possibility in exceptional cases of treating separately questions of the admissibility and merits of the communication.[2]

9. In responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State party (the *ratione temporis* rule), the State party should invoke that circumstance explicitly, including any comment on the possible "continuing effect" of a past violation.

10. In the experience of the Committee, States do not always respect their obligation. In failing to respond to a communication, or responding incompletely, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information relating to the communication. In such circumstances, the Committee may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.

11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

[1] Optional Protocol, article 5(4).
[2] Rules of Procedure of the Human Rights Committee, Rule 97(2). UN Doc. CCPR/C/3/Rev.8, 22 September 2005.

12. The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views".[3] These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument**.** These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

14. Under article 2, paragraph 3 of the Covenant, each State party undertakes "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity." This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found:

> "In accordance with article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views."

15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.[4]

16. The Committee decided, in 1997, under its rules of procedure, to appoint a member of the Committee as Special Rapporteur for the Follow-Up of Views.[5] That member, through written representations, and frequently also through personal meetings with diplomatic representatives of the State party concerned, urges compliance with the Committee's views and discusses factors that may be impeding their implementation. In a number of cases this procedure has led to acceptance and implementation of the Committee's views where previously the transmission of those views had met with no response.

[3] In French the term is "constatations" and in Spanish "observaciones".
[4] Vienna Convention on the Law of Treaties, 1969, article 26.
[5] Rules of Procedure of the Human Rights Committee, Rule 101.

17. It is to be noted that failure by a State party to implement the views of the Committee in a given case becomes a matter of public record through the publication of the Committee's decisions *inter alia* in its annual reports to the General Assembly of the United Nations.

18. Some States parties, to which the views of the Committee have been transmitted in relation to communications concerning them, have failed to accept the Committee's views, in whole or in part, or have attempted to re-open the case. In a number of those cases these responses have been made where the State party took no part in the procedures, having not carried out its obligation to respond to communications under article 4, paragraph 2 of the Optional Protocol. In other cases, rejection of the Committee's views, in whole or in part, has come after the State party has participated in the procedure and where its arguments have been fully considered by the Committee. In all such cases, the Committee regards dialogue between the Committee and the State party as ongoing with a view to implementation. The Special Rapporteur for the Follow-up of Views conducts this dialogue, and regularly reports on progress to the Committee.

19. Measures may be requested by an author, or decided by the Committee on its own initiative, when an action taken or threatened by the State party would appear likely to cause irreparable harm to the author or the victim unless withdrawn or suspended pending full consideration of the communication by the Committee. Examples include the imposition of the death penalty and violation of the duty of non-refoulement. In order to be in a position to meet these needs under the Optional Protocol, the Committee established, under its rules of procedure, a procedure to request interim or provisional measures of protection in appropriate cases.[6] Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.

20. Most States do not have specific enabling legislation to receive the views of the Committee into their domestic legal order. The domestic law of some States parties does, however, provide for the payment of compensation to the victims of violations of human rights as found by international organs. In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.

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[6] Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005, Rule 92 (previously Rule 86):

"The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform the State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication."

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General comment No. 34

Article 19: Freedoms of opinion and expression

General remarks

1. This general comment replaces general comment No. 10 (nineteenth session).

2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.[1] They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

4. Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.

5. Taking account of the specific terms of article 19, paragraph 1, as well as the relationship of opinion and thought (article 18), a reservation to paragraph 1 would be incompatible with the object and purpose of the Covenant.[2] Furthermore, although freedom of opinion is not listed among those rights that may not be derogated from pursuant to the provisions of article 4 of the Covenant, it is recalled that, "in those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the

[1] See communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007; No. 628/1995, *Park v. Republic of Korea*, Views adopted on 5 July 1996.

[2] See the Committee's general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, vol. I (A/50/40 (Vol. I)), annex V.

Committee's opinion cannot be made subject to lawful derogation under article 4".[3] Freedom of opinion is one such element, since it can never become necessary to derogate from it during a state of emergency.[4]

6. Taking account of the relationship of freedom of expression to the other rights in the Covenant, while reservations to particular elements of article 19, paragraph 2, may be acceptable, a general reservation to the rights set out in paragraph 2 would be incompatible with the object and purpose of the Covenant.[5]

7. The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.[6] Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.[7] The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.[8]

8. States parties are required to ensure that the rights contained in article 19 of the Covenant are given effect to in the domestic law of the State, in a manner consistent with the guidance provided by the Committee in its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant. It is recalled that States parties should provide the Committee, in accordance with reports submitted pursuant to article 40, with the relevant domestic legal rules, administrative practices and judicial decisions, as well as relevant policy level and other sectorial practices relating to the rights protected by article 19, taking into account the issues discussed in the present general comment. They should also include information on remedies available if those rights are violated.

Freedom of opinion

9. Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.[9] The harassment, intimidation or stigmatization of a person, including arrest,

[3] See the Committee's general comment No. 29 (2001) on derogation during a state of emergency, para. 13, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI.

[4] General comment No. 29, para. 11.

[5] General comment No. 24.

[6] See the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III

[7] See communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

[8] General comment No. 31, para. 8; See communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999.

[9] See communication No. 550/93, *Faurisson v. France*, Views adopted on 8 November 1996.

detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.[10]

10. Any form of effort to coerce the holding or not holding of any opinion is prohibited.[11] Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

Freedom of expression

11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20.[12] It includes political discourse,[13] commentary on one's own[14] and on public affairs,[15] canvassing,[16] discussion of human rights,[17] journalism,[18] cultural and artistic expression,[19] teaching,[20] and religious discourse.[21] It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive,[22] although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art.[23] Means of expression include books, newspapers,[24] pamphlets,[25] posters, banners,[26] dress and legal submissions.[27] They include all forms of audio-visual as well as electronic and internet-based modes of expression.

Freedom of expression and the media

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.[28] The Covenant embraces a

[10] See communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, Views adopted on 26 March 1986; No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994.
[11] See communication No. 878/1999, *Kang v. Republic of Korea*, Views adopted on 15 July 2003.
[12] See communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990.
[13] See communication No. 414/1990, *Mika Miha v. Equatorial Guinea*.
[14] See communication No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005.
[15] See communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006.
[16] Concluding observations on Japan (CCPR/C/JPN/CO/5).
[17] See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.
[18] See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, Views adopted on 19 March 2009.
[19] See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004.
[20] See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.
[21] Ibid.
[22] Ibid.
[23] See communication No. 926/2000, *Shin v. Republic of Korea*.
[24] See communication No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007.
[25] See communication No. 1009/2001, *Shchetoko et al. v. Belarus*, Views adopted on 11 July 2006.
[26] See communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994.
[27] See communication No. 1189/2003, *Fernando v. Sri Lanka*.
[28] See communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005.

right whereby the media may receive information on the basis of which it can carry out its function.[29] 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.[30] The public also has a corresponding right to receive media output.[31]

14. As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.

15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

16. States parties should ensure that public broadcasting services operate in an independent manner.[32] In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

17. Issues concerning the media are discussed further in the section of this general comment that addresses restrictions on freedom of expression.

Right of access to information

18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs[33] and the right of the general public to receive media output.[34] Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified. Pursuant to article 10 of the Covenant, a prisoner does not

[29] See communication No. 633/95, *Gauthier v. Canada*.

[30] See the Committee's general comment No. 25 (1996) on article 25 (Participation in public affairs and the right to vote), para. 25, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V.

[31] See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.

[32] Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).

[33] See communication No. 633/95, *Gauthier v. Canada*.

[34] See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.

lose the entitlement to access to his medical records.[35] The Committee, in general comment No. 32 on article 14, set out the various entitlements to information that are held by those accused of a criminal offence.[36] Pursuant to the provisions of article 2, persons should be in receipt of information regarding their Covenant rights in general.[37] Under article 27, a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.[38]

19. To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.[39] The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.

Freedom of expression and political rights

20. The Committee, in general comment No. 25 on participation in public affairs and the right to vote, elaborated on the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote. 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 and to inform public opinion without censorship or restraint.[40] The attention of States parties is drawn to the guidance that general comment No. 25 provides with regard to the promotion and the protection of freedom of expression in that context.

The application of article 19 (3)

21. Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.[41] The Committee also recalls the provisions of article 5,

[35] See communication No. 726/1996, *Zheludkov v. Ukraine*, Views adopted on 29 October 2002.

[36] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 33, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, vol. I (A/62/40 (Vol. I)), annex VI*

[37] General comment No. 31.

[38] See communication No. 1457/2006, *Poma v. Peru*, Views adopted on 27 March 2009.

[39] Concluding observations on Azerbaijan (CCPR/C/79/Add.38 (1994)).

[40] See General comment No. 25 on article 25 of the Covenant, para. 25.

[41] See the Committee's general comment No. 27 on article 12, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A

paragraph 1, of the Covenant according to which "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".

22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.[42] Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[43]

23. States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.[44] Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.[45] Journalists are frequently subjected to such threats, intimidation and attacks because of their activities.[46] So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers.[47] All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted,[48] and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.[49]

24. Restrictions must be provided by law. Law may include laws of parliamentary privilege[50] and laws of contempt of court.[51] Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.[52]

25. For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly[53] and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[54]

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[42] See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

[43] See the Committee's general comment No. 22, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), annex VI

[44] See communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

[45] See communication No. 1353/2005, *Njaru v. Cameroon*, Views adopted on 19 March 2007.

[46] See, for instance, concluding observations on Algeria (CCPR/C/DZA/CO/3); concluding observations on Costa Rica (CCPR/C/CRI/CO/5); concluding observations on Sudan (CCPR/C/SDN/CO/3).

[47] See communication No. 1353/2005, *Njaru v. Cameroon* ; concluding observations on Nicaragua (CCPR/C/NIC/CO/3); concluding observations on Tunisia (CCPR/C/TUN/CO/5); concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR); concluding observations on Colombia (CCPR/CO/80/COL).

[48] Ibid. and concluding observations on Georgia (CCPR/C/GEO/CO/3).

[49] Concluding observations on Guyana (CCPR/C/79/Add.121).

[50] See communication No. 633/95, *Gauthier v. Canada*.

[51] See communication No. 1373/2005, *Dissanayake v. Sri Lanka*, Views adopted on 22 July 2008.

[52] See general comment No. 32.

[53] See communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995.

[54] See general comment No. 27.

Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

26. Laws restricting the rights enumerated in article 19, paragraph 2, including the laws referred to in paragraph 24, must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant.[55] Laws must not violate the non-discrimination provisions of the Covenant. Laws must not provide for penalties that are incompatible with the Covenant, such as corporal punishment.[56]

27. It is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression.[57] If, with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.[58]

28. The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term "rights" includes human rights as recognized in the Covenant and more generally in international human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25, as well as rights article under 17 (see para. 37).[59] Such restrictions must be constructed with care: while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote.[60] The term "others" relates to other persons individually or as members of a community.[61] Thus, it may, for instance, refer to individual members of a community defined by its religious faith[62] or ethnicity.[63]

29. The second legitimate ground is that of protection of national security or of public order (*ordre public*), or of public health or morals.

30. Extreme care must be taken by States parties to ensure that treason laws[64] and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.[65] Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.[66] The Committee has found in one case that a restriction on the issuing of a statement in

[55] See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 30 March 1994.

[56] General comment No. 20, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A.*

[57] See communication No. 1553/2007, *Korneenko et al. v. Belarus*, Views adopted on 31 October 2006.

[58] See communication No. 132/1982, *Jaona v. Madagascar*, Views adopted on 1 April 1985.

[59] See communication No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004.

[60] Ibid.

[61] See communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000.

[62] See communication No. 550/93, *Faurisson v. France*; concluding observations on Austria (CCPR/C/AUT/CO/4).

[63] Concluding observations on Slovakia (CCPR/CO/78/SVK); concluding observations on Israel (CCPR/CO/78/ISR).

[64] Concluding observations on Hong Kong (CCPR/C/HKG/CO/2).

[65] Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

[66] Concluding observations on Uzbekistan (CCPR/CO/71/UZB).

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support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.[67]

31. On the basis of maintenance of public order (*ordre public*) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place.[68] Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings.[69] Such proceedings should not in any way be used to restrict the legitimate exercise of defence rights.

32. The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination

33. Restrictions must be "necessary" for a legitimate purpose. Thus, for instance, a prohibition on commercial advertising in one language, with a view to protecting the language of a particular community, violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.[70] On the other hand, the Committee has considered that a State party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the right and freedom of children of that faith in a school district.[71]

34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "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 their protective function; 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".[72] The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.[73]

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[74]

36. The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression

[67] See communication No. 518/1992, *Sohn v. Republic of Korea*, Views adopted on 18 March 1994.
[68] See communication No. 1157/2003, *Coleman v. Australia*.
[69] See communication No. 1373/2005, *Dissanayake v. Sri Lanka*.
[70] See communication No. 359, 385/89, *Ballantyne , Davidson and McIntyre v. Canada*.
[71] See communication No. 736/97, *Ross v. Canada*, Views adopted on 17 July 2006.
[72] General comment No. 27, para. 14. See also Communications No. 1128/2002, *Marques v. Angola*; No. 1157/2003, *Coleman v. Australia*.
[73] See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.
[74] See communication No. 926/2000, *Shin v. Republic of Korea* .

necessary.[75] In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a "margin of appreciation"[76] and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.[77]

Limitative scope of restrictions on freedom of expression in certain specific areas

37. Among restrictions on political discourse that have given the Committee cause for concern are the prohibition of door-to-door canvassing,[78] restrictions on the number and type of written materials that may be distributed during election campaigns,[79] blocking access during election periods to sources, including local and international media, of political commentary,[80] and limiting access of opposition parties and politicians to media outlets.[81] Every restriction should be compatible with paragraph 3. However, it may be legitimate for a State party to restrict political polling imminently preceding an election in order to maintain the integrity of the electoral process.[82]

38. As noted earlier in paragraphs 13 and 20, concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.[83] Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant.[84] Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.[85] Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty,[86] *desacato*,[87] disrespect for authority,[88] disrespect for flags and symbols, defamation of the head of state[89] and the protection of the honour of public officials,[90] and laws should not provide for more severe penalties solely on the basis of the

[75] See communication No. 518/1992, *Sohn v. Republic of Korea* .

[76] See communication No. 511/1992, *Ilmari Länsman, et al. v. Finland*, Views adopted on 14 October 1993.

[77] See communications Nos. 518/92, *Sohn v. Republic of Korea*; No. 926/2000, *Shin v. Republic of Korea*,.

[78] Concluding observations on Japan (CCPR/C/JPN/CO/5).

[79] Ibid.

[80] Concluding observations on Tunisia (CCPR/C/TUN/CO/5).

[81] Concluding observations on Togo (CCPR/CO/76/TGO); concluding observations on Moldova (CCPR/CO/75/MDA).

[82] See communication No. 968/2001, *Kim v. Republic of Korea*, Views adopted on 14 March 1996.

[83] See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.

[84] Ibid.

[85] See communication No. 1128/2002, *Marques v. Angola*.

[86] See communications Nos. 422-424/1990, *Aduayom et al. v. Togo*, Views adopted on 30 June 1994.

[87] Concluding observations on the Dominican Republic (CCPR/CO/71/DOM).

[88] Concluding observations on Honduras (CCPR/C/HND/CO/1).

[89] See concluding observations on Zambia (CCPR/ZMB/CO/3), para.25.

[90] See concluding observations on Costa Rica (CCPR/C/CRI/CO/5), para. 11.

identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.[91]

39. States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3.[92] Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3. States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations.[93] The criteria for the application of such conditions and licence fees should be reasonable and objective, [94] clear, [95] transparent, [96] non-discriminatory and otherwise in compliance with the Covenant.[97] Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.[98]

40. The Committee reiterates its observation in general comment No. 10 that "because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression". The State should not have monopoly control over the media and should promote plurality of the media.[99] Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.

41. Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisements[100] are not employed to the effect of impeding freedom of expression.[101] Furthermore, private media must not be put at a disadvantage compared to public media in such matters as access to means of dissemination/distribution and access to news.[102]

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[91] Ibid., and see concluding observations on Tunisia (CCPR/C/TUN/CO/5), para. 91..

[92] See concluding observations on Viet Nam (CCPR/CO/75/VNM), para. 18, and concluding observations on Lesotho (CCPR/CO/79/Add.106), para. 23.

[93] Concluding observations on Gambia (CCPR/CO/75/GMB).

[94] See concluding observations on Lebanon (CCPR/CO/79/Add.78), para. 25.

[95] Concluding observations on Kuwait (CCPR/CO/69/KWT); concluding observations on Ukraine (CCPR/CO/73/UKR).

[96] Concluding observations on Kyrgyzstan (CCPR/CO/69/KGZ).

[97] Concluding observations on Ukraine (CCPR/CO/73/UKR).

[98] Concluding observations on Lebanon (CCPR/CO/79/Add.78).

[99] See concluding observations on Guyana (CCPR/CO/79/Add.121), para. 19; concluding observations on the Russian Federation (CCPR/CO/79/RUS); concluding observations on Viet Nam (CCPR/CO/75/VNM); concluding observations on Italy (CCPR/C/79/Add. 37).

[100] See concluding observations on Lesotho (CCPR/CO/79/Add.106), para. 22.

[101] Concluding observations on Ukraine (CCPR/CO/73/UKR).

[102] Concluding observations on Sri Lanka (CCPR/CO/79/LKA); and see concluding observations on Togo (CCPR/CO/76/TGO), para. 17.

42. The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government[103]can never be considered to be a necessary restriction of freedom of expression.

43. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.[104]

44. Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

45. It is normally incompatible with paragraph 3 to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings)[105] to travel outside the State party, to restrict the entry into the State party of foreign journalists to those from specified countries[106] or to restrict freedom of movement of journalists and human rights investigators within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses). States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.[107]

46. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as "encouragement of terrorism"[108] and "extremist activity"[109] as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.

[103] Concluding observations on Peru (CCPR/CO/70/PER).
[104] Concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR).
[105] Concluding observations on Uzbekistan (CCPR/CO/83/UZB); concluding observations on Morocco (CCPR/CO/82/MAR).
[106] Concluding observations on Democratic People's Republic of Korea (CCPR/CO/72/PRK).
[107] Concluding observations on Kuwait (CCPR/CO/69/KWT).
[108] Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).
[109] Concluding observations on the Russian Federation (CCPR/CO/79/RUS).

47. Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression.[110] All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice.[111] In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.[112] States parties should consider the decriminalization of defamation[113] and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.[114]

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.[115]

49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.[116] The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.

The relationship between articles 19 and 20

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As

[110] Concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).

[111] Ibid.

[112] Ibid.

[113] Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

[114] See communication No. 909/2000, *Kankanamge v. Sri Lanka*, Views adopted on 27 July 2004.

[115] Concluding observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man (CCPR/C/79/Add.119). See also concluding observations on Kuwait (CCPR/CO/69/KWT).

[116] So called "memory-laws", see communication No. , No. 550/93, *Faurisson v. France*. See also concluding observations on Hungary (CCPR/C/HUN/CO/5) paragraph 19.

such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.[117]

51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.

52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.

[117] See communication No. 736/1997, *Ross v. Canada*, Views adopted on 18 October 2000.

ADVANCE UNEDITED VERSION

Human Rights Committee

General comment No. 35

Article 9: Liberty and security of person

I. General remarks

1. This general comment replaces general comment No. 8 (sixteenth session), adopted in 1982.

2. Article 9 recognizes and protects both liberty of person and security of person. In the Universal Declaration of Human Rights, Article 3 proclaims that everyone has the right to life, liberty and security of person. This is the first substantive right protected by the Universal Declaration, indicating the profound importance of Article 9 of the Covenant both for individuals and for society as a whole. Liberty and security of person are precious for their own sake, and also because deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.

3. Liberty of person concerns freedom from confinement of the body, not a general freedom of action.[1] Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity, as further discussed in paragraph 9 below**.** Article 9 guarantees these rights to everyone. "Everyone" includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.

4. Paragraphs 2 through 5 of article 9 set out specific safeguards for the protection of liberty and security of person. Some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) apply only in connection with criminal charges. But the rest, in particular the important guarantee laid down in paragraph 4, i.e. the right to review by a court of the legality of detention, applies to all persons deprived of liberty.

5. Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12.[2] Examples of deprivations of liberty include police custody, "arraigo,"[3] remand detention, imprisonment after conviction, house arrest,[4] administrative detention, involuntary hospitalization,[5]

[1] 854/1999, Wackenheim v. France, para. 6.3.
[2] 263/1987, González del Río v. Peru, para. 5.1; 833/1998, Karker v. France, para. 8.5.
[3] See Concluding observations Mexico 2010, para. 15.
[4] 1134/2002, Gorji-Dinka v. Cameroon, para. 5.4; see also Concluding observations, United Kingdom 2008, para. 17 (control orders including curfews of up to 16 hours).

institutional custody of children, and confinement to a restricted area of an airport,[6] and also include being involuntarily transported.[7] They also include certain further restrictions on a person who is already detained, for example, solitary confinement or physical restraining devices.[8] During a period of military service, restrictions that would amount to deprivations of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned.[9]

6. Deprivation of personal liberty is without free consent. Individuals who go voluntarily to a police station to participate in an investigation, and who know that they are free to leave at any time, are not being deprived of their liberty.[10]

7. States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivations by third parties.[11] States parties must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory. They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals. States parties should do their utmost to take appropriate measures to protect individuals against deprivations of liberty by the action of other States within their territory.[12]

8. When private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence to article 9. It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. It must also provide effective remedies for victims if arbitrary or unlawful arrest or detention does occur.[13]

9. The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained. For example, officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury.[14] The right to personal security also obliges States parties to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors.[15] States parties must take both prospective measures to prevent future injury and retrospective measures such as enforcement of criminal laws in response to past injury. For example, States parties must respond appropriately to patterns of violence against categories of victims such as

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[5] 754/1997, A. v. New Zealand, para. 7.2 (mental health); see Concluding observations Moldova 2009, para. 13 (contagious disease).

[6] See Concluding observations Belgium 2004, para. 17 (detention of migrants pending expulsion).

[7] R.12/52, Saldías de López v. Uruguay, para. 13.

[8] See Concluding observations Czech Republic 2007, para. 13; Republic of Korea 2006, para. 13.

[9] 265/1987, Vuolanne v. Finland, para. 9.4.

[10] 1758/2008, Jessop v. New Zealand, para. 7.9-7.10.

[11] See Concluding observations Yemen 2012, para. 24.

[12] 319/1988, Cañón García v. Ecuador, paras. 5.1-5.2.

[13] See Concluding observations Guatemala 2012, para. 16.

[14] 613/1995, Leehong v. Jamaica, para. 9.3.

[15] 1560/2007, Marcellana and Gumanoy v. Philippines, para. 7.7;. States parties also violate the right to security of person if they purport to exercise jurisdiction over a person outside their territory by issuing a *fatwa* or similar death sentence authorizing the killing of the victim. See Concluding observations, Islamic Republic of Iran 1993, para. 9; paragraph 63 below (discussing extraterritorial application).

intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity,[16] and violence against persons with disabilities.[17] They should also prevent and redress unjustifiable use of force in law enforcement,[18] and protect their populations against abuses by private security forces, and against the risks posed by excessive availability of firearms.[19] The right to security of person does not address all risks to physical or mental health, and is not implicated in the indirect health impact of being the target of a civil or criminal proceeding.[20]

II. Arbitrary detention and unlawful detention

10. The right to liberty of person is not absolute. Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws. Paragraph 1 requires that deprivations of liberty must not be arbitrary, and must be carried out with respect for the rule of law.

11. The second sentence of paragraph 1 prohibits arbitrary arrest and detention, while the third sentence prohibits unlawful deprivation of liberty, i.e., deprivation of liberty that is not on such grounds and in accordance with such procedure as are established by law. The two prohibitions overlap, in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Arrest or detention that lacks any legal basis is also arbitrary.[21] Unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful[22]; the same is true for unauthorized extension of other forms of detention. Continued confinement of detainees in defiance of a judicial order for their release is arbitrary as well as unlawful.[23]

12. An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law[24], as well as elements of reasonableness, necessity, and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances.[25] Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.[26]

13. The term "arrest" refers to any apprehension of a person that commences a deprivation of liberty, and the term "detention" refers to the deprivation of liberty that begins with the arrest, and that continues in time from apprehension until release.[27] Arrest

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[16] See Concluding observations El Salvador 2003, para. 16.
[17] See Concluding observations Norway 2011, para. 10.
[18] 613/1995, Leehong v. Jamaica, para. 9.3; see Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).
[19] See Concluding observations Philippines 2012, para. 14.
[20] 1124/2002, Obodzinsky v. Canada, para. 8.5.
[21] 414/1990, Mika Miha v. Equatorial Guinea, para. 6.5.
[22] See Concluding observations Brazil 2005, para. 16.
[23] 856/1999, Chambala v. Zambia, para. 7.3.
[24] 1134/2002, Gorji-Dinka v. Cameroon, para. 5.1; 305/1988, Van Alphen v. The Netherlands, para. 5.8.
[25] 1369/2005, Kulov v. Kyrgyzstan, para. 8.3. Pretrial detention in criminal cases is further discussed in Part IV below.
[26] See, e.g., 1324/2004, Shafiq v. Australia, para. 7.2.
[27] See 631/1995, Spakmo v. Norway, para. 6.3.

within the meaning of article 9 need not involve a formal arrest as defined under domestic law.[28] When an additional deprivation of liberty is imposed on a person already in custody, such as detention on unrelated criminal charges, the commencement of that deprivation of liberty also amounts to an arrest.[29]

14. The Covenant does not provide an enumeration of the permissible reasons for depriving a person of liberty. Article 9 expressly recognizes that individuals may be detained on criminal charges, and article 11 expressly prohibits imprisonment on ground of inability to fulfil a contractual obligation.[30] Other regimes involving deprivation of liberty must also be established by law and must be accompanied by procedures that prevent arbitrary detention. The grounds and procedures prescribed by law must not be destructive of the right to liberty of person.[31] The regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections.[32] Although conditions of detention are addressed primarily by articles 7 and 10, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.[33] The imposition of a draconian penalty of imprisonment for contempt of court without adequate explanation and without independent procedural safeguards is arbitrary.[34]

15. To the extent that States parties impose security detention (sometimes known as administrative detention or internment), not in contemplation of prosecution on a criminal charge,[35] the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty.[36] Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and this burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited, and that they fully respect the guarantees provided for by Article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for these conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.[37]

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[28] 1460/2006, Yklymova v. Turkmenistan, paras. 7.2-7.3 (de facto house arrest); 1096/2002, Kurbanova v. Tajikistan, para. 7.2 (detention prior to arrest warrant).

[29] 635/1998, Morrison v. Jamaica, paras. 22.2-22.3; 1397/2005, Engo v. Cameroon, para. 7.3.

[30] Detention for criminal offenses such as fraud that are related to civil law debts does not violate article 11, and does not amount to arbitrary detention. 1342/2005, Gavrilin v. Belarus, para. 7.3.

[31] 1629/2007, Fardon v. Australia, para. 7.3.

[32] Ibid, para. 7.4(a)-7.4(c); see Concluding observations, United States of America 2006, para. 19; General Comment No. 32, paras. 15, 18.

[33] 1629/2007, Fardon v. Australia, para. 7.4(a) (nominally civil detention under same prison regime as prior sentence); see Concluding observations, Belgium 2004, para. 18 (placement in prison psychiatric annexes); United Kingdom 2001, para. 16 (detention of asylum-seekers in prisons).

[34] 1189/2003, Fernando v. Sri Lanka, para. 9.2; 1373/2005, Dissanakye v. Sri Lanka, para. 8.3.

[35] This paragraph concerns security detention, and not the forms of post-conviction preventive detention addressed in paragraph 21 below, or detention for purposes of extradition or immigration control, see paragraph 18 below.

[36] See, e.g., Concluding observations Colombia 2010, para. 20; Jordan 2010, para. 11.

[37] On the relationship of article 9 to article 4 of the Covenant and international humanitarian law, see paragraphs 64 to 67 below.

16. Egregious examples of arbitrary detention include detaining family members of an alleged criminal who are not themselves accused of any wrongdoing, the holding of hostages, and arrests for the purpose of extorting bribes or other similar criminal purposes.

17. Arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (article 19),[38] freedom of assembly (article 21), freedom of association (article 22), freedom of religion (article 18), and the right to privacy (article 17). Arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3, or article 26 is also in principle arbitrary.[39] Retroactive criminal punishment by detention in violation of article 15 amounts to arbitrary detention.[40] Enforced disappearances violate numerous substantive and procedural provisions of the Covenant, and constitute a particularly aggravated form of arbitrary detention. Imprisonment after a manifestly unfair trial is arbitrary, but not every violation of the specific procedural guarantees for criminal defendants in article 14 results in arbitrary detention.[41]

18. Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time.[42] Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt.[43] To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.[44] The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review.[45] Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.[46] Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.[47] Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of

[38] 328/1988, Zelaya Blanco v. Nicaragua, para. 10.3.

[39] 1314/2004, O'Neill and Quinn v. Ireland, para. 8.5 (finding no violation); see Concluding observations Honduras 2006, para. 13 (detention on the basis of sexual orientation); Cameroon 2010, para. 12 (imprisonment for consensual same-sex activities of adults).

[40] 1629/2007, Fardon v. Australia, para. 7.4(b).

[41] See 1007/2001, Sineiro Fernández v. Spain, para. 6.3 (absence of review of conviction by higher court violated paragraph 5 of article 14, but not paragraph 1 of article 9).

[42] 560/1993, A. v. Australia, paras. 9.3-9.4; 794/1998, Jalloh v. Netherlands, para. 8.2; 1557/2007, Nystrom v. Australia, paras. 7.2-7.3.

[43] 1069/2002, Bakhtiyari v. Australia, paras. 9.2, 9.3.

[44] 1551/2007, Tarlue v. Canada, paras. 3.3, 7.6; 1051/2002, Ahani v. Canada, para. 10.2.

[45] 1014/2001, Baban v. Australia, para. 7.2; 1069/2002, Bakhtiyari v. Australia, paras. 9.2, 9.3; see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), guideline 4.3 & annex A (describing alternatives to detention).

[46] 1324/2004, Shafiq v. Australia, para. 7.3; 900/1999, C. v. Australia, paras. 8.2, 8.4.

[47] 2094/2011, F.K.A.G. v. Australia, para. 9.3.

detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[48]

19. States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. The Committee emphasizes the harm inherent in any deprivation of liberty, and also the particular harms that may result in situations of involuntary hospitalization. States parties should make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement.[49] The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.[50] It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law.[51] The procedures should ensure respect for the views of the individual, and should ensure that any representative genuinely represents and defends the wishes and interests of the individual.[52] States parties must offer to institutionalized persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention.[53] Deprivation of liberty must be reevaluated at appropriate intervals with regard to its continuing necessity.[54] The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant.[55]

20. The Covenant is consistent with a variety of criminal sentencing schemes. Convicted prisoners are entitled to have the duration of their sentences administered in accordance with domestic law. Consideration for parole or other forms of early release must be in accordance with the law,[56] and such release must not be denied on grounds that are arbitrary within the meaning of article 9. If such release is granted upon conditions, and later the release is revoked because of an alleged breach of condition, then the revocation must also be carried out in accordance with law and must not be arbitrary and, in particular, not disproportionate to the seriousness of the breach. A prediction of the prisoner's future behavior may be a relevant factor in deciding whether to grant early release.[57]

21. When a criminal sentence includes a punitive period followed by a nonpunitive period intended to protect the safety of other individuals,[58] then once the punitive term of

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[48] 1050/2002, D. & E. v. Australia, para. 7.2; 794/1998, Jalloh v. Netherlands, paras. 8.2-8.3; see also Convention on the Rights of the Child, arts. 3(1), 37(b).

[49] See Concluding observations Latvia 2014, para. 16.

[50] 1062/2002, Fijalkowska v. Poland, para 8.3; 1629/2007, Fardon v. Australia, para. 7.3; see Concluding observations Russian Federation 2009, para. 19; Convention on the Rights of Persons with Disabilities, art. 14(1)(b).

[51] 1062/2002, Fijalkowska v. Poland, para 8.3.

[52] See Concluding observations Czech Republic 2007, para. 14; see also Committee on the Rights of the Child, General comment No. 9, para. 48.

[53] See Concluding observations Bulgaria 2011, para. 10.

[54] 754/1997, A. v. New Zealand, para. 7.2; see Committee on the Rights of the Child, General comment No. 9, para. 50.

[55] 1062/2002, Fijalkowska v. Poland, para 8.3-8.4; 754/1997, A. v. New Zealand, para. 7.3; General Comment No. 31, para. 15.

[56] 1388/2005, De Léon Castro v. Spain, para. 9.3.

[57] 1492/2006, Van der Plaat v. New Zealand, para. 6.3.

[58] In different legal systems, such detention may be known as "rétention de sûreté," or "Sicherungsverwahrung," or, in English, "preventive detention," see 1090/2002, Rameka v. New Zealand.

imprisonment has been served, to avoid arbitrariness the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of committing similar crimes in the future. States should only use such detention as a last resort, and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.[59] State parties must exercise caution and provide appropriate guarantees in evaluating future dangers.[60] The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.[61] If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence, and a State party may not circumvent this prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.[62]

22. The third sentence of paragraph 1 provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Any substantive grounds for arrest or detention must be prescribed by law, and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[63] Deprivation of liberty without such legal authorization is unlawful.[64] Continued detention despite an operative (*exécutoire*) judicial order of release or a valid amnesty is also unlawful.[65]

23. Article 9 requires that procedures for carrying out legally authorized deprivation of liberty should also be established by law, and States parties should ensure compliance with their legally prescribed procedures. Article 9 further requires compliance with domestic rules that define the procedure for arrest by identifying the officials authorized to arrest,[66] or by specifying when a warrant is required.[67] It also requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer,[68] where individuals may be detained,[69] when the detained person must be brought to court,[70] and legal limits on the duration of detention.[71] It also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest,[72] and permitting access to counsel.[73] Violations of domestic procedural rules not related to such issues may not necessarily raise an issue under article 9.[74]

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[59] Ibid, para. 7.3.
[60] See Concluding observations Germany 2012, para. 14.
[61] 1512/2006, Dean v. New Zealand, para. 7.5.
[62] 1629/2007, Fardon v. Australia, para. 7.4.
[63] See, e.g., Concluding observations Philippines 2003, para. 14 (vagrancy law vague), Mauritius 2005, para. 12 (terrorism law), Russian Federation 2009, para. 25 ("extremist activity"), Honduras 2006, para. 13 ("unlawful association").
[64] 702/1996, McLawrence v. Jamaica, para. 5.5 ("[T]he principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.").
[65] 856/1999, Chambala v. Zambia, para. 7.3; 138/1981, Mpandanjila et al. v. Zaire, para. 10..
[66] 461/2006, et al., Maksudov et al. v. Kyrgyzstan, para. 12.2.
[67] 1110/2002, Rolando v. The Philippines, para. 5.5.
[68] 770/1997, Gridin v. Russian Federation, para. 8.1.
[69] 1449/2006, Umarov v. Uzbekistan, para. 8.4.
[70] 981/2001, Gómez Casafranca v. Peru, para. 7.2.
[71] 2024/2011, Israil v. Kazakhstan, para. 9.2.
[72] 1208/2003, Kurbonov v. Tajikistan, para. 6.5.
[73] 1412/2005, Butovenko v. Ukraine, para. 7.6.
[74] See, e.g., 1425/2005, Marz v. Russian Federation, para. 5.3.

III. Notice of reasons for arrest and any criminal charges

24. Paragraph 2 of article 9 imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. Second, they shall be promptly informed of any charges against them. The first requirement applies broadly to the reasons for any deprivation of liberty. Because "arrest" means the commencement of a deprivation of liberty, this requirement applies regardless of the formality or informality with which the arrest takes place, and regardless of the legitimate or improper reason on which it is based.[75] The second, additional requirement applies only to information regarding criminal charges.[76] If a person already detained on one criminal charge is also ordered detained to face an unrelated criminal charge, prompt information must be provided regarding the unrelated charge.[77]

25. One major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded.[78] The reasons must include not only the general legal basis of the arrest, but enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.[79] The "reasons" concern the official basis for the arrest, not the subjective motivations of the arresting officer.[80]

26. Oral notification of reasons for arrest satisfies the requirement. The reasons must be given in a language that the arrested person understands.[81]

27. This information must be provided immediately upon arrest. However, in exceptional circumstances, such immediate communication may not be possible. For example, a delay may be required before an interpreter can be present, but any such delay must be the minimum absolutely necessary.[82]

28. For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons should also be provided directly to their parents, guardians, or legal representatives.[83] For certain persons with mental disabilities, notice of the arrest and the reasons should also be provided directly to persons they have designated or appropriate family members. Additional time may be required to identify and contact the relevant third persons, but notice should be given as soon as possible.

29. The second requirement of paragraph 2 concerns notice of criminal charges. Persons arrested for the purpose of investigating crimes they may have committed, or for the purpose of holding them for criminal trial, must be promptly informed of the crimes of which they are suspected or accused. This right applies in connection with ordinary

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[75] 1460/2006, Yklymova v. Turkmenistan, para. 7.2 (de facto house arrest); 414/1990, Mika Miha v. Equatorial Guinea, para. 6.5 (presidential fiat).

[76] See, e.g., *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J. Reports 2010, p. 639, para. 77 (citing this Committee's General comment No. 8).

[77] 635/1998, Morrison v. Jamaica, paras. 22.2-22.3; 1397/2005, Engo v. Cameroon, para. 7.3.

[78] 248/1987, Campbell v. Jamaica, para. 6.3.

[79] 1177/2003, Wenga and Shandwe v. Democratic Republic of the Congo, para. 6.2.

[80] 1812/2008, Levinov v. Belarus, para. 7.5.

[81] 868/1999, Wilson v. The Philippines, paras. 3.3, 7.5.

[82] See 526/1993, Hill & Hill v. Spain, para. 12.2.

[83] See 1402/2005, Krasnova v. Kyrgyzstan, para. 8.5; General Comment No. 32, para. 42; see Committee on the Rights of the Child, General Comment No. 10, para. 48.

criminal prosecutions, and also in connection with military prosecutions or other special regimes directed at criminal punishment.[84]

30. Paragraph 2 requires that the arrested person be informed "promptly" of any charges, not necessarily "at the time of arrest." If particular charges are already contemplated, the arresting officer may inform the person of both reasons and charges, or the authorities may explain the legal basis of the detention some hours later. The reasons must be given in a language that the arrested person understands.[85] Notice of charges under paragraph 2 serves to facilitate the determination of the propriety of the provisional detention, and therefore paragraph 2 does not require as much detail regarding the charges as would be needed later to prepare for trial,[86] If the authorities have already informed an individual of the charges being investigated prior to making the arrest, then paragraph 2 does not require prompt repetition of the formal charges so long as they communicate the reasons for the arrest.[87] The same considerations as in paragraph 28 apply to prompt information concerning any criminal charges when minors or other vulnerable persons are arrested.

IV. Judicial control of detention in connection with criminal charges

31. The first sentence of paragraph 3 applies to persons "arrested or detained on a criminal charge," while the second sentence concerns persons "awaiting trial" on a criminal charge. Paragraph 3 applies in connection with ordinary criminal prosecutions, military prosecutions, and other special regimes directed at criminal punishment.[88]

32. Paragraph 3 requires, firstly, that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. This requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it.[89] The requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.[90] The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control.[91] If a person already detained on one criminal charge is also ordered detained to face an unrelated criminal charge, the person must be promptly brought before a judge for control of the second detention.[92] 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.[93]

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[84] 1782/2008, Aboufaied v. Libya, para. 7.6. The requirement of being informed about any charges applies to detention for possible military prosecution, regardless of whether the trial of the detainee by a military court would be prohibited by article 14 of the Covenant. 1649/2007, El Abani v. Algeria, paras. 7.6, 7.8.

[85] 493/1992, Griffin v. Spain, para. 9.2.

[86] General Comment No. 32, para. 31; 702/1996, McLawrence v. Jamaica, para. 5.9.

[87] 712/1996, Smirnova v. Russian Federation, para. 10.3.

[88] 1782/2008, Aboufaied v. Libya, para. 7.6. Paragraph 3 applies to detention for possible military prosecution, regardless of whether the trial of the detainee by a military court would be prohibited by article 14 of the Covenant. 1813/2008, Akwanga v. Cameroon, paras. 7.4, 7.5. In international armed conflict, detailed rules of international humanitarian law regarding the conduct of military prosecutions are also relevant to the interpretation of article 9, paragraph 3, which continues to apply. See paragraph 64 below.

[89] 1787/2008, Kovsh v. Belarus, paras. 7.3-7.5.

[90] 1128/2002, Marques de Morais v. Angola, paras. 6.3-6.4; 1096/2002, Kurbanova v. Tajikistan, para. 7.2.

[91] 1914/2009, Musaev v. Uzbekistan, para. 9.3.

[92] 635/1998, Morrison v. Jamaica, paras. 22.2-22.3; 762/1997, Jensen v. Australia, para. 6.3.

[93] 521/1992, Kulomin v. Hungary, para. 11.3.

Accordingly, a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3.[94]

33. While the exact meaning of "promptly" may vary depending on objective circumstances,[95] delays should not exceed a few days from the time of arrest.[96] In the view of the Committee, forty-eight hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing;[97] any delay longer than forty-eight hours must remain absolutely exceptional and be justified under the circumstances.[98] Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment.[99] Laws in most States parties fix precise time limits, sometimes shorter than forty-eight hours, and these should also not be exceeded. An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles.[100]

34. The individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power.[101] The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody,[102] and facilitates immediate transfer to a remand detention centre if continued detention is ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment. In the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention, the individual is entitled to legal assistance, which should in principle be by counsel of choice.[103]

35. Incommunicado detention that prevents prompt presentation before a judge inherently violates paragraph 3. [104] Depending on its duration and other facts, incommunicado detention may also violate other rights under the Covenant, including articles 6, 7, 10, and 14.[105] States parties should permit and facilitate access to counsel for detainees in criminal cases, from the outset of their detention.[106]

36. Once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody, for additional investigation or to await trial. If there is no lawful basis for continuing the detention, the judge must order release.[107] If additional investigation or trial is justified, the judge must decide whether the individual should be released (with or without conditions) pending

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[94] See ibid; 1547/2007, Torobekov v. Kyrgyzstan, para. 6.2; 1278/2004, Reshetnikov v. Russian Federation, para. 8.2; Concluding observations Tajikistan 2005, para. 12.

[95] 702/1996, McLawrence v. Jamaica, para. 5.6; 2120/2011, Kovalev v. Belarus, para. 11.3.

[96] 1128/2002, Marques de Morais v. Angola, para. 6.3; 277/1988, Terán Jijón v. Ecuador (five days not prompt); 625/1995, Freemantle v. Jamaica, para. 7.4 (four days not prompt).

[97] 1787/2008, Kovsh v. Belarus, paras. 7.3-7.5.

[98] Ibid; see also 336/1988, Fillastre v. Bolivia, para. 6.4 (budgetary constraints did not justify ten day delay).

[99] See Concluding observations Hungary 2002, para. 8.

[100] See Committee on the Rights of the Child, General Comment No. 10, para. 83.

[101] 289/1988, Wolf v. Panama, para. 6.2; 613/1995, Leehong v. Jamaica, para. 9.5. Regarding the phrase "other officer authorized by law to exercise judicial power," see paragraph 32 above.

[102] See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 37, approved by UN GA Res. 43/173.

[103] See Concluding observations Kenya 2012, para. 19; see also article 14, paragraph 3(d); Body of Principles (note 102 above), principle 11.

[104] 1297/2004, Medjnoune v. Algeria, para. 8.7.

[105] 1781/2008, Berzig v. Algeria, paras. 8.4, 8.5, 8.8; 176/1984, Lafuente Peñarrieta v. Bolivia, para. 16.

[106] See General Comment No. 32, paras. 32, 34, 38; Concluding observations Togo 2011, para. 19; paragraph 58 below.

[107] See Concluding observations Tajikistan 2005, para. 12; 647/1995, Pennant v. Jamaica, para. 8.2.

further proceedings because detention is not necessary, an issue addressed more fully by the second sentence of paragraph 3. In the view of the Committee, detention on remand should not involve a return to police custody, but rather to a separate facility under different authority, where risks to the rights of the detainee can be more easily mitigated.

37. The second requirement expressed in the first sentence of paragraph 3 is that the person detained is entitled to trial within a reasonable time or to release. This requirement applies specifically to periods of pretrial detention, that is, detention between the time of arrest and the time of judgment at first instance.[108] Extremely prolonged pretrial detention may also jeopardize the presumption of innocence under article 14, paragraph 2.[109] Persons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence.[110] The reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities.[111] Impediments to the completion of the investigation may justify additional time,[112] but general conditions of understaffing or budgetary constraint do not.[113] When delays become necessary, the judge must reconsider alternatives to pretrial detention.[114] Pretrial detention of juveniles should be avoided, but when it occurs they are entitled to be brought to trial in especially speedy fashion under article 10, paragraph 2(b).[115]

38. The second sentence of paragraph 3 requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. It also specifies that release from such custody may be subject to guarantees of appearance, including appearance for trial, appearance at any other stage of the judicial proceedings, and (should occasion arise) appearance for execution of the judgment. This sentence applies to persons awaiting trial on criminal charges, that is, after the defendant has been charged, but a similar requirement prior to charging results from the prohibition of arbitrary detention in paragraph 1.[116] It should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.[117] The relevant factors should be specified in law, and should not include vague and expansive standards such as "public security."[118] Pretrial detention should not be mandatory for all defendants charged with a particular crime,

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[108] 1397/2005, Engo v. Cameroon, para. 7.2. On the relationship between article 9, paragraph 3, and article 14, paragraph 3(c) in this respect, see General Comment No. 32, para. 61.

[109] 788/1997, Cagas v. Philippines, para. 7.3.

[110] General Comment No. 32, para. 35; 818/1998, Sextus v. Trinidad, para. 7.2.

[111] 1085/2002, Taright v. Algeria, paras. 8.2-8.4; 386/1989, Koné v. Senegal, para. 8.6; see also 777/1996, Teesdale v. Trinidad and Tobago, para.9.3 (delay of seventeen months violated paragraph 3); 614/1995, Thomas v. Jamaica, para. 9.6 (delay of nearly fourteen months did not violate paragraph 3); General Comment No. 32, para. 35 (discussing factors relevant to reasonableness of delay in criminal proceedings) .

[112] 721/1997, Boodoo v. Trinidad and Tobago, para. 6.2.

[113] 336/1988, Fillastre v. Bolivia, para. 6.5; 818/1998, Sextus v. Trinidad and Tobago, para. 4.2, 7.2.

[114] 1085/2002, Taright v. Algeria, para. 8.3.

[115] General Comment No. 21, para. 13; see also General Comment No. 32, para. 42; Committee on the Rights of the Child, General Comment No. 10, para. 83.

[116] 1128/2002, Marques de Morais v. Angola, paras. 6.1, 6.4.

[117] 1502/2006, Marinich v. Belarus, para. 10.4; 1940/2010, Cedeño v. Venezuela, para. 7.10; 1547/2007, Torobekov v. Kyrgyzstan, para. 6.3.

[118] See Concluding observations Bosnia and Herzegovina, 2006, para. 18.

without regard to individual circumstances.[119] Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets, or other conditions, would render detention unnecessary in the particular case.[120] If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction.[121] After an initial determination has been made that pretrial detention is necessary, there should be periodic reexamination of whether it continues to be reasonable and necessary in light of possible alternatives.[122] If the length of time that the defendant has been detained reaches the length of the highest sentence that could be imposed for the crimes charged, the defendant should be released. Pretrial detention of juveniles should be avoided to the fullest extent possible.[123]

V. The right to take proceedings for release from unlawful or arbitrary detention

39. Paragraph 4 entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. It enshrines the principle of *habeas corpus.*[124] Review of the factual basis of the detention may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination.[125]

40. The right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, and wholly groundless arrests.[126] It also applies to detention for vagrancy or drug addiction, and detention for educational purposes of children in conflict with the law,[127] and other forms of administrative detention.[128] Detention within the meaning of paragraph 4 also includes house arrest and solitary confinement.[129] When a prisoner is serving the minimum duration of a prison sentence as decided by a court of law after a conviction, either as a sentence for a fixed period of time or as the fixed portion of a potentially longer sentence, paragraph 4 does not require subsequent review of the detention.[130]

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[119] See Concluding observations Argentina 2000, para. 10; Sri Lanka 2003, para. 13.

[120] 1178/2003, Smantser v. Belarus, para. 10.3.

[121] 526/1993, Hill & Hill v. Spain, para. 12.3.

[122] 1085/2002, Taright v. Algeria, paras. 8.3-8.4.

[123] General Comment No. 32, para. 42; see Committee on the Rights of the Child, General Comment No. 10, para. 80.

[124] 1342/2005, Gavrilin v. Belarus, para. 7.4.

[125] 1051/2002, Ahani v. Canada, para. 10.2; 754/1997, A. v. New Zealand, para. 7.3.

[126] See 248/1987, Campbell v. Jamaica, para. 6.4; 962/2001, Mulezi v. Democratic Republic of the Congo, para. 5.2; 1051/2002, Ahani v. Canada, para. 10.2 1062/2002, Fijalkowska v. Poland, para 8.4 ; 291/1988, Torres v. Finland, para. 7.4; 414/1990, Mika Miha v. Equatorial Guinea, para. 6.5.

[127] 265/1987, Vuolanne v. Finland, para. 9.5; cf. Concluding observations Rwanda 2009, para. 16 (recommending abolition of detention for vagrancy).

[128] See Concluding observations Moldova 2002, para. 11.

[129] 1172/2003, Madani v. Algeria, para. 8.5; 265/1987, Vuolanne v. Finland, para. 9.5.

[130] 954/2000, Minogue v. Australia, para. 6.4; 1342/2005, Gavrilin v. Belarus, para. 7.4. Article 14, paragraph 5, however, guarantees criminal defendants the right to a single appeal from an initial conviction to a higher court. General Comment No. 32, para. 45.

41. The object of the right is release (either unconditional or conditional[131]) from ongoing unlawful detention; compensation for unlawful detention that has already ended is addressed in paragraph 5. Paragraph 4 requires that the reviewing court must have the power to order release from the unlawful detention.[132] When a judicial order of release under paragraph 4 becomes operative (*exécutoire*), it must be complied with immediately, and continued detention would be arbitrary in violation of article 9, paragraph 1. [133]

42. The right to bring proceedings applies in principle from the moment of arrest, and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible. [134] In general, the detainee has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention, or where questions regarding ill-treatment of the detainee arise.[135] The court must have the power to order the detainee brought before it, regardless of whether the detainee has asked to appear.

43. Unlawful detention includes detention that was lawful at its inception but has become unlawful, because the individual has completed serving a sentence of imprisonment, or because the circumstances that justify the detention have changed.[136] After a court has held that the circumstances justify the detention, an appropriate period of time may pass, depending on the nature of the relevant circumstances, before the individual is entitled to take proceedings again on similar grounds.[137]

44. "Unlawful" detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant.[138] While domestic legal systems may establish differing methods for ensuring court review of detention, paragraph 4 requires that there be a judicial remedy for any detention that is unlawful on one of these grounds.[139] For example, the power of a family court to order release of a child from detention that is not in the child's best interests may satisfy the requirements of paragraph 4 in relevant cases.[140]

45. Paragraph 4 entitles the individual to take proceedings before "a court," which should ordinarily be a court within the judiciary. Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.[141]

46. Paragraph 4 leaves the option of taking proceedings to the persons being detained, or those acting on their behalf; unlike paragraph 3, it does not require automatic initiation of

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131 E.g., 473/1991, Barroso v. Panama, paras. 2.4, 8.2 (habeas corpus for bail).

132 1324/2004, Shafiq v. Australia, para. 7.4.

133 856/1999, Chambala v. Zambia, para. 7.2.

134 291/1988, Torres v. Finland, para. 7.2 (seven days).

135 See Body of Principles (note 102 above), principle 32(2); General comment No. 29, para. 16.

136 1090/2002, Rameka v. New Zealand, paras. 7.3-7.4.

137 Ibid (annual review of post-conviction preventive detention); 754/1997, A. v. New Zealand, para. 7.3 (regular review of hospitalization); 291/1988, Torres v. Finland, para. 7.4 (review every two weeks of detention for extradition).

138 1255/2004 et al., Shams et al. v. Australia, para. 7.3.

139 Ibid.

140 1069/2002, Bakhtiyari v. Australia, para. 9.5.

141 1090/2002, Rameka v. New Zealand, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court); 291/1988, Torres v. Finland, para. 7.2 (finding review by the Minister of the Interior insufficient); 265/1987, Vuolanne v. Finland, para. 9.6 (finding review by a superior military officer insufficient); see General Comment No. 32, paras. 18-22.

review by the authorities detaining an individual.[142] Laws that exclude a particular category of detainees from the review required by paragraph 4 violate the Covenant.[143] Practices that render such review effectively unavailable to an individual, including incommunicado detention, also amount to a violation.[144] To facilitate effective review, detainees should be afforded prompt and regular access to counsel. Detainees should be informed, in a language they understand, of their right to take proceedings for a decision on the lawfulness of their detention.[145]

47. Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay. The refusal by a competent court to take a decision on a petition for the release of a detained person violates paragraph 4.[146] The adjudication of the case should take place as expeditiously as possible.[147] Delays attributable to the petitioner do not count as judicial delay.[148]

48. The Covenant does not require that a court decision upholding the lawfulness of detention be subject to appeal. If a State party does provide for appeal or further instances, the delay may reflect the changing nature of the proceeding and in any event must not be excessive.[149]

VI. The right to compensation for unlawful or arbitrary arrest or detention

49. Paragraph 5 of article 9 of the Covenant provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Like paragraph 4, paragraph 5 articulates a specific example of an effective remedy for human rights violations, which States parties are required to afford. These specific remedies do not replace, but are included alongside, the other remedies that may be required in a particular situation for a victim of unlawful or arbitrary arrest or detention by article 2, paragraph 3 of the Covenant.[150] Whereas paragraph 4 provides a swift remedy for release from ongoing unlawful detention, paragraph 5 clarifies that victims of unlawful arrest or detention are also entitled to financial compensation.

50. Paragraph 5 obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and make payment within a reasonable period of time. Paragraph 5 does not specify the precise form of procedure, which may include remedies against the state itself, or against individual state officials responsible for the violation so long as they are effective.[151] Paragraph 5 does not require that a single procedure be established providing

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[142] 373/1989, Stephens v. Jamaica, para. 9.7.

[143] R.1/4, Torres Ramírez v. Uruguay, para. 18; 1449/2006, Umarov v. Uzbekistan, para. 8.6.

[144] R.1/5, Hernández Valentini de Bazzano v. Uruguay, para. 10; 1751/2008, Aboussedra v. Libyan Arab Jamahiriya, para. 7.6; 1062/2002, Fijalkowska v. Poland, para. 8.4 (state's failures frustrated the ability of a patient to challenge involuntary committal).

[145] See Body of Principles (note 102 above), principles 13-14.

[146] 1128/2002, Marques de Morais v. Angola, para. 6.5.

[147] 291/1988, Torres v. Finland, para. 7.3.

[148] 1051/2002, Ahani v. Canada, para. 10.3.

[149] 1752/2008, J.S. v. New Zealand, paras. 6.3-6.4 (finding periods of eight days at first instance, three weeks at second instance, and two months at third instance satisfactory in context).

[150] General Comment No. 31, paras. 16, 18; 238/1987, Bolaños v. Ecuador, para. 10; 962/2001, Mulezi v. Democratic Republic of the Congo, para. 7.

[151] See Concluding observations Cameroon 2010, para. 19; Guyana 2000, para. 15; United States of America 1995, para. 34; Argentina 1995 A/50/40 para. 153; cf. 1885/2009, Horvath v. Australia, para.

compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. Paragraph 5 does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement of proceedings for compensation to the initiative of the victim.[152]

51. Unlawful arrest and detention within the meaning of paragraph 5 include those arising within either criminal or noncriminal proceedings, or in the absence of any proceedings at all.[153] The "unlawful" character of the arrest or detention may result from violation of domestic law or violation of the Covenant itself, such as substantively arbitrary detention and detention that violates procedural requirements of other paragraphs of article 9.[154] However, the fact that a criminal defendant was ultimately acquitted, at first instance or on appeal, does not in and of itself render any preceding detention "unlawful."[155]

52. The financial compensation required by paragraph 5 relates specifically to the pecuniary and nonpecuniary harms resulting from the unlawful arrest or detention.[156] When the unlawfulness of the arrest arises from the violation of other human rights, such as freedom of expression, the State party may have further obligations to provide compensation or other reparation in relation to those other violations, as required by article 2, paragraph 3 of the Covenant.[157]

VII. Relationship of article 9 with other articles of the Covenant

53. The procedural and substantive guarantees of article 9 both overlap and interact with other guarantees of the Covenant. Some forms of conduct amount independently to a violation of article 9 and another article, such as delays in bringing a detained criminal defendant to trial, which may violate both paragraph 3 of article 9 and paragraph 3(c) of article 14. At times the content of article 9, paragraph 1, is informed by the content of other articles; for example, detention may be arbitrary by virtue of the fact that it represents punishment for freedom of expression, in violation of article 19.[158]

54. Article 9 also reinforces the obligations of States parties under the Covenant and under the Optional Protocol to protect individuals against reprisals for having cooperated or communicated with the Committee, such as physical intimidation or threats to personal liberty.[159]

55. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6, paragraph 1, may overlap with the right to security of person guaranteed by article 9, paragraph 1. The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-threatening.

8.7 (discussing effectiveness of remedy); 1432/2005, Gunaratna v. Sri Lanka, para. 7.4; General Comment No. 32, para. 52 (requirement of compensation for wrongful convictions).

152 414/1990, Mika Miha v. Equatorial Guinea, para. 6.5; 962/2001, Mulezi v. Democratic Republic of the Congo, para. 5.2.

153 754/1997, A. v. New Zealand, paras. 6.7, 7.4; 188/1984, Martínez Portorreal v. Dominican Republic, para. 11; 962/2001, Mulezi v. Democratic Republic of the Congo, para. 5.2.

154 1128/2002, Marques de Morais v. Angola, para. 6.6; see also 328/1988, Zelaya Blanco v. Nicaragua, para. 10.3 (arbitrary detention); 728/1996, Sahadeo v. Guyana, para. 11 (violation of article 9(3)); R.2/9, Santullo Valcada v. Uruguay, para. 13 (violation of article 9(4)).

155 432/1990, W.B.E. v. Netherlands, para. 6.5; 963/2001, Uebergang v. Austria, para. 4.4.

156 1157/2003, Coleman v. Australia, para. 6.3.

157 Ibid, para. 9; 1128/2002, Marques de Morais v. Angola, para. 8; General Comment No. 31, para. 16.

158 See also paragraph 17 above.

159 See General Comment No. 33, para. 4; 241/1987 and 242/1987, Birindwa ci Birhashwirwa and Tshisekedi wa Mulumba v. Zaire, para. 12.5; see Concluding observations Maldives 2012, para. 26.

Extreme forms of arbitrary detention that are themselves life-threatening violate the rights to personal liberty and personal security as well as the right to protection of life, in particular enforced disappearances.[160]

56. Arbitrary detention creates risks of torture and ill-treatment, and several of the procedural guarantees in article 9 serve to reduce the likelihood of such risks. Prolonged incommunicado detention violates article 9 and would generally be regarded as a violation of article 7.[161] The right to personal security protects interests in bodily and mental integrity that are also protected by article 7.[162]

57. Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant.[163]

58. Several safeguards that are essential for the prevention of torture are also necessary for the protection of persons in any form of detention against arbitrary detention and infringement of personal security.[164] The following examples are non-exhaustive. Detainees should be held only in facilities officially acknowledged as places of detention. A centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives.[165] Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members.[166] Detainees should be promptly informed of their rights, in a language they understand;[167] providing information leaflets in the appropriate language, including in Braille, may often assist the detainee in retaining the information. Detained foreign nationals should be informed of their right to communicate with their consular authorities, or, in the case of asylum-seekers, with the United Nations High Commissioner for Refugees (UNCHR).[168] Independent and impartial mechanisms should be established for visiting and inspecting all places of detention, including mental health institutions.

59. Article 10 of the Covenant, which addresses conditions of detention for persons deprived of liberty, complements article 9, which primarily addresses the fact of detention. At the same time, the right to personal security in article 9, paragraph 1, is relevant to the treatment of both detained and non-detained persons. The appropriateness of the conditions prevailing in detention to the purpose of detention is sometimes a factor in determining whether detention is arbitrary within the meaning of article 9.[169] Certain conditions of detention (such as denial of access to counsel and family) may result in procedural

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[160] 449/1991, Mojica v. Dominican Republic, para. 5.4; 1753/2008, Guezout v. Algeria, paras. 8.4, 8.7.

[161] 1782/2008, Aboufaied v. Libya, paras. 7.4, 7.6; 440/1990, El-Megreisi v. Libyan Arab Jamahiriya, para. 5.4.

[162] General Comment No. 20, para. 2.

[163] Cf. General Comment No. 31, para. 12.

[164] See General Comment No. 20, para. 11; Committee Against Torture, General Comment No. 2, para. 13.

[165] See Concluding observations Algeria 2007, para. 11.

[166] See Body of Principles (note 102 above), principles 17-19, 24; Committee on the Rights of the Child, General Comment No. 10, para. 87.

[167] See Body of Principles (note 102 above), principles 13-14; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, paras. 24-25, adopted by UN GA Res. 45/113 (regarding explanation of rights to detained juveniles).

[168] See Body of Principles (note 102 above), principle 16, paragraph 2.

[169] See paragraphs 14, 18 and 21 above.

violations of paragraphs 3 and 4 of article 9. Article 10, paragraph 2(b), reinforces for juveniles the requirement in article 9, paragraph 3, that pretrial detainees be brought to trial expeditiously.

60. The liberty of movement protected by article 12 of the Covenant and the liberty of person protected by article 9 complement each other. Detention is a particularly severe form of restriction of liberty of movement, but in some circumstances both articles may come into play together.[170] Detention in the course of transporting a migrant involuntarily, is often used as a means of enforcing restrictions on freedom of movement. Article 9 addresses such uses of detention in the implementation of expulsion, deportation, or extradition.

61. The relationship between article 9 and article 14 of the Covenant, regarding civil and criminal trials, has already been illustrated.[171] Article 9 addresses deprivations of liberty, only some of which take place in connection with civil or criminal proceedings within the scope of article 14. The procedural requirements of paragraphs 2 through 5 of article 9 apply in connection with proceedings falling within the scope of article 14 only when actual arrest or detention occurs.[172]

62. Article 24, paragraph 1, of the Covenant entitles every child "to such measures of protection as are required by his status as a minor on the part of his family, society and the State." That article entails the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by article 9 for everyone.[173] A child may be deprived of liberty only as a last resort and for the shortest appropriate period of time.[174] In addition to the other requirements applicable to each category of deprivation of liberty, the best interests of the child must be a primary consideration in every decision to initiate or continue the deprivation.[175] The Committee acknowledges that sometimes a particular deprivation of liberty would itself be in the best interests of the child. Placement of a child in institutional care amounts to a deprivation of liberty within the meaning of article 9.[176] A decision to deprive a child of liberty must be subject to periodic review of its continuing necessity and appropriateness.[177] The child has a right to be heard, directly or through legal or other appropriate assistance, in relation to any decision regarding a deprivation of liberty, and the procedures employed should be child-appropriate.[178] The right to release from unlawful detention may result in return to the

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[170] General Comment No. 27, para. 7; 1134/2002, Gorji-Dinka v. Cameroon, para. 5.4, 5.5 (house arrest); 138/1983, Mpandanjila et al. v. Zaire, paras. 8, 10.

[171] See paragraphs 38, 53 above.

[172] 263/1987, González del Río v. Peru, para. 5.1; 1758/2008, Jessop v. New Zealand, para. 7.9-7.10.

[173] See General Comment No. 17, para. 1; General Comment No. 32, paras. 42-44.

[174] See Concluding observations Czech Republic 2013, para. 17; Convention on the Rights of the Child, art. 37(b).

[175] Communication No. 1069/2002, Bakhtiyari v. Australia, para. 9.7; see Convention on the Rights of the Child, art. 3(1).

[176] See Committee on the Rights of the Child, General Comment No. 10, para. 11; United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), para. 11(b). In contrast, normal supervision of children by parents or family may involve a degree of control over movement, especially of younger children, that would be inappropriate for adults, but that does not constitute a deprivation of liberty; neither do the ordinary requirements of daily school attendance constitute a deprivation of liberty.

[177] See paragraph 12 above; Convention on the Rights of the Child, arts. 37(d), 25.

[178] See General Comment No. 32, paras. 42-44; Committee on the Rights of the Child, General Comment No. 12, paras. 32-37.

child's family or placement in an alternative form of care that accords with the child's best interests, rather than simple release into the child's own custody.[179]

63. In light of article 2, paragraph 1, of the Covenant, States parties have obligations to respect and to ensure the rights under article 9 to all persons who may be within their territory and to all persons subject to their jurisdiction.[180] Given that arrest and detention bring a person within a state's effective control, States parties must not arbitrarily or unlawfully arrest or detain individuals outside their territory.[181] States parties must not subject persons outside their territory to, inter alia, prolonged incommunicado detention, or deprive them of review of the lawfulness of their detention.[182] The extraterritorial location of an arrest may be a circumstance relevant to an evaluation of promptness under paragraph 3.

64. With regard to article 4 of the Covenant, the Committee first observes that, like the rest of the Covenant, article 9 applies also in situations of armed conflict to which the rules of international humanitarian law are applicable.[183] While rules of international humanitarian law may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive.[184] Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary. In conflict situations, access by the International Committee of the Red Cross to all places of detention becomes an essential additional safeguard for the rights to liberty and security of person.

65. Article 9 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, but there are limits on States parties' power to derogate. States parties derogating from normal procedures required under article 9 in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.[185] Derogating measures must also be consistent with a State party's other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty, and non-discriminatory.[186] The prohibitions against taking of hostages, abductions or unacknowledged detention are therefore not subject to derogation.[187]

66. There are other elements in article 9 that in the Committee's opinion cannot be made subject to lawful derogation under article 4. The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a

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[179] Cf. UNHCR Detention Guidelines (note 45 above), para. 54 ("Where possible [unaccompanied or separated children] should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision.").

[180] General Comment No. 31, para. 10.

[181] See ibid; 12/52, Saldías de López v. Uruguay, paras. 12.1-13; R.13/56, Celiberti de Casariego v. Uruguay, para. 10.1-11; 623/1995 et al., Domukovsky et al. v. Georgia, para. 18.2.

[182] See Concluding observations, United States of America 2006, para. 12, 18.

[183] General Comment No. 31, para. 11; General Comment No. 29, para. 3.

[184] General Comment No. 31, para. 11; General Comment No. 29, para. 3, 12, 16.

[185] General Comment No. 29, paras. 4-5. When the emergency justifying measures of derogation arises from the participation of State party's armed forces in a peacekeeping mission abroad, the geographic and material scope of the derogating measures must be limited to the exigencies of the peacekeeping mission.

[186] General Comment No. 29, paras. 8, 9.

[187] Ibid, para. 13(b).

deprivation of liberty that is unreasonable or unnecessary under the circumstances.[188] The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary. Valid derogations from other derogable rights may also be relevant, when a deprivation of liberty is characterized as arbitrary because of its interference with another right protected by the Covenant. During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention.[189] Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application, as explained in paragraph 15 above,[190] including review by a court within the meaning of paragraph 45 above.[191]

67. The procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.[192] In order to protect non-derogable rights, including those in articles 6 and 7, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation.[193]

68. While reservations to certain clauses of article 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to engage in arbitrary arrest and detention of persons.[194]

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[188] Ibid, paras. 4 and 11.
[189] See ibid, para. 3.
[190] See ibid, paras. 4, 11, 15.
[191] See ibid, para. 16; paragraph 67 below.
[192] See General Comment No. 32, para. 6.
[193] General Comment No. 29, para. 16.
[194] General Comment No. 24, para. 8.