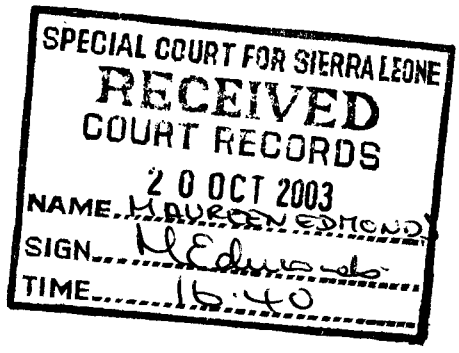
092 SCSL-2003-08-PT 2651
(2651 - 2700)

THE SPECIAL COURT FOR SIERRA LEONE



TRIAL CHAMBER

Judge Bankole-Thompson: Presiding
Judge Boutet
Judge Itoe

Registrar: Robin Vincent

Date: 20th October 2003

The Prosecutor
V.
Sam Hinga Norman

Case SCSL-2003-08-PT

DEFENCE REPLY
TO PROSECUTION RESPONSE TO DEFENCE MOTION ON DENIAL OF RIGHT TO APPEAL

Office of the Prosecutor:
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Introduction

1. This Reply is filed in response to the Prosecution Response to the Defence Motion challenging the *vires* of the amendment to Rule 72 of the Rules of Procedure and Evidence for the Special Court of Sierra Leone and its compatibility with the International Covenant on Civil and Political Rights and basic human rights norms. The Defence agrees with the submissions of the

Prosecution concerning the procedural aspects of this Motion and notes that the Prosecution agree that it is preferable for the integrity of the proceedings of the Special Court and for the development of international criminal law that both the Trial Chamber and Appeals Chamber consider these important issues of jurisdiction. Further, the Defence agrees with the prosecution's submission that these "challenges to jurisdiction are of great importance, especially in the light of the novel questions of law to be raised in these proceedings as a result of the unique nature of the Special Court for Sierra Leone".

2. By way of clarification, the Defence wish to emphasise that it is not the denial of their right of interlocutory appeal of which they make complaint, rather that the amendment to Rule 72 of the Rules of Procedure and Evidence ("the Rules") has effectively removed the accused's right of appeal against conviction on issues of law.

3. The Rules require that issues relating to jurisdiction are raised at an interlocutory stage by way of Preliminary Motion. The Defence submit that the issues raised by the Preliminary Motions would amount to a defence to the charges faced by the accused if decided in his favour. The Defence make no complaint that such issues are dealt with at the interlocutory stage; rather the complaint is that they are deprived of the opportunity of having rulings on substantive issues of the jurisdiction of the court and the liability of the accused reviewed by a higher chamber. The Trial Chamber will be bound by the ruling of the Appeals Chamber on the issues raised by the Preliminary Motions during the accused's trial and any subsequent appeal against conviction will be determined by the same Appeal chamber which will have already ruled on the issues prior to trial. Thus the accused is denied any effective right of appeal on substantive issues of law.

Procedural Matters:

4. The Defence agree that now that the Appeal Chamber is seized of the Application for a Stay of the determination of the Preliminary Motions they

are the competent tribunal to determine the issue of the stay and the application for a stay of the Preliminary Motions before the Trial Chamber is withdrawn.

5. The Defence agree with the prosecution that the proper tribunal for the determination of this Motion is the Trial Chamber in the first instance. The Defence agree with the Prosecution's submission that this Motion can properly be considered by the Trial Chamber pursuant to Rule 73.

Compatibility of Rule 72 with the ICCPR and International Law

6. The Defence submits that the prosecution have fallen into error in considering that this Motion simply raises the issue of the right to interlocutory appeal. Article 20 of the Statute of the Special Court for Sierra Leone ("the Statute") provides that the accused has the right to appeal to the Appeals Chamber following conviction by the Trial Chamber, *inter alia,* on a question of law invalidating the decision. The Defence accepts that it is within the inherent powers of the court to create rules whereby such issues of law are determined prior to trial in the interests of efficiency and expediency. However the designation of such matters as "interlocutory" cannot deprive the accused of the substance of the right to have decisions on substantive issues of law reviewed by a higher chamber. It is submitted that the court should consider the substance of the accused's rights and not the formal characterisation of the issue as "interlocutory" (see for instance *Farrington v The Queen* [1996] 3 WLR 177 considering the right of appeal under the Bahamian constitution from the interlocutory decision to refuse a stay of execution in a death penalty case).

7. Pursuant to the amendment to Rule 72, the accused is denied any effective right to appeal to the Appeals Chamber on issues of law that would invalidate his conviction if determined in his favour. It is submitted that the Statute requires that the Trial Chamber is bound by decisions of the Appeals Chamber on issues of law. Following the first instance determination on the issues raised in the Preliminary Motions by the Appeals Chamber, the Trial Chamber would be bound by the ruling of the Appeals Chamber even if the accused

were permitted to raise such issues again at trial. Thereafter the identically comprised Appeals Chamber would sit on review of its original decision, assuming the accused would be permitted to raise such issues on appeal. The Defence submits that clearly an appeal to the identically comprised chamber as reached the original determination cannot in any sense amount to an effective appeal as is provided for in the Statute.

The ICCPR

8. The Defence accepts that reservations to article 14(5) have been entered into by some countries and that such reservations can properly be entered into in appropriate cases. However in no case has a reservation been entered that is equivalent to the breadth of the denial of right to appeal currently under consideration. It is submitted that the type of proceedings under consideration will be highly relevant as to whether the scope of any reservation is permissible. The General Comment of the Human Rights Committee on Article 14(5)[1] states at paragraph 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. Particular attention is drawn to the other language versions of the word "crime" (...) which shows that the guarantee is not confined only to the most serious offences. In this connection not enough information has been provided [by State parties in their country reports] concerning the procedures of appeal in particular the access to and the power of reviewing tribunals, what requirements must be satisfied to appeal against judgement and the way in which procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14*".

9. The Prosecution rely on the reservations entered by Austria, Germany, Belgium, Norway, Luxemburg and Italy. These reservations, with the exception of Italy, principally were entered into upon advice of the Committee of Experts of the Council of Europe[2] in relation to systems which permit increase of sentence or conviction by the higher court following appeal by the

[1] 13/21 of 12 April 1984
[2] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, paragraph 68

prosecutor. The Defence submits that these reservations do not assist the tribunal in the instant case as in each situation the principle of two-level criminal proceedings has been preserved and thus it has been doubted that in fact such reservations were necessary[3]. The reservation entered by Austria (4b) is restricted to cases where a person is acquitted at first instance and thereafter convicted or a heavier sentence imposed by the higher tribunal following appeal by the prosecutor. The Belgian, Luxemburg and Norwegian reservations are in similar terms. The German reservation is again restricted to convictions at the higher court following acquittal in the lower court (3a) and additionally to criminal cases of minor gravity where imprisonment is not imposed (3b).

10. The Italian reservation is limited to proceedings brought before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers and it was this reservation that the Human Rights Committee was considering in the *Fanali* communication referred to by Judge Shahabuddeen in his separate opinion in *Rutaganda.* Where a party is convicted at first instance by the highest tribunal it is submitted that international human rights law considers such cases to be a distinct category and does not dictate that article 14(5) will be violated by the absence of a right of appeal in such cases, as is confirmed by the decision of the Human Rights Committee in *Fanali* and by the limitation under article 2(2) imposed on the right to appeal guaranteed by the Seventh Protocol to the European Convention[4]. Such a principle logically flows from the fundamental tenet of the separation of powers and the various ensuing constitutional arrangements whereby the power to hold state official criminally liable is restricted to the relevant Constitutional or Supreme Court.

11. However, clearly the instant Motion does not deal with such a case and it is submitted that such a situation is not analogous. The accused is not facing conviction at first instance at the highest tribunal. Rather the accused is facing

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[3] *Ditto*

[4] See also the opinion of Judge Shahabuddeen at paragraph 27

a final determination on issues of law by a higher tribunal without possibility of appeal when he is being tried by a lower tribunal.

12. In the case of *Milan Vujin* (Allegations of contempt against Prior Counsel)[5] the Appeal Chamber found that article 14 of the ICCPR reflected an imperative norm of international law to which the ICTY must adhere and even in the "special circumstances of the case" (i.e. where the Appeals Chamber were already seized of the matter when the allegations of contempt came to light) a person found guilty of contempt at first instance by the Appeals Chamber "must have the right to appeal the conviction". This was achieved by the Appeals Chamber effectively turning itself into a first instance tribunal and permitting appeal to a differently constituted Appeals chamber. It is submitted in future it was clearly envisaged that contempt allegations would be heard first by the Trial Chamber.

13. Further, clearly no reservation to article 14 of the ICCPR has been formulated in respect of the amendment to Rule 72 by the Special Court but more significantly no reservation has been entered by the government of Sierra Leone such as would permit the abrogation of the right of appeal previously provided for in the statute. It is submitted that in the absence of such a reservation, the amendment to the Rules has placed the government of Sierra Leone in breach of its state party obligations under the ICCPR and the accused will be required to submit the matter to the Human Rights Committee pursuant to the Optional Protocol[6] for a determination of the legality of the amended rule.

The *vires* of Rule 73

14. Article 14(1) of the Statute states that "The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the

[5] *Prosecutor v Tadic,* "Allegations of contempt against Prior Counsel, Milan Vujin 27 February 2001.
[6] Sierra Leone ratified the Optional Protocol on the 23rd of August 19996

establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court". As was noted by the prosecution in their Response to the instant Motion at paragraph 19, Rule 72 provided for a right to appeal interlocutory decisions on jurisdiction "as of right" on certain specific issues, including issues raised by the accused in some of his Preliminary Motions awaiting determination. The agreement between the United Nations and the government of Sierra Leone (consistent with their obligations under the ICCPR) establishing the Special Court was thus entered into on the basis that the accused would enjoy an appeal as of right on issues relating to substantive jurisdiction. This right was summarily removed at the plenary session in March 2003 although the Trial Chamber retained discretion to hear such matters prior to appeal before the Appeals Chamber. The above arguments could properly have been addressed to the Trial Chamber in support of the submission that they ought to rule on such issues rather than refer them directly to the Appeal Chamber. Even this discretion however was removed at the August plenary session.

15. It is submitted that the power under article 14(2) to amend those rules where "the applicable Rules do not or do not adequately, provide for a specific situation" cannot properly be interpreted as permitting removal of an appeal as of right (or at all). The right of appeal was specifically considered and provided for in the statute. It is submitted that the power can clearly be properly used to expand the rights of the defendants as was done at the first plenary in March 2003 by removing the restriction that applied at the ICTR that was not considered appropriate to the proceedings before the Special Court. However it is submitted that a dramatic restriction on the defendant's rights which violates the fundamental principle of two-tier criminal proceedings cannot possibly have been contemplated by the framers of the statute, particularly the government of Sierra Leone in the light of its obligations towards its citizens that are to be tried under it.

16. Further, it is clear that were the accused is facing prosecution before the ICTY, the matters raised in his Preliminary Motions would permit appeal to the Appeals Chamber under the Rules at the ICTY even on the narrow (and

rejected) basis argued for by the prosecutor. The Defence agrees with the Prosecution's submission at paragraph 22 of its Response that for the reasons enunciated by the Appeals Chamber in the case of *Tadic* there may be good reasons why "such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial". However it is submitted that the decision as to when an issue ought to properly be decided at any particular stage in the proceedings cannot dictate the accused's entitlement to his fundamental right to a fair trial of which the right to appeal is a constituent element.

17. The Defence fully accepts that tribunals such as the Special Court have the inherent power to exercise jurisdiction over matters in order to fulfil their intrinsic purpose. Such an inherent power exists to expand their jurisdiction beyond the terms of the relevant statute "in order to ensure that its exercise of the jurisdiction given to it by its statute is not frustrated and that its basic judicial functions are safeguarded"[7]. It is submitted that the jurisdiction of the Special Court is to try "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996"[8] at a "fair and public hearing"[9] and to provide a right to appeal to the Appeals Chamber, *inter alia,* "on a question of law invalidating the decision [of the Trial Chamber]"[10]. It is submitted that the amendment to Rule 72 removing this right of effective appeal cannot be properly characterised as a power that is necessary to ensure the Special Court exercises its jurisdiction according to the statute.

18. The Defence submits that the approach of the Appeals Chamber in *Tadic*[11], as confirmed by the Appeals Chamber in *Delalic*[12] is entirely consistent with their submissions. The Appeals Chamber in *Tadic* interpreted Rule 72 as

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[7] *Prosecution v Tadic,* IT-94-1-A-R77 "Judgment of allegations of contempt against Prior Counsel, Milan Vujin" App. Ch. 31 January 2000, paragraph 18.
[8] SSCSL, article 1
[9] SSCSL, article 17
[10] SSCSL, article 20
[11] *Prosecutor v Tadic* "Decision on the Defence Motion for Interlocutory Appeal on jurisdiction" IT-94-1-AR72, App. Ch., 2 October 1995
[12] *Prosecutor v Zejnil Delalic, Zdravko Mucic etc.* IT-96-21-T "Decision on Application for Leave to Appeal (Provisional Release) Hazim Delic" 22 November 1996, paragraph 21.

broadening the right of appeal to that which was provided for in the statute so that "Rule 72 ... enhanced and strengthened the judicial rights of the accused" by providing for a right of appeal that was not provided in the statute. Expanding existing procedures so as ensure the rights of the accused, and in particular the right of appeal, is clearly part of the proper functioning of the court as its jurisdiction may properly be characterised as ensuring the accused receives a fair trial on the matters within the subject jurisdiction of the court. It is submitted that the inherent power of the court to read in powers that enhance the fair trial rights of the defendant provided for in the statute cannot assist in the determination of the legality of the court's entitlement to abrogate the rights of the defence as provided for in the statute.

19. The Defence rely on the view of the Appeals Chamber in *Tadic* that it was necessary to read Rule 72 expansively so as to permit of an appeal to the Appeal Chamber and the characterisation of such action as for the purpose of strengthening "the judicial rights of the accused" in support of its submission that the principle of two-tier criminal proceedings on fundamental issues of law (which would amount to a defence if successful) is part of international customary law.

20. Further or alternatively the Defence submits that the amendment to Rule 72 is *ultra vires* the statute in that article 20 creating the Appeals Chamber does not create a jurisdiction to routinely determine substantive issues at first instance. While an inherent power may be divined in "special circumstances" (such as contempt of court by counsel in a case before the Appeals Chamber) in order for the Court to carry out its function as discussed above, it is submitted that the Appeals Chamber cannot lawfully assign to itself a first instance jurisdiction significantly beyond the parameters of the statute creating it which it intends to exercise as a matter of course.

Conclusion

21. In conclusion, the Defence submits that for the reasons hereinbefore stated the Trial Chamber ought to grant a Declaration that the amendment to Rule 72 agreed at the plenary session in August 2003 is *ultra vires* the statute and/or in

breach of the ICCPR and international human rights norms in that it denies the accused the principle of two-tier criminal proceedings and an effective right of appeal on fundamental issues of law which would amount to a defence if found in his favour.

For the Defence, 20th of October 2003

James Blyden Jenkins-Johnson

Sulaiman Banja Tejan-Sie II

Quincy Whitaker

DEFENCE AUTHORITIES

In addition to those relied on by the Prosecution, the Defence rely on the following:

1. *Farrington v The Queen* ([1997] AC, 395, [1996] 3 WLR 177)

2. General Comment of the Human Rights Committee on Article 14(5) 13/21 of 12 April 1984

3. Excerpt from "U.N. Covenant on Civil and Political Rights: CCPR Commentary", Manfred Nowak (N.P. Engel 1994)

2662

[PRIVY COUNCIL]

FARRINGTON — PETITIONER

AND

THE QUEEN — RESPONDENT

[APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE COURT OF APPEAL OF THE BAHAMAS]

1996 May 22;
June 17

Lord Keith of Kinkel, Lord Jauncey of Tullichettle and Lord Steyn

Bahamas, The - Constitution - Fundamental rights and freedoms - Sentence of death for murder - Applicant claiming delay in carrying out execution contravening constitutional rights - Application for stay of execution pending hearing of constitutional motion - Judge refusing stay on ground that motion bound to fail - Court of Appeal upholding judge's decision without dismissing motion - Whether "decision" by Court of Appeal on constitutional motion - Whether leave to appeal to Privy Council as of right - Bahamas Independence Order 1973 (S.I. 1973 No. 1080), Sch., art. 104

The applicant was convicted of murder in the Bahamas in 1992 and sentenced to death. His appeal to the Court of Appeal of The Bahamas was dismissed and the Judicial Committee of the

Privy Council dismissed his for special leave to appeal against conviction. In March 1996 the applicant issued a motion for relief under article 28 of the Constitution of The Bahamas, claiming that delay in carrying out his execution had contravened his fundamental right to protection for inhuman and degrading treatment guaranteed by article 17(1), and sought an order staying his execution pending determination of the constitutional motion. The judge dismissed the application for a stay on the ground that the applicant's motion was "plainly and obviously bound to fail." The Court of Appeal of The Bahamas, without making any formal order dismissing the constitutional motion, upheld the judge's refusal of a stay for like reasons.

On the question whether an appeal to the Judicial Committee lay as of right under article 104(2) of the Constitution,[1] and on the applicant's petition for special leave to appeal as a poor person:-

Held, granting special leave to appeal, that on its true construction article 104(2) of the Constitution provided that an appeal lay as of right to the Judicial Committee from any decision of the Court of Appeal of The Bahamas heard pursuant to article 104(1) which had determined a constitutional motion; that notwithstanding that the orders refusing the applicant a stay had been interlocutory in character and there had not been any formal order on the constitutional motion, in substance and effect it had been determined adversely to the applicant, and an appeal lay as of right within article 104(2); and that, accordingly, the applicant would be granted special leave to appeal as a poor person (post, pp. 399C, E-F).

Per curiam. Even in a case where an appeal lies as of right it would be inappropriate to grant special leave to appeal as a poor person where it is plain beyond rational argument that the appeal is doomed to fail (post, p. 399F-G).

The following case is referred to in the judgment of their Lordships:

Pratt v. Attorney-General for Jamaica [1994] 2 A.C. 1; [1993] 3 W.L.R. 995; [1993] 4 All E.R. 769, P.C.

The following additional cases were cited in argument:

Bland v. Chief Supplementary Benefit Officer [1983] 1 W.L.R. 262; [1983] 1 All E.R. 537, C.A.
Bradshaw v. Attorney-General of Barbados [1995] 1 W.L.R. 936, P.C.
Davis (Lady) v. Lord Shaughnessy [1932] A.C. 106, P.C.
Guerra v. Baptiste [1996] 1 A.C. 397; [1995] 3 W.L.R. 891; [1995] 4 All E.R. 583, P.C.
Khan (Rajah Tasadduq Rasul) v. Manik Chand (1902) L.R. 30 Ind.App. 35, P.C.
Lopes v. Valliappa Chettiar [1968] A.C. 887; [1968] 3 W.L.R. 92; [1968] 2 All E.R. 136, P.C.
Ratnam v. Cumarasamy [1965] 1 W.L.R. 8; [1964] 3 All E.R. 933, P.C.
Reckley v. Minister of Public Safety and Immigration [1995] 2 A.C. 491; [1995] 3 W.L.R. 390; [1995] 4 All E.R. 8, P.C.
Riley v. Attorney-General of Jamaica [1983] 1 A.C. 719; [1982] 3 W.L.R. 557; [1982] 3 All E.R. 469, P.C.
Strathmore Group Ltd. v. A.M. Fraser [1992] 2 A.C. 172; [1992] 3 W.L.R. 1, P.C.

[1] Constitution of The Bahamas, art. 104: see post, pp. 398H-399A.

APPLICATION for special leave to appeal in forma pauperis by the applicant, Ricardo Farrington, from the decision of the Court of Appeal of the Commonwealth of The Bahamas (Gonsalves-Sabola P., George and Liverpool JJ.A.) on 29 April 1996 dismissing the applicant's appeal from the judgment of Osadebay J. on 9 April 1996 whereby he had refused a stay of execution pending a hearing of his motion for relief under article 28 of the Constitution of The Bahamas, claiming that a delay in carrying out his execution pursuant to his conviction for murder on 30 November 1992 had contravened his fundamental right to protection from inhuman and degrading treatment guaranteed by article 17(1) of the Constitution, on the ground that any such claim was bound to fail.

The facts are stated in their Lordships' judgment.

Patrick O'Connor Q.C. and *Robin du Preez* for the applicant. An order which effectively disposes of the issues in a case is a final order: *Ratnam v. Cumarasamy* [1965] 1 W.L.R. 8. It follows that the applicant may appeal to the Board as of right by virtue of article 104(2) of the Constitution of the Commonwealth of The Bahamas. [Reference was made to *Lady Davis v. Lord Shaughnessy* [1932] A.C. 106; *Rajah Tasadduq Rasul Khan v. Manik Chand* (1902) L.R. 30 Ind.App. 35; *Bland v. Chief Supplementary Benefit Officer* [1983] 1 W.L.R. 262 and *Strathmore Group Ltd. v. A. M. Fraser* [1992] 2 A.C. 172.] In any event, the right of appeal to the Board under article 104(2) is in respect of "any decision given by the Court of Appeal in any such case." That wording is wide enough to cover both final and interlocutory orders. A safeguard against absurd appeals is provided by the use of the word "decision."

As to the application for special leave to appeal as a poor person, the delay in carrying out the execution contravened the applicant's right to protection from inhuman and degrading treatment guaranteed by article 17(1) of the Constitution. The Court of Appeal erred in law in treating the five-year period mentioned in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1 as a fixed time limit. [Reference was made to *Riley v. Attorney-General of Jamaica* [1983] 1 A.C. 719; *Guerra v. Baptiste* [1996] 1 A.C. 397; *Bradshaw v. Attorney-General of Barbados* [1995] 1 W.L.R. 936 and *Reckley v. Minister of Public Safety and Immigration* [1995] 2 A.C. 491.]

Sir Godfray Le Quesne Q.C. and *Peter Knox* for the Attorney-General of The Bahamas. There is no right of appeal under article 104(2) in respect of interlocutory orders. The decision of the Court of Appeal was interlocutory in character. No formal order was made dismissing the constitutional motion.

The five-year period referred to in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1 is applicable to The Bahamas: see *Reckley v. Minister of Public Safety and Immigration* [1995] 2 A.C. 491. If, however, the applicant has an arguable case that the delay in his case falls within the ambit of article 17(1), then it may be appropriate to grant special leave. [Reference was made to *Lopes v. Valliappa Chettiar* [1968] A.C. 887, 893.]

[LORD KEITH OF KINKEL. The Board will advise Her Majesty that leave to appeal ought to be granted, for reasons to be given later.]

Cur. adv. vult.

17 June. The judgment of their Lordships was delivered by LORD KEITH OF KINKEL.

On this application for special leave to appeal as a poor person an important question regarding the proper construction of article 104(2) of the Constitution of the Commonwealth of The Bahamas arose. At the conclusion of the hearing their Lordships agreed humbly to advise Her Majesty that the petitioner ought to be granted special leave to appeal. They now record their decision and reasons on the point of construction.

In May 1990 the applicant was arrested and charged with murder. In August 1990 he was committed for trial. On 30 November 1992 the applicant was convicted of murder in the Supreme Court, Nassau. The trial judge sentenced the applicant to death. In April 1994 the Court of Appeal of the Commonwealth of The Bahamas dismissed an appeal by the applicant against conviction. In March this year the Judicial Committee of the Privy Council dismissed the applicant's petition and supplemental petition for special leave to appeal. The Advisory Committee on the Prerogative of Mercy then considered the applicant's case. The advice was that the law should take its course. On 27 March 1996 a warrant for execution was read to the applicant and a time for execution was set at 8 a.m. on 9 April.

On 3 April the applicant submitted a motion under article 28 of the Constitution claiming, on the principle established in *Pratt v. Attorney-General for Jamaica* [1994] 2 A.C. 1, that the delay in carrying out the execution in his case contravened his fundamental right to protection from inhuman and degrading treatment guaranteed by article 17(1) of the Constitution. At the same time the applicant applied for an order staying his execution pending determination of his constitutional motion. Osadebay J. dismissed the application for a stay pending determination of the constitutional motion but granted a short stay pending appeal. In written reasons dated 9 April 1996 the judge concluded that the applicant's motion was "plainly and obviously bound to fail, 'being plainly and obviously ill-founded.' " For this reason he dismissed the application. The applicant appealed. On 29 April the Court of Appeal of the Commonwealth of the Bahamas dismissed the appeal. In written reasons dated 6 May the Court of Appeal treated the applicant's constitutional motion as doomed to fail since "the period of three years and four months spent by the applicant on death row does not on the *Pratt* principle raise a presumption of inhuman or degrading treatment or punishment." Nevertheless the Court of Appeal granted a short stay pending the submission of a petition for special leave to appeal to the Privy Council. That is the background against which the application for leave to appeal as a poor person came before their Lordships.

It is now necessary to turn to article 104. It provides:

> "(1) An appeal to the Court of Appeal shall lie as of right from final decisions of the Supreme Court given in exercise of the

jurisdiction conferred on the Supreme Court by article 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms). (2) An appeal shall lie as of right to the Judicial Committee of Her Majesty's Privy Council or to such other court as may be prescribed by Parliament under article 105(3) of this Constitution from any decision given by the Court of Appeal in any such case."

There was a debate as to whether an appeal lies as of right in the present case. Counsel for the applicant contrasted the right of appeal under article 104(1) *to* the Court of Appeal against "final decisions of the Supreme Court" with the right of appeal under article 104(2) *from* "any decision given by the Court of Appeal in any such case." That wording, he argued, was wide enough to cover any decision whether final or interlocutory. Their Lordships reject that literal interpretation. It would be unworkable since it would involve an appeal as of right, for example, on a decision to adjourn the proceedings for further inquiries to be made. In their Lordships' view article 104(2) contemplates a decision determining a constitutional motion.

On behalf of the Attorney-General it was submitted that there is no right of appeal since the decision of the Court of Appeal was interlocutory in character. Counsel said that it makes no relevant difference that the consequence of the refusal of a stay may be the execution of the applicant. Counsel argued that the focus must be on the technical character of the order made. And no formal order had been made dismissing the constitutional motion. This is too formalistic an approach to the interpretation of the provisions of article 104(2). It is well settled that constitutional provisions must be generously construed. And it is clear that both the judge and the Court of Appeal ruled that the constitutional motion was doomed to fail. At both levels it was decided that there was nothing to try on the constitutional motion. Both courts treated the constitutional motion as if it were struck out. In substance and effect the constitutional motion was determined adversely to the applicant.

It follows that there is an appeal as of right. If the applicant were not a poor person he would require no special leave. He is, however, a poor person and accordingly seeks special leave to appeal as such.

Having decided to grant special leave to the applicant their Lordships propose to say nothing about the merits or demerits of the appeal. On the other hand, for the avoidance of doubt their Lordships make it clear that even in a case where an appeal lies as of right their Lordships consider that it would be inappropriate to grant special leave to appeal as a poor person if it is plain beyond rational argument that the appeal is doomed to fail.

Solicitors: Burton Copeland; Charles Russell.

C. T. B.

U.N. Covenant on Civil and Political Rights

CCPR Commentary

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N. P. Engel, Publisher · Kehl · Strasbourg · Arlington

I. In General

1 The adoption of an individual right to trial in court and detailed minimum guarantees of the accused in criminal proceedings is based on the *Anglo-Saxon common law* tradition of "*due process of law*", which can be traced to the Magna Charta Libertatum of 1215.[1] Arts. 10 and 11 of the UDHR contain only a general right to an equal, fair and public hearing before an independent, impartial tribunal,[2] as well as the principles of presumption of innocence and "*nulla poena sine lege*". As early as 1948-1949, however, the HRComm began work on a detailed catalogue of minimum procedural guarantees,[3] which formed the basis for the HRComm draft of Art. 14 formulated in 1954[4] and for the largely equivalent provisions in Art. 6 of the ECHR[5] and Art. 8 of the ACHR.[6] During the drafting of Art. 14, a fundamental role was played by the US,[7] in whose constitutional history central importance has been placed on substantive and procedural "due process of law".[8] The emphasis on the principle of equality at the beginning of Art. 14(1) is above all due to a Soviet initiative, which, after initial defeat in the HRComm in 1949, was ultimately adopted in 1952 by the narrow

1 *Cf.* Noor Muhammad, *Due Process of Law for Persons Accused of Crime*, in Henkin 138 ff.; van Dijk, *The Right of the Accused to a Fair Trial under International Law*, SIM Special No. 1, 1 f. (1983) (Utrecht); Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 1967 ICLQ 352 ff.

2 Art. 10 of the UDHR has often been criticized in the literature as too indefinite. *Cf.*, *e.g.*, Lillich, in Meron at 140, with further references.

3 E/800, 22 (Art. 13); E/1371, 32 f. (Art. 13). For the historical background to Art. 14, *cf.* especially A/2929, 42 ff.; A/4299, §§ 34 ff.; Bossuyt 278 ff.

4 *See* A/2929, 42; E/2573, 67.

5 *See* Frowein & Peukert 107 f., with further references.

6 Art. 7 of the ACHPR is, on the contrary, much less detailed.

7 *Cf.*, *e.g.*, the drafts in E/CN.4/21, Annex C (Arts. 9, 10); E/CN.4/37 (Art. 10); E/CN.4/170; E/CN.4/365; E/CN.4/426. *Cf. also* the references in Bossuyt 278 ff.

8 *Cf.* the 5th and 14th Amendments to the US Constitution of 1791 and 1868. "Substantive due process" is roughly comparable to the Continental European principles of legality and the binding force of basic rights on the legislative, executive and judicial branches of Government; "procedural due process", on the other hand, first gained acceptance in the national basic rights thinking of most Western European States by way of Art. 6 of the ECHR. This helps explain the predominant importance played by Arts. 5 and 6 of the ECHR in the application of the ECHR in such States as Austria, the Federal Republic of Germany, Switzerland, France, Belgium or the Netherlands. *Cf.*, *e.g.*, the contributions by Ermacora, Kopetzki, Nowak and Hock, in Ermacora, Nowak & Tretter, at 51, 207, 301, 315 and 329; van Dijk, *Domestic Status of Human Rights Treaties and the Attitude of the Judiciary: The Dutch Case*, in Progress in the Spirit of Human Rights (Festschrift for F. Ermacora) 631 (ed. by Nowak, Steurer & Tretter 1988) (Kehl/Strasbourg/Arlington)

majority of 8:6, with 2 abstentions.[9] The attempt by socialist States to set down the principle of democracy as a fundamental tenet of judicial proceedings was, however, rejected by a clear majority.[10]

The wording and historical background of Art. 14 thus demonstrate that agreement was reached in a universal human rights treaty on a provision based on *liberal principles of separation of powers and independence of the judiciary* vis-à-vis the executive. Although their legal systems were founded on unity of powers, and democratic legitimation was more important than judicial independence, none of the Socialist States submitted reservations to Art. 14. Instead, most *reservations* stemmed from Western States. For instance, Austria exempted deprivation of liberty in administrative and financial penal proceedings from the application of this provision.[11] France exempted the disciplinary régime in the armies, Denmark, the principle of public hearing and the right to an appeal, the Netherlands, the right of the accused to be tried in his presence, Norway, the right to an appeal and, as with Sweden, the principle of "ne bis in idem", etc.[12]

These far-reaching reservations reveal the *problematique of detailed procedural guarantees* in international human rights treaties. Even in the area of the Council of Europe, substantial problems were raised by the imposition of Anglo-American principles of due process on Continental legal systems in connection with the autonomous interpretation of such vague terms as "civil rights and obligations", "criminal charge", "tribunal" or "fair trial".[13] When dealing with universal treaties, there is greater danger that national legal systems and their practical application may be inconsistent with the international obligations of these States.[14] By nature, procedural guarantees are not directed at requiring States Parties to refrain from doing something but rather obligate them to undertake extensive

9 *See* E/CN.4/253; E/CN.4/L.124; E/CN.4/SR.109, 11; E/CN.4/SR.323, 13. Decisive for adoption was that all Third World States (with the exception of China) voted in favour of the motion and that France and Greece abstained.

10 *See* E/CN.4/253 (3d sentence); E/CN.4/L.124 (3d sentence); E/CN.4/SR.109, 12; E/CN.4/SR.323, 14; A/2929, 42 (§ 76). *Cf. also* Bossuyt 282.

11 CCPR/C/2/Rev.3, *reproduced in* the Appendix, *infra* p. 750. For the analogous problematic of the Austrian reservation to Art. 5 of the ECHR, *cf.* Kopetzki, *Artikel 5 und 6 MRK (VfGH)*, in Ermacora, Nowak & Tretter 207, 272 ff.

12 For the texts of these reservations, *cf.* CCPR/C/2/Rev.3, *reproduced in* the Appendix, *infra* pp. 754, 753, 764, 765, 766.

13 This observation is in no way to be implied as criticism of the case law of the Strasbourg organs, which have successfully sought to take account of the significance of Art. 6 of the ECHR in their interpretation of this provision. *But see* Matscher, *Die Verfahrensgarantien der EMRK in Zivilrechtssachen*, 1980 ÖZÖR 8.

14 *Cf.*, *e.g.*, the criticism by Tomuschat, 1985 ZaöRV 564. *See also* the criticism voiced in 1959 by the Indian delegate Mehta in the 3d Committee of the GA, A/C.3/SR.962, § 7.

positive measures to ensure these guarantees. The subjective claim to trial in court in Art. 14(1) obligates States Parties to set up independent, impartial courts and to give them such an institutional and financial structure that they are able to conduct a fair trial in all types of civil and criminal matters and to accord all accused persons the minimum rights guaranteed in Art. 14(2)-(7). Many of these claims (e.g., to be tried without undue delay, to free legal assistance and interpreters, to compensation, etc.) call for a highly developed legal system, which poor States are not always able to offer to the necessary extent.

4 These observations are designed to point out the underlying problematique and in no way to detract from the overriding importance of Art. 14 for the entire area of domestic human rights protection, or even to call into question the direct applicability of this provision. On the contrary, inherent in these procedural guarantees is a far-reaching potential for a step-by-step adaptation of the differing national legal systems to a common minimum standard of the "rule of law" in civil and criminal trials.[15] The various rights shall be described systematically by reference to their historical backgrounds, the case law of the Committee and, as far as necessary, Strasbourg case law on Art. 6 of the ECHR. Resort to this latter source appears justified in light of the great similarity of the two provisions and their common historical background.[16] In view of the extensive literature on Art. 6 of the ECHR, however, the references to Strasbourg holdings are limited to a few standard works.

II. Equality Before the Courts

5 The right to equality before the courts in the first sentence of Art. 14(1) is a specific statement of the general doctrine of equality (Art. 26), which is not found in any other general human rights treaty. In specialized conventions to eliminate discrimination against certain groups of persons, the right to equal treatment before the courts without distinction as to race, colour, national origin, heritage or sex is expressly emphasized.[17] Equality before the courts was adopted by the HRComm at the initiative of the Soviet Union with the support of other socialist and Third World States in opposition to Western States.[18] A British and Argentinian motion in the 3d Committee of

15 *See, e.g.*, in this sense, the comments made in 1959 by the Yugoslavian delegate Karapandza in the 3d Committee of the GA, A/C.3/SR.962, § 23.

16 *See also, e.g.*, in this sense, Noor Muhammad, *supra* note 1, at 145 ff.; van Dijk, *supra* note 1, at 1 f.

17 *See, e.g.*, Art. 5(a) of the CERD; Art. 15(2) of the CEDAW.

18 *Cf. supra* note 9.

the GA to strike the first sentence of Art. 14(1) was finally withdrawn after long debate.[19] Its proponents stressed that all arbitrary distinctions, particularly on the basis of race and wealth, had to be prohibited, whereas the opponents argued that equality before the courts was covered by the general right to equality before the law (Art. 26) and the right to recognition as a person before the law (Art. 16).[20]

It is clear from the discussions in the 3d Committee of the GA that the 6
majority of the delegates viewed equality before the courts as an important, general principle of the "rule of law", which is further implemented by way of the specific provisions regarding a fair hearing before an impartial tribunal, as well as by the minimum guarantees to which every person accused of a criminal offense is entitled "in full equality" ("en pleine égalité") under Art. 14(3). The right to equality before the courts goes beyond equality before the law, referring to the specific application of laws by the judiciary.[21] It is to be read in conjunction with the general prohibition of discrimination under Art. 2(1). This means that all persons must be granted, without distinction as to race, religion, sex, property, etc., a right of *equal access to a court*.[22] Establishing separate courts for the groups of persons listed in Art. 2(1) thus violates Art. 14.[23] In addition, discriminatory practice by the courts, particularly on the basis of the distinctional criteria set forth in Art. 2(1), may also lead to a violation of Art. 14. In *Ato del Avellanal v. Peru*, the Committee found an instance of sex discrimination and a violation of the right to equality before the courts where Art. 168 of the Peruvian Civil Code entitled only the husband to represent matrimonial property before the courts.[24] On the other hand, the fact that the plaintiff and the respondent in civil matters or the prosecutor and the accused in criminal cases have different rights does not violate this provision, so long as this does not

19 A/C.3/L.792, L.805/Rev.2; A/C.3/SR.966, §§ 13-14. *Cf.* BOSSUYT 283.

20 A/2929, 42 (§ 75); A/C.3/SR.961, §§ 1, 4. In the only case in which the Committee has found a violation of the right to equality before the courts, it also noted a violation of Arts. 3 and 26, No. 202/1986. *See infra* para. 6.

21 *Cf., e.g.*, the remarks by the Italian delegate Colucci and the Romanian delegate Dumitru, in A/C.3/SR.962, § 10, SR.964, § 6, or the Pakistani delegate Ahmed, in A/C.3/SR.962, § 10, SR.964, § 6, SR.966, § 21.

22 The Committee emphasized the right of equal access to courts in its GenC 13/21, § 3, *reproduced in* the Appendix, *infra* p. 858.

23 *Cf., e.g.*, in this sense, the comments of the Ukrainian delegate Nedbaiio and the Soviet delegate Morozov, in A/C.3/SR.961, § 22, SR.965, § 15.

24 No. 202/1986, §§ 2.1, 10.1, 11. The communication by a Yugoslavian national who felt systematically discriminated against by the Canadian civil courts was, however, declared inadmissible as manifestly unfounded, No. 17/1977. In a case against the Netherlands, No. 273/1989, § 6.4, the Committee observed that Art. 14 guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal.

contravene the principle of "equality of arms";[25] similarly, diplomatic privilege or parliamentary immunity is not affected.[26]

7 The prohibition of separate courts for various races, sexes, religious societies, etc. raises the question of the *admissibility of special courts* for certain groups of persons, in particular, *military courts*. Since in most States the latter are empowered to decide on military offences by soldiers, and since Art. 2(1) does not expressly disapprove of the distinction between civil and military persons, the existence of military courts does not violate Art. 14 when the other guarantees under this provision are observed. More difficult to answer is whether military courts may decide on charges against civilians. The Committee has dealt with this issue in a large number of communications against Uruguay,[27] as well as in its General Comment on Art. 14.[28] It concluded that this could be justified only in very exceptional cases under conditions which genuinely afford the full guarantees of a fair trial. In many of these cases, it found a violation of Art. 14.[29] The general assertion that military tribunals may not rule on matters concerning civil persons was not, however, shared by the Committee.[30]

8 The first sentence of Art. 14(1) refers to *equality before the courts and tribunals* ("égaux devant les tribunaux et les cours de justice", "iguales ante los tribunales y cortes de justicia"). A systematic interpretation of the various sentences in Art. 14(1)[31] leads to the result that the word "*court*" aims at the qualification of an authority in the domestic legal system, whereas the word "*tribunal*" contains substantive requirements, particularly independence and impartiality, that call for an autonomous interpretation independent of national legal terms.[32] The two terms normally coincide,[33] but national legal systems may provide administrative authorities with the

25 *See infra* para. 20.

26 *Cf., e.g.*, the comments by the Argentinian delegate Ruda, in A/C.3/SR.966, § 14, and by the Indian delegate Mehta, *id.* at § 29.

27 Nos. 4, 5, 6, 8, 10/1977; Nos. 28, 32, 33/1978; Nos. 43, 44, 52, 56, 63, 66/1979; Nos. 70, 73, 74, 80, 83/1980; Nos. 84, 92, 103, 105, 110/1981; No. 123/1982; Nos. 139, 159, 162/1983.

28 GenC 13/21, § 4, *reproduced in* the Appendix, *infra* p. 858.

29 *See infra* the references in paras. 20, 27, 32, 37, 41, 43, 45, 51, 52 and 60.

30 *Fals Borda, et al. v. Colombia*, No. 46/1979, § 13.3. § 5 of the "Basic Principles on the Independence of the Judiciary", *infra* note 49, provides for a right to a hearing before *ordinary* courts.

31 In the second sentence, reference is made only to a "tribunal" ("un tribunal"). The situation becomes somewhat confusing in the third sentence, where the French and Spanish version use the term "tribunal" but the English text refers to "court" (*cf. also* CE Doc. H(70)7, 36). Despite this disagreement, it may be assumed that the two terms are not synonymous. Otherwise, the first sentence would be a tautology.

32 *Cf. infra* paras. 15-18.

33 *See also* the comments by the Peruvian delegate Cox, in A/C.3/SR.962, § 21.

guarantees of a tribunal or set up courts in the formal sense that do not offer these guarantees. In the latter case as well, the principle of equality is to be respected.

III. Right to a Fair and Public Hearing (para. 1)

1. Introduction

The right to a fair and public hearing before a tribunal in all suits at law and criminal matters pursuant to Art. 14(1) is the core of "due process of law". All the remaining provisions in Art. 14(2) to (7) and Art. 15 are specific formulations of the "fair trial" in criminal cases. Art. 14(1) contains an *institutional guarantee* that obligates the States Parties to take extensive, positive measures to ensure this guarantee. They must *set up* by law independent, impartial *tribunals* and provide them with the competence to hear and decide on *criminal charges* and on *rights and obligations in suits at law*. Such hearings must be *fair* and *public* and, insofar as a criminal charge is involved, comport with the other provisions in Arts. 14 and 15. Finally, all decisions in criminal and civil matters must be pronounced publicly. Many of the terms listed in Art. 14(1) are in need of interpretation.

2. Rights and Obligations in Suits at Law

All persons have a claim that their "rights and obligations in a suit at law" ("des contestations sur ses droits et obligations de caractère civil") be heard by a tribunal. Whether a claim is one of private or public law cannot be dependent on the formal classification under national law, since this would deprive Art. 14 of its substantive meaning. This term must thus be interpreted autonomously in accordance with its ordinary meaning in light of its object and purpose (Art. 31(1) of the VCLT). The purpose of this provision is apparently to add a substantive obligation to the organizational *separation between the judiciary and the administration*, which can be paraphrased with the distinction known since Roman law between *private law and public law*.[34] Since the various theories to delineate the two legal

34 The position is sometimes taken in the literature that the terms "civil rights and obligations" (Art. 6 of the ECHR) and "suit at law" (Art. 14 of the Covenant) refer not only to private law claims but also to all subjective rights of the individual in the area of individual liberty. *Cf.* VAN DIJK, *The interpretation of "civil rights and obligations" by the European Court of Human Rights – one more step to take*, in →

spheres (interest theory, subordination theory, subjection theory, etc.) offer only general guidelines, it is ultimately the task of the competent organs to make a decision in a given case. It is thus not surprising that the Strasbourg institutions and national courts have developed rich, controversial case law on this issue.[35] Because the French wording of Art. 14(1) and that of Art. 6(1) of the ECHR are equivalent in this regard,[36] it seems justified to describe in brief the most important results of this case law.[37]

11 In the view of the *Strasbourg organs*, Art. 6 of the ECHR is applicable when a dispute ("contestation") exists between the parties to a trial (this can also be an administrative trial), the outcome of which is directly decisive for the determination of civil rights and obligations. This sort of direct effect was accorded, for example, to real-estate approvals in the sale of agricultural property, to the prohibition of the continued operation of a private clinic or similar prohibitions on the exercise of a profession or economic activity, to restrictions on ownership, to the granting or revocation of certain licenses or to some social insurance claims.

12 The *Committee* as well tends to interpret broadly the term "suit at law" in Art. 14 of the Covenant. In *Y.L. v. Canada*, it dealt with the question of whether the claim by a former Army member for a disability pension was a suit at law. It noted a discrepancy between, on the one hand, the English and Russian versions and, on the other, the French and Spanish versions, stating:

"In the view of the Committee the concept of a 'suit at law' or its equivalent in the other language texts is based on the nature of the right in question

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Protecting Human Rights – The European Dimension (Studies in honour of Gerard J. Wiarda) 131, 133 ff., 143 (1988) (Cologne), with further references, particularly the dissenting opinion of the European Commission members Melchior and Frowein in the *Benthem* case. Despite certain indications in the historical background of these two provisions pointing in this direction, such an extensive interpretation is, however, opposed by the wording and purpose of this central provision of the rule of law, particularly in its systematic context with Art. 2(3) of the Covenant, i.e., Art. 13 of the ECHR. On the other hand, Graefrath 202, states that Art. 14 is generally unable to be applied to administrative hearings and by no means establishes a claim that certain civil law matters must be decided by a court. In my opinion, this interpretation robs Art. 14 of its fundamental essence.

35 *Cf.* Frowein & Peukert 110 ff.; van Dijk & van Hoof 295 ff.; Kopetzki, *supra* note 11, at 245 ff.; van Dijk, *supra* note 34, § 3 of the "Basic Principles on the Independence of the Judiciary", *infra* note 49, avoids a substantive definition of the competence of courts, stating instead that "[t]he judiciary shall have jurisdiction over all issues of a judicial nature . . .".

36 The English version of Art. 6 of the ECHR uses the words "civil rights and obligations".

37 The Committee of Experts of the Council of Europe likewise assumed that the two provisions had the same meaning. CE Doc. H(70)7, 37.

rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features."[38]

In the case at issue, it affirmed the application of Art. 14 but dismissed the communication since the Canadian legal system had provided an adequate remedy within the meaning of Art. 14 in the form of the possibility of appeal to the Federal Court of Appeal.[39] In an individual opinion by Committee members *Graefrath*, *Pocar* and *Tomuschat*, who reached the same result for different reasons, the position was taken that claims against a superior administrative authority in pension matters were not a suit at law pursuant to Art. 14, since the relationship between a soldier and the Crown differed in essence from a labour contract under Canadian law.

3. Criminal Charge

The term "criminal charge" ("accusation en matière pénale"), which corresponds literally with that in Art. 6 of the ECHR, also requires an autonomous interpretation. Otherwise, States Parties would be at liberty to avoid the application of Art. 14 by transferring the decision over a criminal offence, including imposition of punishment, to administrative authorities. However, the question of *which sanctions are to be qualified as punishment* is as difficult as the definition of a suit at law, such that the case law of the *Strasbourg organs* is equally extensive and controversial in this area.[40] Not only the nature and severity of the threatened sanction but also the type of sanctioned offence is to be drawn upon in evaluating whether a criminal

38 No. 112/1981, § 9.2. *See also* McGoldrick 414 f.

39 *Id.* at §§ 9.4, 9.5, 10. *Cf. also* the summary by Nowak, 1986 HRLJ 298. Incorrect is the rendition by de Zayas, Møller & Opsahl, 1985 GYBIL at 48. In *Muñoz Hermoza v. Peru*, No. 203/1986, the Committee apparently assumed that the claim to reinstatement in public service was of a civil law nature. *See infra* para. 21. In *Morae v. France*, No. 207/1986, § 9.3, the Committee considered a litigation under the French Bankruptcy Law as a suit at law (*cf. infra* para. 21 and the summary in Nowak 1990 HRLJ 151 f.), while in *van Meurs v. the Netherlands*, No. 215/1986, § 5.2 judicial proceedings aimed at dissolving a labour contract. *See infra* para. 24.

40 *Cf.* Frowein & Peukert 117 ff.; van Dijk & van Hoof 307 ff.; van Dijk, *supra* note 1, at 16 ff.; Kopetzki, *supra* note 11, at 271 f.

charge exists. When a sanction is not only of a preventive character (e.g., the imposition of protective custody or temporary loss of driver's license) but also of a retributive and/or deterrent character, and when it is directed at the general public (i.e., not only at a specific group of persons or professions), then it is qualified by the European Court of Human Rights as punishment, regardless of its severity (i.e., even, for instance, a fine for a traffic offence). On the other hand, the Court refused to qualify as punishment disciplinary measures against certain groups of persons or professions (soldiers, prisoners, members of free trades) that do not transcend a certain minimum of intensity (e.g., 5 days of imprisonment). Similarly, the expulsion or extradition of aliens or dismissal from the police department was not viewed as punishment. In spite of the dubiousness of some Strasbourg decisions,[41] the basic assumptions of this case law may be transferred to the Covenant. The practice of the Committee does not yet offer much guidance in this regard.[42]

14 The claim to a fair trial in court on a criminal "*charge*" ("accusation") does not arise only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned.[43] This is usually the first official notification of a specific accusation,[44] but in certain cases, this may also be as early as arrest. The rights guaranteed in Art. 14 are applicable until termination of the criminal proceedings, regardless of whether by conviction, acquittal or discontinuance of the proceedings. These rights are also applicable to proceedings at the second instance.

4. Hearing before a Tribunal

15 The primary *institutional guarantee* of Art. 14 is that rights and obligations in civil suits or criminal charges are not to be heard and decided by political institutions or by administrative authorities subject to directives; rather, this is to be accomplished by a *competent, independent and impartial tribunal established by law*. Normally, the term "tribunal" corresponds to that of national civil and criminal courts, although a tribunal denotes a substantively determined institution that may deviate from the formally

41 *Cf.*, *e.g.*, the criticism by van Dijk, *supra* note 1, at 191; Frowein & Peukert 122 f.
42 van Dijk, *supra* note 1, at 21, points out that Art. 14 has been applied to minor criminal offences in the State reporting procedure. However, this had nothing to do with a general practice by the Committee but rather with the view of several members. *See also* McGoldrick 397.
43 *Cf.* Noor Muhammad, *supra* note 1, at 145 f.
44 Frowein & Peukert 121.

(and nationally) defined term "court". On the one hand, it is not enough for the national legislature to designate an authority as a court if this does not correspond to Art. 14(1)'s requirements of independence and impartiality. On the other hand, administrative authorities that are largely independent and free of directives may, under certain circumstances, satisfy the requirements of a tribunal pursuant to Art. 14.

Tribunals must be *competent* ("compétent") and *established by law* ("établi par la loi"). Although the former criterion does not appear in Art. 6(1) of the ECHR,[45] it merely represents a more specific formulation of establishment by law.[46] Both conditions are to ensure that the jurisdictional power of a tribunal is determined generally and independent of the given case, i.e., not arbitrarily by a specific administrative act. The term "*law*" is, as in other provisions in the Covenant, to be understood in the strict sense of a general-abstract parliamentary law or an equivalent, unwritten norm of common law, which must be accessible to all persons subject to it.[47] A law of this sort must establish the tribunals and define the subject matter and territorial scope of their jurisdiction.[48] 16

In addition, tribunals must be *independent* ("indépendant"). The requirement of independence relates primarily to the executive but also to a lesser extent to the legislative branch of the State. Judges or other members of a tribunal need not necessarily be appointed for life or be unimpeachable, but they must be appointed or elected for a longer period of time (at least several years) and may not be subject to directives or in some other manner dependent on other State organs in the exercise of their office.[49] In particular, this independence is not always assured with military courts, revolutionary tribunals and similar special courts.[50] However, the criterion of independence goes beyond mere separation of State powers and is to ensure that tribunals are not overly influenced by powerful social groups.[51] In certain cases, this may also lead to a duty on States Parties to 17

45 This is attributable to a Yugoslavian motion in the HRComm, E/CN.4/575.
46 CE Doc. H(70)7, 37.
47 *See supra* Art. 12, paras. 25-27.
48 *Cf.* A/2929, 42 (§ 77); A/4299, § 52; Noor Muhammad, *supra* note 1, at 147; van Dijk, *supra* note 1, at 40.
49 For the comparable case law on Art. 6 of the ECHR *cf.* Kopetzki, *supra* note 11, at 261 ff. For the independence of the courts, *see also* the "Basic Principles on the Independence of the Judiciary", adopted in Milan in 1985 by the 7th UN Congress on Crime Prevention and reinforced by the GA in Res. 40/146 and 41/149; *see* ICJ-Review No. 37/1986, 62.
50 *Cf.* the references to the State reporting procedure by the Committee, in van Dijk, *supra* note 1, at 37; McGoldrick 399 ff.
51 *Cf.*, in this sense, the comments by the French delegate Boucquey, in A/C.3/SR.964, § 17. *Support*: Noor Muhammad, *supra* note 1, at 147.

undertake positive measures to ensure this guarantee against excessive influence by the media, industry, political parties, etc.

18 The latter example demonstrates a further definitional feature of a tribunal: it must be *impartial*. Whereas independence relates to the appointment and impeachment of judges and other members of a tribunal, impartiality aims at the specific holding in a given case. A judge is, e.g., not impartial when he is biased, i.e., when he has a personal interest in the case before him. Moreover, a judge may not allow himself to be excessively guided by emotions and political motives or to be influenced by "media justice". Impartiality is also closely related to the guarantee of a fair trial and with equality before the courts pursuant to the first sentence of Art. 14(1).[52]

5. The Principle of a "Fair Trial"

19 Art. 14(1) guarantees a right to a *fair hearing* ("sa cause soit entendue équitablement") by a tribunal. This principle is at the center of the civil and criminal procedural guarantee and, with respect to criminal jurisdiction, is specified by a number of concrete rights in Arts. 14 and 15. The right to a fair trial is, however, broader than the sum of these individual guarantees. This follows from Art. 14(3), which expressly refers only to the accused's "*minimum guarantees*" ("au moins aux garanties suivantes"). Thus, although a criminal trial may fulfil all the requirements of Art. 14(2) to (7) and Art. 15, it may nevertheless conflict with the precept of fairness in Art. 14(1).

20 The most important criterion of a fair trial is the *principle of "equality of arms"* between the plaintiff and respondent or the prosecutor and defendant (*"audiatur et altera pars"*). For instance, this principle is violated if the accused is excluded from an appellate hearing when the prosecutor is present or if a court expert takes such a dominating position that he is in effect a witness for the prosecution.[53] In addition, procedural rights, such as inspection of records or submission of evidence, must be dealt with in a manner equal for both parties. With respect to a number of arbitrary trials before military tribunals in Uruguay, the Committee found a violation of the right to a fair hearing pursuant to Art. 14(1), in addition to specific violations

52 For the issue of impartiality, *cf.* the violations of Art. 14(1) found in *Gonzáles del Rio v. Peru*, No. 263/1987, § 5.2 and *Karttunen v. Finland*, No. 387/1989, §§ 7.1-8; van Dijk, *supra* note 1, at 37 ff.; A/C.3/SR.964, § 6, SR.966, § 21. *See also* the individual opinion of Chanet, Herndl, Aguilar, Urbina and Wennergren in *Collins v. Jamaica*, No. 240/1987.

53 For these and similar cases under Strasbourg case law, *cf.* Frowein & Peukert 138 ff., van Dijk § van Hoof 318 ff.; van Dijk, *supra* note 1, at 23 ff., Noor Muhammad, *supra* note 1, at 146 f. The Committee stressed the principle of "equality of arms", e.g., in No. 207/1986, § 9.3, and No. 219/1986, § 10.2.

of the rights in Art. 14(3).[54] In a case involving a group of eight former members of Parliament in Zaire arrested on account of their criticism of President *Mobuto* and sentenced to lengthy prison terms in the absence of procedural guarantees, a general violation of the right to a fair hearing pursuant to Art. 14(1) was ascertained.[55]

The principle of a fair trial including "equality of arms" equally applies to **21** *suits at law*. In *Morael v. France*, a case concerning proceedings under the French Bankruptcy Law, the Committee interpreted the concept of a fair hearing "as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*, and expeditious procedure".[56] Whereas the Committee held the French proceedings to be in conformity with these conditions, it found a violation of the last mentioned one, i.e., that *justice be rendered without undue delay*, in *Munoz Hermoza v. Peru*. This communication had been submitted by an ex-sergeant of the Guardia Civil (police) who had been dismissed from service for allegedly insulting a superior. Following discontinuance of the criminal proceedings against him, he unsuccessfully fought for his reinstatement for ten years before various administrative and judicial authorities. The Committee held that administrative proceedings lasting seven years constituted unreasonable delay and thus a violation of the right to a fair hearing under Art. 14(1).[57]

6. Requirement of Publicity

a) In General

As held by the European Court of Human Rights in a number of decisions **2.** on Art. 6 of the ECHR, the requirement of publicity, which serves to make the administration of justice transparent, is an essential element of the right

54 Nos. 5, 8, 10/1977; No. 28/1978; No. 44/1979; No. 70/1980; Nos. 139, 159/1983. *Cf. also* the individual opinion by Cooray, Dimitrijević and Lallah, in No. 203/1986, § 3.

55 No. 138/1983. *Cf. also* the case of the German citizen *Wolf v. Panama*, No. 289/1988, § 6.6, in which minimum standards of a fair trial, such as equality of arms and the principle of adversary proceedings, had been violated. *See also* the *Jamaican death penalty* cases *supra* Art. 6, para. 28, *Gonzáles del Rio v. Peru*, No. 263/1987, § 5.2 and *Karttunen v. Finland*, No. 387/1989, §§ 7.1-8.

56 No. 207/1986, § 9.3. *Cf. also* No. 289/1988, § 6.6.

57 No. 203/1986, §§ 11.3, 12. The Committee apparently assumed that these administrative proceedings involved a claim of a civil law nature. *Cf. supra* para. 12 & note 39. In *Bolanos v. Ecuador*, No. 238/1987, § 8.4, concerning criminal proceedings, the Committee reiterated that "the concept of a fair hearing necessarily entails that justice be rendered without undue delay", and consequently found violations of Art. 14(1) and 15(1).

to a fair trial, particularly in democratic societies.[58] During the drafting of Art. 14 in the 3d Committee of the GA, the French delegate *Bouquin* summarized the purpose of this principle (in contrast to formerly common secret justice) in the pregnant phrase "justice must not be secret".[59] In addition to the purpose of democratic control by the people, also inherent in the procedural requirement of publicity is the rational idea of better finding the truth. As Art. 6(1) of the ECHR, Art. 14(1) distinguishes between the *dynamic publicity* of the proceedings of judicial organs in the formal-procedural sense – i.e., the manner in which a court decision is arrived at – and the *static publicity* of the judgment as a means to supervise the proceedings once completed.[60] Whereas the public may be excluded from the proceedings for a number of reasons, the precept of publicity of the decision applies nearly without restriction. This stronger protection for static publicity (applicable in Art. 6(1) of the ECHR without exception) is attributable to a US initiative in the HRComm.[61] In the 3d Committee of the GA, Israel unsuccessfully attempted to have this distinction deleted.[62]

b) Publicity of the Proceedings

23 The second sentence of Art. 14(1) guarantees a subjective right of the parties in civil and criminal trials to a fair and *public hearing* ("sa cause soit entendue ... publiquement") before a tribunal. The third sentence, however, restricts this right with a number of exceptions. The specific formulation can be traced to a Philippine motion in the HRComm from 1949,[63] which was extensively discussed and repeatedly amended in both the HRComm and in the 3d Committee of the GA.[64] In 1950 a US proposal, which came quite close to the final text but stressed the interests of juveniles, was adopted by a clear majority.[65] The general ground for exclusion in "the interest of the private lives of the parties" and the words "in a democratic society" are attributable to a French initiative.[66] In the 3d Committee of the

58 *Cf.*, in particular, the *Axen*, *Pretto* and *Sutter* cases. *Cf. also generally* Nowak & Schwaighofer, *Das Recht auf öffentliche Urteilsverkündung in Österreich*, 1985 EuGRZ 725; Frowein & Peukert 148; van Dijk & van Hoof 325 ff.; Cremona, *The Public Character of Trial and Judgment in the Jurisprudence of the European Court of Human Rights*, in Protecting Human Rights, *supra* note 34, at 107. *See also* GenC 13/21, § 6, *reproduced in* the Appendix *infra* p. 858 f.

59 A/C.3/SR.964, § 15.

60 *Cf.* Nowak & Schwaighofer, *supra* note 58, at 728, with further references.

61 E/CN.4/426; E/CN.4/SR.156, § 25.

62 A/C.3/L.795/Rev. 3; A/C.3/SR.961, § 11; SR.967, § 3.

63 E/CN.4/232.

64 *See* Bossuyt 284 ff.

65 E/CN.4/426; E/CN.4/SR.156, § 25.

66 E/CN.4/L.152/Rev. 2; L.154/Rev. 2; E/CN.4/SR.323, 14.

GA, only the parenthetical term "*ordre public*" was inserted in conformity with Art. 12(3).[67] With reference to the practice common in Latin America of conducting written trials, Argentina sought to strike the principle of a public hearing and to replace this with the publication of written documents, but this did not succeed.[68] The Latin American practice was, however, taken into account in Art. 8(5) of the ACHR, which made the requirement of publicity subject only to criminal proceedings, "except insofar as may be necessary to protect the interests of justice". Art. 7 of the ACHPR does not provide for any publicity duty whatsoever.

The right to a public hearing thus means that all trials in civil and criminal matters must in principle be conducted *orally and publicly*.[69] In *van Meurs v. the Netherlands*, the Committee stressed that this is "a duty upon the State that is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish". This includes the duty to "make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made".[70] The principle of a public hearing is thus not only a right of the parties to the proceedings which could be waived by them, but also *a right of the public in a democratic society*. It applies, however, not to all stages of a trial but only to *hearings*, i.e., to the submissions of the opposing parties in a specific matter. Parts of a trial that do not have to do with the determination of the facts, such as appellate proceedings limited to a question of law, thus need not be either oral or public. The general observation of the Committee in *R.M. v. Finland* "that the absence of oral hearings in the appellate proceedings (i.e., in a criminal case before the Court of Appeal) raises no issue under article 14 of the Covenant" seems, however, not to be in accordance with the wording of this provision. If appellate proceedings are of a nature that they determine a criminal charge

67 A/4299, § 55.

68 *See* A/C.3/L.805/Rev.1 to Rev.3; A/4299, § 53; A/C.3/SR.961, §§ 6, 11, 18, 19; A/C.3/SR.963, § 5.

69 It was essentially uncontested in the 3d Committee of the GA that the term "public hearing" required an oral hearing. *See* A/4299, § 53. *See also* the response by the Argentinian delegate Ruda to a corresponding inquiry by his colleague from the Dominican Republic in A/C.3/SR.961, §§ 18, 19. The contrary opinion can be seen in the comments by the Israeli delegate Baror, in *id.* at § 11.

70 No. 215/1986, §§ 6.1, 6.2.

or rights and obligations in a suit at law, the right to a public hearing must be provided."[71]

25 However, the *public*, including the press, can be *excluded* from all or parts of a trial[72] for a variety of reasons, some of which are also found in other limitation clauses of the Covenant.[73] Exclusion of the public in a given case follows by order of the tribunal concerned, but this requires – even though not expressly stated in Art. 14 – a legal basis in the respective rules of procedure. The public can be excluded for reasons of *morals* in, e.g., a hearing regarding a sexual offence. *Public order* (ordre public) relates primarily to order within the courtroom, and *national security*, to the secrecy of important military facts (e.g., in espionage trials).[74] The last two reasons may, however, only lead to exclusion of the public so long as the principles of a *democratic society* are observed.[75]

26 Furthermore, the public may be excluded when this is necessary in *the interest of the private lives of the parties* ("l'intérêt de la vie privée des parties"). This passage was inserted by the HRComm in 1952 at the initiative of France instead of the protection of the interests of juveniles proposed in the US draft.[76] Particularly conceivable here are family matters, sexual offences or other cases in which publicity might violate the private and familial sphere of the parties or of the victim.[77] Finally, the public may also

71 No. 301/1988, § 6.4. *But see* the correct view of the Committee in *Kartunen v. Finland*, No. 387/1989, § 7.3. For the distinction between trial and hearing, *cf.* Nowak & Schwaighofer, *supra* note 59, at 727 f. *But cf.* the rather broad interpretation in the case-law of the Strasbourg organs in Frowein & Peukert 148; van Dijk, *supra* note 1, at 30 f.

72 In the 3d sentence of Art. 14(1), reference is no longer made to the publicity of the "hearing" but rather to the "trial", which is inconsistent.

73 *See*, in particular, Arts. 12(3), 13, 18(3), 19(3), 21 and 22(2). *Cf. generally supra* Art. 12, paras. 34-44, with further references.

74 *Cf.* Frowein & Peukert 149; van Dijk, *supra* note 1, at 32.

75 The restriction "in a democratic society", inserted by the HRComm in 1952 at the initiative of France following the model of Art. 6(1) of the ECHR, received a narrow majority of 9:7, with 1 abstention, E/CN.4/L.154/Rev.2; E/CN.4/SR.323, 14. In the 3d Committee of the GA, it was criticized, *inter alia*, by the Indian representative, A/C.3/SR.962, § 7. Thereafter, the French representative noted that these words represented an indispensable restriction on the relatively vague authority to interfere for reasons of public order or national security, A/C.3/SR.964, § 20; A/4299, § 55. From a purely grammatical standpoint, the meaning of these words is somewhat unclear on account of the unusual sentence structure and the absence of a reference to the necessity of the restriction analogous to that in Arts. 21 and 22(2). *Cf. also* A/C.3/SR.966, § 30.

76 *See* E/CN.4/L.152/Rev.2; E/CN.4/SR.323, 14. In Art. 6(1) of the ECHR, both reasons for exclusion can be found alongside one another.

77 The victim of crime may be included among the parties to a trial, but not, however, "other innocent persons", as suggested by Noor Muhammad, *supra* note 1, at 149. For the interpretation of this provision, *cf. also* A/2929, 43 (§ 81).

be excluded in the *interests of justice* ("intérêts de la justice"). However, this authority is valid only "in special circumstances" ("des circonstances particulières") and only "to the extent strictly necessary in the opinion of the court" ("dans la mesure où le tribunal l'estimera absolument nécessaire"). Such exclusion of the public is thus permissible only in highly extraordinary cases; for instance, when continuation of the trial is endangered by the emotional reactions of the spectators.[78]

In a number of *cases* in which the authors were sentenced to prison terms in secret, written trials before military tribunals in *Uruguay*, the Committee found a violation of the right to a public hearing.[79] In all of these typical cases of secret justice to suppress regime opponents, Uruguay's military Government did not even make an effort to justify the exclusion of the public for one of the reasons listed in Art. 14(1). The situation was similar in a communication involving the conviction of eight former members of Parliament in *Zaire* by the secret justice of the State security court.[80]

c) Public Pronouncement of the Judgment

Both the wording and the *historical background* of Art. 14(1) reveal that static publicity is more strongly protected in this provision than dynamic publicity of the trial. As early as in the *HRComm*, it was emphasized on a number of occasions that certain factors may justify the conducting of a secret hearing, but not, however, keeping the judgment secret.[81] In 1949 a draft by several States that was largely synonymous with the second sentence of Art. 6(1) of the ECHR ("Judgement shall ...") was adopted without dissent; prior to this, a reference – not contained in Art. 6 of the ECHR – that the trial includes the judgment was rejected by a vote of 6:3, with 6 abstentions.[82] In 1950 this provision was redrafted upon motion by the US, creating the possibility of an exception to public pronouncement of the judgment in the interest of juveniles.[83] At the initiative of France, the reference was (re)inserted that the requirement of publicity applies equally to civil and criminal trials.[84] A British motion to extend the exceptions to

78 *Cf.* Noor Muhammad, *supra* note 1, at 149.

79 No. 10/1977, Nos. 28, 32/1978; No. 44/1979; Nos. 70, 74, 80/1580; No. 159/1983; No. 139/1964. *Cf.* McGoldrick 418 f.

80 No. 138/1983.

81 *Cf.* A/2929, 42 (§ 78).

82 E/CN.4/286: "Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial (*including the judgement*), in the interest ...". *See* E/CN.4/SR.110, 5; Bossuyt 285.

83 E/CN.4/426; E/CN.4/SR.156, § 25.

84 E/CN.4/L.152/Rev.2; E/CN.4/SR.323, 15.

matrimonial disputes and proceedings regarding the guardianship of children was adopted by the HRComm by a vote of 11-4, with 3 abstentions.[85] In this context, it was pointed out that this sort of exclusion of the public served not merely the interests of juveniles and did not necessarily mean exclusion of the press.[86]

29 Although delegates from Israel and several Latin American States criticized farther-reaching protection for static publicity in the *3d Committee of the GA*, the majority adhered to this distinction.[87] Only Argentina was successful in replacing the phrase in the HRComm draft "any judgement ... shall be *pronounced publicly*" ("tout jugement ... doit être *rendu* publiquement")[88] with the mere "shall be *made* public" ("sera public").[89] This was to ensure that the principle of static publicity could be satisfied not only by an oral pronouncement of the judgment in a public session but also by publication of the written judgment.[90] Although this change was aimed at the Latin American practice of non-public trials, even the European Court of Human Rights today interprets the express requirement of public pronouncement in Art. 6(1) of the ECHR in this pragmatic sense.[91]

30 In the interest of the democratic precept of publicity, i.e., the control of the administration of justice by the people, the sole aspect of importance is that judgments be *publicly accessible* to everyone.[92] This may transpire either by oral pronouncement in a public session or by publication of the written judgment or by both methods. A violation of Art. 14(1) thus occurs when

85 E/CN.4/L.142; E/CN.4/SR.323 15.

86 *See* A/2929, 43 (§ 82). The latter interpretation by the British delegation is, however, not covered by the wording of this provision. There is nothing to indicate a privilege for the media.

87 *See* A/4299, § 54. *See also* the references in BOSSUYT 288 f.

88 *See* E/2573, 67.

89 A/C.3/L.805/Rev.1-3. According to the original Argentinian version, "every judgement shall be given due publicity"; subsequently it was to read "any judgement shall be public"; only in the end was the word "made" inserted, which was, however, not taken into consideration in the French text. The most authentic version in this case – the Spanish text ("todo sentencia ... será pública") – gives clear expression to the mere duty to publicize. For the historical background, *cf.*, in particular, A/C.3/SR.961, §§ 18, 19, SR.963, §§ 5, 28, SR.964, §§ 15, 21, SR.966, § 15, SR.967, § 24.

90 A/C.3/SR.963, § 5, SR.966, § 15.

91 *Cf.* Nowak & Schwaighofer, *supra* note 58, at 725 ff.; FROWEIN & PEUKERT 149; Cremona, *supra* note 58, at 111 f.

92 That is, not merely for the parties to the trial, as suggested by van Dijk, *supra* note 1, at 31. The Committee as well refers to a right of the society at large, GenC 13/21, § 6, *reproduced in* the Appendix, *infra* p. 858 f.

judgments are made accessible only to a certain group of persons[93] or when inspection of the judgment is made dependent on a specific interest.[94]

In contrast to Art. 6(1) of the ECHR, which sets up an absolute right in this respect, and Art. 8 of the ACHR, which does not contain any right to publication of the judgment, Art. 14(1) of the Covenant provides a list of individual *exceptions*. In particular, judgments need not be made public when this conflicts with the interest of juveniles, as in guardianship proceedings. In addition, divorce judgments or similar decisions in matrimonial disputes do not have to be made public. Finally, there is a certain logical relationship between static and dynamic publicity. If, for example, the public was excluded from the trial in the interest of the private lives of the parties, then there is a legitimate need in keeping certain parts of the judgment secret, which can be accomplished by making the judgment anonymous or by publishing an abbreviated version.[95] The right to publication of a judgment can be asserted by anyone, i.e., not merely by the parties,[96] and thus cannot be restricted by the parties by their dispensing with this right.[97]

In various cases dealing with secret military trials in Uruguay, the Committee found not only a violation of dynamic publicity but also a violation of the duty to publish the judgment.[98]

IV. Minimum Guarantees of the Accused in Criminal Trials

1. Presumption of Innocence (para. 2)

As with Art. 6(2) of the ECHR, Art. 8(2) of the ACHR or Art. 7(1)(b) of the ACHPR, Art. 14(2) of the Covenant contains the presumption of innocence, an essential principle of a fair trial. Whereas the HRComm sought to deal with this principle in conjunction with the other rights of the accused in a criminal trial,[99] the 3d Committee of the GA decided on the

93 For instance, decisions of the Austrian Supreme Court (insofar as these are not contained in the official publication) were only accessible to professors of law for academic purposes. *See* Nowak & Schwaighofer, *supra* note 58, at 730, 732. This provision was quashed by a decision of the Austrian Constitutional Court of 28 June 1990, G 315/89, G 67/90.

94 In this regard, the majority opinion of the ECtHR in the *Sutter* case, Series A 74 (1984), appears problematic.

95 *Cf.* Nowak & Schwaighofer, *supra* note 58, at 732.

96 *Id.* at 733.

97 For this issue, *cf.* van Dijk, *supra* note 1, at 30; VAN DIJK & VAN HOOF 325; Cremona, *supra* note 58, at 110 f.

98 Nos. 28, 32/1978, No. 44/1979.

99 *See* Art. 14(2) of the HRComm draft of 1954, in E/2573, 67.

basis of a British motion in 1959 to take into account the significance of the presumption of innocence in a separate paragraph.[100]

34 Art. 14(2) provides the *right to be presumed innocent*[101] to "everyone charged with a criminal offence" ("toute personne accusée d'une infraction pénale"). In accordance with general opinion, which is also confirmed by Strasbourg holdings, the presumption of innocence, as well as most of the other rights in Art. 14, are available not only to the defendant in the strictest sense of the word but also to an *accused* person prior to the filing of a criminal charge.[102] A person has this right "until proved guilty according to law" ("jusqu'à ce que sa culpabilité ait été légalement établie"), i.e., until a conviction becomes binding following the final appeal.

35 The greatest significance of the presumption of innocence, however, comes to light in the *criminal trial* itself. The prosecutor must prove the defendant's guilt; in cases of doubt, the accused must be found not guilty in accordance with the ancient principle *in dubio pro reo*. The way in which guilt is to be proved is ultimately a question of national law. Although a Philippine motion in the HRComm for insertion of the words "beyond reasonable doubt" was defeated by a vote of 8:2, with 3 abstentions,[103] it is still possible to draw here upon this generally recognized principle of law.[104] The judge or the jury thus may convict an accused only when there is no reasonable doubt of his or her guilt. Moreover, the judge must conduct the criminal trial without previously having formed an opinion on the guilt or innocence of the accused.

36 However, this duty applies not only to criminal judges. In its General Comment on Art. 14, the Committee stressed the *duty on all public authorities* to "refrain from prejudging the outcome of a trial".[105] In particular, ministers or other influential governmental officials may, in this respect, commit a violation of Art. 14(2).[106] In the case of excessive "media justice" or the danger of impermissible influencing of lay or professional judges by other powerful social groups, one also has to assume that the State is under a corresponding positive duty to ensure the presumption of innocence.[107]

100 A/C.3/L.792, A/C.3/SR.961, § 2, SR.967, § 29; A/4299, § 56.
101 The English wording of Art. 6(2) of the ECHR, as well as the French text of both provisions, states only that innocence shall be presumed.
102 *Cf.* Noor Muhammad, *supra* note 1, at 150; van Dijk, *supra* note 1, at 41 f.; Frowein & Peukert 164 ff.
103 E/CN.4/365; E/CN.4/SR.156, 6 ff.
104 *Cf.* Noor Muhammad, *supra* note 1, at 150.
105 GenC 13/21, § 7, *reproduced in* the Appendix, *infra* p. 859. *See also* McGoldrick 404 f.
106 *Cf.* the case law of the Strasbourg organs on Art. 6(2), in Frowein & Peukert 164 f.
107 *Id.* at 166.

A violation of the right to be presumed innocent is in practice extremely *difficult to prove*. This is especially confirmed by the fact that the *Committee*, which has dealt with a large number of apparently arbitrary and prejudicial criminal cases, expressly held Art. 14(2) to have been violated only in two communications against Uruguay.[108] 37

2. Right to be Informed of the Charge (para. 3(a))

The right of an accused to be informed of the nature and cause of the charge against him corresponds literally to Art. 6(3)(a) of the ECHR and was adopted by the GA without amendment to the HRComm draft. The formulation goes back to a Philippine draft in 1949.[109] The duty to inform relates to the *nature and cause* ("de la nature et des motifs") of the charge or accusation. Following a British initiative, the words *in detail* ("de façon détaillée") were inserted in 1952.[110] The duty to inform under Art. 14(3)(a) is thus more precise and comprehensive than that for arrested persons under Art. 9(2). It also applies to persons at liberty. Nature and cause of a criminal charge means not only the exact legal description of the offence but also the facts underlying it.[111] This information must be sufficient to allow preparation of a defence pursuant to Art. 14(3)(b) 38

The requirement that a person be informed *promptly* ("dans le plus court délai") was inserted into the original draft by a proposal submitted jointly by five States in the HRComm.[112] Information must thus be provided with the lodging of the charge or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person.[113] 39

Finally, a British motion added the requirement that the information must be provided to the accused *"in a language which he understands"* ("dans une langue qu'elle comprend"). The authority must translate the indictment, and perhaps the arrest warrant or corresponding oral declaration, into a 40

108 Nos. 5, 8/1977. In No. 203/1986, Committee members Cooray, Dimitrijevic and Lallah held in an individual opinion that the presumption of innocence also had been violated. *Cf. also* No. 207/1986, § 9.5, No. 263/1987, § 5.4, and McGoldrick 419 f.
109 E/CN.4/232. *Cf.* Bossuyt 294 f.
110 E/CN.4/L.142; E/CN.4/SR.323, 15.
111 *Cf.* Noor Muhammad, *supra* note 1, at 152; van Dijk, *supra* note 1, at 43 f.; Frowein & Peukert 171; GenC 13/21, § 8, *reproduced in* the Appendix, *infra* p. 859.
112 E/CN.4/286; E/CN.4/SR.110, 5.
113 In its GenC 13/21, § 8, *reproduced in* the Appendix, *infra* p. 859, the Committee mentions, for example, naming the suspect publicly.

language the accused understands.[113] In criminal hearings, the accused may also request the free services of an interpreter (Art. 14(3)(f)).

41 In *Sendic v. Uruguay* and *Mbenge v. Zaire*, for instance, the *Committee* found an express violation of the duty to inform under Art. 14(3)(a).[115]

3. Preparation of the Defence (para. 3(b))

42 Art. 14(3)(b) contains several rights, which on occasion overlap with those in subpara. d. The accused's *right to have adequate time and facilities for the preparation of his defence* ("à disposer du temps et de facilités nécessaires à la préparation de sa défense") stems from a British draft in the HRComm in 1952 and is apparently based on Art. 6(3)(b) of the ECHR.[116] This right applies not only to accused persons but also to their defence attorneys, and it relates to all stages of the trial.[117] What adequate time means depends on the circumstances and complexity of the case, but a few days is normally insufficient.[118] The word "facilities" means that the accused or his defence counsel is granted access to the documents, records, etc. necessary for preparation of the defence. However, this does not give rise to a claim to be furnished with copies of all relevant documents.[119]

43 The accused's *right to communicate with counsel of his own choosing* ("à communiquer avec le conseil de son choix") was inserted in the 3d Committee of the GA upon motion by Israel.[120] In the present context, it serves solely the *preparation* of the defence and is particularly relevant when the individual concerned is being held in pre-trial detention. An analogous provision can be found in Art. 8(2)(d) of the ACHR, but not in Art. 6 of the ECHR. Typical violations of this right stem from cases of *incommunicado detention*[121] or when an *ex-officio defence attorney* has been appointed for the

114 *Cf.* van Dijk, *supra* note 1, at 44.

115 No. 16/1977, No. 63/1979. *See* McGoldrick 420 f. and the recent Sub-Commission report on the right to a fair trial prepared by Chernichenko & Treat, E/CN.4/Sub.2/1991/29,8.

116 E/CN.4/L.142; E/CN.4/SR.323, 15; Bossuyt 296.

117 *Cf.* van Dijk, *supra* note 1, at 44 ff.; Noor Muhammad, *supra* note 1, at 152.

118 *Id. See also* No. 283/1988, §§ 8.3 and 8.4 (half an hour in a capital case is insufficient) and GenC 13/21, § 9, *reproduced in* the Appendix, *infra* p. 859; Frowein & Peukert 172 ff.

119 This was the holding of the Committee in *O. F. v. Norway*, No. 158/1983, § 5.5. *Cf.* de Zayas, Møller & Opsahl, 1985 GYBIL at 49; McGoldrick 421.

120 A/C.3/L.795/Rev.3; A/C.3/SR.967, § 27.

121 *See* CE Doc. H(70)7, 38. *See also, e.g.* the decisions of the Committee in *Wight v. Madagascar*, No. 115/1982, § 17; *Pietraroia v. Uruguay*, No. 44/1979, § 17; *Drescher Caldas v. Uruguay*, No. 43/1979, § 14; *Lafuente Peñarrieta v. Bolivia*, No. 176/1984,

accused against his will.[122] Impermissible interference with the right to preparation of defence was found in a large number of other cases against Uruguay, Panama, Zaire, Jamaica and Madagascar.[123]

4. Claim to be Tried without Undue Delay (para. 3(c))

The right guaranteed in Art. 14(3)(c) was inserted into the catalogue of minimum rights of the accused by a motion from Israel in the 3d Committee of the GA.[124] Its counterpart – "a ... hearing within a reasonable time" – can be found in Art. 6(1) of the ECHR and in Art. 8(1) of the ACHR, where it also applies to civil proceedings. With respect to criminal trials, these provisions are synonymous because Art. 6(1) of the ECHR is in practice interpreted not only as a right to a trial but also to a judgment within a reasonable time.[125] The claim under Art. 14(3)(c) ("to be tried without undue delay", "à être jugée sans retard excessif") relates to the pronouncement of a definitive judgment.[126] In the event of pre-trial detention, this guarantee overlaps with that in Art. 9(3): beginning with their arrest, pre-trial detainees have a claim to be tried "within a reasonable time" ("dans un délai raisonnable"); once they have actually been accused or charged, a judgment must be made "without undue delay", regardless of whether they are (still) in detention.

As with most minimum rights in this provision, the time limit in Art. 14(3)(c) begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him. It ends on the date of the definitive decision, i.e., final and conclusive judgment or dismissal of the proceedings. It depends on the circumstances and complexity of the case as to what a reasonable time (or undue delay) is. The Strasbourg organs have deemed trials that even lasted longer than 10 years to be compatible with Art. 6(1) of the ECHR, holding, on the other hand, others lasting less than one year to be in violation of the provision.[127] The *Committee* has particularly had occasion to deal with this question with respect to military

122 This was ascertained in several cases against Uruguay, in which a defence counsel was appointed *ex officio* by the military courts. *See, e.g.*, Nos. 52, 56/1979; No. 73/1980; No. 6, 8/1977; Nos. 28, 32/1978; Nos. 49, 63/1979; Nos. 70, 73, 74, 80, 83/1980; Nos. 92, 103, 110/1981; Nos. 123, 124/1982; No. 139/1983; Nos. 283, 289, 338/1988. *See* McGoldrick 422; Chernichenko & Treat, *supra* note 115, 12 f.

123 *See, e.g.*, Nos. 6, 8/1977; Nos. 28, 32/1978; Nos. 49, 63/1979; Nos. 70, 73, 74, 80, 83/1980; Nos. 92, 103, 110/1981; Nos. 123, 124/1982; No. 139/1983; Nos. 283, 289, 338/1988. *See* McGoldrick 422; Chernichenko & Treat, *supra* note 115, 12 f.

124 A/C.3/L.795/Rev.3; A/C.3/SR.967, § 27; Bossuyt 297.

125 *Cf.* Frowein & Peukert 156 ff.; van Dijk, *supra* note 1, at 33 ff.; van Dijk & van Hoof 328 ff.

126 *See also* GenC 13/21, § 10, *reproduced in* the Appendix, *infra* p. 859.

127 *Cf.* the survey by Frowein & Peukert 159 ff.

trials in *Uruguay*. It found a violation of Art. 14(3)(c) in the *Drescher Caldas* case, where the author was charged less than two months following his arrest and then subjected to four sittings within the subsequent eight months.[128] In the great majority of cases in which the Committee deemed this provision to have been violated, there were delays of several years that could not be justified with any special reasons.[129] In *Pinkney v. Canada*, a violation of Art. 14(3)(c) was found, where the production of the trial transcripts took 29 months, such that the appeal was delayed nearly three years.[130] Similarly, the Committee found in *Pratt, Morgan and Kelly v. Jamaica* the time span of 45 months (or almost 5 years respectively) between the dismissal of the authors' appeal and the delivery of the Court of Appeal's written judgment, which prevented them from proceeding to appeal before the Privy Council, in contravention of Art. 14(3) (c).[131]

5. Right to Defence (para. 3(d))

46 The right to defence can be traced to a number of proposals in the HRComm, primarily from the US, the Philippines and the United Kingdom, and was hotly debated due to the adoption of a claim to free legal assistance.[132] It can be divided into a list of individual rights:
- to defend oneself *in person*,
- to choose one's own *counsel*,
- *to be informed* of the right to counsel, and
- to receive *free legal assistance*.

47 In the 3d Committee of the GA, a further right was placed at the beginning of subpara. d by way of an Israeli amendment, namely, the right *to be tried in one's presence*.[133] The relationship between these five rights is in need of interpretation. Above all, it is disputed whether the State may introduce an absolute requirement of mandatory counsel in criminal trials and thereby force an accused to accept an ex-officio defence counsel when he cannot afford his own attorney.

128 No. 43/1979, §§ 12.2, 13.4, 14.
129 In the *Sendic* case, No. 63/1979, the trial lasted 10 years; in *Cariboni*, No. 159/1983, 6 years. *Cf. also* Nos. 5, 8/1977, No. 27/1978; Nos. 43, 56/1979; Nos. 80, 83/1980; Nos. 84, 92, 103, 110/1981; Nos. 123, 124/1982; Nos. 129, 156/1983; No. 238/1987, No. 336/1988. *Cf.* de Zayas, Møller & Opsahl, 1985 GYBIL at 49; McGoldrick 424 f.; Chernichenko & Treat, *supra* note 115, 13 f.
130 No. 27/1978, §§ 10, 22, 25. *Cf.* McGoldrick 423.
131 Nos. 210/1986 and 225/1987, §§ 13.4, 13.5, 14; No. 253/1987, §§ 5.12, 6.
132 *Cf.* A/2929, 43; the various proposals and opinions in Bossuyt 298 f.
133 A/C.3/L.795/Rev.3; A/C.3/SR.967, § 29; Bossuyt 300.

With respect to the similarly formulated provision in Art. 6(3)(c) of the ECHR, the Strasbourg organs have taken a relatively restrictive stance and affirmed the right of States to assign a defence counsel against the will of the accused in the interest of administration of justice.[134] At least for the interpretation of Art. 14(3)(d) of the Covenant and Art. 8(2)(e) of the ACHR, the contrary view has been taken in the literature that the accused may not be deprived of the right to defend himself.[135] These divergent viewpoints are likely attributable to the distinction between the trial system based on inquisition and that based on accusation.[136]

Whereas the English version could be interpreted in a more restrictive sense, at least the French and Spanish versions clearly point in the direction of priority for the accused to choose his own defence. The travaux préparatoires are of little assistance in this regard. The only inference that may be drawn from the gradual development of this provision in the HRComm is that the right of the accused to choose his own defence was originally in the foreground[137] and later supplemented by the right to free legal assistance. In 1949 the claim to free legal assistance continued to be rejected with the argument that this could not in practice be realized in all States.[138] Thus, it can hardly be assumed that the subsequent adoption of this additional right was intended to restrict the right of choice. The same direction is taken by the comments of the Israeli delegate in the 3d Committee of the GA, to whose initiative the adoption of the right to be tried in one's presence can be attributed.[139]

A systematic interpretation, including the travaux préparatoires, tends to lead to the following *result*: Everyone charged with a criminal offence has a primary, unrestricted right to be present at the trial and to defend himself. However, he can forego this right and instead make use of defence counsel, with the court being required to inform him of the right to counsel. In principle, he may select an attorney of his own choosing so long as he can afford to do so. Should he lack the financial means, he has a right to appointment of defence counsel by the court at no cost, insofar as this is necessary in the interest of administration of justice. Whether the interests

134 *Cf.* Frowein & Peukert 177 f.; van Dijk & van Hoof 349.
135 van Dijk, *supra* note 1, at 25 ff.; Noor Muhammad, *supra* note 1, at 153; van Dijk & van Hoof 352.
136 For the effect that these two systems have on the meaning of the presumption of innocence, the right to a fair trial and the right to defense counsel, *cf.* Gomien, *Two Bases for the Right to Defence Counsel in Criminal Proceedings*, 3/1987 NJHR 65.
137 *Cf.*, *e.g.*, the Philippine draft from 1949, in E/CN.4/232.
138 E/CN.4/281; E/CN.4/SR.110, 6. Cf. A/2929, 43 (§ 85), Bossuyt 298 f.
139 A/C.3/SR.964, § 30.

of justice require the State to provide for effective representation by counsel depends primarily on the seriousness of the offence and the potential maximum punishment. The Committee found, e.g., that fines of 1,000 Norwegian krones for two traffic violations did not require the assignment of a lawyer at the expense of the State, whereas in a capital case it was "axiomatic" that legal assistance be available.[139] Although the accused in principle has no influence on the selection of a counsel assigned to him under a legal aid scheme, he may at any time make use of the right to defend himself when an ex-officio counsel is appointed against his will (e.g., in military court trials).

51 In a number of cases primarily involving military court trials in Uruguay, the *Committee* found a violation of the *right to be present* at the trial.[141] It is permissible to try an accused in *absentia* only when he was summoned in a timely manner and informed of the proceedings against him.[142] In *Angel Estrella v. Uruguay*, in which a military court had provided the author merely with the choice between two attorneys appointed *ex officio*, it was determined that the right to defence by counsel of one's own choosing had been violated.[143] A similar decision was reached in *Viana Acosta v. Uruguay*, in which the author had been forced to accept a military *ex officio* counsel even though a civilian attorney had declared himself willing to act as defence counsel.[144] In a number of *capital cases*, the question was at issue whether the accused had a right to contest the choice of their court-appointed attorneys, and whether they should have been afforded an opportunity to be present during the hearing of their appeal. The Committee, bearing in mind the seriousness of the death penalty and the ineffectiveness of the court-appointed lawyers in these cases, answered both questions in the affirmative and found violations of Art. 14(3)(d). in *Pinto v. Trinidad and Tobago*, it stressed that "legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice"; in *Kelly v. Jamaica*, it expressed the opinion that "while Art. 14(3)(d) does not entitle

140 *O.F. v. Norway*, No. 158/1983, § 5.6; *Robinson v. Jamaica*, No. 223/1987, § 10.3; *Pinto v. Trinidad and Tobago*, No. 232/1987, § 12.5; *Reid v. Jamaica*, No. 250/1987, § 11.4; *Kelly v. Jamaica*, No. 253/1987, § 5.10; *Henry v. Jamaica*, No. 230/1987, § 8.3; *Campbell v. Jamaica*, No. 248/1987, § 6.6; *Thomas v. Jamaica*, No. 272/1988, § 11.4; *Simmonds v. Jamaica*, No 338/1988, § 8.3. *Cf. also J.S. v. Canada*, No. 130/1982, § 6; de Zayas, Møller & Opsahl, 1985 GYBIL at 49 f.

141 *See, e.g.*, Nos. 28, 32/1978; Nos. 44, 63/1979; No. 70/1980; No. 92/1981; No. 139/1983; No. 289/1988. *Cf.* McGoldrick 425 ff.

142 *Mbenge v. Zaire*, No. 16/1977, §§ 14.1, 21. *Cf. also* GenC 13/21, § 11, *reproduced in* the Appendix, *infra* p. 859

143 No. 74/1980, §§ 8.6, 10. *Cf. also* in a similar sense, *Varilskis v. Uruguay*, No. 80/1980, §§ 9.5, 11; *Hiber Conteris v. Uruguay*, No. 139/1983, §§ 9.2, 10; *López Burgos v. Uruguay*, No. 52/1979, §§ 2.4, 13.

144 No. 110/1981, §§ 13.2, 15

the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice"; and in *Reid v. Jamaica*, it held "that the State Party should have appointed another lawyer for his defence or allowed him to represent himself at the appeal proceedings". The right to be present before the Court of Appeal in addition to a counsel of one's own choice was, however, denied in *Henry v. Jamaica*.[145] This case law thus seems to support the systematic interpretation of Art. 14(3)(d) described above.[146]

6. Calling and Examining Witnesses (para. 3(e))

The right to call, obtain the attendance of and examine witnesses under the same conditions as the prosecutor is an essential element of "equality of arms" and thus of a fair trial.[147] The right of the accused *to obtain the examination of witnesses on his behalf* is, however, not absolute. The first draft, which was unanimously approved by the HRComm in 1949, provided the accused with an unrestricted right "to obtain compulsory attendance of witnesses in his behalf".[148] The final version, adopted in 1952 on the basis of a British initiative by a vote of 10:5, with 3 abstentions, is less stringent[149] and corresponds to the language of Art. 6(3)(d) of the ECHR.[150] As a result, the right of the accused to obtain the attendance and examination of witnesses on his behalf is subject to the restriction that this be *"under the same conditions as witnesses against him"* ("dans les mêmes conditions que les témoins à charge"). Criminal courts are thus provided with relatively broad discretion, but in summoning witnesses, they must not violate the principles of fairness and "equality of arms". An express violation of Art. 14(3)(e) has been found by the Committee only in extreme cases, such as in *Sendic v. Uruguay*, where the author had been sentenced by a military court to 30 years imprisonment in *absentia* and in *camera* without having any 5

145 No. 232/1987, § 12.5; No. 253/1987, § 5.10; No. 250/1987, § 11.4; No. 230/1987, § 13.2. *Cf. also Pratt and Morgan v. Jamaica*, Nos. 210/1986 and 225/1987, § 13.2; *Robinson v. Jamaica*, No. 223/1987, § 10.3, *Campbell v. Jamaica*, No. 248/1987, § 6.6; *Thomas v. Jamaica*, No. 272/1988, § 11.5; *Simmonds v. Jamaica*, No. 338/1988, § 8.4; McGoldrick 426 f., Chernichenko & Treat, *supra* note 115, 101 f.

146 *See supra* para. 50. *See also* van Dijk, *supra* note 1, at 26.

147 *Cf.* van Dijk, *supra* note 1, at 46 f.; Noor Muhammad, *supra* note 1, at 154; Frowein & Peukert 178 ff.

148 *See* the unanimously adopted motion submitted jointly by Chile, Egypt, France, the Philippines and the US, E/CN.4/286, E/CN.4/SR.110, 6. Cf. A/2929, 43 (§ 86). For the historical background, *cf. generally* Bossuyt 301 f.

149 E/CN.4/L.142, E/CN.4/SR.323, 16. In the GA, this version was not amended.

150 Art. 8(2)(f) of the ACHR grants a farther-reaching right in this regard. *Cf.* van Dijk, *supra* note 1, at 47

opportunity to call witnesses on his behalf.[151] A further example of an obvious violation of this minimum guarantee of a fair trial can be found in *Mbenge v. Zaire*, where the author, the former governor of the province of Shaba, was twice sentenced to death in *absentia*.[152]

53 The right *to examine, or have examined, witnesses for the prosecution* is, on the contrary, formulated without restriction.[153] Nevertheless, the Strasbourg organs have accorded the courts a certain amount of discretion to reject some questions that do not serve in ascertaining the truth.[154] The formulation "to examine or have examined" takes into account the distinction between the various legal systems, in particular, between accusatorial and inquisitorial trials.[155] Of principal importance here is that the parties are treated equally with respect to the introduction of evidence by way of interrogation of witnesses.

7. Claim to the Free Assistance of an Interpreter (para. 3(f))

54 The right of accused persons who do not understand the court's language to the free assistance of an interpreter corresponds literally to that in Art. 6(3)(e) of the ECHR, as well as to the sense of that in Art. 8(2)(a) of the ACHR. It can be traced to proposals by the US and the Philippines in the HRComm, the requirement of free assistance being added by a motion from Chile.[156] Particularly controversial was whether the claim to an interpreter related only to the trial itself or was also to cover the translation of all relevant written documents (especially the indictment, evidence, judgment, etc.). Corresponding motions by the Soviet Union and Yugoslavia to extend the scope of protection to all relevant materials were repeatedly defeated by the HRComm – the last in 1952 – by extremely narrow majorities.[157]

55 The wording of Art. 14(3)(f) is in this regard equally amenable to a narrow and a broad interpretation. It may be inferred from the formulation "language used in court" ("la langue employée à l'audience") that the entire *oral hearing* must be translated.[158] Moreover, Art. 14(3)(a) prescribes that

151 No. 63/1979, §§ 12.3, 16.2, 20.

152 No. 16/1977, §§ 14.1, 21. Criminal trials *in absentia* are, however, not generally prohibited: *see supra* para. 51 and note 142. For a violation of Art. 14(3)(e) *see also Little v. Jamaica*, No. 283/1988, § 8.4.

153 Cf. van Dijk, supra note 1, at 46.

154 Cf. Frowein & Peukert 143 f., 180; VAN DIJK & VAN HOOF 353.

155 *Cf.* Noor Muhammad, *supra* note 1, at 154.

156 *See* E/CN.4/170, 232, 279, 283, 286; E/CN.4/SR.110, 7. Cf. BOSSUYT 303 f.

157 *See* E/CN.4/253, 284, E/CN.4/L.124; E/CN.4/SR.109, 12, SR.110, 7, SR.323, 16; A/2929, 43 (§ 87). *See also* BOSSUYT 303 f.

158 *Cf.* van Dijk, *supra* note 1, at 47 f.

information on the nature and cause of the charge is to be provided in a language that the accused understands. Whether the "language used in court" also applies to *written documents* is doubtful in light of the travaux préparatoires. However, pursuant to Arts. 31 and 32 of the VCLT, these are to be drawn upon only when the meaning of a provision is ambiguous in light of its object and purpose.

56 The purpose in appointing an interpreter is to guarantee that an accused who does not understand the court's language receives a fair trial. It is highly doubtful whether this is ensured when the accused is able to follow the oral hearing but unable to read the indictment, documents or other written evidence. For this reason, the European Court of Human Rights has interpreted broadly the analogous provision in Art. 6(3)(e) of the ECHR, taking into account the general principle of a fair trial, and assumed that the accused has a right to the translation of all written materials and oral statements pertaining to the criminal trial, since he must be able to understand them in order to have the benefit of a fair trial.[159] In addition, the position has been taken in the literature and by the European Commission of Human Rights that the right to an interpreter also relates to the interrogation of the suspect or accused by the police or the examining magistrate.[160]

57 The *free* assistance of an interpreter is absolute, i.e., the costs incurred by the appointment of an interpreter may not be imposed on the accused following conviction.[161] This applies equally to aliens, as well as to members of *linguistic minorities*. In a number of cases submitted by members of linguistic minorities, in particular by *Bretons against France*, the Committee stressed, however, that Art. 14(3)(f) does not provide any right simply to have court proceedings conducted in the language of one's choice or to express oneself in the language in which one normally expresses oneself. If members of a linguistic minority or aliens are sufficiently proficient in the official court's language, they have no right to the free assistance of an interpreter.[162]

159 *See*, in particular, the holding in the *Luedicke* case, Series A No. 29 (1978), para. 48; FROWEIN & PEUKERT 180 f.; VAN DIJK & VAN HOOF 355.

160 van Dijk, *supra* note 1, at 48; VAN DIJK & VAN HOOF 355 (n. 814).

161 FROWEIN & PEUKERT 182; VAN DIJK & VAN HOOF 356; GenC 13/21, § 13, *reproduced in* the Appendix, *infra* p. 860.

162 *Guesdon v. France*, No. 219/1986, §§ 10.2, 10.3; *Cadoret and Le Bihan v. France*, Nos. 221/1987 and 323/1988, §§ 5.6, 5.7; *Barzhig v. France*, No. 237/1988; §§ 5.5, 5.6; *C.L.D. v. France*, No. 439/1990, § 4.2; *Z.P. v. Canada*, No. 341/1988, § 5.3; *C.E.A. v. Finland*, No. 316/1988, § 6.2. *Cf.* CHERNICHENKO & TREAT, *supra* note 115, 15.

8. Prohibition of Self-Incrimination (para. 3(g))

58 The prohibition of self-incrimination is found in Art. 8(2)(g) and (3) of the ACHR, but not in Art. 6 of the ECHR. This is because it was missing from the 1949 draft of the HRComm, which served as the model in the drafting of Art. 6 of the ECHR. The prohibition is instead attributable to a proposal by the Philippines in 1950, which was adopted only in part.[163] A supplementary part that would have forbidden a confession from being obtained by a promise of reward or immunity was rejected.

59 The prohibition of self-incrimination has its roots in English common law and today generally belongs to the essence of a fair trial, such that it must also be viewed as being covered by Art. 6 of the ECHR.[164] It relates only to the accused. Witnesses, on the other hand, may not refuse to testify. The term "to be compelled" ("être forcée") refers to various forms of direct or indirect physical or psychological pressure, ranging from torture and inhuman treatment prohibited by Arts. 7 and 10 to various methods of extortion or duress and the imposition of judicial sanctions in order to compel the accused to testify. Although Art. 14 does not expressly prohibit forced confessions or statements by the accused from being admissible as evidence in criminal trials, the Committee called upon States Parties in its General Comment on Art. 14 to set down in law corresponding prohibitions of the use of such evidence.[165]

60 In *individual communications*, a variety of violations of Art. 14(3)(g) by *Uruguay* have been established. These mostly involved cases in which the accused were subjected to severe torture in order to compel them to confess and sign written statements incriminating themselves.[166]

9. Juvenile Trials (para. 4)

61 In contrast to regional human rights conventions, the Covenant contains not only a separate article dealing with the rights of the child (Art. 24) but also various procedural provisions to protect juveniles: Art. 6(5) prohibits the death penalty for persons under the age of 18; Art. 10(2) and (3) requires

163 E/CN.4/365; E/CN.4/SR.159, §§ 41-42. *Cf.* A/2929, 43 (§ 88); Bossuyt 305. For the 1949 HRComm draft, *see* Art. 13(2) in E/1371, 32 f.

164 *Cf.* CE Doc. H(70)7, 39; Noor Muhammad, *supra* note 1, at 154; van Dijk, *supra* note 1, at 42.

165 GenC 13/21, § 14, *reproduced in* the Appendix, *infra* p. 860. *Cf. also* the prohibition on the use of evidence in Art. 15 of the CAT.

166 No. 52/1979; Nos. 73, 74/1980; Nos. 139, 159/1983. *Cf. also* de Zayas, Møller & Opsahl, 1985 GYBIL at 50; McGoldrick 329 f.

that juveniles be separated from adults in pre-trial detention and in prison; Art. 14(1) provides for exceptions from the principle that judgments be made public; and Art. 14(4) obligates the States Parties to conduct criminal trials[167] against juveniles in such a manner "as will take account of their age and the desirability of promoting their rehabilitation". These rights were brought together under Art. 40 of the 1989 Convention on the Rights of the Child (CRC) and developed further.[168] The term "*juvenile persons*" ("jeunes gens") is not defined in the Covenant, but it undoubtedly describes those years in a person's life beginning with the age of criminal responsibility and ending with majority age.[169] The specific determination of these two age limits rests with the States Parties. However, they are obligated to establish specific age limits[170] and in so doing to avoid large deviations from internationally common norms (roughly 14 to 18 or 19 years of age).

62 The adoption of Art. 14(4) and its specific formulation was not without controversy in the HRComm and the 3d Committee of the GA.[171] The initiative originated from France, the US, the United Kingdom and India. Although the criterion of promoting rehabilitation is based on a British proposal of 1950, the British delegation demanded two years later that this paragraph be struck and in 1959 questioned the sense of this criterion.[172] An Italian motion in the 3d Committee of the GA that sought to make rehabilitation of juveniles a task of the criminal trial was defeated by a vote of 33:12, with 26 abstentions,[173] and the formulation of the HRComm draft was finally adopted without amendment.

63 Art. 14(4) does not expressly obligate States Parties to establish *juvenile courts*.[174] Nevertheless, they must ensure that criminal trials against juveniles are conducted differently than those against adults, this being normally accomplished by juvenile courts.[175] Which type of trial is best suited to the particular age of juveniles is to be decided independently by the States Parties, taking into account the findings of juvenile criminal

167 The fact that Art. 14(4) relates only to criminal trials results from the systematic context, as well as from the reference to the "loi pénale" and the "efectos penales" in the French and Spanish texts.

168 GA-Res. 44/25 of 20 November 1989.

169 *Cf. infra* Art. 24, para. 13.

170 *Cf.*, in this sense, Noor Muhammad, *supra* note 1, at 155. *Cf. also* GenC 13/21, § 16, *reproduced in* the Appendix, *infra* p. 860.

171 *Cf.* Bossuyt 307 ff.

172 *See* E/CN.4/445, 449; E/CN.4/L.142; A/C.3/SR.963, § 31.

173 A/C.3/L.815/Rev.1; A/C.3/SR.967, § 29.

174 A corresponding Canadian motion in the 3d Committee of the GA could not gain the necessary support, A/C.3/SR.965, § 73.

175 Special courts and procedures are also noted by the Committee in GenC 13/21, § 16, *reproduced in* the Appendix, *infra* p. 860.

sociology. However, the Covenant indicates that a juvenile trial must take into account the interest of promoting the *rehabilitation* ("rééducation", "readaptación social") of juveniles. This precept is based on the view that juveniles should as far as possible be spared the stigma of crime and that offences by juveniles should not be fought with punishment but rather with educational measures.[176] Art. 40(1) of the CRC refers in this regard to the objective of "promoting the child's reintegration and the child's assuming a constructive role in society".[177]

10. Right to an Appeal (para. 5)

64 The right to appeal a criminal conviction to a higher tribunal is one of the more recent human rights of the "first generation".[178] It is to be found neither in the HRComm draft of the Covenant nor in Art. 6 of the ECHR, and was based rather on a motion by Israel in the 3d Committee of the GA in 1959.[179] In 1969 an analogous right was set down in Art. 8(2)(h) of the ACHR, and in 1984, in Art. 2 of the 7th AP to the ECHR.

65 In contrast to the latter provision, Art. 14(5) was intentionally formulated quite generally. The Israeli delegate *Baror* repeatedly emphasized that he was interested only in the recognition of the principle of a right to appeal, with the type of appeal depending on the respective legal system.[180] Remedies of cassation are thus just as admissible as meritorial appeals,[181] so long as the appeal deals with a genuine *review* ("examine"). It is thus doubtful whether proceedings limited to mere questions of law are sufficient.[182] The proceedings must take place before *"a higher tribunal"*

176 *Cf.* Noor Muhammad, *supra* note 1, at 155.

177 Art. 19(3) of the 1988 HRComm draft, E/CN.4/1988/28 (*cf.* 20/1987 SIM Newsletter 96), was, however, much clearer in this respect than the compromise formula adopted one year later in Art. 40(1) and (4).

178 For the "three generations of human rights" *cf. supra*, Introduction, para. 3.

179 A/C.3/L.795/Rev.3; A/C.3/SR.961, §§ 14, 23, 24; SR.962, § 1; SR.967, § 39. Cf. Bossuyt 310.

180 A/C.3/SR.961, § 24; SR.964, § 31. *See also* A/C.3/SR.964, § 12. *Cf. also* Dimitrijević, Committee 11.

181 *See also* A/C.3/SR.964, § 25.

182 *Cf.* van Dijk, *supra* note 1, at 49, with further references; CE Doc. H(70)7, 40 (§ 144). *Cf. also* the reservation by Denmark, which became necessary because an appeal (against the question of guilt) is not admissible against a jury conviction: CCPR/C/2/Rev.3, *reproduced in* the Appendix, *infra* p. 753.

("une juridiction supérieure").[183] In appellate proceedings as well, the guarantees of a fair and public trial are to be observed.[184]

66 The right guaranteed by Art. 14(5) is available to all persons convicted of a *crime*. In its General Comment on Art. 14, the Committee noted that different terms were used in the various languages ("crime", "infraction", "delito", "prestuplenie") and stressed that this provision is applicable not only to the most serious offences (crimes).[185] This interpretation is confirmed by the travaux préparatoires. The original Israeli draft provided for an exception in favour of petty offences, which was later struck following a motion by Ceylon.[186]

67 However, Ceylon's motion also contained a proposal for insertion of the words *"according to law"* ("conformément à la loi").[187] Although it is unambiguous here that this proviso does not permit interference with the right but rather only determinations on how it is exercised,[188] Ceylon's delegate stressed when discussing his motion that the question whether petty offences may be exempted from the application of Art. 14(5) was an "operative detail" that may be regulated by internal legislation. This interpretation was confirmed by the Committee in *Salgar de Montejo v. Colombia*, to the extent that an offence for which a one-year prison term had been imposed was deemed to be "serious enough" for the application of Art. 14(5).[189] If domestic law provides for further instances of appeal, the

183 In *Salgar de Montejo v. Colombia*, No. 64/1979, a "recurso de reposición", which resulted in confirmation of the original judgment by the very same judge, was not deemed to be a review by a higher tribunal within the meaning of Art. 14(5). *Cf. also* van Dijk, *supra* note 1, at 49.

184 GenC 13/21, § 17, *reproduced in* the Appendix, *infra* p. 861. For instance, in *Pinkney v. Canada*, No. 27/1978, § 21, the Committee found a violation of Art. 14(3)(c) in conjunction with Art. 14(5), that the trial transcripts took nearly three years to be completed was held to constitute an undue delay in the appellate proceedings. *See also* de Zayas, Möller & Opsahl, 1985 GYBIL at 51.

185 GenC 13/21, § 17, *reproduced in* the Appendix, *infra* p. 860. *Cf.* Graefrath 203 f.

186 *See* A/C.3/L.795/Rev.1, Rev.2; A/C.3/SR.963, § 8; SR.964, §§ 12, 31. Art. 2(2) of the 7th AP to the ECHR provides for an analogous possibility for restriction.

187 A/C.3/L.818; A/C.3/SR.964, § 12; SR.967, § 39. For the meaning of this formulation, *cf. generally supra* Art. 12, paras. 25-26.

188 This results clearly from the wording and was confirmed in *Salgar de Montejo v. Colombia*, No. 64/1979, § 10.4: "The Committee considers that the expression 'according to law' in article 14(5) of the Covenant is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined 'according to law' is the modalities by which the review by a higher tribunal is to be carried out." *See also*, in this sense, CE Doc. H(70)7, 40 (§ 145).

189 A/C.3/SR.964, § 12; No. 64/1979, § 10.4. *But see* the French and German reservations, in CCPR/C/2/Rev.3, *reproduced* in the Appendix, infra pp. 755, 756.

convicted person must have effective access to each of them. Consequently, the Committee in *capital punishment cases* v. *Jamaica* found violations of Art. 14(5). Since the Jamaican Court of Appeal had failed to make its judgments available, the convicted persons were in fact prevented from appealing in third instance to the Judicial Committee of the Privy Council in London.[189]

68 Also controversial is whether the right to an appeal applies only to the case of a conviction in the first instance or also to the case of *aggravation of sentence by the appellate court* (for instance, as a result of a nullity appeal by the prosecutor to confirm the law). For this reason, a number of Western European States whose legal systems allow aggravation of sentence at the appellate level submitted a reservation upon recommendation by the Committee of Experts of the Council of Europe.[191] It is doubtful whether such a reservation is necessary, since Art. 14(5) merely establishes the principle of two-level criminal proceedings. Should a conviction, however, first result at the appellate level, the person convicted must be afforded a further appeal. When a person's conviction has been reversed or (s)he has been pardoned on the basis of new or newly discovered facts showing a miscarriage of justice under Art. 14(6), no entitlement to a retrial arises.[192]

69 In addition to the principle of constitutional *responsibility of ministers*, some States also recognize the criminal responsibility of supreme State organs for certain offences before a constitutional court or other supreme court. Since in these cases there is no provision for an appeal against a conviction, these States had to submit reservations to Art. 14(5).[193] In *Fanali* v. *Italy*, the Committee had to decide whether the *Italian reservation* was also able to be applied to a retired air force general, who had been convicted of corruption in so-called "one level only" proceedings before the Italian Constitutional Court within the scope of the "Lockheed Trial". Although the reservation actually related only to the President of the Republic and to ministers, its application to the entire trial was affirmed and thus Art. 14(5) held not to have been violated.[194]

→ These are doubtlessly based on the considerations of the Committee of Experts of the Council of Europe, in CE Doc. H(70)7, 40 (§ 144).

190 *Henry* v. *Jamaica*, No. 230/1987, § 8.4; *Little* v. *Jamaica*, No. 283/1988, § 8.5.

191 *See* the reservations by Austria, Belgium, the Federal Republic of Germany and Luxembourg, in CCPR/C/2/Rev.3, *reproduced in* the Appendix, *infra* pp. 750, 752, 756, 761. *See also* CE Doc. H(70)7, 39 f. (§ 144).

192 *See* the individual opinions of Higgins and Wako in the case of *L.G.* v. *Mauritius*, No. 354/1989. *But see* the individual opinion of Wennergren, *id.*

193 *See* the reservations by Belgium, Italy and the Netherlands, in CCPR/C/2/Rev.3, *reproduced* in the Appendix, *infra* pp. 752, 760, 764. *See also* CE Doc. H(70)7, 40 (§ 144).

194 No. 75/1980, §§ 11.4-11.8, 12. *Cf.* McGoldrick 432 ff.

11. Right to Compensation for Miscarriage of Justice (para. 6)

The right to compensation in the event of a sentence based on a miscarriage of justice was, at the time of its drafting, the most controversial provision in Art. 14.[195] Although as early as 1949 the HRComm had adopted a corresponding proposal by the Philippines,[196] this right is missing in both Art. 6 of the ECHR and Art. 8 of the ACHR. The first motion to strike this provision – by the United States in the HRComm in 1950 – met with as little success as subsequent ones by the United Kingdom, the Netherlands and Argentina in the 3d Committee of the GA.[197] The latter motions were defeated by the narrow majority of 25:19, with 29 abstentions. Whereas the socialist States abstained, voting by the remaining States was quite evenly distributed among three groups.[198] Today, also in Western Europe, the right to compensation is so widely recognized that in 1984 it was set down in Art. 3 of the 7th AP to the ECHR, whose wording corresponds nearly completely to Art. 14(6) of the Covenant.

The outlines of the formulation of Art. 14(6) are based on a French draft, later revised by a joint motion of France and Belgium.[200] The wording "his conviction has been reversed or he has been pardoned on the ground that" stems from US proposals in the HRComm.[201] The words "according to law" ("conformément à la loi") were inserted on the basis of a an amendment by Afghanistan in the 3d Committee of the GA.[201] The original drafts in the HRComm contained the passage that in the event of an execution, the descendants were to receive compensation, but this was later dropped by the HRComm. Efforts by Israel and France in the 3d Committee of the GA to simplify the text were unsuccessful.

The claim to compensation is based on the following *prerequisites*:

a) conviction by a final decision for a criminal offence;

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195 For the historical background of Art. 14(6) in the HRComm and in the 3d Committee of the GA, *cf.* A/2929, 43 f.; A/4299, § 59; Bossuyt 311 ff. Art. 14(6) is also occasionally criticized in the literature. *Cf.*, *e.g.*, Tomuschat, 1985 ZaöRV at 564.

196 E/CN.4/232; E/CN.4/SR.110, 8.

197 *Cf.* E/CN.4/365; E/CN.4/SR.158, § 39; A/C.3/L.792, L.797, L.805/Rev.3; A/C.3/SR.967, § 30.

198 Of the Western States, the US, Belgium, France, Greece and Norway voted for the right to compensation; Spain, Turkey, the Netherlands, the United Kingdom, Ireland, Canada, Australia and New Zealand voted against; Austria, Italy, Portugal, Denmark, Sweden and Finland abstained.

199 E/CN.4/365, 431; E/CN.4/L.154/Rev.2.

200 E/CN.4/L.133; E/CN.4/SR.323, 10, 17.

201 A/C.3/L.801; A/C.3/SR.967, § 37. For the meaning of this formulation, *cf. generally supra* Art. 12, paras. 25-26.

b) later reversal of the conviction or pardoning of the person convicted on the ground of

i.) subsequently acknowledged miscarriage of justice;

ii.) absence of fault of the person convicted with respect to the belated disclosure of the miscarriage of justice; and

iii.) serving of a sentence on the basis of the miscarriage of justice.

73 *Re: a)*

The conviction must be *final* ("définitive") and may relate to any *criminal offence* ("condamnation pénale"), i.e., to petty offences as well

74 *Re: b)*

The mere disclosure of a miscarriage of justice is insufficient: rather, the conviction must be formally *reversed* ("annulée").[202] or the person convicted must be *pardoned* ("la grâce est accordée"). This additional requirement is based on US proposals in the HRComm. In the 3d Committee of the GA, pardoning met with particular criticism, since this normally does not reverse the conviction but rather remits the sentence for humanitarian reasons.[203] The reference to pardoning was nevertheless retained in order to cover those cases in which a miscarriage of justice was acknowledged but the convicted person only pardoned.

75 *Re: i)*

Reversal of the conviction or pardoning entitles the person concerned to receive compensation only when a *new or newly discovered fact* ("un fait nouveau ou nouvellement révélé") *shows conclusively* ("prouve") that there has been a *miscarriage of justice* ("une erreur judiciaire"). The grounds supporting the reversal must demonstrate conclusively the new or newly discovered fact *(nova producta or nova reperta)* disclosing the miscarriage of justice. In *Muhonen v. Finland*, the author had been sentenced to an 11-month prison term for refusal to fulfil his military service; while serving this sentence, the Military Service Examining Board recognized his status as conscientious objector on the basis of his ethical conviction, and he was pardoned shortly thereafter. The Committee denied a right to compensation, since the author's pardon was not due to proof of a miscarriage of justice but rather was motivated by considerations of equity.[204]

202 This normally occurs in a retrial. Art. 14(6) does not, however, necessarily require an entitlement to retrial; *cf.* the individual opinions *supra* note 192.

203 *Cf., e.g.*, the criticism of the delegates from Italy and Romania, in A/C.3/SR.962, § 34, SR.964, § 9. *Cf. also* the observations of the Committee in *Muhonen v. Finland*, No. 89/1981, § 11.2.

204 No. 89/1981, § 11.2. *Cf.* de Zayas & Möller, 1986 NJIL at 391 ff.; McGoldrick 434 f.

Re: ii) 7

If the reversal of the conviction is based on a newly discovered fact compensation need not be granted when the untimely disclosure of this fact can be *attributed to the person convicted*. However, the burden of proof for this rests with the State. This restriction on the compensation claim, inserted at the initiative of France,[205] rules out cases in which a person allows himself to be convicted in order to avoid betraying another who is truly guilty.

Re: iii) 7

Compensation is granted only when a person has *suffered punishment* ("a subi une peine"). This normally means prison sentences, but according to its clear wording, Art. 14(6) is applicable to all types of punishment, whereas the compensation claim in Art. 9(5) is to be granted only in case of unlawful arrest or detention.[206]

Compensation is to be granted *"according to law"*. This passage can be traced to an amendment by Afghanistan in the 3d Committee of the GA and is based on the conviction that a matter as complex as awarding of compensation for a miscarriage of justice can only be implemented nationally by way of corresponding statutory precautions.[207] As in Art. 14(5), the issue here is a *proviso* regarding the *exercise* of this typical right of performance.[208] However, States are not empowered by this proviso to create conditions and prerequisites that go beyond those set down in Art. 14(6). Neither are they permitted to circumvent compensation by failing to enact the requisite laws. Should they feel that the actual implementation of this right is impossible, they must instead submit a reservation.[209] Since other States as well have failed to fulfil their treaty obligation in this regard, the Committee has expressly emphasized in its General Comment on Art. 14 that they must "supplement their legislation in this area in order to bring it into line with the provisions of the Covenant".[210] These laws are, above all, to regulate in detail the modalities for granting compensation, as well as the amount, particularly in the case of non-pecuniary damages (e.g., with prison sentences).

205 E/CN.4/154/Rev.2; E/CN.4/SR.323, 17.

206 *Cf. supra* Art. 9, paras. 47-48. *See* e.g. No. 408/1990, § 6.3.

207 *See* A/C.3/L.801; A/C.3/SR.961, § 8; SR.967, § 37.

208 *Cf. supra* para. 67. *Cf. also supra* Art. 9, para. 51.

209 *See* the reservations by Guyana, New Zealand and Trinidad and Tobago, in CCPR/C/2/Rev.3, *reproduced* in the Appendix, *infra* pp. 757, 765, 768.

210 GenC 13/21, § 18, *reproduced* in the Appendix, *infra* p. 860.

introduction to that publication, the texts of declarations, reservations and objections are normally reproduced in full. Unless shown in quotation marks, the text is a translation (by the Secretariat).

2. Part I of the present document contains the texts of reservations, declarations, notifications and objections made by States parties concerning the Covenant.

Part II contains the texts concerning the Optional Protocols.

3. The organization of this document reflects a number of national and international developments that have occurred since the previous revision was issued in 1989. The developments in question are the following:

a. Through the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States united to form one sovereign State. As from the date of unification, the Federal Republic of Germany acts in the United Nations under the designation of "Germany". The former German Democratic Republic had ratified the Covenant on 8 November 1973 and reservations made at the time have been listed separately under the designation "Germany".

b. On 22 May 1990 the People's Democratic Republic of Yemen and the Yemen Arab Republic merged to form a single sovereign State called the Republic of Yemen, with Sana'a as its capital. The People's Democratic Republic of Yemen had acceded to the Covenant on 9 May 1987; the reservations it made at the time have been reproduced under the designation "Yemen". The Yemen Arab Republic was not a State party to the Covenant.

c. By a note transmitted by the Permanent Representative of the Russian Federation to the United Nations Office at Geneva on 26 December 1991, the Ministry for Foreign Affairs of the Russian Federation informed the Secretary-General that:

> "the membership of the Union of Soviet Socialist Republics in the United Nations and all of its bodies as well as the participation in all the conventions, agreements and other international legal instruments signed within the framework of the United Nations or under its auspices, is continued by the Russian Federation ... . The Russian Federation remains responsible ... for all rights and obligations of the USSR in the United Nations, including the financial obligations".

Accordingly, all material emanating from the former Union of Soviet Socialist Republics has been listed in this publication under the designation "Russian Federation".

I. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. General information

Adopted by the General Assembly of the United Nations on 16 December 1966

ENTRY INTO FORCE: 23 March 1976, in accordance with article 49, for all provisions except those of article 41; 28 March 1979 for the provisions of article 41, in accordance with paragraph 2 of the said article 41

REGISTRATION: 23 March 1976, No. 14668

Text: United Nations, *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407 (procès-verbal of rectification of Spanish authentic text).

Note. The Covenant was opened for signature at New York on 19 December 1966.

(Table of ratifications as at 1 June 1993, see below at p. 886).

B. Texts of reservations and declarations

(For objections to these declarations and reservations see section D, below p. 775)

AFGHANISTAN

Upon accession [Original: Arabic]

The presiding body of the Revolutionary Council of the Democratic Republic of Afghanistan declares that the provisions of paragraphs 1 and 3 of article 48 of the International Covenant on Civil and Political Rights and provisions of paragraphs 1 and 3 of article 26 of the International Covenant on Economic, Social and Cultural Rights, according to which some countries cannot join the aforesaid Covenants, contradicts the international character of the aforesaid treaties. Therefore, according to the equal rights of all States to sovereignty, both Covenants should be left open for the purpose of the participation of all States.

ALGERIA

Upon ratification [Original: French]

The Algerian Government interprets article 1, which is common to the two Covenants, as in no case impairing the inalienable right of all peoples to self-determination and to control over their natural wealth and resources.

It further considers that the maintenance of the state of dependence of certain territories referred to in article 1, paragraph 3, of the two Covenants and in article 14 of the Covenant on Economic, Social and Cultural Rights is contrary to the purposes and principles of the United Nations, to the Charter of the Organization and to the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)).

The Algerian Government interprets the provisions of article 8 of the Covenant on Economic, Social and Cultural Rights and article 22 of the Covenant on Civil and Political Rights as making the law the framework for action by the State with respect to the organization and exercise of the right to organize.

The Algerian Government considers that the provisions of article 13, paragraphs 3 and 4, of the Covenant on Economic, Social and Cultural Rights can in no case impair the right freely to organize its educational system.

The Algerian Government interprets the provisions of article 23, paragraph 4, of the Covenant on Civil and Political Rights regarding the rights and responsibilities of spouses as to marriage, during marriage and at its dissolution as in no case impairing the essential foundations of the Algerian legal system.

AUSTRALIA

Upon ratification [Original: En

*Articles 2 and 50**

"Australia advises that, the people having united as one people in a Commonwealth under the Crown, it has a federal constitutional system. It accepts the provisions of the Covenant extend to all parts of Australia as a Federal State without any limitations or exceptions. It enters a general reservation that article 2, paragraphs 2 and 3, and article 50 shall be given effect consistently with and subject to the provisions in article 2, paragraph 2.

Under article 2, paragraph 2, steps to adopt measures necessary to give effect to rights recognized in the Covenant are to be taken in accordance with each State's Constitutional processes which, in the case of Australia, are the processes of a federal State in which legislative, executive and judicial powers to give effect to the rights recognized in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.

In particular, in relation to the Australian States the implementation of provisions of the Covenant over whose subject matter the federal authorities have legislative, executive and judicial jurisdiction will be a matter for those authorities. The implementation of those provisions of the Covenant over whose subject matter the authorities of the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and where a provision has both Federal and State aspects, its implementation will accordingly be a matter for the respective constitutionally appropriate authorities (for the purpose of implementation the Northern Territory will be regarded as a constituent State).

To this end, the Australian Government has been in consultation with the State and Territory Ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant."

Article 10

"Australia accepts the principle stated in paragraph 1 of article 10 and the principles of the other paragraphs of that article, but makes the reservation that this and other provisions of the Covenant are without prejudice to laws and arrangements, of the type now in force in Australia, for the preservation of discipline in penal establishments." In relation to paragraph 2 (a) the

* See the notification of withdrawal of these reservations and declarations in section C (below at p. 773).

segregation is accepted as an objective to be achieved progressively. In relation to paragraphs 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned."

Article 14

"Australia accepts paragraph 3 (b) on the understanding that the reference to adequate facilities does not require provision to prisoners of all the facilities available to a prisoner's legal representative."

Australia accepts the requirement in paragraph 3 (d) that everyone is entitled to be tried in his presence, but reserves the right to exclude an accused person where his conduct makes it impossible for the trial to proceed."

Australia interprets paragraph 3 (d) of article 14 as consistent with the operation of schemes of legal assistance in which the person assisted is required to make a contribution towards the cost of the defence related to his capacity to pay and determined according to law, or in which assistance is granted in respect of other than indictable offences, only after having regard to all relevant matters."

Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provisions."

*Article 17**

"Australia accepts the principles stated in article 17 without prejudice to the right to enact and administer laws which, in so far as they authorize action which impinges on a person's privacy, family, home or correspondence, are necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the protection of public health or morals or the protection of the rights and freedoms of others."

*Article 19**

"Australia interprets paragraph 2 of article 19 as being compatible with the regulation of radio and television broadcasting in the public interest with the object of providing the best possible broadcasting services to the Australian people."

Article 20

"Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interests of public order *(ordre public)*, the right is reserved not to introduce any further legislative provision on these matters."

*Article 25**

"The reference in paragraph (b) of article 25 to 'universal and equal suffrage', is accepted without prejudice to law which provide that factors such as regional interest may be taken into account in defining electoral divisions, or which establish franchises for municipal and other local government elections related to the sources of revenue and the functions of such government."

* See the notification of withdrawal of these reservations and declarations in section C (below at p. 773).

Convicted persons

Australia declares that laws now in force in Australia relating to the rights of perso who have been convicted of serious criminal offences are generally consistent with t requirements of articles 14, 18, 19, 25 and 26 and reserves the right not to see amendment of such laws.

Discrimination and distinction

The provisions of articles 2, paragraph 1, and 24, paragraph 1, 25 and 26 relating discrimination and distinction between persons shall be without prejudice to la designed to achieve for the members of some class or classes of persons equal enjoym of the rights defined in the Covenant. Australia accepts article 26 on the basis that object of the provision is to confirm the right of each person to equal treatment in application of the law.

Declaration

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

AUSTRIA

Upon ratification [Original: Germ

1. Article 12, paragraph 4, of the Covenant will be applied provided that it will affect the Act of 3 April 1919, State Law Gazette No. 209, concerning the Expulsion the Transfer of Property of the House of Habsburg-Lorraine as amended by the A 30 October 1919, State Law Gazette No. 501, the Federal Constitutional Act of 3 1925, Federal Law Gazette No. 292, and the Federal Constitutional Act of 26 Ja 1928, Federal Law Gazette No. 30, read in conjunction with the Federal Constitu Act of 4 July 1963, Federal Law Gazette No. 172.

2. Article 9 and article 14 of the Covenant will be applied provided that regulations governing the proceedings and measures of deprivation of liberty as pr for in the Administrative Procedure Acts and in the Financial Penal Act permissible within the framework of the judicial review by the Federal Admini Court or the Federal Constitutional Court as provided by the Austrian Fe Constitution.

3. Article 10, paragraph 3, of the Covenant will be applied provided that regulations allowing for juvenile prisoners to be detained together with adults 25 years of age who give no reason for concern as to their possible detrimental inf on the juvenile prisoner remain permissible.

4. Article 14 of the Covenant will be applied provided that the principles go the publicity of trials as set forth in article 90 of the Federal Constitutional L amended in 1929 are in no way prejudiced and that:

a. Paragraph 3, subparagraph (d) is not in conflict with legal regulations stipulate that an accused person who disturbs the orderly conduct of the trial o presence would impede the questioning of another accused person, of a witness expert can be excluded from participation in the trial;

b. Paragraph 5 is not in conflict with legal regulations which stipulate that acquittal or a lighter sentence passed by a court of the first instance, a higher may pronounce conviction or a heavier sentence for the same offence, while they the convicted person's right to have such conviction or heavier sentence revie still higher tribunal;

c. Paragraph 7 is not in conflict with legal regulations which allow proceedings that led up to a person's final conviction or acquittal to be reopened.

5. Articles 19, 21 and 22 in connection with article 2, paragraph 1, of the Covenant will be applied provided that they are not in conflict with legal restrictions as provided for in article 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6. Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination.

BARBADOS

Upon accession [Original: English]

"The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present."

BELARUS

Declaration made upon signature and confirmed upon ratification [Original: Byelorussian]

The Byelorussian Soviet Socialist Republic declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation.

BELGIUM

Upon ratification [Original: French]

Reservations

1. With respect to articles 2, 3 and 25, the Belgian Government makes a reservation, in that under the Belgian Constitution the royal powers may be exercised only by males. With respect to the exercise of the functions of the regency, the said articles shall not preclude the application of the constitutional rules as interpreted by the Belgian State.

2. The Belgian Government considers that the provision of article 10, paragraph 2 (a), under which accused persons shall, save in exceptional circumstances, be segregated from convicted persons is to be interpreted in conformity with the principle, already embodied in the standard minimum rules for the treatment of prisoners [resolution (73) 5 of the Committee of Ministers of the Council of Europe of 19 January 1973], that untried prisoners shall not be put in contact with convicted prisoners against their will [rules 7 (b) and 85 (1)]. If they so request, accused persons may be allowed to take part with convicted persons in certain communal activities.

3. The Belgian Government considers that the provisions of article 10, paragraph 3, under which juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status refers exclusively to the judicial measures provided for under the régime for the protection of minors established by the Belgian Act relating to the protection of young persons. As regards other juvenile ordinary-law offenders, the Belgian Government intends to reserve the option to adopt

measures that may be more flexible and be designed precisely in the interest of the persons concerned.

4. With respect to article 14, the Belgian Government considers that the last part of paragraph 1 of the article appears to give States the option of providing or not providing for certain derogations from the principle that judgements shall be made public. Accordingly, the Belgian constitutional principle that there shall be no exceptions to the public pronouncements of judgements is in conformity with that provision. Paragraph 5 of the article shall not apply to persons, who under Belgian law, are convicted and sentenced at second instance following an appeal against their acquittal of first instance or who, under Belgian law, are brought directly before a higher tribunal such as the Court of Cassation, the Appeals Court or the Assize Court.

5. Articles 19, 21 and 22 shall be applied by the Belgian Government in the context of the provisions and restrictions set forth or authorized in articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, by the said Convention.

Declarations

6. The Belgian Government declares that it does not consider itself obligated to enact legislation in the field covered by article 20, paragraph 1, and that article 20 as a whole shall be applied taking into account the rights to freedom of thought and religion, freedom of opinion and freedom of assembly and association proclaimed in articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in articles 18, 19, 21 and 22 of the Covenant.

7. The Belgian Government declares that it interprets article 23, paragraph 2, as meaning that the right of persons of marriageable age to marry and to found a family presupposes not only that national law shall prescribe the marriageable age but that it may also regulate the exercise of that right.

BULGARIA

Upon ratification [Original: English]

"The People's Republic of Bulgaria deems it necessary to underline that the provisions of article 48, paragraphs 1 and 3, of the International Covenant on Civil and Political Rights, and article 26, paragraphs 1 and 3, of the International Covenant on Economic, Social and Cultural Rights, under which a number of States are deprived of the opportunity to become parties to the Covenants, are of a discriminatory nature, as the provisions are inconsistent with the very nature of the Covenants, which are universal in character and should be open for accession by all States. In accordance with the principle of sovereign equality, no State has the right to bar other States from becoming parties to a Covenant of this kind."

CONGO

Upon accession [Original: French]

Reservation

The Government of the People's Republic of the Congo declares that it does not consider itself bound by the provisions of article 11 . . .

Article 11 of the International Covenant on Civil and Political Rights is incompatible with articles 386 ff. of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1.... Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt ...

means of enforcement have failed, when the amount due exceeds 20 000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith.

CZECH AND SLOVAK FEDERAL REPUBLIC

Upon signature [Original: Czech]

The Czechoslovak Socialist Republic declares that the provisions of article 48, paragraph 1, of the International Covenant on Civil and Political Rights are in contradiction with the principle that all States have the right to become parties to multilateral treaties governing matters of general interest.

Upon ratification

The provision of article 48, paragraph 1, is in contradiction with the principle that all States have the right to become parties to multilateral treaties regulating matters of general interest.

DENMARK

Upon ratification [Original: English]

"1. The Government of Denmark makes a reservation in respect of article 10, paragraph 3, second sentence. In Danish practice, considerable efforts are made to ensure appropriate age distribution of convicts serving sentences of imprisonment, but it is considered valuable to maintain possibilities of flexible arrangements.

2. a. Article 14, paragraph 1, shall not be binding on Denmark in respect of public hearings. In Danish law, the right to exclude the press and the public from trials may go beyond what is permissible under this Covenant, and the Government of Denmark finds that this right should not be restricted.

b. Article 14, paragraphs 5 and 7, shall not be binding on Denmark.

The Danish Administration of Justice Act contains detailed provisions regulating the matters dealt with in these two paragraphs. In some cases, Danish legislation is less restrictive than the Covenant (e. g. a verdict returned by a jury on the question of guilt cannot be reviewed by a higher tribunal, cf. paragraph 5); in other cases, Danish legislation is more restrictive than the Covenant (e. g. with respect to resumption of a criminal case in which the accused party was acquitted, cf. paragraph 7).

3. Reservation is further made to article 20, paragraph 1. This reservation is in accordance with the vote cast by Denmark in the sixteenth session of the General Assembly of the United Nations in 1961 when the Danish delegation, referring to the preceding article concerning freedom of expression, voted against the prohibition against propaganda for war."

FINLAND

Upon ratification [Original: English]

Reservations

"1. With respect to article 9, paragraph 3 of the Covenant, Finland declares that according to the present Finnish legislation the Administrative authorities may take decisions concerning arrest or imprisonment, in which event the case is taken up for decision in court only after a certain time lapse.

2. With respect to article 10, paragraphs 2 (b) and 3, of the Covenant, Finland declares that, although juvenile offenders are, as a rule, segregated from adults, it does not deem appropriate to adopt an absolute prohibition not allowing for more flexible arrangements.

3. With respect to article 13 of the Covenant, Finland declares that the article does not correspond to the present Finnish legislation regarding an alien's right to be heard or lodge a complaint in respect of a decision concerning his expulsion.*

4. With respect to article 14, paragraph 1, of the Covenant, Finland declares that under Finnish law a sentence can be declared secret if its publication would be an affront to morals or endanger national security.*

5. With respect to article 14, paragraph 3 (d), of the Covenant, Finland declares that the contents of this paragraph do not correspond to the present legislation in Finland inasmuch as it is a question of the defendant's absolute right to have legal assistance already at the stage of preliminary investigations.

6. With respect to article 14, paragraph 7, of the Covenant, Finland declares that it is going to pursue its present practice, according to which a sentence can be changed to the detriment of the convicted person, if it is established that a member or an official of the court, the prosecutor or the legal counsel have through criminal or fraudulent activity obtained the acquittal of the defendant or a substantially more lenient penalty, or if fresh evidence has been presented with the same effect, and according to which an aggravated criminal case may be taken up for reconsideration if, within a year, until then unknown evidence is presented, which would have led to conviction or a substantially more severe penalty.

7. With respect to article 20, paragraph 1, of the Covenant, Finland declares that it will not apply the provisions of this paragraph, this being compatible with the standpoint Finland already expressed at the sixteenth session of the United Nations General Assembly by voting against the prohibition of propaganda for war, on the grounds that this might endanger the freedom of expression referred in article 19 of the Covenant.

FRANCE

Upon accession [Original: French]

Declarations and reservations

1. The Government of the Republic considers that, in accordance with Article 103 of the Charter of the United Nations, in case of conflict between its obligations under the Covenant and its obligations under the Charter (especially Articles 1 and 2 thereof), its obligations under the Charter will prevail.

2. The Government of the Republic enters the following reservation concerning article 4, paragraph 1: firstly, the circumstances enumerated in article 16 of the Constitution in respect of its implementation, in article 1 of the Act of 3 April 1878 in the Act of 9 August 1849 in respect of the declaration of a state of siege, in article 1 of Act No. 55-385 of 3 April 1955 in respect of the declaration of a state of emergency, which enable these instruments to be implemented, are to be understood as meeting the purpose of article 4 of the Covenant, and, secondly, for the purpose of interpreting implementing article 16 of the Constitution of the French Republic, the terms "to the extent strictly required by the exigencies of the situation" cannot limit the powers of the President of the Republic to take "the measures required by circumstances".

3. The Government of the Republic enters a reservation concerning articles 5 and 19 to the effect that these articles cannot impede enforcement of the rules pertaining to the disciplinary régime in the armies.

4. The Government of the Republic declares that article 13 cannot derogate from chapter IV of Order No. 45-2658 of 2 November 1945 concerning the entry into and sojourn in, France of aliens, nor from the other instruments concerning the expulsion of aliens in force in those parts of the territory of the Republic in which the Order of 2 November 1945 does not apply.

5. The Government of the Republic interprets article 14, paragraph 5, as stating a general principle to which the law may make limited exceptions, for example, in the case of certain offences subject to the initial and final adjudication of a police court and of criminal offences. However, an appeal against a final decision may be made to the Court of Cassation which rules on the legality of the decision concerned.

6. The Government of the Republic declares that articles 19, 21 and 22 of the Covenant will be implemented in accordance with articles 10, 11 and 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

However, the Government of the Republic enters a reservation concerning article 19 which cannot derogate from the monopoly of the French radio and television broadcasting system.*

7. The Government of the Republic declares that the term "war", appearing in article 20, paragraph 1, is to be understood to mean war in contravention of international law and considers, in any case, that French legislation in this matter is adequate.

8. In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.[2]

* See the notification of withdrawal of these reservations and declarations in section C (below at p. 774).

* See the notification of withdrawal of this reservation in section C (below at p. 774).

2 In this connection, the Secretary-General received on 25 April 1980 from the Government of the Federal Republic of Germany the following declaration with regard to the declaration made by France concerning article 27 of the said Covenant.

The Federal Government refers to the declaration on article 27 made by the French Government and stresses in this context the great importance attaching to the rights guaranteed by article 27. It interprets the French declaration as meaning that the Constitution of the French Republic already fully guarantees the individual rights protected by article 27.

GAMBIA

Upon accession [Original: English]

"For financial reasons free legal assistance for accused persons is limited in our Constitution to persons charged with capital offences only. The Government of the Gambia therefore wishes to enter a reservation in respect of article 14, paragraph 3 (d), of the Covenant in question."

GERMANY**

Upon ratification [Original: German]

1. Articles 19, 21 and 22 in conjunction with article 2, paragraph 1, of the Covenant shall be applied within the scope of article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms.

2. Article 14, paragraph 3, (d), of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing before the court of review (*Revisionsgericht*).

** Through the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States united to form one sovereign State. As from the date of unification, the Federal Republic of Germany acts in the United Nations under the designation "Germany". The former German Democratic Republic ratified the Covenant on 8 November 1973.

3. Article 14, paragraph 5, of the Covenant shall be applied in such manner that:

a. A further appeal does not have to be instituted in all cases solely on the grounds that the accused person – having been acquitted by the lower court – was convicted for the first time in the proceedings concerned by the appellate court;

b. In the case of criminal offences of minor gravity the review by a higher tribunal of a decision not imposing imprisonment does not have to be admitted in all cases.

4. Article 15, paragraph 1, of the Covenant shall be applied in such manner that if provision is made by law for the imposition of a lighter penalty the hitherto applicable law may for certain exceptional categories of cases remain applicable to criminal offences committed before the law was amended.[3]

GERMAN DEMOCRATIC REPUBLIC

Upon ratification [Original: G

"The German Democratic Republic considers that article 48, paragraph 1, of the Covenant runs counter to the principle that all States which are guided in their policy by the purposes and principles of the United Nations Charter have the right to become parties to conventions which affect the interests of all States.

The German Democratic Republic has ratified the two Covenants in accordance with the policy it has so far pursued with the view to safeguarding human rights. It is convinced that these Covenants promote the world-wide struggle for the enforcement of human rights, which is an integral part of the struggle for the maintenance and strengthening of peace. On the occasion of the 25th anniversary of the Universal Declaration of Human Rights it thus contributes to the peaceful international co-operation of States, to the promotion of human rights and to the joint struggle against their violation by aggressive policies, colonialism and *apartheid*, racism and other forms of assaults on the right of the peoples to self-determination.

The Constitution of the German Democratic Republic guarantees the civil, economic, social and cultural rights to every citizen independent of race, sex and religion. Socialist democracy has created the conditions for every citizen not only to enjoy these rights but also take an active part in their implementation and enforcement.

Such fundamental human rights as the right to peace, the right to work, social security, the equality of women, and the right to education have been fully implemented in the German Democratic Republic. The Government of the German Democratic Republic has always paid great attention to the material prerequisites for guaranteeing above all the social and economic rights. The welfare of the working people and its continuous improvement are the 'Leitmotiv' of the entire policy of the Government of the German Democratic Republic.

The Government of the German Democratic Republic holds that the speedy ratification of the two human rights Covenants by further Member States of the United Nations would be an important step to implement the aims for respecting and observing the human rights, the aims proclaimed in the Charter of the United Nations."

GUINEA

Upon ratification [Original:

In accordance with the principle whereby all States whose policies are guided by the purposes and principles of the Charter of the United Nations are entitled to become parties to covenants affecting the interests of the international community, the Government of the Republic of Guinea considers that the provisions of

3 *See* below at p. 884.

paragraph 1, of the International Covenant on Civil and Political Rights are contrary to the principle of the universality of international treaties and the democratization of international relations.

GUYANA

Upon ratification [Original: English]

In respect of article 14, paragraph 5

"While the Government of the Republic of Guyana accepts the principle of legal aid in all appropriate criminal proceedings is working towards that end and at present applies it in certain defined cases, the problems of implementation of a comprehensive legal aid scheme are such that full application cannot be guaranteed at this time."

In respect of article 14, paragraph 6

"While the Government of the Republic of Guyana accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle."

HUNGARY

Upon signature [Original: English]

"The Government of the Hungarian People's Republic declares that paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and paragraph 1 of article 48 of the International Covenant on Civil and Political Rights according to which certain States may not become signatories to the said Covenants are of a discriminatory nature and are contrary to the basic principle of international law that all States are entitled to become signatories to general multilateral treaties. These discriminatory provisions are incompatible with the objectives and purposes of the Covenants."

Upon ratification

"The Presidential Council of the Hungarian People's Republic declares that the provisions of article 48, paragraph 1 and 3, of . . . the International Covenant on Civil and Political Rights, and article 26, paragraphs 1 and 3, of the International Covenant on Economic, Social and Cultural Rights are inconsistent with the universal character of the Covenants. It follows from the principle of sovereign equality of States that the Covenants should be open for participation by all States without any discrimination or limitation."

ICELAND

The ratification was accompanied by reservations
with respect to the following provisions [Original: Icelandic]

1. Article 8, paragraph 3 (a), in so far as it affects the provisions of Icelandic law which provide that a person who is not the main provider of his family may be sentenced to a term at a labour facility in satisfaction of arrears in support payments for his child or children.

2. Article 10, paragraph 2 (b), and paragraph 3, second sentence, with respect to the separation of juvenile prisoners from adults. Icelandic law in principle provides for such separation but it is not considered appropriate to accept an obligation in the absolute form called for in the provisions of the Covenant.

3. Article 13, to the extent that it is inconsistent with the Icelandic legal provisions in force relating to the right of aliens to object to a decision on their expulsion.

4. Article 14, paragraph 7, with respect to the resumption of cases which have already been tried. The Icelandic law of procedure has detailed provisions on this matter which it is not considered appropriate to revise.

5. Article 20, paragraph 1, with reference to the fact that a prohibition against propaganda for war could limit the freedom of expression. This reservation is consistent with the position of Iceland at the General Assembly at its sixteenth session.

Other provisions of the Covenant shall be inviolably observed.

INDIA

Upon accession [Original: English]

"I. With reference to [. . .] article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [that article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.

II. With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further, under the Indian legal system there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.

III. With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners.

IV. With reference to [. . .] articles 12, 19, paragraph 3, 21 and 22 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the provisions of the said articles shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India."

IRAQ

Upon signature and confirmed upon ratification [Original: English]

"The entry of the Republic of Iraq as a party to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights shall in no way signify recognition of Israel nor shall it entail any obligation towards Israel under the said two Covenants.[4]

The entry of the Republic of Iraq as a party to the above two Covenants shall not constitute entry by it as a party to the Optional Protocol to the International Covenant on Civil and Political Rights."

4 In two communications received by the Secretary-General on 10 July 1969 and 23 March respectively, the Government of Israel declared that it "has noted the political character of declaration made by the Government of Iraq on signing and ratifying the above Covenants. In view of the Government of Israel, these two Covenants are not the proper place for such political pronouncements. The Government of Israel will, in so far as concerns the substance matter, adopt towards the Government of Iraq an attitude of complete reciprocity".

Identical communications, *mutatis mutandis*, were received by the Secretary-General from Government of Israel on 9 July 1969 in respect of the declaration made on accession by the Government of the Syrian Arab Republic, and on 29 June 1970 in respect of the declaration on accession by the Government of Libya. In the latter communication, the Government moreover stated that the declaration concerned "cannot in any way affect the obligations of the Libyan Arab Republic already existing under general international law".

Upon ratification

"Ratification by Iraq . . . shall in no way signify recognition of Israel nor shall it be conducive to entry with her into such dealings as are regulated by the said [Covenant]."[4]

IRELAND

Upon ratification [Original: English]

Article 6, paragraph 5

"Pending the introduction of further legislation to give full effect to the provisions of paragraph 5 of article 6, should a case arise which is not covered by the provisions of existing law, the Government of Ireland will have regard to its obligations under the Covenant in the exercise of its power to advise commutation of the sentence of death."

Article 10, paragraph 2

"Ireland accepts the principles referred to in paragraph 2 of article 10 and implements them so far as practically possible. It reserves the right to regard full implementation of these principles as objectives to be achieved progressively."

Article 14

"Ireland reserves the right to have minor offences against military law dealt with summarily in accordance with current procedures which may not, in all respects, conform to the requirements of article 14 of the Covenant.

Ireland makes the reservation that the provision of compensation for the miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provisions."

Article 19, paragraph 2

"Ireland reserves the right to confer a monopoly on or require the licensing of broadcasting enterprises."

Article 20, paragraph 1

"Ireland accepts the principle in paragraph 1 of article 20 and implements it as far as it is practicable. Having regard to the difficulties in formulating a specific offence capable of adjudication at national level in such a form as to reflect the general principles of law recognized by the community of nations as well as the right to freedom of expression, Ireland reserves the right to postpone consideration of the possibility of introducing some legislative addition to, or variation of, existing law until such time as it may consider that such is necessary for the attainment of the objective of paragraph 1 of article 20."

Article 23, paragraph 4

"Ireland accepts the obligations of paragraph 4 of article 23 on the understanding that the provision does not imply any right to obtain a dissolution of marriage."

4 For the text of note 4, *see* above at p. 758.

ISRAEL

Upon ratification [Original: Engli[illegible]

Declaration

"Since its establishment, the State of Israel has been the victim of continuous threa[illegible] and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaig[illegible] of terrorism resulting in the murder of and injury to human beings.

In view of the above, the state of emergency which was proclaimed in May 1948 [illegible] remained in force ever since. This situation constitutes a public emergency within [illegible] meaning of article 4(1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with [illegible] said article 4, to take measures to the extent strictly required by the exigencies of [illegible] situation, for the defence of the State and for the protection of life and prop[illegible] including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, I[illegible] thereby derogates from its obligations under that provision."

Reservation

"With reference to article 23 of the Covenant, and any other provision thereo[illegible] which the present reservation may be relevant, matters of personal status are governe[illegible] Israel by the religious law of the parties concerned.

To the extent that such law is inconsistent with its obligations under the Cove[illegible] Israel reserves the right to apply that law."

ITALY

Upon ratification [Original: F[illegible]

Article 9, paragraph 5

The Italian Republic, considering that the expression "unlawful arrest or detent[illegible] contained in article 9, paragraph 5, could give rise to differences of interpret[illegible] declares that it interprets the aforementioned expression as referring exclusively [illegible] of arrest or detention contrary to the provisions of article 9, paragraph 1.

Article 12, paragraph 4

Article 12, paragraph 4, shall be without prejudice to the application of transi[illegible] provision XIII of the Italian Constitution, respecting prohibition of the entry in[illegible] sojourn in the national territory of certain members of the House of Savoy.

Article 14, paragraph 3

The provisions of article 14, paragraph 3 (d), are deemed to be compatib[illegible] existing Italian provisions governing trial of the accused in his presence and dete[illegible] the cases in which the accused may present his own defence and those in wh[illegible] assistance is required.

Article 14, paragraph 5

Article 14, paragraph 5, shall be without prejudice to the application of [illegible] Italian provisions which, in accordance with the Constitution of the Italian R[illegible] govern the conduct, at one level only, of proceedings instituted before the Cons[illegible] Court in respect of charges brought against the President of the Republic [illegible] Ministers.

Article 15, paragraph 1

With reference to article 15, paragraph 1, last sentence: "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby", the Italian Republic deems this provision to apply exclusively to cases in progress.

Consequently, a person who has already been convicted by a final decision shall not benefit from any provision made by law, subsequent to that decision, for the imposition of a lighter penalty.

Article 19, paragraph 3

The provisions of article 19, paragraph 3, are interpreted as being compatible with the existing licensing system for national radio and television and with the restrictions laid down by law for local radio and television companies and for stations relaying foreign programmes.

JAPAN

Upon ratification [Original: English]

"... the Government of Japan declares that 'members ... of the police' referred to in ... paragraph 2 of article 22 of the International Covenant on Civil and Political Rights be interpreted to include fire service personnel of Japan."

LIBYAN ARAB JAMAHIRIYA

Upon accession [Original: English]

"The acceptance and the accession to this Covenant by the Libyan Arab Republic shall in no way signify a recognition of Israel or be conducive to entry by the Libyan Arab Republic into such dealings with Israel as are regulated by the Covenant."[4]

LUXEMBOURG

Upon ratification [Original: French]

Interpretative declarations

The Government of Luxembourg considers that article 10, paragraph 3, which provides that juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status, refers solely to the legal measures incorporated in the system for the protection of minors, which is the subject of the Luxembourg Youth Welfare Act. With regard to other juvenile offenders falling within the sphere of ordinary law, the Government of Luxembourg wishes to retain the option of adopting measures that might be more flexible and be designed to serve the interests of the persons concerned.

The Government of Luxembourg declares that it is implementing article 14, paragraph 5, since that paragraph does not conflict with the relevant Luxembourg legal statutes, which provide that, following an acquittal or a conviction by a court of first instance, a higher tribunal may deliver a sentence, confirm the sentence passed or impose a harsher penalty for the same crime. However, the tribunal's decision does not give the person declared guilty on appeal the right to appeal that conviction to a higher appellate jurisdiction.

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4 For the text of note 4, *see* above at p. 758.

2694

Reservations

The Government of Luxembourg further declares that article 14, paragraph 5, shall not apply to persons who, under Luxembourg law, are remanded directly to a high court or brought before the Assize Court.

The Government of Luxembourg accepts the provision in article 19, paragraph provided that it does not preclude it from requiring broadcasting, television and film companies to be licensed.

The Government of Luxembourg declares that it does not consider itself obligated to accept legislation in the field covered by article 20, paragraph 1, and that article 20 as a whole will be implemented taking into account the rights to freedom of thought, religion, opinion, assembly and association laid down in articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in articles 18, 19, 21 and 22 of the Covenant.

MALTA

Upon accession [Original: English]

Reservations

Article 13

"The Government of Malta endorses the principles laid down in article 13. However, in the present circumstances it cannot comply entirely with the provisions of this article."

Article 14, paragraph 2

"The Government of Malta declares that it interprets paragraph 2 of article 14 of the Covenant in the sense that it does not preclude any particular law from imposing on any person charged under such law the burden of proving particular facts."

Article 14, paragraph 6

"While the Government of Malta accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with article 14, paragraph 6, of the Covenant."

Article 19

"The Government of Malta desiring to avoid any uncertainty as regards the application of article 19 of the Covenant declares that the Constitution of Malta allows such restrictions to be imposed upon public officers in regard to their freedom of expression as are reasonably justifiable in a democratic society. The Code of Conduct for public officers in Malta precludes them from taking an active part in political discussion or other political activity during working hours or on the premises.

The Government of Malta also reserves the right not to apply article 19 to the extent that this may be fully compatible with Act 1 of 1987 entitled 'An Act to regulate limitations on the political activities of aliens', and this in accordance with article 16 of the Convention of Rome (1950) for the protection of Human Rights and Fundamental Freedoms or with section 41 (2) (a) (ii) of the Constitution of Malta."

Article 20

"The Government of Malta interprets article 20 consistently with the rights guaranteed by articles 19 and 21 of the Covenant but reserves the right not to introduce legislation for the purposes of article 20."

Article 22

"The Government of Malta reserves the right not to apply article 22 to the extent that existing legislative measures may not be fully compatible with this article."

MEXICO

Upon accession [Original: Spanish]

Interpretative statements

Article 9, paragraph 5

Under the Political Constitution of the United Mexican States and the relevant implementing legislation, every individual enjoys the guarantees relating to penal matters embodied therein, and consequently no person may be unlawfully arrested or detained. However, if by reason of false accusation or complaint any individual suffers an infringement of this basic right, he has, *inter alia*, under the provisions of the appropriate laws, an enforceable right to just compensation.

Article 18

Under the Political Constitution of the United Mexican States, every person is free to profess his preferred religious belief and to practice its ceremonies, rites and religious acts, with the limitation, with regard to public religious acts, that they must be performed in places of worship and, with regard to education, that studies carried out in establishments designed for the professional education of ministers of religion are not officially recognized. The Government of Mexico believes that these limitations are included among those established in paragraph 3 of this article.

Reservations

Article 13

The Government of Mexico makes a reservation to this article, in view of the present text of article 33 of the Political Constitution of the United Mexican States.

Article 25, subparagraph (b)

The Government of Mexico also makes a reservation to this provision, since article 130 of the Political Constitution of the United Mexican States provides that ministers of religion shall have neither an active nor a passive vote, nor the right to form associations for political purposes.

MONGOLIA

Declaration made upon signature and renewed upon ratification [Original: English]

[Same declaration, *mutatis mutandis*, as that made by the Byelorussian Soviet Socialist Republic, see p. 751.]

NETHERLANDS

Upon ratification [Original: English]

Reservations

Article 16

"The Kingdom of the Netherlands subscribes to the principle set out in paragraph 1 of this article, but it takes the view that ideas about the treatment of prisoners are so liable to change that it does not wish to be bound by the obligations set out in paragraph 2 and paragraph 3 (second sentence) of this article."

Article 12, paragraph 1

"The Kingdom of the Netherlands regards the Netherlands and the Netherlands Antilles as separate territories of a State for the purpose of this provision."

Article 12, paragraphs 2 and 4

"The Kingdom of the Netherlands regards the Netherlands and the Netherlands Antilles as separate countries for the purpose of these provisions."

Article 14, paragraph 3 (d)

"The Kingdom of the Netherlands reserves the statutory option of removing a person charged with a criminal offence from the courtroom in the interests of the proper conduct of the proceedings."

Article 14, paragraph 5

"The Kingdom of the Netherlands reserves the statutory power of the Supreme Court of the Netherlands to have sole jurisdiction to try certain categories of persons charged with serious offences committed in the discharge of a public office."

Article 14, paragraph 7

"The Kingdom of the Netherlands accepts this provision only in so far as obligations arise from it further to those set out in article 68 of the Criminal Code of the Netherlands and article 70 of the Criminal Code of the Netherlands Antilles as they apply. They read:

1. Except in cases where court decisions are eligible for review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands or the Netherlands Antilles has delivered an irrevocable judgement.

2. If the judgement has been delivered by some other court, the same person may not be prosecuted for the same offence in the case of (i) acquittal or withdrawal of proceedings or (ii) conviction followed by complete execution, remission or lapse of sentence."

Article 19, paragraph 2

"The Kingdom of the Netherlands accepts the provision with the proviso that it does not prevent the Kingdom from requiring the licensing of broadcasting, television or cinema enterprises."

Article 26, paragraph 1

"The Kingdom of the Netherlands does not accept the obligation set out in this provision in the case of the Netherlands."

Article 25 (a)

"The Kingdom of the Netherlands does not accept this provision in the case of the Netherlands Antilles."*

Explanation

"[The Kingdom of the Netherlands clarifies] that although the reservations [ ] are partly of an interpretational nature, [it] has preferred reservations to interpretational declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allows for the interpretation put upon it. By using the reservation form the Kingdom of the Netherlands wishes to ensure in all cases that the relevant obligations arising out of the Covenant will not apply to the Kingdom, or will apply only in the way indicated.

NEW ZEALAND

Upon ratification [Original: English]

Reservations

"The Government of New Zealand reserves the right not to apply article 10, paragraph 2 (b), or paragraph 3, in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply article 10, paragraph 3, where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned.

The Government of New Zealand reserves the right not to apply article 14, paragraph 6, to the extent that it is not satisfied by the existing system for *ex gratia* payments to persons who suffer as a result of a miscarriage of justice.

The Government of New Zealand having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons, and having regard to the right of freedom of speech, reserves the right not to introduce further legislation with regard to article 20.

The Government of New Zealand reserves the right not to apply article 22 as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade-union representation and encourage orderly industrial relations, may not be fully compatible with that article."

NORWAY

Upon ratification [Original: English]

"Subject to reservations to article 6, paragraph 4,* article 10, paragraph 2 (b) and paragraph 3, 'with regard to the obligation to keep accused juvenile persons and juvenile offenders segregated from adults' and to article 14, paragraphs 5 and 7, and to article 20, paragraph 1."

REPUBLIC OF KOREA

Upon accession [Original: Korean]

The Government of the Republic of Korea [declares] that the provisions of paragraphs 5 and 7 of article 14, article 22 and paragraph 4 of article 23 of the Covenant shall be so applied as to be in conformity with the provisions of the local laws including the Constitution of the Republic of Korea.

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* *See* the notification of withdrawal of this reservation in section C (below at p. 775).

ROMANIA

Upon signature [Original: French]

The Government of the Socialist Republic of Romania declares that the provisions of article 48, paragraph 1, of the International Covenant on Civil and Political Rights are at variance with the principle that all States have the right to become parties to multilateral treaties governing matters of general interest.

Upon ratification

a. The State Council of the Socialist Republic of Romania considers that the provisions of article 48, paragraph 1, of the International Covenant on Civil and Political Rights are inconsistent with the principle that multilateral international treaties whose purposes concern the international community as a whole must be open to universal participation.

b. The State Council of the Socialist Republic of Romania considers that the maintenance in a state of dependence of certain territories referred to in article 1, paragraph 3, of the International Covenant on Civil and Political Rights is inconsistent with the Charter of the United Nations and the instruments adopted by the Organization on the granting of independence to colonial countries and peoples, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted unanimously by the United Nations General Assembly in its resolution 2625 (XXV) of 1970, which solemnly proclaims the duty of States to promote the realization of the principle of equal rights and self-determination of peoples in order to bring a speedy end to colonialism.

RUSSIAN FEDERATION

Declaration made upon signature and confirmed upon ratification [Original: Russian]

[Same declaration, *mutatis mutandis*, as that made by the Byelorussian Soviet Socialist Republic, see p. 751.]

SWEDEN

Upon ratification [Original: French]

Sweden reserves the right not to apply the provisions of article 10, paragraph 2 (b), with regard to the obligation to segregate juvenile offenders from adults, the provisions of article 14, paragraph 7, and the provisions of article 20, paragraph 1, of the Covenant.

SWITZERLAND

Upon accession [Original: French]

Reservations

Article 10, paragraph 2 (b)

The separation of accused juvenile persons from adults is not unconditionally guaranteed.

Article 12, paragraph 1

The right to liberty of movement and freedom to choose one's residence is applicable subject to the federal laws on aliens, which provide that residence and establishment permits shall be valid only for the canton which issues them.

Article 14, paragraph 1

The principle of a public hearing is not applicable to proceedings which involve a dispute relating to civil rights and obligations or to the merits of the prosecution in a criminal matter; these, in accordance with cantonal laws, are held before an administrative authority. The principle that any judgement rendered shall be

public is adhered to without prejudice to the cantonal laws on civil and criminal procedure, which provide that a judgement shall not be rendered at a public hearing, but shall be transmitted to the parties in writing.

The guarantee of a fair trial has as its sole purpose, where disputes relating to civil rights and obligations are concerned, to ensure final judicial review of the acts or decisions of public authorities which have a bearing on such rights or obligations. The term "final judicial review" means a judicial examination which is limited to the application of the law, such as a review by a Court of Cassation.

Article 14, paragraph 3, subparagraphs (d) and (f)

The guarantee of free legal assistance assigned by the court and of the free assistance of an interpreter does not definitively exempt the beneficiary from defraying the resulting costs.

Article 14, paragraph 5

The reservation applies to the federal laws on the organization of criminal justice, which provide for an exception to the right of anyone convicted of a crime to have his conviction and sentence reviewed by a higher tribunal, where the person concerned is tried in the first instance by the highest tribunal.

Article 20

Switzerland reserves the right not to adopt further measures to ban propaganda for war, which is prohibited by article 20, paragraph 1.

Switzerland reserves the right to adopt a criminal provision which will take into account the requirements of article 20, paragraph 2, on the occasion of its forthcoming accession to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.

Article 25, subparagraph (b)

The present provision shall be applied without prejudice to the cantonal and communal laws, which provide for or permit elections within assemblies to be held by a means other than secret ballot.

Article 26

The equality of all persons before the law and their entitlement without any discrimination to the equal protection of the law shall be guaranteed only in connection with other rights contained in the present Covenant.

SYRIAN ARAB REPUBLIC

Upon accession [Original: French]

1. The accession of the Syrian Arab Republic to these two Covenants shall in no way signify recognition of Israel or entry into a relationship with it regarding any matter regulated by the said two Covenants.[4]

2. The Syrian Arab Republic considers that paragraph 1 of article 26 of the Covenant on Economic, Social and Cultural Rights and paragraph 1 of article 48 of the Covenant on Civil and Political Rights are incompatible with the purposes and objectives of the said Covenants, inasmuch as they do not allow all States, without distinction or discrimination, the opportunity to become parties to the said Covenants.

TRINIDAD AND TOBAGO

Upon accession [Original: English]

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

4 For the text of note 4, see above at p. 758.

iii) Where at any time there is a lack of suitable prison facilities, the Government of the Republic of Trinidad and Tobago reserves the right not to apply article 10, paragraphs 2 (b) and 3, so far as those provisions require juveniles who are detained to be accomodated separately from adults.

iii) The Government of the Republic of Trinidad and Tobago reserves the right not to apply paragraph 2 of article 12 in view of the statutory provisions requiring persons intending to travel abroad to furnish tax clearance certificates.

iv) The Government of the Republic of Trinidad and Tobago reserves the right not to apply paragraph 5 of article 14 in view of the fact that section 43 of its Supreme Court of Judicature Act No. 12 of 1962 does not confer on a person convicted on indictment an unqualified right of appeal and that in particular cases, appeal to the Court of Appeal can only be done with the leave of the Court of Appeal itself or of the Privy Council.

v) While the Government of the Republic of Trinidad and Tobago accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with paragraph 6 of article 14 of the Covenant.

vi) With reference to the last sentence of paragraph 1 of article 15. – "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby", the Government of the Republic of Trinidad and Tobago deems this provision to apply exclusively to cases in progress. Consequently, a person who has already been convicted by a final decision shall not benefit from any provision made by law, subsequent to that decision for the imposition of a lighter penalty."

vii) The Government of the Republic of Trinidad and Tobago reserves the right to impose *lawful and/or reasonable restrictions* with respect to the right of assembly under article 21 of the Covenant.

viii) The Government of the Republic of Trinidad and Tobago reserves the right not to apply the provision of *article 26* of the Covenant in so far as it applies to the holding of property in Trinidad and Tobago, in view of the fact that licenses may be granted to or withheld from *aliens* under the Aliens Landholding Act of Trinidad and Tobago."

UKRAINE

Declaration made upon signature and confirmed upon ratification [Original: R...

[Same declaration, *mutatis mutandis*, as that made by the Byelorussian Soviet Socialist Republic, see p. 751.]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN [REL...

Upon signature [Original:...

"First, the Government of the United Kingdom declare their understanding that, by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under article 1 of the Covenant and their obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail.

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5 In a communication received by the Secretary-General on 31 January 1979, the Government of Trinidad and Tobago confirmed that paragraph (vi) constituted an interpretative declaration which did not aim to exclude or modify the legal effect of the provisions of the Covenant [...]

Secondly, the Government of the United Kingdom declare that:

a. In relation to article 14 of the Covenant, they must reserve the right not to apply, or not to apply in full, the guarantee of free legal assistance contained in subparagraph (d) of paragraph 3 in so far as the shortage of legal practitioners and other considerations render the application of this guarantee in British Honduras, Fiji and St. Helena impossible;

b. In relation to article 23 of the Covenant, they must reserve the right not to apply the first sentence of paragraph 4 in so far as it concerns any inequality which may arise from the operation of the law of domicile;

c. In relation to article 25 of the Covenant, they must reserve the right not to apply:

i) Subparagraph (b) in so far as it may require the establishment of an elected legislature in Hong Kong and the introduction of equal suffrage, as between different electoral rolls, for elections in Fiji; and

ii) Subparagraph (c) in so far as it applies to jury service in the Isle of Man and to the employment of married women in the Civil Service of Northern Ireland, Fiji, and Hong Kong.

Lastly, the Government of the United Kingdom declare that the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented."

Upon ratification

"Firstly the Government of the United Kingdom maintain their declaration in respect of article 1 made at the time of signature of the Covenant.

The Government of the United Kingdom reserve the right to apply to members of and persons serving with the armed forces of the Crown and to persons lawfully detained in penal establishments of whatever character such laws and procedures as they may from time to time deem to be necessary for the preservation of service and custodial discipline and their acceptance of the provisions of the Covenant is subject to such restrictions as may for these purposes from time to time be authorized by law.

Where at any time there is a lack of suitable prison facilities or where the mixing of adults and juveniles is deemed to be mutually beneficial, the Government of the United Kingdom reserve the right not to apply article 10, paragraphs 2 (b) and 3, so far as those provisions require juveniles who are detained to be accomodated separately from adults, and not to apply article 10, paragraph 2 (a), in Gibraltar, Montserrat and the Turks and Caicos Islands in so far as it requires segregation of accused and convicted persons.

The Government of the United Kingdom reserve the right not to apply article 11 in Jersey.

The Government of the United Kingdom reserve the right to interpret the provisions of article 12, paragraph 1, relating to the territory of a State as applying separately to each of the territories comprising the United Kingdom and its Dependencies.

The Government of the United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in and the departure from the United Kingdom as they may deem necessary from time to time and accordingly, their acceptance of article 12, paragraph 4, and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories.

The Government of the United Kingdom reserve the right not to apply article 13 in

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.

General comment 11/19 of 29 July 1983 [Prohibition of Propaganda for War and Advocacy of Hatred]

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.

General comment 12/21 of 12 April 1984 [Peoples' Right of 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 info regard to it or confine themselves to a reference to election laws. The C considers it highly desirable that States parties' reports should contain infor each paragraph of article 1.

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

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

6. Paragraph 3, in the Committee's opinion, is particularly important because imposes specific obligations on States parties, not only in relation to their ow but vis-à-vis all peoples which have not been able to exercise or have been d the possibility of exercising their right to self-determination. The general nat paragraph is confirmed by its drafting history. It stipulates that "The States pa present Covenant, including those having responsibility for the administratio Self-Governing and Trust Territories, shall promote the realization of the rig determination, and shall respect that right, in conformity with the provisi Charter of the United Nations". The obligations exist irrespective of whethe entitled to self-determination depends on a State party to the Covenant or not. that all States parties to the Covenant should take positive action to facilitate r of and respect for the right of peoples to self-determination. Such positive actio consistent with the States' obligations under the Charter of the United Nations international law; in particular, States must refrain from interfering in the inter of other States and thereby adversely affecting the exercise of the right determination. The reports should contain information on the performance obligations and the measures taken to that end.

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

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

General comment 13/21 of 12 April 1984 [Procedural Guarantees in Civil and Trials]

1. The Committee notes that article 14 of the Covenant is of a complex n that different aspects of its provisions will need specific comments. All provisions are aimed at ensuring the proper administration of justice, and t uphold a series of individual rights such as equality before the courts and trib the right to a fair and public hearing by a competent, independent and impartia

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 fr trial, the judgement must, with certain strictly defined exceptions, be made public

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

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

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

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

11. Not all reports have dealt with all aspects of the right of defence as def subparagraph 3 (d). The Committee has not always received sufficient infor concerning the protection of the right of the accused to be present duri determination of any charge against him nor how the legal system assures his righ to defend himself in person or to be assisted by counsel of his own choosing. arrangements are made if a person does not have sufficient means to pay fo assistance. The accused or his lawyer must have the right to act diligently and fe in pursuing all available defences and the right to challenge the conduct of the

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 retrial prohibited pursuant to principle of *ne bis in idem* as contained in paragraph 7. This understanding of meaning of *ne bis in idem* may encourage States parties to reconsider their reservati to article 14, paragraph 7.

General comment 14[23] of 2 November 1984 (Right to Life and Nuclear Weapons)

1. In its general comment 6 (16) adopted at its 378th meeting on 27 July 1982, Human Rights Committee observed that the right to life enumerated in the f paragraph of article 6 of the International Covenant on Civi and Political Rights is supreme right from which no derogation is permitted even in time of public emergen The same right to life is enshrined in Article 3 of the Universal Declaration of Hun Rights adopted by the General Assembly of the United Nations on 10 December 1948 is basic to all human rights.

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

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

4. The Committee associates itself with this concern. It is evident that the designi testing, manufacture, possession and deployment of nuclear weapons are among t greatest threats to the right to life which confront mankind today. This threat compounded by the danger that the actual use of such weapons may be brought abo 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 suspicion and fear between States, which is in itself antagonistic to the promotion universal respect for an observance of human rights and fundamental freedoms accordance with the Charter of the United Nations and the International Covenants Human Rights.

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

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

General comment 15[27] of 22 July 1986 (Position of Aliens)

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