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**INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS (ICCPR)**

**LEGAL IMPLEMENTATION INDEX**

*July 2003*



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## **I. Introduction**

With support from the United States Agency for International Development (USAID), the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI) developed this assessment tool to analyze how a legal system implements the fundamental international human rights provided for in the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>. The goal of this assessment process is to identify specific points where rule of law development work is indicated and facilitate further analysis of basic civil and political rights.

As the fundamental expression of international human rights in the area of civil and political rights, the ICCPR provides an accepted framework for base-lining a country's human rights situation and measuring progress in the actualization of these rights. The broad scope of the ICCPR makes it a particularly versatile legal instrument in the context of rule of law programming because it addresses not only individual rights but also the necessary institutional structures to realize these rights.

While the project enjoys the sponsorship of the United States Government, the ICCPR Legal Implementation Index (ICCPR Index) does not necessarily reflect the views of the U.S. Government, and it draws upon materials and examples from a wide variety of sources. Thus, it is intended to benefit—and represent views of—human rights professionals of all nationalities.

### **Significance of the ICCPR**

Prior to World War II, human rights was not an international priority; international law governed the interaction of states, not individuals, and what nations did within their borders was their business alone.<sup>2</sup> This changed with close of the war and the conclusion of the Charter of the United Nations.<sup>2</sup>

Although the Charter mentions human rights and particular rights for individuals, it does not define them. Rather, one article of the Charter – dealing with the creation of the Economic and Social Council of the United Nations – empowers the Council to create a commission to deal with human rights and to draft an international bill of human rights.<sup>3</sup>

The creation of the Commission on Human Rights led to the drafting of the International Covenant on Civil and Political Rights, which together with the Universal Declaration of Human Rights<sup>4</sup> and the International Covenant on Economic, Social, and Cultural Rights<sup>5</sup> form the United Nations' international bill of human rights. The drafting process began in 1949, and it concluded in 1966 with the finalization of the ICCPR and an Optional Protocol. Today, the ICCPR represents the most comprehensive and universally applicable statement of individual and collective human rights.

However, the ICCPR is more than just a listing of rights. The drafters—delegations of states' representatives—agreed that a central obligation of the ICCPR would be the implementation of its provisions at the national level.<sup>6</sup> Accordingly, Article 28 of the ICCPR establishes a Human Rights Committee (HRC), a body of experts charged with the interpretation of these listed rights and with the monitoring of their implementation by States parties to the Covenant.

Parties to the treaty are required to submit to the HRC a self-assessment, or Country Report. Article 40 of the ICCPR obligates States parties to submit "reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights."<sup>7</sup> This Country Report is due within one year of the entry into force of the ICCPR within a country and thereafter when requested by the HRC.

The first Optional Protocol takes the HRC's role in human rights protection a step further by allowing individuals of States parties to the protocol to submit individual complaints to the committee alleging violations of the Covenant's provisions.

Each international treaty, including the International Covenant on Civil and Political Rights, has a life of its own and must be interpreted in a fair and just manner . . . by the body entrusted with the monitoring of its provisions.<sup>8</sup>

The ICCPR's significance internationally has been established through the interpretation of its provisions. This interpretation is done primarily through four general means: 1) General Comments of the HRC; 2) Concluding Remarks of the HRC given on state Country Reports; 3) decisions by the HRC on individual complaints submitted under the Optional Protocol; and 4) scholarly commentary and analysis, including comparison and reference with other international instruments. It is from these sources that the ICCPR Index draws its form and substance, as they are the means by which the general rights in the ICCPR are translated into concrete requirements for action by States parties.

## **Purpose**

The ICCPR Index provides a framework for a methodical examination of a country's implementation of the rights included in the Covenant. With this Index, ABA/CEELI seeks to develop an assessment process that identifies the basic elements, laws, structures, and practices needed to fully implement the ICCPR.<sup>9</sup> The Index is intended to be capable of implementation in relatively short time frames (3-6 months). It is therefore not intended to be an exhaustive exploration of the relevant issues. Rather, the assessment procedure will be used to both identify basic missing components in a country's legal system and suggest areas where further analysis and reform are necessary.

Because the assessment will provide a detailed schematic of the status of civil and political rights, the ICCPR Index will guide domestic and international NGOs, both advocacy and technical assistance providers, in more detailed diagnostic assessments and program development in problem areas. The Human Rights Committee (HRC) has generally expressed the need for greater detail in the Country Reports filed under the ICCPR, and Elizabeth Evat, a former member of the HRC, has stated:

If domestic courts, legal practitioners, and human rights advocates were fully aware of the obligations that their States have undertaken, and how those obligations are interpreted and applied by independent monitoring bodies, they might well be able to do more to press for effective implementation and to ensure that the application of laws and policies was as far as possible consistent with treaty obligations.<sup>10</sup>

The Index is intended to provide both the signatory governments and NGO actors with a concise reference source and framework for developing more comprehensive analyses in this vein. Furthermore, the results assembled with this assessment tool will provide a foundation upon which to examine the compatibility of existing legal structures with regional human rights regimes, e.g., the European Convention on Human Rights (ECHR).<sup>11</sup> Because of the evolving nature of ICCPR jurisprudence, the assessment is intended to be a living document subject to updates and refinements.

ABA/CEELI has noted from experience that these issues frequently warrant a more detailed analysis of practical, social, and cultural barriers to reform, which are not strictly legal in nature. While segments of the assessment do focus on these types of barriers, the drafters have intentionally emphasized legal aspects. This emphasis does not constitute a value judgment as to the relative importance of these issues, but rather, a choice to identify these issues for further

study within the context of the formal legal system. ABA/CEELI considers this to be an important step in a larger dialogue that should span disciplines.

In addition to facilitating this dialogue by making the ICCPR Index readily available to the public, ABA/CEELI authored a manuscript on the ICCPR which has been published by Transnational Publishers under the title: *The Practical Guide to the International Covenant on Civil and Political Rights (ICCPR)*. The *Practical Guide* provides legal and non-legal audiences alike with easy access to, and the ability to quickly grasp, the nature and scope of ICCPR rights and freedoms. It will inform and educate domestic and international non-governmental organizations, human rights advocates and defenders, and governments of signatory states about the specifics of the Covenant's provisions. The *Practical Guide* will also serve as a convenient reference tool for academics and legal scholars.

## **Distinguishing Other Assessments**

The schematic approach of the ICCPR Index distinguishes this type of assessment from other narrative assessments of human rights. While the ICCPR Index examines a broad range of criteria, it does not attempt to report on the problem area(s) through extensive narrative discourse of anecdotal information.

Rather, the ICCPR Index seeks to catalogue significant structural issues across the range of topics covered by the treaty. Thus, this assessment will not provide narrative commentary on the overall status of human rights in a country, nor will it provide exhaustive coverage of particular cases. Rather, the assessment will identify specific legal provisions and mechanisms that are present, missing, or malfunctioning in the enforcement of civil and political rights.

***Illustrative Example:*** Article 26 of the ICCPR forbids discrimination based on gender. The assessment tool would systematically identify relevant laws, regulations, and institutions dealing with these issues. As a result, the assessment might report: Country X guarantees non-discrimination under Article 78 of its Constitution of 1979, and Articles 50-65 of the 1989 Gender Law provide for an Equal Employment Opportunity Commission. However, the Ministry for Women, Children, and Minorities drafted only the first regulation establishing the basic structure of the Commission in 1990. Needed amendments to the civil and criminal procedure laws are still missing, thereby rendering any Commission acts unenforceable.

This type of assessment identifies positive points as well as "red flags." If red flags are sporadic, it may be a result of oversight, carelessness, etc. In those cases, programmatic solutions may be relatively easy, and USAID and other assistance providers would be able to offer immediate suggestions regarding the placement of a specialist to address technical problems. However, if "red flags" concentrate in certain areas such as judicial independence, gender, etc., it may be that more detailed analysis is required in those areas to diagnose problems and design program solutions.

## **Local Ownership of the Assessment Process**

The ABA/CEELI ICCPR Index will provide a mechanism for systematically gathering—and organizing—a broad range of information from key local legal professionals who actually work in the relevant areas, as opposed to Executive Branch staff attorneys typically engaged in the production of Country Reports. ABA/CEELI considers the proper methodological approach to require consultations with a range of professionals working within the domestic legal system in the following basic areas: judiciary; executive; NGO community; business community; and media. Consequently, ABA/CEELI anticipates that the perspectives assembled will reflect an enhanced diversity of views and reflect practical successes and challenges in domestic implementation, as opposed to solely the official position of the current government.

Perhaps more importantly, the existence of an alternative (*i.e.*, non-governmental) assessment system will increase the availability of specific comparative material catalogued in a manner that promotes the transplantation of innovative approaches to human rights implementation. The narrative structure of most scholarly research and human rights reports imposes significant transaction costs to human rights professionals seeking access to current comparative developments. In contrast, the ICCPR Index conveniently segregates information, allowing for quick comparisons between jurisdictions. ABA/CEELI intends to develop a specialized computer database to house this information following the completion of the ICCPR Index.

## **Overall Framework of the ICCPR Index**

The ICCPR contains both classic substantive rights and provisions of general application that address the manner in which substantive rights are realized. Because the ICCPR Index is intended to be an assessment tool, capable of rapid deployment and use, it by definition cannot be expected to address every detail of ICCPR implementation. To focus and establish a framework for the ICCPR Index, ABA/CEELI chose to draw basic indicia of compliance from the major provisions of general application: Articles 2, 3, and 5. While ABA/CEELI acknowledges that this list is not comprehensive and that the ICCPR contains other general provisions, ABA/CEELI concluded that the set of general criteria derived from these articles provides a useful tool for identifying the crucial elements of basic treaty compliance. Furthermore, these articles provide a coherent framework for data collection suitable for relatively rapid assessments.

In Section I of the ICCPR Index, the articles of general application are examined, and the substantive basis for the selection of assessment criteria is explained. In Section II, other rights of general application are explored. While these rights are more procedural in nature, they are no less fundamental. In fact, their fundamental nature dictates that they be examined separately, for the failure to realize any of these rights could risk the emasculation of all rights that follow. In Section III, the Section I assessment criteria are applied to the various substantive rights. In this way, ABA/CEELI strives to give meaning to the accessory provisions of general application in their proper context, as well as to conduct a review of the substantive civil and political rights themselves.

Within the U.N. treaty system, the ICCPR is an instrument of general application, and the ICCPR Index is structured to look for the basic indicia reflecting respect for civil and political rights. However, by definition, the inquiry may be taken to a more specific level as noted above. Other U.N. treaties, such as the Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>12</sup>, examine the rights embodied in certain ICCPR provisions in more extensive detail, including social, cultural, and practical factors. ABA/CEELI notes that these more specific treaties provide far more elaborate criteria—an examination of which would be beyond the scope of the ICCPR Index.

To address these more specific topics, ABA/CEELI maintains that more specific tools are required, and it has commissioned projects to address the more specific issues of judicial reform and women's rights. These tools are currently in various stages of development, and they will attempt critical evaluations of a similar technical nature. The ICCPR Index is more general, and ABA/CEELI does NOT intend to create a system of rating countries on their compliance with the ICCPR. Rather, the results of the Index will serve to build a comprehensive database upon which to embark on such ambitious tasks, as well as the aforesaid, more specific inquiries. In terms of the latter, formal linkages among the various tools under development are being considered.

## **Data Collection**

ABA/CEELI will examine the substantive treaty provisions in a standard format, addressing each of the rights in turn during the data collection process. ABA/CEELI is proposing the following generic format for the inquiry:

**Statement of the Issue(s)**

- Text of the Treaty Article
- Statement of General Commentary Shaping the Assessment Inquiry
- List of Similar Treaty Articles/Provisions

**Basic Criteria and Questions Assessed**

- List of questions posed and criteria examined to determine compliance and local responses to these issues
- Primary legal sources including: Title of constitution, law, or regulation; list of relevant articles; citation to official reporter; notation as to availability in English
- Secondary legal sources including: Commentary, cases, articles, etc. with full citations

**Statements of the Findings**

- Conclusions Section: A 3-6 sentence summary of the findings
- Analysis Section: All the relevant analysis—broken down by perspectives where relevant—such as judicial, executive, NGO, and layperson
- Government Response: Any formal government response to the findings
- Matters Pending: A list of issues that requires further investigation and might affect scoring

Ideally, ABA/CEELI envisions a structured combination of local NGO activists and international human rights professionals working together to assemble this information. No attempt will be made to engage in statistically defensible polling. All information will be gathered from “key informant” interviews. The team involved in that interview process would be tabulated and noted at the end of the report/database entry, providing for easy follow-up.

## **II. Establishing the Analytical Framework**

### **A Functional Approach to Implementation**

At the beginning of the ICCPR, there are several articles that are sometimes described as accessory provisions, and these articles provide interpretative guidance as to how to properly implement the protections of the Covenant. Thus, these provisions collectively serve as a “lens” with which to view the remaining provisions of the Covenant. Proper implementation of human rights standards is a dynamic state commitment, requiring systematic vigilance. Use of this lens ensures that each right is scrutinized for both the formal and informal elements necessary for its proper enjoyment.

These articles of general application are:

- Article 2: Obligation to Enforce Covenant Rights
- Article 3: Obligation to Ensure Equal Rights of Men and Women
- Article 5: Scope of Covenant Rights

These three articles address several broad themes that define a pragmatic approach to realizing Covenant rights. First and foremost among these is that each state has an obligation to formally establish the legal framework necessary to secure civil and political rights, and this framework must do so in a non-discriminatory manner, ensuring equal access to these rights. However, the drafters realized that the establishment of proper legislation and enforcement mechanisms alone is not sufficient to guarantee enjoyment of a right, and the second theme is that rights are not solely a function of formal legal structures. Typically, a number of non-legal measures are necessary to secure an environment where rights are understood and enforced, and additional programs, such as human rights education, are required to establish this environment. Moreover, even when a human rights culture has been established, other challenges remain--namely, the potential for competing claims to rights. A healthy system of human rights protections cannot tolerate circumstances where one is allowed to assert a right in a manner detrimental to the legitimate rights of others, and the final theme is that each claim to a right is circumscribed by the rights of others to enjoy similar rights. Mutual respect for Covenant rights requires that their application not be abused and that individuals have a basis to rely on their fair and even application, even in the most difficult of national conditions. The drafters of the Covenant chose to frame the Covenant with these concerns in mind, and taken together, these themes provide a core methodology for assessing whether a state has taken the necessary measure to implement the substantive protections of the Covenant.

## Article 2: Obligation to Enforce Covenant Rights

1. *Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State party to the present Covenant undertakes:*
  - a. *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
  - b. *To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the State, and to develop the possibilities of judicial remedy;*
  - c. *To ensure that the competent authorities shall enforce such remedies when granted.*

Article 2 is the core of the Covenant, containing general obligations designed to ensure that States parties apply the provisions of the ICCPR domestically. The inclusion of a separate provision mandating domestic implementation of the Covenant can be traced back as early as 1947.<sup>1</sup> Applicable to all Covenant rights equally, Article 2 plays a significant function in the systematic interpretation of the ICCPR.<sup>2</sup> As its wording makes clear, Article 2 does not establish independent, subjective rights but rather duties of the States parties based on rights already recognized in the Covenant.<sup>3</sup>

Captured within Article 2 are a number of provisions that are dealt with separately in other conventions, including the following:

- Articles 1, 13, and 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR);
- Articles 1, 2, and 25 of the American Convention on Human Rights<sup>4</sup> (ACHR); and
- Articles 1, 2, and 26 of the African Charter on Human and Peoples' Rights<sup>5</sup> (ACHPR).<sup>6</sup>

The Human Rights Committee's (HRC) focus on the efforts of States parties to implement Article 2 has been pronounced: it has consistently required detailed explanations as to the "exact status of the Covenant within the respective constitutional and legal regimes of the States parties."<sup>7</sup> While the HRC has often drawn on Article 2 to establish a Covenant violation, "an express violation of this provision has been found in only a few cases."<sup>8</sup>

**Article 2(1) Interpretation:** Article 2(1) has both a positive and negative character. The latter requires States parties to refrain from restrictions of enumerated civil and political rights. Sometimes, this duty implies absolute restrictions, as is the case with the prohibition against torture in Article 7. Other times, this duty simply prohibits arbitrary interference, such as in the case of the right of privacy in Article 17.<sup>9</sup> However, it is crucial to note the duties in Article 2(1) are not progressive duties. The parallel provision in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) contemplates such progressive realization, but the ICCPR imposes an immediate obligation, which a state either is, or is not, fulfilling.

In the context of positive duties, States parties must guarantee that both substantive and procedural protections are available to persons within its jurisdiction. This duty also imposes an obligation to address "horizontal effects" that might result in private interference with the enjoyment of rights, e.g., the right to personal security in Article 9(1).<sup>10</sup> The manner in which a state fulfills these duties is flexible, and States parties are not required to formally incorporate the

ICCPR in domestic law.<sup>11</sup> This flexibility does not free federal states from the duty to take all necessary measures at lower levels, and there is a substantial case to be made that States parties are obligated to observe these rights and accompanying obligations when acting abroad.<sup>12</sup>

While its precise boundaries may not be clear, the HRC has concluded that even immigration laws may fall within the ambit of Article 2(1) if they impact or affect the enjoyment of other rights in a discriminatory manner.<sup>13</sup> In terms of discrimination, Article 2(1) requires States parties to ensure the rights contained within the Covenant are protected without discrimination. Article 26 furthers this concept by stating “all persons are equal before the law and entitled to equal protection by the law.” Through these two articles, the Covenant ensures that there are laws that protect every person’s human rights and that there should not be any discrimination in the application of these laws. Commentators have tried to distinguish these two articles. Article 2(1) is directed more at legislation, and Article 26 is more directed at the specifics of enforcement.<sup>14</sup>

The HRC has held that Articles 2(1) and 26 may be used in conjunction to challenge discriminatory legislation that has been enforced to the detriment of an individual. In *Luciano Weinberger Weisz v. Uruguay*, the HRC examined a case where a journalist had been deprived of political rights on the basis of a conviction for the crime of “subversive association.” The HRC held that Articles 2(1) and 26 are violated when someone is subject to “sanctions solely because of his or her political opinion.”<sup>15</sup>

**Article 2(2) Interpretation:** The HRC notes that Article 2 of the Covenant generally leaves it to the States parties concerned to choose the method of implementation in their territories, within the framework set out in that article, and an individual cannot claim *a priori* that seeking domestic enforcement would be futile. Thus, the HRC insists upon the exhaustion of local remedies.<sup>16</sup>

However, Article 2(2) recognizes that the choice of implementation is not formalistic, and implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not *per se* sufficient. Thus, where appropriate, the HRC has suggested that a State party develop new mechanisms to enable individuals to enjoy their rights.<sup>17</sup> In General Comment 3, the HRC notes, “This duty is particularly obvious in a number of articles, but in principle this undertaking relates to all rights set forth in the Covenant.”<sup>18</sup> Implicit within this approach is the understanding that individuals may express their human rights concerns through human rights NGOs, and the HRC has cited Article 2 when recommending that a State party engage in an “intensive dialogue” with human rights NGOs.<sup>19</sup> The HRC has made clear:

It is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training. It is desirable also to give publicity to the State party’s cooperation with the Committee.<sup>20</sup>

**Article 2(3) Interpretation:** Article 2(3)(a) establishes the requirement that violations of Covenant rights have a corresponding remedy that is effective in practice. If no such remedy exists, the exhaustion of “all available remedies” as required under Articles 2 and 5(2)(b) of the First Optional Protocol is considered satisfied, allowing individuals to proceed with a petition to the HRC.<sup>21</sup> Room for interpretation arises under Article 2(3)(b) concerning whether a judicial remedy is *per se* required. The *Travaux Préparatoires* and the text do not support solely political remedies as sufficient, placing a clear priority on judicial remedies.<sup>22</sup> HRC decisions indicate this provision may be focused on “repressive” remedies to address specific violations—the one notable exception being the right to life where preventive measures are clearly needed.<sup>23</sup> However, in cases where judicial remedies are called for, the HRC has noted that Article 2(3) contemplates that they will be in accordance with the protections secured in Article 14, such as judicial independence.<sup>24</sup>

In any case, what is clear is that Article 2(3) imposes a general duty on States parties to pass legislation providing for remedies and to compensate persons if it fails to do so.<sup>25</sup> States parties may not simply assert compliance with this provision in response to evidence that the State failed to provide an effective remedy. The HRC has held that a State's assertion of the existence of a remedy is not a substitute for a State's duty to investigate alleged violations of non-derogable rights.<sup>26</sup> Moreover, the HRC has specified that legislation restricting investigations into alleged abuses is problematic because it contributes to an "atmosphere of impunity."<sup>27</sup>

This duty follows from the language of Article 2(3)(c), which also makes clear that the *de jure* remedy provided must be enforceable. In cases where a *de jure* remedy is not enforced, an individual should have additional recourse, and if "no competent court" exists to hear an appeal of an ineffective remedy, Article 2(3), in conjunction with Article 9(4), may be violated.<sup>28</sup> While it must be enforceable, the type of enforcement may vary with the type of violation. For example, compensation issues may depend on the right in question, e.g., Articles 9(8) and 14(6) dealing with faulty conviction and unlawful detention respectively.<sup>29</sup> Acknowledging the importance of the remedy issue, the HRC has addressed a wide range of nuanced issues ranging from the exclusion of illegally obtained evidence to the role of an ombudsman.<sup>30</sup>

## Article 3: Obligation to Ensure Equal Rights of Men and Women

*The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*

Like Article 2, Article 3 of the ICCPR has both positive and negative obligations. However, Article 3 does not address discrimination in general, but rather focuses on equality between men and women. Consequently, Article 3 serves to emphasize that every effort must be made to eliminate prejudice against women, despite the possibility that this might be perceived as repetition of the nondiscrimination guarantees in the Covenant.<sup>1</sup> As the HRC noted in its General Comment addressing Article 3, "The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right."<sup>2</sup>

At first glance, this language could imply that Article 3 urged that States parties endeavor to ensure equal treatment of men and women as to every civil and political right, regardless of whether they are set forth in the Covenant—similar to the protections provided in Article 26. However, this effort to "oblige states to undertake a commitment the scope of which was not clearly defined" was rejected by the drafters.<sup>3</sup> Thus, the scope of Article 3 is limited to obliging States parties to ensure the equal enjoyment of the rights secured by the Covenant.

Other international instruments have addressed issues related to gender equality, including:

- European Convention On Human Rights (ECHR), Article 14;
- International Covenant On Economic, Social, And Cultural Rights (ICESCR), Article 3;
- Convention On The Political Rights Of Women;<sup>4</sup>
- Convention On Nationality Of Married Women;<sup>5</sup>
- Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW);<sup>6</sup>
- Declaration On The Elimination Of Violence Against Women;<sup>7</sup>
- Declaration On The Protection Of Women And Children In Armed Conflict;<sup>8</sup>
- Convention On The Consent To Marriage, Minimum Age for Marriage and Registration of Marriages;<sup>9</sup>
- ILO Convention, No. 100 (Equal Remuneration For Men And Women);<sup>10</sup>
- ILO Convention, No. 111 (Discrimination With Respect To Employment);<sup>11</sup> and
- UNESCO Convention Against Discrimination In Education.<sup>12</sup>

**General Interpretation:** The HRC interprets Article 3 broadly and in conjunction with other articles of the Covenant, especially Article 2(2). Article 3 implies duties for state authorities to ensure equality guarantees. Ensuring equality means more than simply making a distinction between the sexes; it implies a need for active behavior and specific measures, *e.g.*, affirmative action.<sup>13</sup>

Whether Article 3 constitutes a foundation for asserting an independent right to affirmative action is questionable. In General Comment 28, replacing the original 1981 comment on Article 3, the HRC implies that Article 3 has an accessory character.<sup>14</sup> The Committee reviewed the application of Article 3 by states in the context of other rights secured by the Covenant, specifically Articles 6, 7, 8, 9, 10, 12, 14, 16, 17, 18, 19, 23, and 27. However, the accessory character does not imply that Article 3 depends on whether a right of the Covenant was violated, but rather, whether there has been some manner of gender-specific discrimination in the application of that right. Thus, Article 3 works closely in conjunction with the other articles of the Covenant, as opposed to establishing an independent substantive right.<sup>15</sup>

**Scope of Affirmative Action:** Article 3 requires States parties to take positive steps towards the guarantee of equal rights to men and women. These steps include not only the enactment of legislative guarantees, but also effective monitoring and enforcement steps. As the HRC indicated in its original comments on Article 3:

[A]rticle 3 ... deal[s] with the prevention of discrimination [and] requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of the rights. This cannot be done simply by enacting laws. Hence, more information has generally been required regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations under Article 3 . . .<sup>16</sup>

Thus, Article 3 contemplates a pragmatic, as well as legal, understanding of the right to equality between men and women. States parties will not be able to satisfy their legal obligations under the Covenant merely through the enactment of legislation.

States parties have an obligation to publicize measures taken to ensure the effectiveness of the right to equality. "Necessary steps . . . include[s] the . . . education of state officials in human rights."<sup>17</sup> Moreover, instances of inequality between men and women are frequently grounded in the traditional, historical, religious or cultural attitudes common within a particular State party. States parties have an obligation to ensure that such attitudes do not adversely affect the right of men and women to the equal enjoyment of their rights under the Covenant. Specifically, government officials should be educated on the special needs of women regarding their reproductive rights, as well as measures that secure their safety and health. While education of government officials is a priority, the HRC has noted that "persistent negative attitudes towards women" justifies broader measures "to promote popular awareness" of the issues involved.<sup>18</sup>

The HRC has been explicit that Article 3 implies broad, assertive, verifiable action on the part of States parties. It must enact legislation to protect the equality of men and women. It must also ensure that such legal guarantees are secured, useful and accessible: "[N]ecessary steps to enable every person to enjoy [the rights secured under the Covenant pursuant to articles 2 and 3] . . . include[s] . . . the education of the population."<sup>19</sup> States must therefore provide their populace with the means of understanding its rights to be free from discrimination and of acting upon them.

In General Comment 28, the HRC indicated that these obligations include "the removal of obstacles to the equal enjoyment of each of such rights."<sup>20</sup> The HRC emphasized that these obligations are defined in conjunction with a variety of substantive articles, and the HRC identified issues that could pose violations of Article 3 in conjunction with another specific articles:

- Article 4: Risks posed with armed conflict such as rape, abduction, and other gender-based violence.<sup>21</sup>
- Article 6: Risks posed with clandestine abortions, practice of infanticide, custom of dowry killings, and gender specific poverty and deprivation that is life threatening.<sup>22</sup>
- Article 7: Threat of domestic violence, practice of forced sterilization, access to abortion in cases of rape, and practice of corporal punishment to enforce dress codes.<sup>23</sup>
- Article 8: Practice of trafficking in women, prostitution, and slavery disguised as the performance of services.<sup>24</sup>
- Article 9: Practice of house confinement for women as a customary sanction.<sup>25</sup>
- Article 10: Absence of separate prison facilities for women, female guards for female prisoners, special protections for pregnant women, and access to rehabilitation.<sup>26</sup>
- Article 12: Presence of marital/parental powers restricting movement of adult females, and limitations on access to travel documentation.<sup>27</sup>
- Article 13: Gender specific limitations on the rights of aliens in matters of expulsion.<sup>28</sup>
- Article 14: Limitations on access to courts, female testimony, and the presumption of innocence for female defendants.<sup>29</sup>

- Article 16: Limitations on the right to property, ability to contract, or the right to enjoy full legal personality.<sup>30</sup>
- Article 17: Absence of special protection against rape, forced sterilization, and pregnancy testing as a condition of employment.<sup>31</sup>
- Article 18: Limitations on ability to change or express religion such as third party consent requirements.<sup>32</sup>
- Article 19: Practice of pornography depicting women as objects in degrading or inhuman circumstances.<sup>33</sup>
- Article 23: Presence of age distinctions in right to marry, third party marital consent requirements, polygamy, prohibitions on mixed religious marriages, limitation on rights of re-marriage, restrictions on child custody, limitations on ownership and administration of marital property, restrictions on the right to a name or nationality, and limitations on inheritance rights.<sup>34</sup>
- Article 24: Limitations on access to education and health care.<sup>35</sup>
- Article 25: Absence of provisions securing and promoting equal access to and participation in public affairs and public office.<sup>36</sup>
- Article 26: Presence of laws that penalize crimes such as adultery unequally, customs and traditions that impede access to better employment and equal pay, and gender-based limitations on access to government services including education.<sup>37</sup>
- Article 27: Presence of minority cultural, religious, or language rights that could limit a woman's access to equal enjoyment of Covenant rights.<sup>38</sup>

## Article 5: Scope of Covenant Rights

*1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*

*2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.*

Article 5, along with Article 2, defines obligations that are designed to ensure the maximum extension of Covenant protections. Given that the assertion of one right may challenge another, it is important that States parties interpret, enforce, and monitor Covenant rights in a manner that supports the overall framework of rights. Article 5 makes this duty explicit, prohibiting the use of Covenant rights in a manner inconsistent with this goal.

Similar protections are found in other international agreements, including:

- Universal Declaration on Human Rights (UDHR), Article 30;
- European Convention on Human Rights (ECHR), Article 17 and 18; and
- American Convention on Human Rights (ACHR), Article 29.

Thus, this progressive approach to human rights implementation enjoys broad support and creates a duty upon those seeking to implement human rights to consider the proper dimensions of each right.

Article 5 is not often invoked, and the ICCPR has not been employed as a general matter to limit rights. Nevertheless, assertion of a right could clearly in some instances run afoul of this provision. For example, a religious state may not assert religious doctrine as a justification for acts that impinge on the freedoms of others by citing the right of the majority population to their religious freedom as justification. The HRC has specifically stated that “although a State might defend its culture and national religion, in doing so, it could not deviate from the fundamental common values elaborated in the Covenant.”<sup>1</sup>

In terms of application, the HRC has held that Article 5 is one of the “general undertakings by States and cannot be invoked, in isolation.”<sup>2</sup> With this interpretation, Article 5 does not provide independent substantive rights, but rather, ancillary protection that attaches to the assertion of other rights.

**Article 5(1) Interpretation:** Like Articles 4 and 22(2), Article 5(1) is itself limited. It prohibits only “activity” or “acts.” As such, the language of Article 5(1) directly flows from Article 30 of the Universal Declaration of Human Rights.<sup>3</sup> The history of Article 30 indicates that the focus on acts and action was intended to prevent States from pursuing persons for expressions of critical or contrary opinion.

Article 5(1) prohibits “only those actions that have the aim of destroying or limiting the human rights of others. There must be the prohibited objective and an action, and the two must be linked. Thus, to invoke Article 5(1) there must be some evidence of the ‘aim’ of destroying or limiting the rights secured by the Covenant, and there must be some action in furtherance of that aim.”<sup>4</sup> Some commentators have also suggested a further implicit limitation: namely, that Article 5(1) only applies to those rights specified in the Covenant that are capable of being misused. In other words, it applies to rights requiring action for their effectuation. Rights of existence, such as life or liberty, cannot be misused. Thus, the rights most concerned with Article 5(1) are rights of religion, expression, opinion, belief, and association, among others.<sup>5</sup>

Premised on the notion that rights can be abused, Article 5(1) ensures that, though rights may be restricted for certain public reasons, limitation in general is not a permissible goal. A state therefore may not use a crisis (a national emergency or other stated need to protect public order or health) for the express purpose of denying other rights to other groups or individuals.<sup>6</sup> As such, Article 5(1) further limits a state's ability to derogate from the Covenant pursuant to Article 4 or from its freedom of expression protections pursuant to Article 22(2). While both imply that a State has a measure of discretion in determining whether derogation measures are appropriate, Article 5(1) prevents a derogating state from using a national crisis for the illegitimate purpose of denying or limiting the rights of others. As such, Article 5(1) calls for a subjective inquiry into the aims and objectives of a State's decision to derogate from the Covenant, regardless of whether such a decision is pursuant to Article 4 or 22(2).

Article 5(1) reaches beyond the States parties to the Covenant. By prohibiting not only states, but also groups and individuals within states, from any actions aimed towards the destruction of or excessive limitation of the rights and freedoms secured by the Covenant. In this respect, Article 5(1) would take precedence over other articles of the Covenant. For example, a state could criminalize the activity or group that sought the destruction of the rights of others (e.g., terrorism or a terrorist organization) and that decision would not be subject to attack as violating the Covenant's protection of the right to freedom of assembly or association.

However, it is important to note that Article 5(1) is not a license to exempt certain persons or groups from the protections of the Covenant. A state may not use a person or groups' lawful activity as the basis for depriving them of their rights. Even activity aimed at the destruction or limitation of rights under the Covenant does not negate other due human rights protections.

Furthermore, Article 5(1) may serve as a basis for holding States parties accountable for actions taken outside their territorial borders in conjunction with Article 2. The HRC has cited Article 5(1) as a basis for holding a state accountable for its extraterritorial actions. In *Burgos v. Uruguay*, the HRC held that a person who was arrested, detained, and mistreated abroad could make a claim against the state actor and that any holding to the contrary would be "unconscionable."<sup>7</sup>

**Article 5(2) Interpretation:** Article 5(2) prevents a state from using the Covenant as a basis for denying or limiting other rights, whether guaranteed by domestic or international law. Thus, it may be thought of as a "savings" clause or a canon of construction, which is designed to guard against restricting otherwise applicable human rights. It is aimed at ensuring that otherwise permissible restrictions or derogations are not used to legalize such restrictions. For example, the fact that the Covenant might not recognize a right (e.g., the right to property) cannot justify the state's refusal to recognize the right if it is secured elsewhere, such as in a national constitution. Concomitantly, a state may not use the notion that the Covenant recognizes certain rights to a lesser extent than do other national instruments to reduce its compliance with those other national instruments. It is notable that Article 5(2) does not incorporate domestic human rights protections or other international obligations. Article 5(2) does not mandate adherence to any particular panoply of rights, but instead removes the Covenant as an excuse for a state's failure to comply with higher standards, whether domestic or international.<sup>8</sup>

## **Assessment Inquiry Derived from Articles 2, 3, and 5**

The analysis of Articles 2, 3, and 5 illustrates that these general, accessory provisions are integral to the interpretation of the remaining articles of the Covenant. Consequently, it is important that an analysis of these subsequent provisions incorporate the protections outlined in these articles. The “Assessment Inquiry” described below is derived from the analysis of Articles 2, 3, and 5, and it serves to frame the assessment process for the substantive human rights provisions of the Covenant (Section III). The Assessment Inquiry is also employed to the extent practical to frame the assessment of the procedural provisions (Section II). However, because interpretation is not a mechanistic process, this Assessment Inquiry is not applied inflexibly. Where, for example, certain elements of the Assessment Inquiry do not logically apply, or require modification, the Assessment Inquiry associated with the article in question is modified accordingly.

### **Assessment Inquiry**

#### **I. State Has A Legal Obligation To Enact Appropriate Legislation:**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article X of this Covenant?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

#### **II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:**

Are laws reflecting the rights in Article X adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article X? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article X?

#### **III. State Has A Legal Obligation To Secure And Respect Certain Core Rights Regardless Of Any State Of Emergency:**

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article X are accessible to all individuals within the jurisdiction of State X? Describe examples of State X’s efforts to secure the rights in Article X for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article X?

Are there informal structures that limit the exercise of the rights in Article X that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article X?

Has the state provided the necessary resources to make the rights in Article X accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article X. In addition, with respect to specific articles, consider the following specific challenges:

- Article 4: What measures has State X taken to eliminate the risks posed with armed conflict such as rape, abduction, and other gender-based violence?
- Article 6: What measures has State X taken to eliminate the risks posed with clandestine abortions, the practice of infanticide, the custom of dowry killings, and gender specific poverty and deprivation that is life threatening?
- Article 7: What measures has State X taken to eliminate the threat of domestic violence, practice of forced sterilization, and use of corporal punishment to enforce dress codes? What measures has State X done to insure access to abortion in cases of rape?
- Article 8: What measures has State X taken to eliminate trafficking in women, prostitution, and slavery disguised as the performance of services.
- Article 9: What measures has State X taken to eliminate house confinement for women as a customary sanction?
- Article 10: What measure has State X taken to provide separate prison facilities for women, female guards for female prisoners, special protections for pregnant women, and access to rehabilitation?

- Article 12: What measures has State X taken to eliminate marital/parental powers restricting movement of adult females and provide females with access to travel documentation?
- Article 13: What measures has State X taken to insure gender-neutral review of alien expulsion orders?
- Article 14: What measures has State X taken to eliminate any limitations on access to courts and female testimony in court? What measures has State X taken to insure the presumption of innocence for female defendants?
- Article 16: What measures has State X taken to eliminate any limitations on the right to property, ability to contract, or right to enjoy full legal personality?
- Article 17: What measures has State X taken to provide special protection against rape, forced sterilization, and pregnancy testing as a condition of employment?
- Article 18: What measures has State X taken to eliminate any limitations on ability to change or express religion, such as third party consent requirements?
- Article 19: What measures has State X taken to eliminate pornography depicting women as objects in degrading or inhuman circumstances?
- Article 23: What measures has State X taken to eliminate age distinctions in right to marry, third party marital consent requirements, polygamy, prohibitions on mixed religious marriages, limitation on rights of re-marriage, restrictions on child custody, limitations on ownership and administration of marital property, restrictions on the right to a name or nationality, and limitations on inheritance rights?
- Article 24: What measures has State X taken to eliminate limitations on access to education and health care?
- Article 25: What measures has State X taken to promote provisions securing and promoting equal access to public affairs and public office?
- Article 26: What measures has State X taken to eliminate discrepancies in punishment for crimes such as adultery, customs and traditions that impede access to better employment and equal pay, and gender-based limitations on access to government services including education?
- Article 27: What measures has State X taken to monitor and restrict minority cultural, religious, or language rights that could limit a woman's access to equal enjoyment of Covenant rights?

#### **IV. Right To An Effective Remedy And Its Enforcement**

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article X? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article X? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article X? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article X?

#### **V. Limitations And/Or Derogations and Scope of Rights**

Are there any circumstances in which State X has derogated from its obligation to guarantee the rights and freedoms set forth in Article X?

If State X has derogated from any of the provisions of Article X did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures.

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the rights and freedoms set forth in Article X, or which recognize them to a lesser extent? Has State X acted to limit or restrict the rights and freedoms set forth in Article X in some other fashion?

Are any existing limitations or restrictions on the rights and freedoms set forth in Article X guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the rights and freedoms set forth in Article X? Has State X restricted other human rights guarantees?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights and freedoms set forth in Article X? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the rights and freedoms set forth in Article X?

What administrative, judicial, or other measures has State X taken in response to non-state actor engaged in activities that limit or restrict the ability of others to enjoy the rights and freedoms set forth in Article X?

### **III. Analyzing Implementation: Provisions of General Application**

The ICCPR contains several articles that define rules of general application, which are important, and in many cases necessary, for the full enjoyment of other rights. While the mechanisms and processes defined in these articles are not implicated in every situation involving a Covenant right, these protections are essential in certain circumstances, and when these protections are not respected, some or all of the other Covenant protections may be jeopardized.

The articles addressing these general protections are:

- Article 4: Limitations on Derogations Based on Public Emergency
- Article 14: Due Process Rights in Civil and Criminal Trials
- Article 15: Prohibition Against Retroactive Criminal Laws
- Articles 30(4) and 40(1): Obligation to Participate in the ICCPR Machinery
- Article 50: Obligation to Resolve Federalism Issues

Article 4 addresses state action during times of national emergency. Drafters of the Covenant recognized that a national emergency may strain existing institutions and procedures, making it impossible to preserve the same level of protection. However, the drafters were also cognizant of the fact that an “emergency” can be the pretext whereby a government seeks to curtail the rights of individuals within its jurisdiction. With this concern in mind, they defined specific parameters that should be adhered during a national emergency, establishing that certain rights are inviolable and making permissible restrictions subject to scrutiny and limitation to the greatest extent possible.

Ultimately, the protection of human rights is a continuous struggle even in times of peace and security, and Articles 14 and 15 establish basic protections that are intended to empower the individual to realize his or her rights. Article 15 guarantees the right of individuals to notice as to those matters that the state deems criminal and entitles individuals to benefit from reductions in the severity of prescribed punishments. Article 14 defines what constitutes adequate judicial process, when a case comes before a court or tribunal. By definition, states are fallible, and individuals will continue to need notice of what constitutes a crime and an effective judicial forum for seeking enforcement of their rights.

However, due to its status as an international treaty, the Covenant also contemplates that proper enforcement of human rights transcends national boundaries and is a matter of international concern. To monitor the performance of States parties, Articles 30(4) and 40(1) of the Covenant establish the Human Rights Committee and compel States parties to report to the Committee on the status of Covenant rights within their jurisdiction. Though these provisions may not be subject to individual enforcement action, as noted in Chapter I, they nevertheless play a crucial role, providing an international monitoring body capable of applying pressure to specific states to improve their human rights protections.

Finally, Article 50 addresses the particular challenges that federal states may face regarding ICCPR implementation. Typically, treaties are matters for the national government. However, the sub-national units within a federal system may play a crucial role in implementation. Article 50 establishes a clear duty on the part of the national government to ensure that all Covenant rights and protections are respected at the sub-national level of government.

## Article 4: Limitations on Derogations Based on Public Emergency

1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin.*

2. *No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.*

3. *Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*

### General Commentary

Article 4 allows the state to derogate from its official obligations under the Covenant in times of recognized public emergency. It is only to be invoked when two stringent conditions are met. First, there must be a situation prevailing throughout the country that constitutes a state of emergency which threatens the existence of the nation. Second, the state must officially proclaim the existence of a state of emergency.<sup>1</sup> Every system of rights is essentially a structure of qualified rights or guarantees. Article 4 is both a qualification of the general obligations of Article 2 and a crucial potential accessory protection to Covenant provisions, although it is rarely invoked.

Accordingly, the Human Rights Committee views Article 4 as having “paramount importance” in the ICCPR “system” for protecting human rights.<sup>2</sup> On the one hand, Article 4 embodies the tension within the Covenant between the rights of the individual and the right of a state to its own continued existence. A state has a legal obligation to the rights of individuals that competes with its own efforts to maintain its existence. The Universal Declaration of Human Rights (UDHR) indicates a similar balancing: Article 1 of the UDHR indicates all human beings have certain rights, but Article 29 notes that rights are balanced by correlative duties. Thus, the rights of an individual against the state can be, and are, limited.

At the same time, a state’s actions in a state of emergency have the potential to affect every ICCPR right and prohibition. The Covenant’s drafters recognized that repudiation or suspension of human rights protections in times of national crisis was foreseeable. Indeed, many states have similar suspension authority in their basic laws and/or constitutions. The United States Constitution, for example, allows Congress to suspend the *writ of habeas corpus* “when in cases of rebellion or invasion the public safety may require it.”<sup>3</sup> There was apparently near universal acceptance among the drafters of the Covenant regarding the need for a provision allowing derogation.

The HRC is concerned that Article 4 not become a “back door” to Article 2 obligations to secure the rights under the Covenant. The HRC “does not agree...that the Covenant must be interpreted and applied against the background of the conditions prevailing in the country.”<sup>4</sup> Indeed, those instances when derogation may be necessary – states of emergency – are precisely those times when the protection of human rights is most needed.<sup>5</sup> Thus, the Committee has indicated that full compliance with Article 4 requires protection for human rights despite the occurrence of a state of emergency. Derogation from a human rights norm must be seen, and taken, only as an exceptional and temporary step.

The Human Rights Committee is concerned with the possibility of abuse of emergency powers.<sup>6</sup> Thus, it has noted that in cases of public emergency relating to armed conflict, the rules of international humanitarian law apply and supplement the requirements of Articles 4 and 5 of the ICCPR to forestall the possibility of such abuse.<sup>7</sup> The HRC has made it a practice to require explanations and submissions regarding the effect of any measures taken pursuant to Article 4 on

the enjoyment of the other rights secured by Articles 1-27 of the Covenant.<sup>8</sup> Article 4, therefore, represents a realistic compromise, allowing derogation, but only in certain instances, with specific limits, and conditioned upon public obligations. The HRC has instructed states to “carefully consider” situations of possible derogation, especially those involving armed conflict, before invoking Article 4 and thereby ensure that doing so is “necessary and legitimate.”<sup>9</sup>

**Article 4(1) Interpretation:** The HRC has indicated that measures of derogation must be strictly required by the situation. However, Article 4(1) does not define the concept of “public emergency,” but subsequent consideration has made it clear that “every disturbance or catastrophe” does not qualify as a public emergency.<sup>10</sup> The situation must threaten the whole nation, not just a part of it, and it must cast in doubt the continued physical integrity of the population, the political independence, or territorial integrity of the state. Impairment of the basic functioning of the state institutions that are indispensable to ensuring and protecting the rights under the Covenant may also suffice, but economic difficulties *per se* do not. Moreover, internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation are likewise insufficient.<sup>11</sup>

The phrase “life of the nation” is also not defined. However, when considering the scope of a similar article of the European Convention on Human Rights, the European Commission of Human Rights concluded that, to threaten the life of a nation, a public emergency must: be actual and imminent; have effects that involve the entire nation; threaten the continuity of the organized life of the community; and be of such exceptional nature that the crisis or danger cannot be dealt with by normal measures otherwise permitted.<sup>12</sup> The Committee has indicated that indefinite states of emergency are incompatible with Article 4.<sup>13</sup>

In addition, the Human Rights Committee has cautioned that examination of the question of derogation does not stop with analysis of whether or not the situation may permit derogation. A derogating state must justify that the actual measures of derogation are specifically required by the situation. Thus, the HRC notes: “no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behavior of a State party.”<sup>14</sup>

In its second General Comment on Article 4 (the first was in 1981, the most recent in 2001), the Human Rights Committee sought to clarify the reach of Article 4. Reflecting on the phrase “other obligations under international law,” the HRC has indicated that States parties should pay particular attention to the rules of international humanitarian law. Article 4 is to be read in conjunction with provisions of that body of law so that no Article 4 derogation may occur if doing so would thereby breach international humanitarian law obligations, whether treaty-based or in general. Thus, a State party that may not have acceded to a particular treaty may find itself nevertheless constrained in its use of Article 4 and rights under the ICCPR. In pursuit of this connection, the HRC observed that it would review the other international legal obligations of States parties to the ICCPR in any review of an Article 4 matter.<sup>15</sup>

**Article 4(2) Interpretation:** Article 4(2) expressly prevents derogation from certain “core” rights. Of the seven rights enumerated as non-derogable by Article 4(2), four are protected from derogation by similar provisions in other human rights treaties.<sup>16</sup> These four rights are expanded upon and firmly protected in other United Nations multilateral international instruments, including the Genocide Convention, Slavery Convention, and Torture Convention. The HRC has indicated that the protection of these particular rights is all the more necessary during times of national emergency.<sup>17</sup> However, the HRC has also made clear that the fact that a listed provision is non-derogable does not imply it cannot be subject to some restrictions, pointing to Article 18(3) which permits derogations independent of Article 4.<sup>18</sup>

The HRC has also strongly indicated that these are not the only rights protected from derogation by Article 4. Setting forth a relatively expansive understanding of the reach of Article 4, the Human Rights Committee explicitly linked it with the Article 5, which also restricts how States parties may interpret ICCPR provisions.<sup>19</sup> In addition, the HRC opined that the particular

provisions contained in Article 4(2) establishes those protections as peremptory norms of international law and that the universe of peremptory norms is broader than those in Article 4(2). Again, the HRC referenced international humanitarian law, establishing it as within the ambit of Article 4(2).<sup>20</sup> However, the HRC also listed several rights which it considers incapable of being lawfully derogated from pursuant to Article 4, including Article 10's protection of humane treatment while in detention; hostage taking or unacknowledged detention (which would violate Article 9); the rights of persons belonging to minorities, with respect to which the HRC specifically referenced genocide; deportation or forcible transfer with out grounds that would constitute a crime against humanity (Article 12); and advocacy of national, racial, or religious hatred in violation of Article 20.<sup>21</sup> The Committee also indicated that judicial due process, fair trial, and available fair remedy provisions of the Covenant cannot be subject to derogation if so doing would circumvent the Covenant as a whole, the non-derogable rights listed, or other international obligations.<sup>22</sup>

**Article 4(3) Interpretation:** The HRC has stated that it considers the obligation of Article 4 in regard to information to be of paramount importance. "States parties, when they resort to their power of derogation under Article 4, commit themselves to a regime of international notification."<sup>23</sup> Notification is the underpinning of the Article 4 regime; without it, the HRC cannot perform its obligations. In addition, the HRC noted that, with respect to monitoring states of emergency, notification is central to the ability of other states to do so. Moreover, the HRC has indicated that it expects a full explanation of any derogation measures in the derogating state's report under Article 40 of the Covenant. It has expressed its concern at the "the lack of clarity in the law governing the . . . state of emergency" in Azerbaijan, the failure of Syria to provide details about its state of emergency "in actual situations and cases," and condemned the Dominican Republic that its stated grounds for declaring a state of emergency are "too broad."<sup>24</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Publicly Announce Derogations From Rights Secured By The Covenant And To Inform Other States Parties And The United Nations:** Any State party wishing to make use of its right under the Covenant to derogate from provisions of the Covenant must take two public actions. First, it must publicly proclaim the existence of a state of emergency that necessitates the derogation measures. The Human Rights Committee appears to believe that most states have a legal mechanism for making such a declaration. Second, it must inform other States parties to the Covenant by reporting to the Secretary-General of the U.N. the nature of and reasons for the derogation measures. The latter communication must be specific: Article 4(3) requires the derogating state to specify which provisions it has derogated, or purported to derogate, from and the reasons for doing so.

Emphasizing the temporary nature of such measures, the State party must also communicate through the Secretary-General when it terminates the derogation. In accordance with Article 40, the Human Rights Committee requires a complete explanation of any derogations within the derogating state's report. A right-by-right explanation of the derogation measures, including relevant supporting and explanatory documentation, is requested.

## **Assessment Inquiry**

Is State X securing the rights guaranteed under the Covenant? Do domestic guarantees for such rights secured by the Covenant exist that are not enforced? Has State X publicly announced measures in derogation of rights secured under the Covenant? Has State X publicly indicated why those domestic provisions are not enforced? Has State X informed other States parties and/or the Secretary-General of the United Nations of the derogation measures?

What measures has State X taken to eliminate the risks posed with armed conflict such as rape, abduction, and other gender-based violence?

## **II. A State's Ability To Derogate From The Provisions Of The Covenant Is Strictly Limited:**

Article 4 has four express limitations on a state's ability to derogate from the provisions of the Covenant. First, Article 4(1) allows derogation only when a "public emergency that threatens the life of the nation" exists. Second, general derogation is not allowed. A state may only take permissible measures; that is, the derogation measures taken must be "strictly required by the exigencies of the situation." Herein, Article 4 expresses a requirement that the derogation be proportional to the danger it purports to address; if the danger wanes, so must the derogation be removed or relaxed.<sup>25</sup> Third, the measures chosen must not be inconsistent with other obligations under international law, including the requirements of the UDHR, other human rights treaties, and the laws of war. Fourth, there also appears to be an implicit indication that states are to act in good faith and, thus, cannot opportunistically use derogation measures to discriminate.<sup>26</sup>

### ***Assessment Inquiry***

Has State X publicly proclaimed a state of emergency? What is the nature of this emergency, and how does it threaten the life of State X? What measures in derogation have been introduced? How have these measures been connected to the state of emergency?

What time limits, if any, have been put on these measures by State X? Has State X derogated, or purported to derogate, from other human rights treaties to which it is a party? Is there any indication that State X's implementation of these derogation measures has targeted a portion of the population on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status?

**III. State Has A Legal Obligation To Secure And Respect Certain Core Rights Regardless Of Any State Of Emergency:** Article 4(2) expressly prevents derogation from certain "core" rights. Given the importance of these rights – especially during states of public emergency – States parties may not derogate from these rights. The State party may not derogate from the rights listed in Article 4(2), general peremptory norms of international law, or other Covenant provisions if doing so would thereby derogate from non-derogable rights. Special attention should be paid to a state's obligations with respect to other international human rights treaties, general international law, and international humanitarian law.

### ***Assessment Inquiry***

Is State X continuing to secure and respect the following:

- Right to life? (Article 6)
- Prohibition against the use of torture, inhuman, or degrading treatment? (Article 7)
- Ban on slavery? (Article 8)
- Prohibition on the retroactive imposition of criminal penalties? (Article 9)
- Ban on imprisonment for failure to fulfill a contractual obligation? (Article 11)
- Right to recognition as a person before the law? (Article 16)
- Right to freedom of thought, conscience, and religion? (Article 18)

## Article 14: Due Process Rights in Civil and Criminal Trials

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

### General Commentary

Article 14 is a foundation Covenant article that is necessary for the proper implementation of all basic substantive rights. The protections therein have a rich history that can be traced back to the Anglo-Saxon concept of “due process of law” and its origins in the *Magna Charta Libertatum* of 1215. Article 14’s modern application of this concept draws heavily upon the U.S. experience, reflecting the substantial U.S. role in the drafting of this article. Consequently, Article 14 is imbued with the principles of separation of powers and an independent judiciary, and these positive state obligations have often proved challenging to implement. Nevertheless, the framework established in Article 14 provides one of the most sophisticated (and accepted) blueprints of what is now commonly understood as the “rule of law.”<sup>1</sup>

Provisions similar to Article 14 may be found in a number of international and regional human rights conventions, including the:

- Universal Declaration of Human Rights (UDHR), Articles 10 and 11;
- European Convention on Human Rights (ECHR), Article 6; and
- American Convention on Human Rights (ACHR), Article 8.

A particularly rich source of analogous jurisprudence can be found under Article 6 of the ECHR. The European Court of Human Rights in Strasbourg has been particularly active in grappling with due process concepts, and given the similarities between Article 6 of the ECHR and Article 14 of the Covenant, ECHR case-law represents a substantial body of persuasive authority.<sup>2</sup>

In accordance with Article 4, Article 14 is a derogable right subject to restrictions during a period of public emergency. However, the HRC has been explicit in cautioning against unnecessary restrictions during times of emergency. According to the HRC, all restrictions should “not exceed those strictly required by the exigencies of the actual situation.”<sup>3</sup>

**General Interpretation:** Article 14 can be divided into two parts: Article 14(1), which establishes fundamental rules of law that apply to both criminal and civil trial proceedings; and Article 14(2-7), which defines specific guarantees that should be present in all criminal proceedings. Regarding the latter, the HRC has made clear that Articles 14(1) and (3) provide judges with the general authority to hear allegations that Article 14 has been violated “during any stage of the prosecution.”<sup>4</sup> Moreover, Article 14(1) is understood to apply to all proceedings at all levels. Thus, it may even serve as a residual guarantee of certain rights that are more specifically ensured in the later paragraphs.<sup>5</sup>

During the Covenant ratification process, a number of Western states filed reservations to Article 14. Many of these reservations underscore the difficulties Continental legal systems faced incorporating Anglo-Saxon due process as an overlay to their existing national legal systems. Terms and phrases that had inherent meaning in the Anglo-Saxon context, such as “fair trial,” were laden with legal meanings that have required substantial work to apply. Consequently, these terms and phrases are integral to an understanding of both the meaning and application of the protections in Article 14. Furthermore, they require the establishment of certain structures that poor, developing nations commonly find difficult to provide.<sup>6</sup>

Given the wide variety in the national legal systems, the HRC has taken a cautious, practical approach to developing Article 14 jurisprudence. The HRC has consistently avoided becoming a court of 4<sup>th</sup> instance. In *H.T.B. v. Canada*, the HRC clearly stated: “The Committee recalls that it is in principle for the courts of the States parties to the Covenant, and not for the Committee to evaluate the facts and evidence of a particular case, unless it is apparent that the courts’ decisions are manifestly arbitrary or amount to a denial of justice.”<sup>7</sup> Therefore, the HRC will refrain from reviewing the factual determinations of national courts unless these determinations are so clearly erroneous as to emasculate the legal, procedural protections embodied in Article 14.

**Article 14(1) Interpretation:** This general paragraph outlines the basic due process that should attach to all stages of criminal and civil trials. The underlying substance is most often understood through the key terms and phrases that capture the essence of the paragraph.

**Suits at Law:** While it is clear that Article 14 applies to both criminal and civil proceedings, Article 14(1) does not define the difference between a criminal proceeding and a “suit at law,” and States parties have focused their reports in many instances on criminal proceedings, avoiding the issue of suits at law altogether. The definition will clearly differ depending upon the legal system under examination, and the HRC has invited States parties to address the distinction with greater detail.<sup>8</sup>

**Equal Access to a Competent, Independent, and Impartial Tribunal:** The purpose of this provision is 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.”<sup>9</sup> Specifically, its aim is “to assure that criminal charges are heard by a court set up in advance and independently of a particular case—and not prior to and specifically for the offense involved.”<sup>10</sup> The term “tribunal” can include administrative authorities that act in that capacity, *i.e.* independent of government direction.<sup>11</sup>

Article 14 applies Article 2(1) and 26 specifically to the treatment of persons in the courts. Therefore, it prevents States parties from conditioning access to ordinary courts on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In *Ato del Avellanal v. Peru*, the HRC condemned the denial of access to married women in cases involving matrimonial property.<sup>12</sup> However, the right to equal access does not preclude states from setting up “special courts with jurisdiction over all persons belonging to the same category, such as military personnel.”<sup>13</sup> In the case of military tribunals, jurisdiction over civilians remains a contentious issue, and the HRC has noted that this “should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14.”<sup>14</sup> The HRC has noted that broad jurisdiction in the context of military courts can contribute to a culture of impunity where military officials do not consider themselves accountable for violations of human rights.<sup>15</sup>

What is essential for all courts is that the law provide guarantees that secure the independence and impartiality of the judicial body, whatever its nature. Independence refers to the structural relationship between the judicial body and other government structures, and impartiality refers to the relationship between a judge and the matter at issue in a specific case.<sup>16</sup> While the two have similarities, there are differences, and Article 14 requires both.

For a judicial body to be independent, the appointment and removal procedure must establish structural independence. In *Bahamonde v. Equatorial Guinea*, the HRC examined the influence of the country president over the judiciary. The HRC concluded that “where the functions and competences of the judiciary and executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.”<sup>17</sup> Consistent with this reasoning, the HRC has criticized short-term judicial appointments and recommended that all removals be pursuant to “an objective, independent procedure prescribed by law.”<sup>18</sup>

Regarding impartiality, the HRC summarized the concept in *Karttunen v. Finland*: “‘Impartiality’ of the court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”<sup>19</sup> Inherent within this duty is the responsibility of the court to police itself in accordance with local law. The HRC specifically held in *Karttunen v. Finland*, “Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria.”<sup>20</sup> If a court fails to do so and the judge in question hears the case, the trial itself “cannot normally be considered to be fair or impartial within the meaning of article 14.”<sup>21</sup> While there exists the possibility that this type of infraction is not outcome determinative, a person who challenges the process in these circumstances should be entitled to a full hearing on the issue, including the opportunity to orally present his/her case.<sup>22</sup>

Ultimately, the assessment of independence and impartiality is not a precise science, but there are certain factors that should be routinely considered. The HRC has noted these issues include “the manner in which judges are appointed, the qualifications for appointment, 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.”<sup>23</sup>

**Fair Hearing and Minimum Requirements:** Generally, the concept of what constitutes the basics of a fair trial is detailed in paragraphs 2-7. However, as one leading commentator has noted, “The right to a fair trial is...broader than the sum of these individual guarantees.”<sup>24</sup> Moreover, the Human Rights Committee has specifically noted that the “observance” of these guarantees is not *ipso facto* sufficient to satisfy the right to a fair hearing.<sup>25</sup>

In *Richards v. Jamaica*, the HRC examined a case where a prosecutor negotiated a manslaughter plea in return for filing a *nolle prosequi*. Immediately thereafter, the prosecutor

instituted a new action on the same facts, charging the defendant with murder. The HRC held that this disingenuous use of procedural rules was improper. According to the HRC, “the resort to a *nolle prosequi* in such circumstances, and the initiation of a further charge against the author, was incompatible with the requirements of a fair trial within the meaning of article 14, paragraph 1, of the Covenant.”<sup>26</sup>

In *Maleki v. Italy*, the HRC examined a case where a trial was conducted *in absentia*. While the HRC had previously held *in absentia* trials permissible under Article 14, the HRC had also established that the state has an obligation to first summon the accused in a timely and informative manner. In *Maleki v. Italy*, the state failed to show both that summons had been provided and that the accused was legally able to challenge an *in absentia* verdict upon his apprehension. Under these circumstances, the HRC held that the facts “disclose a violation of article 14, paragraph 1, of the Covenant.”<sup>27</sup>

**Equality of Arms:** The single most important factor in holding a fair trial is the equality of arms between the plaintiff and respondent or the prosecutor and defendant. “‘Equality of arms’, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of the trial.”<sup>28</sup> It would be impossible to detail all areas where a procedural inequality could exist, but an example of such would be if the accused were excluded from an appellate hearing at which the prosecutor was present. Whatever procedural rights and privileges are extended to the prosecution must also be extended to the defense.<sup>29</sup>

**Right to a Public Hearing:** The right to a public hearing is interpreted broadly. Human rights experts have noted: “The right to a public hearing means that... [trials, civil and criminal,] should as a rule be conducted orally and publicly, without a specific request by the parties to that effect. The public, including the press, may be excluded from all or part of the trial for the reasons specified in Article 14(1), but such an exclusion must be based on a decision of the court rendered in the keeping with the respective rules of procedure.”<sup>30</sup> Even in cases where the public may have been properly excluded, the HRC has made explicit that the judgment “must, with certain strictly defined exceptions, be made public.”<sup>31</sup> The general right to public proceedings and a public judgment constitute essential transparency safeguards that protect both the accused and the general public. In a democratic society based on the rule of law, both a party to a dispute and the general public have a defined interest in confirming that their system of justice has functioned in accordance with the law.<sup>32</sup>

In *Van Meurs v. the Netherlands*, the HRC gave guidance on what is implied in the right to a public hearing:

The Committee observes that courts must 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. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.<sup>33</sup>

The permissible limitations on public access to hearings contemplated in Article 14(1) are targeted at the protection of select interests, such as “morals, public order (*ordre public*), national security in a democratic society, or when the interest of the private lives of the parties so require.” Common exceptions involve family matters or sexual offences. Similarly, the permissible limitations on the publication of judgments are targeted at matrimonial and juvenile issues. Typically, states address this concern through the issuance of redacted decisions that obscure the identities of those involved.<sup>34</sup> All other restrictions on public access may be viewed as suspect.<sup>35</sup>

Given the general bias in favor of transparency, deviations, even when seemingly within the context of permissible limitations, should be scrutinized. Thus, for example, the exception based on “national security in a democratic society” will be construed strictly and consistent with the general rule in favor of transparency. The HRC has ruled against secret, anti-terrorist trials. In *Polay Campos v. Peru*, the HRC concluded that the secret trials in question were “incompatible” with Article 14. In the words of the HRC, “the very nature of a system of trials by ‘faceless judges’ in a remote prison is predicated on the exclusion of the public from the proceedings.”<sup>36</sup>

**Article 14(2) Interpretation:** This provision sets forth the central right of the accused to be presumed innocent until proven guilty in a court of law. This right implies both that the judicial system will process the case in accordance with the presumption of innocence and that public officials will refrain from commenting otherwise.

**Burden of Proof at Trial:** The HRC declared in General Comment 13, “No guilt can be presumed until the charge has been proven beyond reasonable doubt.”<sup>37</sup> Thus, this presumption of innocence should be applied to suspects or accused persons during the pre-trial proceeding and the defendant during the trial. “[I]n cases of doubt, the accused must be found not guilty in accordance with the ancient principle in *dubio pro reo*.”<sup>38</sup>

The HRC has made clear that there are limitations on the Article 14(2) presumption of innocence. In *Moraël v. France*, the HRC concluded that civil trials may be conducted in accordance with other standards. Citing strict liability standards, the HRC held, “The provision concerning the presumption of innocence in article 14(2) cannot therefore be applied in the case under consideration.”<sup>39</sup> In addition, the presumption does not extend to witnesses. In *López v. Spain*, the HRC held that compelling witnesses to testify “falls outside the scope” of Article 14(2).<sup>40</sup>

**Public Respect for the Burden of Proof:** The HRC also declared in General Comment 13, “Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.”<sup>41</sup> Public respect for the burden of proof is the corollary that the accused is to be treated in accordance with their presumed innocence. This obligation to respect the presumption of innocence extends to “ministers or other influential government officials.”<sup>42</sup>

Even if these criteria are met, realization of the protection of Article 14(2) may be dependent on fulfillment of the prohibition against unduly prolonged detention contained in Article 9(3). The HRC has noted that extended pre-trial detention may in effect diminish or eliminate the presumption of innocence.<sup>43</sup> More specifically, the HRC has criticized the practice of linking the duration of pre-trial detention to the duration of the alleged offense.<sup>44</sup>

**Article 14(3)(a) Interpretation:** This paragraph establishes the right of a person to basic information about the charges being brought against him or her. In General Comment 13, the HRC clarified that this right extends to all persons facing criminal charges, regardless of whether the person is “in detention.”<sup>45</sup>

**Nature and Cause:** To properly address the nature and cause of the case, one must clearly explain the law that the individual is accused of breaking (“nature”) and state the specific facts of the case against that person (“cause”). Human rights experts have noted: “Thus, [Article 14(3)(a)] is broader than the corresponding rights granted under Article 9(2) of the ICCPR applicable to arrest. The rationale is that the information provided must be sufficient to allow the preparation of a defense.”<sup>46</sup> The HRC has stated, “[t]he specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.”<sup>47</sup> In accordance with the article itself, this information must be provided in a language that the person understands.

**Promptly:** The HRC has defined “promptly” in relatively expansive terms: “The Committee notes further that the right to be informed of the charge ‘promptly’ requires that information be given in

the manner described as soon as the charge is first made by a competent authority.”<sup>48</sup> The HRC considers a charge to be made “when, in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such.”<sup>49</sup>

**Article 14(3)(b) Interpretation:** This provision establishes a right to time and material support to mount a defense to criminal charges brought.

**Adequate Time:** This factor is case-specific and should be determined by the complexity of the particular case and circumstances surrounding it.<sup>50</sup> However, the inquiry must be construed consistently with this right, and “[t]his right applies not only to accused persons but also to their defense attorneys, and it relates to all stages of the trial.”<sup>51</sup> In *Phillip v. Trinidad and Tobago*, the HRC held that a weekend was insufficient time for an inexperienced attorney to mount a defense in a capital case. Thus, the denial of a request for additional time constituted a violation of Article 14(3)(b) under the circumstances.<sup>52</sup>

**Adequate Facilities:** The HRC has interpreted the term “facilities” to “include access to documents and other evidence which the accused requires to prepare their case, as well as the opportunity to engage and communicate with counsel.”<sup>53</sup> When an accused is discussing his or her defense with counsel, an environment ensuring confidentiality of communications must be provided.<sup>54</sup>

This factor has, among other things, been interpreted to mean that the accused and defense counsel must be granted access to basic information, files, and documents necessary for the preparation of a defense, but this right does not mean that the accused has a right “to be furnished with copies of all relevant documents in a criminal investigation.”<sup>55</sup> Furthermore, even the appropriate documents need not be translated into the native language of the defendant so long as counsel fully comprehends them.<sup>56</sup> However, in all cases, if the information is potentially exculpatory, the failure to provide this information will likely constitute a violation of the right.<sup>57</sup>

**Counsel of One’s Own Choosing:** Implicit throughout all aspects of the right to prepare one’s defense is the ability of the accused to communicate with counsel of their own choosing. Furthermore, counsel should be free “to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue influence from any quarter.”<sup>58</sup>

**Article 14(3)(c) Interpretation:** This paragraph establishes a prohibition against undue delay in both bringing a case to trial and processing it. According to the HRC, this right applies equally to “all stages” of a trial.<sup>59</sup> Thus, an examination of undue delay encompasses the period from “when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him...to the date of a definitive decision, i.e., final and conclusive judgment or dismissal of the proceedings.”<sup>60</sup>

Each case varies in terms of complexity and circumstances, and all factors are taken into consideration. For example, in *Thomas v. Jamaica*, the HRC held that 23 months constituted undue delay between the trial and appeal of a capital case.<sup>61</sup> Contrast the European Court of Human Rights, which has interpreted the analogous ECHR provision, Article 6(1), to permit periods longer than 10 years in certain cases.<sup>62</sup> In sum, this determination is conducted on a case-by-case basis.

When considering the concept of undue delay, the Article 14(5) right of appeal may have special relevance. The HRC has concluded that Article 14(3)(c) requires that a defendant receive “within reasonable time, access to written judgments, duly reasoned, for all instances of appeal.”<sup>63</sup> Furthermore, the HRC has concluded, “[A]rticle 14, paragraph 3(c), and Article 14, paragraph 5, are to be read together, in the sense that the right to review of conviction and sentence must be made available in all instances.”<sup>64</sup>

**Article 14(3)(d) Interpretation:** This provision guarantees certain basic rights of defense. In the exceptional cases where a trial *in absentia* is justified, these elements are viewed with heightened scrutiny.<sup>65</sup>

Each of the following five separate components are generally considered to be included among the basic rights:

- Right to be Tried in One's Presence;
- Right to Defend One's Self in Person;
- Right to Choose One's Own Counsel;
- Right to be Informed of the Right to Counsel; and
- Right to Receive Free Legal Counsel.<sup>66</sup>

The right to counsel is not always available at no cost, but legal aid should be provided in cases in which one cannot afford it. The HRC has indicated that the failure to provide legal aid at the time of the arrest or the limitation of legal aid to serious crimes violates Article 14(3)(d).<sup>67</sup>

The rights of defense should be respected at all phases of the proceedings. In *Reid v. Jamaica*, the court allowed the deposition of witnesses to continue in the absence of defense counsel. The HRC held that "the magistrate, when aware of the absence of the author's defense counsel, should not have proceeded with the deposition of witnesses without allowing the author the opportunity to ensure the presence of his counsel."<sup>68</sup> Moreover, if counsel fails to provide effective, professional counsel, the state has an obligation to intervene. In *Reid v. Jamaica*, the HRC also concluded that failure of counsel to appear at closing arguments constituted a sufficient dereliction of duty to warrant a halt to the proceedings, and the court's failure to do so violated Article 14 (3)(d).<sup>69</sup>

However, one of the most controversial issues in this area involves whether a state may impose counsel upon a defendant in a criminal trial. The European Court of Human Rights has interpreted the analogous ECHR provision, Article 6(3)(c), to permit this type of restriction on the right to defend one's self when it is "in the interest of administration of justice."<sup>70</sup> In contrast, an analysis of the issue under the Covenant supports the ultimate right of the defendant to choose. The distinction between the two provisions may be attributable to the historical differences inherent in the Continental inquisitorial system versus the Anglo-Saxon accusatorial system.<sup>71</sup> Consistent with the supremacy of defendant's right to choose, the HRC has held that the failure of a state to legislatively provide for the right to defend one's self can constitute a violation of Article 14(3)(d).<sup>72</sup>

**Article 14(3)(e) Interpretation:** This paragraph establishes the right of a defendant to obtain the attendance and examination of witnesses on an equal basis with the prosecution.<sup>73</sup> This right is a key element of "equality of arms." In practice, this right requires the prosecution to inform the defense, within a reasonable time, of all witnesses they intend to call in order for them to prepare an adequate defense. This requirement presumes that the witnesses are not anonymous, and the right of the defense to be present during the witness testimony is the general rule. Exceptions to the latter may only be permitted when the witness has reasonable fears of reprisal from the defendant, and in no case should a witness be examined in the absence of both the defendant and counsel.<sup>74</sup>

In *Grant v. Jamaica*, the HRC examined a case where a trial was continued after the police failed to produce a witness at the instruction of the judge. Noting that the case was a capital case, the HRC held that the judge under the circumstances "should have adjourned the trial and issued a subpoena to secure the attendance" of the witness.<sup>75</sup> Furthermore, the HRC held that it was the responsibility of the state to secure the transportation to the trial for the witness. According to the HRC, the failure of the state to take all the aforesaid measures constituted a "violation of article 14, paragraphs 1 and 3(e)."<sup>76</sup>

In *Garcia Fuenzalida v. Ecuador*, the HRC addressed the right of a defendant to obtain expert testimony. The prosecution had introduced laboratory reports concerning blood and semen discovered, and the defendant contested the report, requesting an expert to examine specific issues contained therein. The HRC held that the failure of the judge to order expert testimony concerning this matter of “crucial importance to the case...constituted a violation of article 14, paragraphs (3)(e) and 5.”<sup>77</sup>

**Article 14(3)(f) Interpretation:** This provision ensures that the accused understands the charges and proceedings against him or her regardless of ability to speak the official language. According to the HRC, “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.”<sup>78</sup> The right to understand the charges and proceedings is a basic and fundamental right of a fair trial, and this right entitles the accused, whether a national or alien, to have an interpreter during all stages of the proceedings.<sup>79</sup> This right is not absolute, and a member of a linguistic minority who understands the official language may not use this right to secure an interpreter for his or her mother tongue. Furthermore, the *Travaux Préparatoires* casts doubt on whether this right requires a translation of all documents. In contrast, the European Court of Human Rights has taken the position that the analogous ECHR provision, Article 6(3)(e), does in fact require the translation of written materials.<sup>80</sup>

**Article 14(3)(g) Interpretation:** This paragraph prohibits an accused from being compelled to give testimony against him or herself. In particular, the HRC has emphasized that the protections provided in Articles 7 and 10(1) should be considered in the application of this paragraph, and the law of a State party should make clear that evidence obtained through coercion is “wholly unacceptable.”<sup>81</sup> Although it is not specifically stated that evidence obtained by such manners of coercion is inadmissible in court, it has been the practice of the Human Rights Committee to interpret that this evidence is not admissible. Furthermore, it is clear that the accused’s silence may not be used as evidence of their guilt.<sup>82</sup> The position of the accused should be distinguished from that of a witness, who may in fact be compelled to testify.<sup>83</sup>

**Article 14(4) Interpretation:** This paragraph requires the state to take into account the special circumstances involved in juvenile prosecutions, emphasizing the need for measures focused on rehabilitation. Some states address these juvenile justice issues through specialized juvenile courts. How best to conduct a trial suited for children is generally left to the State party to determine, but Article 14(4) does require that states “must ensure that criminal trials against juveniles are conducted differently than those against adults,” and though it does not define the range of ages that constitute a juvenile, it does require the states to “establish certain limits.”<sup>84</sup> In terms of the limits of discretion granted the state, the HRC has declared that juveniles should “enjoy at least the same guarantees and protection as are accorded to adults under Article 14.”<sup>85</sup>

**Article 14(5) Interpretation:** This provision guarantees a right of appeal. The HRC has stated that every person convicted of a crime (this includes both minor and serious offenses) should have a legal right to have his/her conviction or sentence properly reviewed by a higher tribunal. At the appellate level, the procedures should at a minimum comport with the “fair and public hearing requirements of paragraph 1 of article 14.”<sup>86</sup>

If the review does not include a hearing and is limited to matters of law, the HRC has held that the appellate review falls short of what is required by Article 14(5).<sup>87</sup> However, even a system that does not provide for an automatic right of appeal may still satisfy the requirements of Article 14(5) if the review of an application for appeal results in a full review of the conviction in terms of facts and law.<sup>88</sup>

If procedural shortcomings prevent the use of what would otherwise be an effective appeal, the HRC has clearly held that these shortcomings may constitute violations of Article 14(5). In *Hill v. Spain*, the HRC cited the lack of an available lawyer to submit an appeal as a violation.<sup>89</sup>

Similarly, the failure to provide the defendant with a reasoned judgment in a timely manner has consistently been deemed to violate Article 14(5) because of its inherent role in the appellate process.<sup>90</sup> However, in *Bailey v. Jamaica*, the HRC did find “notes of the oral judgment” to be sufficient “even if less than desirable.”<sup>91</sup>

The absolute right to an appeal in a criminal trial is limited to one appeal. However, if the domestic legal system provides for additional appeals, the defendant must have equal access to these as well.<sup>92</sup> The particularities on appeal may not always be favorable to the defendant. Some Continental systems provide for the “aggravation” of a sentence at the appellate level on the basis of a prosecutorial “nullity” appeal, and various Western European states have submitted reservations to Article 14(5) to ensure no violation occurs as a result. Regardless, a substantial argument can be made that the text of Article 14(5) itself does not prohibit this Continental practice.<sup>93</sup>

**Article 14(6) Interpretation:** This paragraph guarantees a right of compensation to a person erroneously convicted of a crime. As a general matter, the HRC has noted that States parties have frequently failed to establish their compliance with this right. The HRC has recommended that states take steps to establish this guarantee in the domestic legal system.<sup>94</sup> In *W.J.H. v. The Netherlands*, the HRC outlined the factors that should be satisfied to make a claim for compensation due to a miscarriage of justice:

- A final conviction for a criminal offense;
- Suffering punishment as a consequence of such conviction; and
- A subsequent reversal or pardon on the ground of a new or newly discovered fact showing conclusively that there has been a miscarriage of justice.<sup>95</sup>

Commentators have noted that the convicted person must not benefit from having himself (or herself) contributed to the miscarriage of justice or delay in disclosure of dispositive evidence in order to benefit from the right to compensation established in Article 14(6).<sup>96</sup>

**Article 14(7) Interpretation:** This provision requires the state to respect the principle of *ne bis in idem*, a.k.a. *res judicata* or the prohibition against double jeopardy. The addition of this principle to Article 14 was a topic of some debate, and interestingly, there is no analogue in the main text of the ECHR. The principle was added to the ECHR, but it came later in an optional protocol. This context helps to explain the rationale for the reservations that a number of Western countries have filed to this provision. The HRC has sought to clarify the application of the principle of *ne bis in idem*, distinguishing it from cases where a trial has been interrupted for “exceptional circumstances” and resumes at a later date. The HRC has expressed optimism that this clarification should permit a number of states to withdraw their reservations.<sup>97</sup> What constitutes “exceptional circumstances” is not entirely clear, but it may well include fundamental flaws such as the presence of fraud, forgeries, and bribing of officials. Furthermore, it should be noted that this principle is applied at the national level. Thus, the courts of another State party are not prohibited from re-trying a defendant over whom they have obtained jurisdiction.<sup>98</sup>

## Assessment Guidelines

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 14 secures general due process protections for all individuals and certain specific due process protections for those accused of committing crimes. Inherent within these protections is the right to equal, unconditional access to a competent, legally-established court, tribunal, and/or administrative authority with judicial powers. Furthermore, states must take measures to ensure the independence and impartiality of all bodies charged with judicial functions, and within a judicial body. Article 14 requires that the proceedings must provide a fair, public hearing that ensures the “equality of arms” between the prosecution and the defense. In a criminal trial, procedures should be established and respected that guarantee the presumption of innocence, prompt

notification of the defendant as to the charges; and guarantee the material and linguistic facilities to put on a defense, including the calling of witnesses. A person cannot be compelled to testify against him or herself, and separate procedures should exist to address the special concerns that apply to juvenile defendants. Once convicted, a person has a right to an appeal, and if the conviction is overturned due to a miscarriage of justice, i.e. a newly-discovered fact, they are entitled to compensation. As a general rule, a person convicted or acquitted through a final decision cannot be re-tried.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 14?

What laws guarantee people under the jurisdiction of State X this type of protection? In addition to the matters noted, consider the following in your description:

- Distinctions between civil and criminal trials;
- Types of judicial bodies and their jurisdiction, including specifically the limits placed on military tribunals with regard to civilian matters;
- Measures to secure the independence and impartiality of judicial bodies, including judicial appointment/selection, tenure, promotion, and discipline;
- Procedural rules that secure a fair, public hearing; and
- Protections providing for the right to defense for an accused.

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection? In addition to the matters noted, consider the following in your description:

- Mandatory use of an explanation to and for persons under investigation, accused of a crime, or under arrest of the legal and factual bases underlying the case against them;
- Prohibitions or safeguards intended to prevent the use of coercion against accused persons;
- Whether a defendant has a right to be tried in his or her presence; defend him or herself; choose counsel; be informed of the right to counsel; and receive legal aid;
- Whether a defendant has access to defense counsel at no cost to the defendant in cases where the defendant cannot afford it;
- Whether a defendant has the right to confront witnesses; and
- Placement of the burden of proving guilt on the prosecution;
- Whether a defendant is provided an interpreter free of charge?
- Availability of appeal in case of conviction;
- Restrictions that prevent multiple trials for the same alleged offense?
- Use of a prosecutorial standard for such proof, such as “beyond a reasonable doubt;”

Are there any legal provisions that contradict any of these guarantees? In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Procedural inequalities that impair the right of the defense to make a case in the same manner as the prosecution;
- Procedural or other restrictions of access of defendant and counsel to the documents and information necessary to prepare a case in a confidential environment;
- Restrictions on availability of time for defendant and/or counsel to prepare a quality defense case;
- Exceptions to defendant’s right to confront the witnesses against him or her;

- Exceptions to the right to appeal;
- Exceptions to the prohibition against multiple trials for the same offense; and
- Whether timely final written judicial decisions are available to the defense and the public.

What measures has State X taken to ensure that special courts, war crimes tribunals, and military courts do not infringe upon courts of general jurisdiction?

How is the notion of a “juvenile” defined in the legal system? What special protections exist in juvenile trials? Are these protections at least as complete as those granted adults?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** Article 14 due process rights place a number of specific responsibilities on state enforcement and judicial authorities, and all state enforcement and judicial authorities should be educated and equipped with an understanding of the rights of individuals in judicial proceedings. However, all public authorities bear responsibility for the protection of the presumption of innocence, and thus, there must be a broad-based training that emphasizes the prohibition against publicly commenting upon or judging the outcome of a pending trial. Officials responsible for the custody of accused persons should be prepared to inform accused persons of the criminal charges against them and must be capable of explaining the charges, the laws which the accused is believed to be violating, and the exact facts of the case, all in a language comprehensible to the accused. Moreover, these officials should be aware of the prohibition against the use of coercion of the accused, as well as the legal repercussions to which they will be subject in the event that they resort to such coercion. Given Article 14’s predisposition towards transparency, all relevant officials should be educated in the rights of the public to attend hearings and access appropriate information about a case. To the extent relevant, officials should also be trained in the special handling of juvenile trials.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 14 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 14? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 14?

What training do members of the judiciary receive regarding the standards set forth in Article 14? Describe any circumstances that may make it difficult for the judiciary to be impartial.

Are the judgments of the court made public? Describe any circumstances in which the public may be excluded from a trial and/or a judgment is not made public.

Are there instances where officials make public statements regarding the guilt or innocence of an accused person? If so, describe.

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Due to the complex nature of the Article 14 procedural protections, special scrutiny should be applied to government officials charged with enforcement and decision-making authority and their

interaction. States parties must ensure that all accused persons are immediately informed of criminal charges against them in a language they understand. The laws in question and the specific facts in the case must also be clearly explained. To facilitate a proper response, accused persons must have access to free counsel (should they decide not to defend themselves) and to an interpreter, where necessary. They, together with their defense, must also have access to the documents and evidence necessary to make their case. In addition, the general public has an interest in verifying that due process has been provided, and specific measures must be taken to ensure the required transparency. Consequently, public access to the proceedings and the final decision should be provided, including reasonable notice of the proceedings and physical access to the proceedings and decision.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 14 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 14 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 14?

Are there informal structures that limit the exercise of the rights in Article 14 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 14 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 14. Consider the following: What measures has State X taken to eliminate any limitations on access to courts and female testimony in court? What measures has State X taken to insure the presumption of innocence for female defendants?

Does the defense team have access to the documents and information necessary to prepare a case in a confidential environment?

How are provisions requiring that defendants receive a trial/appeal within a reasonable period of time following notice of the case against him/her enforced?

**IV. Right To An Effective Remedy And Its Enforcement:** Individuals are entitled to an effective remedy and compensation in cases when the state fails to provide an effective remedy. Given the vulnerable position of persons in custody, special remedies may be required in cases where it appears there has been a “miscarriage of justice,” requiring additional resources to be committed to effectively realize the rights of an accused. States parties must ensure that persons claiming a violation of the protections of Article 14 and its national implementing legislation and/or administrative measures have access to effective means of seeking redress and/or enforcement of such provisions. If such national measures implementing Article 14 are violated, the victim must be able to obtain any required adjustment in any criminal penalties imposed, including release from incarceration. States parties must ensure that such remedies are considered promptly and that any remedies granted are swiftly enforced.

### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 14? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What appeals are available in criminal trials? Are all levels of appeal equally accessible to defendants?

Do the regulations surrounding the appeals process allow for a meaningful appeal?

Do defendants have the right to compensation for miscarriages of justice? If so, what are the criteria for filing such a claim?

What procedures exist for the investigation and prosecution of state officials for violations of Article 14? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 14? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 14?

**V. Limitations And/Or Derogations And Scope Of Rights:** During times of national public emergency as defined by Article 4, States parties may derogate from Article 14. In such cases, however, States parties must comply with the additional requirements of Article 4 and all other relevant provisions within the Covenant.

In compliance with Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the rights guaranteed under Article 14. Certain Article 14 protections may overlap with other Covenant rights, and the fact that the rights accorded in another article, e.g., Article 9(2), may not be as broad shall not serve to limit the rights provided in Article 14. Furthermore, no restriction of or derogation from the rights of all persons equally to due process shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee procedural due process rights in civil and criminal trials as set forth in Article 14?

If State X has derogated from any of the provisions of Article 14 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the obligation to guarantee procedural due process rights in civil and criminal trials as set forth in Article 14, or which recognizes these rights to a lesser extent? Has State X acted to limit or restrict procedural due process rights in civil and criminal trials as set forth in Article 14 in some other fashion?

Are any existing limitations or restrictions on the procedural due process rights in civil and criminal trials as set forth in Article 14 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting procedural due process rights in civil and criminal trials as set forth in Article 14?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy procedural due process rights in civil and criminal trials as set forth in Article 14? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of procedural due process rights in civil and criminal trials as set forth in Article 14?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the guarantee of procedural due process rights in civil and criminal trials as set forth in Article 14?

## Article 15: Prohibition Against Retroactive Criminal Laws

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

### General Commentary

Article 15(1) enshrines a basic principle of due process of law, stating that no person should be held criminally liable for any action that was not a crime at the time of its commission. In addition, where penalties are specified at the time a crime was committed, this provision of the Covenant forbids states imposing heavier penalties for criminal activities than those that existed at the time the crime was committed. In distinct contrast, when laws are amended to reduce penalties, they are required to have retroactive effect.

With regard to the application of these rules, the lack of national legislation enumerating crimes “according to the general principles of law recognized by the community of nations” shall not be a bar to prosecution. Thus, Article 15(2) affirms universal jurisdiction and accountability for war crimes and similar international crimes, securing the ongoing growth and application of this dynamic area of law regardless of national legislation.

Other international instruments have addressed the issues related to the prohibition of retroactive criminal law, including:

- Universal Declaration of Human Rights (UDHR), Article 11(2);
- European Convention on Human Rights (ECHR), Article 7;
- American Convention on Human Rights (ACHR), Article 9; and
- African Charter on Human and Peoples’ Rights (ACHPR), Article 7.

In contrast to the Covenant, most of these treaties merge the prohibition on retroactive criminal laws with provisions protecting the presumption of innocence and/or other rights to be accorded accused persons. Moreover, the Covenant generally takes the protection against retroactivity one step further: It indicates that those convicted and sentenced for a particular crime should reap the benefit if the penalty imposed for their offense is subsequently reduced. Of the treaties mentioned above, only the ACHR contains a similar protection.

In accordance with Article 4(2), Article 15 is a non-derogable right. Therefore, it may not be subject to restrictions even during a period of public emergency.

**Article 15(1) Interpretation:** Article 15(1) secures the right to have advance notice of what actions the government will consider criminal. This guarantee encompasses two established principles of criminal law, *nullum crime sine lege* and *nulla poena sine lege*. The first principle prohibits states from giving retroactive effect to criminal laws and requires states to define crimes with certainty. The second principle prohibits states from giving retroactive effect to a penalty.<sup>1</sup>

The drafting history reveals concerns as to the scope given the principle of *nullum crime sine lege*. Notably, Article 15(1) does not absolutely prevent accused persons from being brought to trial for an act or omission not punishable as an offense at the time when it was committed. The provision is concerned with conviction. In this way, the drafting majority expressed faith in the judicial process, “the question of whether or not an act or omission constitutes a criminal offense was to be decided by the court and the accused should therefore be brought to trial.”<sup>2</sup> To avoid

problems in this regard, Article 15(1) implicitly requires States parties to define their criminal offenses in national laws. Furthermore, whenever a penalty is contemplated in legislation, there exists a duty to associate it with a specific crime, and a generic provision that establishes a penalty for “punishing offences similar in nature and gravity” is “incompatible with the concept of *nullum crimen sine lege*.”<sup>3</sup> Thus, a State party cannot decide which acts are criminal after they are committed. However, all national measures are understood in the context of international law, and the specific inclusion of the term “international” introduces a couple of potential limitations. First, it may prevent an accused aliens from escaping punishment on grounds that their offense was not criminal under their state’s law. Second, it may prevent a state from sheltering accused persons on grounds that their national law does not criminalize the offense.<sup>4</sup>

Similarly, a state may not determine the penalty, after the commission of an offense, nor impose a heavier penalty. Both are inconsistent with the principle of *nulla poena sine lege*. However, what constitutes a penalty is not always clear. In *A.R.S. v. Canada*, the HRC examined a case where a parole provision with mandatory supervision was imposed retroactively. The HRC ruled the complaint inadmissible, stating that “mandatory supervision cannot be considered as equivalent to a penalty, but is rather a measure of social assistance intended to provide for the rehabilitation of the convicted person, in his own interest.”<sup>5</sup>

Some controversy also surrounded the final sentence of Article 15(1) regarding benefit from lighter subsequent penalties. Many committee members felt that “the provision as worded could be interpreted to mean that an offender who was already serving a sentence was automatically entitled to have it reduced if the law were revised to specify a lighter penalty for the same offense” and urged that such an interpretation was inappropriate for the Covenant.<sup>6</sup> Others objected to the idea that convicted persons could only benefit from a lighter penal law that came into force between their conviction and their sentencing, adding that this would be unfair to those already sentenced.<sup>7</sup>

While the HRC has not explicitly ruled on the underlying issues, an analysis of relevant analogous case law supports an interpretation that applies in stages. During a trial, a court should apply all legislation that comes into force prior to conviction, giving effect to any lighter penalty across the board. Once a person has been convicted, the duty to apply the lighter penalty retroactively would apply only to those who have yet to complete their sentence. Thus, those who have actually completed their sentences would not be entitled to a claim for compensation in accordance with Article 9(5).<sup>8</sup>

**Article 15(2) Interpretation:** This paragraph reinforces the application of international criminal law. During its drafting, there was substantial debate concerning the need for its inclusion. Drafters expressed concern that its inclusion might cast doubt over the validity of post–World War II international criminal tribunals and/or that it was simply a reiteration of Article 15(1).<sup>9</sup> Also, some drafters debated whether the phrase “general principles of law recognized by the community of nations” was capable of being reduced to a precise legal definition. Ultimately, the provision was approved as an affirmation that future international criminal actions, especially during times of armed conflict, would be punished accordingly.<sup>10</sup> The quoted phrase is a reference to customary international law, and as such, it makes clear that focus of Article 15(2) is on crimes against humanity, war crimes, slavery, and other crimes recognized as current customary international law.<sup>11</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** The State has a legal obligation pursuant to Article 15 to ensure that persons are held criminally accountable only for those actions or omissions that constituted a crime when committed whether under applicable national or international law. This obligation imposes a positive obligation upon the State party that complements Article 14 protections of fair trial rights. Accordingly, regardless of any political

or other pressures, the State must take positive action to adequately define crimes and limit their retroactive application both in terms of convictions and penalties. Similarly, the State must ensure that, if provision is made for a lesser penalty subsequent to commission of the criminal offense, the offender is able to benefit from such decision, provided the entire sentence has yet to be served.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 15?

What laws guarantee people under the jurisdiction of State X this type of protection? Consider the following general topics in your discussion:

- Counter-terrorism plans, measures, and procedures;
- Crimes and criminal procedures generally;
- Legal aid services available to persons in custody;
- Relevant treaty or customary international law; and
- Rights to review of sentences in light of new legislation.

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties must ensure that persons accused of criminal action benefit from the protections of Article 15 and its implementing legislation and/or administrative measures. In furtherance of this goal, States parties must ensure that the text of Article 15, as well as its implementing legislation and/or administrative measures, are available to the public and state officials charged with their enforcement. States must inform those charged with criminal action of their rights under Article 15 and its implementing legislation and/or administrative measures and any associated procedures to guarantee that they benefit from the protection of Article 15. In addition, the “positive” aspect of Article 15 obligates States parties to ensure that personnel having authority over those accused and convicted of crimes undergo appropriate instruction in the guarantees granted such persons by Article 15, as well as training in the manner in which national legislative and administrative measures provide for those protections.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 15 adequately published and distributed? Are new criminal and criminal procedure provisions provided to all courts on a timely basis? How is the right of all persons to enjoy reductions in penalties and prohibit retroactive criminal legislation publicized?

What special measures are taken to distribute these materials both within the formal legal sector to judges, lawyers, prosecutors, prison officials and police officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 15? What training programs are in place for both legal and non-legal professionals regarding the right to enjoy the benefits of lesser penalties and prohibit retroactive criminal legislation? What resources are dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 15?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** States parties to the Covenant must ensure that persons accused of criminal offenses are aware of and in a position to benefit from the protections of Article 15. Procedures should be in place to make sure that cases are reviewed when lighter penalties are included in national legislation and administrative measures implementing Article 14. The state must devote monetary and other resources to ensuring that the aforementioned procedures are enforced. It should also implement concrete measures to monitor the effective application of Article 15 and associated laws and administrative measures.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 15 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 15 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 15?

Are there informal structures that limit the exercise of the rights in Article 15 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 15 accessible? Are there obstacles to the use of these resources?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure, pursuant to Article 2(3) of the Covenant, that persons claiming a violation of the protections of Article 15 and its national implementing legislation and/or administrative measures have access to effective means of seeking redress and/or enforcement of such provisions. If such national measures implementing Article 15 are violated, the victim must be able to obtain any required

adjustment in any criminal penalties imposed, including release from incarceration. States parties must ensure that such remedies are considered in a prompt and timely fashion and that any remedies granted are subsequently enforced.

### **Assessment Inquiry**

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 15? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 15? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 15? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 15?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 15 is a non-derogable right, even during times of national public emergency. Indeed, a time of public emergency is precisely a time of such potential for abuse of criminal processes that the protection against *ex post facto* imposition of criminal liability is most necessary.

In compliance with Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the rights guaranteed under Article 15. Moreover, no restriction of or derogation from the right of all persons to protection against retroactive criminal laws shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent. However, an individual's right to enjoy subsequent reductions in penalties does not imply a right to compensation pursuant to Article 9(5).

### **Assessment Inquiry**

Are there any circumstances in which State X has sought to derogate from its obligation to guarantee the right to humane treatment as a detainee as set forth in Article 15?

If State X has sought to derogate from any of the provisions of Article 15 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the prohibition against retroactive criminal laws as set forth in Article 15, or which recognizes this prohibition to a lesser extent? Has State X acted to limit or restrict the prohibition against retroactive criminal law as set forth in Article 15 in some other fashion?

Are any existing limitations or restrictions on the prohibition against retroactive criminal law as set forth in Article 15 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the prohibition against retroactive criminal law as set forth in Article 15?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition against retroactive criminal law as set forth in Article 15? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the prohibition against retroactive criminal law as set forth in Article 15?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the prohibition against retroactive criminal law as set forth in Article 15?

## Articles 30(4) and 40(1): Obligation to Participate in the ICCPR Machinery

**Article 30(4):** *Elections of the members of the Committee shall be held at a meeting of the States parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest numbers of votes and an absolute majority of the votes of the representatives of the States parties present and voting.*

**Article 40(1):** *The States parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:*

(a) *Within one year of the entry into force of the present Covenant for the States parties concerned;*

(b) *Thereafter whenever the Committee so requests.*

### General Commentary

These two articles relate to the participation of States parties in the machinery established by the Covenant, especially the Human Rights Committee (HRC). Specifically, Article 30(4) relates to a periodic meeting of the States parties to elect members of the HRC. Article 40(1) relates to the periodic reporting system established under the Covenant.

These two articles have analogues in other international instruments. Article 64 of the United Nations Charter indicates that the Economic and Social Council (ECOSOC) may take reports from member countries. The International Covenant on Economic, Social and Cultural Rights (ICESCR) indicates in Article 16 provides that States parties shall submit periodic reports to the Secretary-General, who in turn will transmit them to ECOSOC. Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) contains a reporting requirement that obligates States parties to report on the “legislative, judicial, and administrative or other measures” adopted to combat racism. Other international instruments containing similar reporting requirements include the:

- Convention Against Torture, Article 19;<sup>1</sup>
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 18;
- Convention on the Rights of the Child (CRC), Article 44;<sup>2</sup>
- Convention on the Suppression and Punishment of the Crime of Apartheid, Article 7;<sup>3</sup>
- European Convention on Human Rights (ECHR), Article 57;
- African Charter on Human and Peoples’ Rights (ACHPR), Article 62; and
- American Convention on Human Rights (ACHR), Article 42.

Pursuant to Article 40(1), each State party is under a legal obligation to submit an initial report within one year of the Covenant’s entry into force. Subsequent reports are required upon the request of the HRC as described in Chapter I.

**Article 30(4) Interpretation:** Article 30(4) addresses the election of those persons who will sit on the HRC. The drafting history of this provision indicates that this issue was heavily debated. The committee considered a variety of existing bodies as potentially the appropriate repository of actual authority to elect members of the HRC, including States parties to the Covenant, the International Court of Justice, and the General Assembly.<sup>4</sup>

Pursuant to Article 28(3), members of the HRC serve in their personal capacity and are elected as such. They are to be of high moral character and of recognized competence in the field of human rights.<sup>5</sup> However, work on the HRC is part-time and, therefore, a member need not be personally independent of his or her government.<sup>6</sup>

The members of the HRC are elected at a meeting convened by the U.N. Secretary-General. Each State party may nominate two persons who are nationals of the nominating state;

nominations are submitted to the Secretary-General at least one month prior to the meeting. The election is by secret ballot voting of the States parties. To be elected, one must obtain both a majority of votes and an absolute majority of those States parties present and voting. The HRC may not contain more than one national of a single state. The term of membership on the HRC is four years.

In addition to the meetings of the HRC, the chairpersons of the treaty bodies – collectively, the expert bodies constituted pursuant to the provisions of the ICCPR, ICESCR, CERD, CAT, CEDAW, and CRC – meet regularly to discuss common issues. Often these meetings will involve representatives of States parties, independent United Nations agencies, other intergovernmental organizations (such as the Organization for Security and Cooperation in Europe), other United Nations human rights bodies (such as the Commission on Human Rights and its Sub-Commission on the Protection and Promotion of Human Rights), and nongovernmental organizations.<sup>7</sup> The chairpersons have convened 14 times between 1984 and 2002.<sup>8</sup>

**Article 40(1) Interpretation:** Article 40 requires States parties to report to the HRC initially within one year and then subsequently as requested. The inclusion of this provision was also strenuously debated. Several drafting committee representatives objected on grounds that any reporting requirement “was contrary to the U.N. Charter, in particular to Article 2, ¶7, and constituted a violation of national sovereignty.”<sup>9</sup> Others questioned the purpose of reporting, arguing that it would “inevitably detract from the immediacy” of the terms of the Covenant, suggesting that the text of Article 40(1) encourages an assumption that “progress” in implementing the Covenant’s requirements is favored over immediacy.<sup>10</sup>

Under Article 40, the HRC has a mandate to engage in the “consideration” and “study” of the reports submitted. As a general rule, the periodic reports under Article 40 are considered in chronological order as they are received. On occasion, the HRC has accorded a report priority due to a critical human rights situation in a particular state. In addition, pursuant to Article 40(1)(b), the HRC has requested specific reports related to particular human rights issues in States parties.<sup>11</sup>

As part of its on-going efforts to clarify its work and methodology, the HRC adopted a “consensus statement” regarding its duties under Article 40.<sup>12</sup> The HRC decided that, in the course of its consideration of the periodic reports, it is empowered to promulgate general comments. The purpose of these comments is to make the Committee’s cumulative experience available for the benefit of all states in order to promote their further implementation of the Covenant. Specifically, the general comments are to “draw their [the HRC members] attention to the insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these states and international organizations in the promotion and protection of human rights. These comments should also be of interest to other states, especially those preparing to become parties to the Covenant.”<sup>13</sup>

The Committee’s main objective in its consideration of reports under Article 40 has been to establish, then to strengthen and to maintain, a constructive dialogue between the Committee and States parties.<sup>14</sup> It regards this as crucial to its work. The HRC developed a basic methodology of focusing on specific issues precisely in order to concentrate its interaction with States parties on key problems, which it has amended from time to time.<sup>15</sup>

As explained in further detail in Chapter I, up to 1999, the Committee required States parties to submit Article 40 reports every five years. After review, the Committee would then adopt so-called “Concluding Observations” on states’ reports pursuant to Article 40.<sup>16</sup> However, in 1999, it decided that submission of subsequent periodic reports would be set on a case by case basis and noted in the Committee’s Concluding Observations to the state party report.<sup>17</sup> The Committee can also request a “focused” follow up report to be submitted within a short time frame (perhaps 18 months).<sup>18</sup> State party Article 40 reports are reviewed by a working group of the Committee prior to one of its three annual sessions. As part of this review, the working group can

receive information from UN specialized agencies and the UN secretariat (which often prepares a “country profile” drawn from previously submitted material). Nongovernmental organizations, though lacking official status, also have considerable ability to influence the consideration of States party reports.<sup>19</sup> These independent organizations and institutions are sources of information and technical expertise that can be of assistance to a reporting State or the Committee’s consideration of a State report. The HRC has in recent years encouraged such organizations to provide supplemental information, which on occasion has been so complete as to be referred to as a “shadow report.”

In recent years, some questions have arisen regarding the continued applicability to the remnants of States parties to the Covenant that have, since ratification or accession to the ICCPR, disintegrated.<sup>20</sup> Examples of this type of development include Yugoslavia (Croatia, Bosnia, Macedonia, and Slovenia) and Indonesia (East Timor). In addition, similar issues may be implicated by the extension of the Covenant to cover administrated territories (e.g., Macau or Kosovo). In a straightforward explication of settled international law, the Committee has opined that human rights treaty obligations devolve with territory and successor States are bound by Covenant provision the same as their predecessor States. “Once the people living in a territory find themselves under the protection of the [ICCPR], such protection cannot be denied to them merely on account of the dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State.”<sup>21</sup> The Committee specifically noted that Article 40 reporting obligations continue to apply as well.<sup>22</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Pursuant to Article 30, the state has an opportunity to participate in the selection of members of the HRC. Also, the state has a legal obligation pursuant to Article 40 to report to the HRC regarding its progress in implementing the Covenant. This obligation includes responding to the oral inquiries of the HRC and to its requests for additional information. The state should take whatever legal, administrative, or diplomatic measures necessary to ensure that its reports are filed with the Committee in a timely fashion and that its representatives are available to the Committee. It should ensure that it is in a position to respond to inquiries from the Committee as requested.

### ***Assessment Inquiry***

Does State X have a legal framework for participation in the selection of members of the HRC?

Has State X taken whatever legal, administrative, or diplomatic measures necessary to ensure that its reports are filed in a timely manner with the Committee and that its representatives are available to the Committee for consultation?

Has State X ensured that it is in a position to respond to inquiries from the Committee as requested?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties must ensure that persons charged with formulating the state’s submissions to the HRC, as set forth in Article 40, are sufficiently qualified to do so and that they have sufficient access to information from state agencies and the public.

### ***Assessment Inquiry***

Do state officials have knowledge and training on how to participate in the selection of HRC members?

Are persons charged with formulating State X's reports to the HRC appropriately qualified to do so? Have they been appropriately trained? Are the persons charged with presenting State X's report to the HRC qualified and competent?

Has State X taken advantage of the United Nations reporting training program?

Do the persons charged with formulating State X's reports have adequate access to the information necessary to complete the reports?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** States parties to the Covenant must ensure that the state's obligation to provide information to the HRC, pursuant to Article 40, and the actual information it provides are available to and accessible by the public. The state must devote monetary and other resources to ensuring that the state's submissions to the Committee are comprehensive and include a proper canvassing of domestic human rights professionals and their reports.

***Assessment Inquiry***

Has State X advertised its obligation to submit reports? Are people under the jurisdiction of State X able to easily access these reports?

Are the conclusions of the HRC disseminated and discussed within State X?

What resources, monetary or other, has State X devoted to ensuring that its reports to the HRC are comprehensive? Has State X canvassed local professionals?

To what extent are non-governmental organizations engaged in the compilation of reports?

**IV. Right To An Effective Remedy And Its Enforcement:** Persons wishing to contribute to a state's submission of information to the HRC, required under Article 40, should have a means of doing so.

***Assessment Inquiry***

Do peoples of State X desiring to contribute to State X's reports to the HRC have a means of doing so? If so, please describe the manner in which they are allowed to participate. If not, has State X provided a meaningful remedy for the violation of the right as set forth in Article 40(1)? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 40(1)? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights set forth in Article 40(1)? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 40(1)?

**V. Limitations And/Or Derogations And Scope Of Rights:** If a state does not comply with the requirements of Article 40 as a result of a national public emergency, it should comply with the provisions of Article 4. Notification pursuant to Article 4 is a separate procedure designed to be timely, given the emergency. A state must ensure that any notifications are given immediately and not only when the next periodic report is due.

#### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated, or purported to derogate, from its reporting requirement to the HRC because of a state of emergency in accordance with Article 4? If so, did State X notify the Secretary-General and the appropriate authorities immediately following the declaration of public emergency and not only at the time of its next periodic report?

Does State X have any existing laws, conventions, regulations, or customs which prevent it from submitting periodic progress reports as required by Article 40(1)?

Does State X prohibit groups or persons from engaging in activities aimed at preventing it from fulfilling the reporting requirement established by the HRC in 40(1)?

## Article 50: Obligation to Resolve Federalism Issues

*The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.*

### General Commentary

Article 50 requires States parties to resolve their federalism issues in order to facilitate implementation of the Covenant. It indicates plainly that the provisions of the Covenant extend to all parts of federal states without limitation. Other human rights treaties generally contain similar provisions. The American Convention on Human Rights (ACHR) specifies that national governments of federal States parties “implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction. . .”<sup>1</sup> However, the Convention requires only that national governments “take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.”<sup>2</sup> The European Convention on Human Rights (ECHR) does not have a federalism clause, *per se*, but has a clause more appropriately denominated as colonial. Article 56 (Article 63 renumbered pursuant to Protocol 11) allows that signatory states may declare at ratification that the Convention will apply in “all or any of the territories for whose international relations it is responsible.”<sup>3</sup>

**General Interpretation:** Article 50 ensures that federal states will resolve potential issues surrounding the compliance of their constituent administrative units with the requirements of the Covenant. During the drafting of the Covenant, the General Assembly raised a question regarding the need for a federal state article and requested that the drafting committee prepare a recommendation designed to secure “the maximum extension of the Covenant to the constituent units of federal states and the meeting of constitutional problems of federal states.”<sup>4</sup> Article 50 is the result, albeit a controversial one.

The inclusion of Article 50 was heavily debated in the drafting committee. Many felt it necessary to resolve issues created by the constitutions of federal states, which may prevent the state from forcing its constituent units to act in accordance with the Covenant. Additionally, the lack of a resolution to the federalism issue might also limit federal states’ ability to ratify the Covenant. In opposition to Article 50, some argued that its inclusion was in conflict with the principle of universality enshrined in the United Nations Charter and the Universal Declaration of Human Rights (UDHR). Moreover, others contended that a federalism clause would establish an inequality between federal and unitary states with respect to their international obligations.<sup>5</sup>

The basic inquiry of the Human Rights Committee’s consideration of each State party report is an evaluation of the effect that ratification of the Covenant has had on that state’s legal and constitutional order.<sup>6</sup> The HRC has therefore sought from federal States parties’ explanations of the division of jurisdiction for human rights matters in federal states, an idea of how a federal state may obtain uniformity on human rights enforcement, and how conflicts in enforcement can be, or are, resolved.

### Assessment Guidelines

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** A federal state has a legal obligation to ensure that issues involving its constituent units do not impede the application of the Covenant to the entirety of the State party. The federal State party must enact appropriate legislation and administrative measures that implement the Covenant throughout its territory. It must therefore resolve outstanding or potential federalism issues. Such a federal State party must enforce such legislative and administrative measures to ensure uniformity of application of the Covenant throughout the state. It must therefore take legislative or administrative measures to ensure that conflicts in enforcement are resolved.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 50? What laws guarantee people under the jurisdiction of State X this type of protection? What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection? In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Measures ensuring that issues involving constituent units do not impede the application of the Covenant to the entirety of federal State X; and
- Measures ensuring that the Covenant is applied uniformly throughout federal State X.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** Federal States parties must ensure that persons in all its constituent units benefit from the Covenant and its implementing legislation and/or administrative measures. In furtherance of this goal, federal States parties must ensure that the text of the Covenant, as well as its implementing legislation and/or administrative measures, are available to the public and to state officials charged with their enforcement. Such federal States parties should also ensure that personnel having authority over human rights matters addressed by provisions of the Covenant undergo appropriate instruction in the guarantees set forth in the Covenant, as well as training in the manner in which national legislative and administrative measures provide for those protections.

### ***Assessment Inquiry***

Are laws reflecting the rights and duties in Article 50 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights and duties embodied in Article 50? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights and duties embodied in Article 50?

How has the federal State party ensured that personnel having authority over human rights matters have undergone the appropriate instruction in the guarantees granted by the Covenant?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Federal States parties to the Covenant must ensure that persons throughout its territory are aware of the Covenant, its provisions, and the interrelationship of legislative frameworks. Consider the following in your assessment:

- Personnel of existing enforcement mechanisms such as the police, ombudsman, etc.;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;

- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

### ***Assessment Inquiry***

What measures has State X taken to ensure that the constitutional guarantees, laws, regulations or other legal acts it has implemented in compliance with Article 50 are accessible to its populace? Are persons throughout all parts of federal State X fully aware of the Covenant and its provisions?

What procedural requirements must be fulfilled to take advantage of these guarantees, laws, regulations or other legal acts? What resources are available to the populace to facilitate their efforts to fulfill such requirements?

**IV. Right to an Effective Remedy and its Enforcement:** States parties must ensure that such national implementing legislation and/or administrative measures provide access to effective means of seeking redress and/or enforcement of the protections of the Covenant and such implementing provisions.

### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 50? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy, throughout the federal State X;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 50? Has State X initiated special programs to raise awareness of the people under the jurisdiction of State X of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 50? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 50?

**V. Limitations and/or Derogations and Scope of Rights:** Article 50 is subject to derogation during times of national emergency. Moreover, it is possible during such an emergency that a federal state may lose control over a constituent unit. It is at such times that the protections of the Covenant are most necessary.

In compliance with Article 5, neither states, nor groups, nor individuals, including those in constituent states of a federal State party, may engage in activity aimed at the destruction of the rights guaranteed under the Covenant. Moreover, no restriction of or derogation from the rights, duties, and protections secured by the Covenant shall be permitted by constituent units to a federal State party on the pretext that the Covenant does not recognize such rights, or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from the rights, obligations, or freedoms set forth in Article 50?

If State X has derogated from any of the provisions of Article 50, did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the rights, obligations, or freedoms set forth in Article 50, or which recognize these rights, obligations, or freedoms to a lesser extent? Has State X acted to limit or restrict these the rights, obligations, or freedoms set forth in Article 50 in some other fashion?

Are any existing limitations or restrictions on the rights, obligations, or freedoms set forth in Article 50 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the rights, obligations, or freedoms set forth in Article 50?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights, obligations, or freedoms set forth in Article 50? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the rights, obligations, or freedoms set forth in Article 50?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights, obligations, or freedoms set forth in Article 50?

## **IV. Analyzing Implementation: Substantive Human Rights Protections**

The ICCPR contains a broad cross-section of substantive civil and political human rights protections. This cross section encompasses both positive and negative provisions. Positive provisions describe rights and duties that the state is obligated to protect and fulfill, and negative provisions describe actions that a state is obligated to refrain from. Both types of provisions are contained in the substantive articles explored in this final chapter.

However, regardless of whether an article contains positive and negative provisions, the “lens” provisions discussed in Chapter II continue to obligate the state to take affirmative steps to promote the observance of these provisions. In addition, when applicable, the provisions of general application discussed in Chapter III impose another layer of obligation upon the state. Thus, the substantive human rights protections contained in the Covenant must always be considered in light of these provisions, for the Covenant depends on the concurrent application of these provisions to ensure the necessary conditions for the enjoyment of civil and political rights.

Understanding this overlap in Covenant provisions is particularly important when introducing these rights and protections to a jurisdiction where institutional foundations for human rights are weak, such as a post-conflict environment. In these circumstances, those charged with establishing civil and political rights must be cognizant of the organic nature of the Covenant, distinguishing amongst the various requirements. Though the importance of framing substantive protections should not be understated, incorporation of the substantive Covenant provisions into the local legal framework is only one of the critical steps.

The Covenant “lens” requires more than simple legislation, rather it contemplates a complete program of promulgation, dissemination, education, monitoring, and enforcement. These distinctions serve as guideposts for determining whether the necessary cultural and institutional components are in place to secure the full enjoyment of the rights and protections of a given article. While the significance of these components is at a premium in unstable environments, all countries must be willing to commit resources to make sure these obligations continue to be fulfilled with respect to each article.

## Article 1: Right to Self-Determination

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

### General Commentary

Article 1 is common to both the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), a fact which highlights the importance of the right to self-determination for the attainment of other rights. Indeed, the concept of self-determination is one of the most important foundational precepts of modern human rights protections. It figured prominently in the League of Nations, the aftermath of World War II (Atlantic Charter), and the formation of the United Nations.<sup>1</sup> The Human Rights Committee (HRC), in its limited General Comment, notes that the rights protected by Article 1 are “an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of these rights.”<sup>2</sup>

Other international instruments have addressed the issues related to the right to self-determination, including:

- Atlantic Charter, (1941);
- United Nations Charter, Article 2;
- Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>3</sup> and
- Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States.<sup>4</sup>

In addition, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities has prepared two studies of the legal and factual significance of the right to self-determination in light of the above United Nations’ resolutions, declarations, and Conventions, as well as other, similar documents.<sup>5</sup>

Despite (or perhaps because of) its “landmark political significance,” the right of self-determination has been controversial and problematic.<sup>6</sup> Significant difficulty has been encountered in discerning and applying its legal substance.<sup>7</sup> Indeed, the Human Rights Committee may well view issues relevant to self-determination to be more appropriately the subject of meetings of States parties.<sup>8</sup>

Divining the proper interpretation of Article 1’s principles is complicated by the fact that the drafting history reveals that the text was developed amid vast differences of opinion. Generally, smaller, less developed, as well as socialist states favored inclusion of Article 1 in the two Covenants, while Western states, notably the European countries (which had significant colonial reach), “vehemently” opposed it.<sup>9</sup> The States opposing the inclusion of the right to self-determination in the Covenants argued vociferously that self-determination is not a “right” at all, but a political principle. While Article 1 is separate from the bulk of the substantive rights in the Covenant, the text of the article does indicate that self-determination is considered a right. The drafting history indicates that attempts to refer to the “principle of self-determination” were rejected.<sup>10</sup> However, the text of the article speaks directly to a collective right.<sup>11</sup>

The Human Rights Committee has developed limited jurisprudence on Article 1, no doubt due in large part to its unwillingness to admit individual complaints under the First Optional Protocol to

the ICCPR.<sup>12</sup> Nevertheless, the HRC has issued a few decisions. For instance, the HRC has found inadmissible several communications seeking to have minority or indigenous populations within existing states recognized as states themselves.<sup>13</sup>

While some States parties made reservations against Article 1 in their ratification of the ICCPR, the reporting obligations of States parties include Article 1.<sup>14</sup> The HRC has questioned some states closely with respect to how the right of peoples to self-determination is “understood, promoted, and given effect.”<sup>15</sup> The principle of self-determination has also come under scrutiny with respect to other articles of the Convention, notably Article 19, concerning freedom of expression, and Article 25, concerning political rights of citizens.<sup>16</sup>

**Interpretation of Article 1(1):** Article 1(1) is the heart of the article. It provides that “peoples” have the “right” to self-determination and, thereby, the ability to freely determine their political status and pursue their own development. Accordingly, there will be an enduring relationship between Article 1 and Article 27’s protection of minority rights; with the oppression of minority groups will come calls for self-determination for those minority groups.

The HRC has noted that Article 1 “imposes on all States parties corresponding obligations.”<sup>17</sup> It has requested that States parties provide information regarding “the constitutional and political processes which in practice allow the exercise of this right.”<sup>18</sup> The HRC has questioned whether Article 1 was provided as a continuing right and how it might affect an assertion for change in the present constitutional structures and political processes of a particular State party.<sup>19</sup> The HRC has also inquired as to the likely beneficiaries of the rights included under Article 1(1), delving into who is entitled to self-determination, what criteria has governed decisions regarding granting self-determination, and similar issues.<sup>20</sup>

Scholarship regarding self-determination and the ICCPR has described a distinction between internal and external self-determination.<sup>21</sup> Internal self-determination refers to the right of a people to choose a political status without disturbing the existing state’s boundaries, while external self-determination would rearrange the state’s international borders. This distinction may affect who is entitled to exercise self-determination: “the definition of peoples in terms of the ICCPR becomes less contentious if one recognizes that all peoples are entitled to some form of self-determination” though all may not be entitled to external self-determination (the most “radical” form).<sup>22</sup>

**Interpretation of Article 1(2):** Article 1(2) “sounds like a very important right.”<sup>23</sup> It indicates that all peoples may “for their own ends” dispose of their natural wealth and resources, but it is moderated by the link to international economic obligations. The HRC has not extensively considered this paragraph of Article 1, for it has only periodically questioned states regarding limitations on the right to use property or government measures affecting natural resources.<sup>24</sup> Moreover, the general comment issued by the HRC does not shed much light on the HRC’s interpretation of Article 1(2), as it simply notes that the paragraph “entails corresponding duties for all States” and that reporting States parties should “indicate any factors or difficulties” limiting “free disposal of their natural wealth.”<sup>25</sup>

**Interpretation of Article 1(3):** The HRC considers Article 1(3) “particularly important in that it imposes specific obligations on States parties” with respect to both their own peoples but also all peoples who “have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination.”<sup>26</sup> For example, some States parties continue to administrate trust territories (e.g., Guam). Article 1(3) indicates that all States parties should promote the realization of the right to self-determination in conformity with the U.N. Charter.<sup>27</sup> Given that this paragraph explicitly imposes obligations on States parties with respect to peoples not under their jurisdiction, it is at odds with the structure of the ICCPR in general.<sup>28</sup> States’ representatives have regularly requested HRC clarification of this paragraph with respect to international application of the right to self-determination.<sup>29</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Through Article 1, the ICCPR obligates States parties to recognize and promote the collective right of peoples to pursue self-determination and economic development. The HRC has encouraged States parties to describe their legal measures and processes protecting, allowing, or limiting the pursuit of these rights. Article 1(3) also specifically obligates States parties to promote the possibility to exercise self-determination for those peoples who have not.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 1?

What laws guarantee people under the jurisdiction of State X this type of protection? What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection? What procedural inequities, limitations on, or obstacles to the pursuit of this provision exist?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Limitations or restrictions on actions intended toward change of national boundaries;
- Existence of trust territory or similar dependent administrative status; and
- Allocation and use of natural resources.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to self-determination and economic development is well-publicized. All persons should be informed of peoples' collective rights under Article 1. Accordingly, a State party must have trained personnel who are able to permit and protect the right of peoples within the state to pursue these rights. States must also possess trained personnel to advocate internationally to promote the right to self-determination for peoples not within the jurisdiction of the State.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 1 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 1? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 1?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** The HRC has indicated that self-determination is a foundational right to the securing of other rights specified in the ICCPR. The HRC has not been particularly clear with respect to how to make the right to self-determination accessible or what criteria may govern or limit this right. States parties

reporting on Article 1 have generally confined their remarks to political expression and economic development. It appears by implication that a State party can provide for limitations on this right. Nevertheless, in theory, it should make the pursuit of self-determination accessible through the courts and other governmental avenues of legal redress.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 1 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 1 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers);
- Use of formal and informal media;
- Traditional justice structures that deal with Covenant rights, including self-determination (such as indigenous courts, religious courts, and other nontraditional justice processes); and
- Mechanisms available to impede private parties and/or government from squandering national assets to which a self-determination claim (Art. 1(2)) might be made.

Are the measures effective in preventing the abuse of the rights in Article 1?

In particular, what measures have been taken to ensure that any limitations on the right to self-determination, especially as it relates to natural resources use, are narrowly tailored?

Are there informal structures that limit the exercise of the rights in Article 1 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 1?

Has the state provided the necessary resources to make the rights in Article 1 accessible? Are there obstacles to the use of these resources?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that complaints of denial of the right to self-determination and use of natural resources can be

addressed fully through appropriate legal or administrative means, which should include the availability of officially designated and trained personnel. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but they also must have effective remedies at their disposal.

### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 1? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 1? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the right to self-determination, especially as it relates to natural resources use? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 1? What possibilities exist for obtaining sufficient judicial or other recognition of status to enable the legal pursuit of self-determination rights?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 4(2) does not limit the derogability of Article 1. In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the rights guaranteed under Article 1. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to self-determination as set forth in Article 1?

If State X has derogated from any of the provisions of Article 1, did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United

Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to self-determination as set forth in Article 1, or which recognize this right to a lesser extent? Has State X acted to limit or restrict the right to self-determination as set forth in Article 1 in some other fashion?

Are any existing limitations or restrictions on the right to self-determination as set forth in Article 1 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to self-determination as set forth in Article 1?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to self-determination as set forth in Article 1? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to self-determination as set forth in Article 1?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to self-determination set forth in Article 1?

## Article 6: Right to Life

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
2. *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.*
3. *When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.*

### General Commentary

The right to life is the most basic and fundamental of all human rights, without which all other rights are irrelevant. To insure comprehensive coverage, Article 6 requires States parties to provide legal protections at both the state and individual levels. Thus, a state must both take measures to prevent arbitrary state killings as well as arbitrary killings by individuals. However, these measures must conform to the Covenant, and the Human Rights Committee has censured extreme measures taken by states to combat terrorism, including tolerance of extrajudicial executions.<sup>1</sup> Furthermore, pursuant to Article 4(2), the right to life is non-derogable, and therefore, it cannot be suspended, even in the event of an emergency threatening the life of the nation.<sup>2</sup>

Other international human rights provisions that ensure the right to life include:

- Universal Declaration of Human Rights (UDHR), Article 3;
- European Convention on Human Rights (ECHR), Article 2;
- American Convention on Human Rights (ACHR), Article 4; and
- African Charter on Human and Peoples' Rights (ACHPR), Article 4.

Unlike Article 4 of the ACHR, which specifically refers to “the moment of conception,” Article 6 of the ICCPR does not explicitly address the parameters of when “life” begins. During its drafting such language was specifically proffered and rejected.<sup>3</sup> To the extent the HRC has subsequently addressed the controversial issue of abortion, the HRC has tended to focus on the potential risks involved in anti-abortion legislation.<sup>4</sup> The Committee has noted, for example, that the criminalization of all abortions gives rise to serious problems and may implicate Article 6 to the extent that the lives of pregnant women are at risk in clandestine abortions.<sup>5</sup>

**Article 6(1) Interpretation:** The HRC has broadly defined the protection of the right to life “by law” focusing on the concept of “arbitrary” killings, as opposed to simply “unlawful” killings. In *Guerrero v. Columbia*, the HRC examined the intentional shooting of “suspected kidnappers” by Colombian security forces. Pursuant to legislation in force, the security forces occupied a house and subsequently shot and killed, without warning, a number of individuals as they arrived. Legal proceedings were dismissed on the basis of a law authorizing this type of conduct. The HRC determined that this use of force was “disproportionate” under the circumstances, constituting an arbitrary deprivation of life under Article 6(1), and that the authorizing legislation should be amended to prevent future such occurrences.<sup>6</sup>

Pursuant to its broad definition of the right to life, the Committee has indicated that cultural practices and preferences can implicate Article 6. Thus, it has called some states to account for excessive restrictions on the availability of abortion (noted supra) and for condoning the practice of female genital mutilation. As to the latter, the Committee has cited this practice as violating both Articles 6 and 7.<sup>7</sup>

In addition to such violations of commission, the HRC has determined that a state may violate Article 6(1) through omission. For example, when the state brings someone into custody, the state has the duty to take active steps to protect the life of the individual in custody. Blanket assertions that a person disappeared or committed suicide will not substitute for proper protection in advance and a full investigation into circumstances surrounding any such unexpected death or disappearance.<sup>8</sup> Moreover, regardless of whether the individual was in custody, the HRC examines cases of unexplained disappearances with heightened scrutiny. In General Comment 6, the HRC notes that “States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”<sup>9</sup> Failure of a state to actually commit sufficient resources to this task may run afoul of the general duties of enforcement found in Article 2, as well as the specific protections of Article 6.<sup>10</sup>

During the drafting of Article 6(1), the term “arbitrarily” was debated and concerns as to vagueness were raised. Delegates ultimately concluded that its inclusion was preferable to an enumeration of specific cases “in which deprivation of life would be deemed lawful.”<sup>11</sup> Subsequently, scholars have attempted to enumerate what constitutes an arbitrary deprivation of life, but, while useful, these lists fall short of capturing the context-sensitive nature of an inquiry into arbitrariness.<sup>12</sup>

In terms of positive duties, the HRC has stated that Article 6(1) should ensure the protection of life through positive measures against malnutrition, epidemics, armed conflict, and even thermonuclear war.<sup>13</sup> However, the latter has proven to be particularly difficult to formulate as a justiciable, as opposed to political, case.<sup>14</sup>

**Article 6(2) Interpretation:** While Article 6(2) explicitly permits the use of the death penalty, the HRC has concluded that measures to abolish or restrict its use are to be understood as “progress” towards the realization of human rights within the meaning of the reporting requirements under Article 40.<sup>15</sup> This restrictive reading parallels the explicit language of the ACHR in Article 4(2), which prohibits the death penalty from either being extended or reintroduced. However, extradition of a person from a non-death penalty state to a death penalty state has not been considered a *per se* violation of Article 6(2).<sup>16</sup>

The Second Optional Protocol to the ICCPR abolishes the death penalty, and Article 2(1) of the Second Optional Protocol requires states to eliminate the death penalty in all cases, unless a reservation is filed for its use during time of war.<sup>17</sup> To the extent a state retains the death penalty, Article 6(2) explicitly limits its use to the “most serious crimes.” The HRC has not clearly enumerated those offenses qualifying as the “most serious crimes,” but it has stressed, however, that this term is to be construed restrictively.<sup>18</sup> The Committee has condemned states for imposing death as a penalty for crimes including apostasy, embezzlement, theft, and homosexuality.<sup>19</sup> Similarly, failing to provide sufficient information for the Committee to make a judgment as to how the State party implements the death penalty will also invoke its concern under Article 6.<sup>20</sup>

In cases where the death penalty is to be applied, Article 6(2) prescribes that it must be pursuant to a “final judgment” and that it must be “in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant.” These terms prevent *ex post facto* death penalty provisions, and they implicitly reference certain procedural guarantees provided elsewhere in the ICCPR. The HRC has noted that the latter

should involve at a minimum: “the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to seek review by a higher tribunal.”<sup>21</sup> These considerations require consideration of various other ICCPR provisions, including Articles 2, 14, 15, and 26.<sup>22</sup>

Regarding the actual execution of the death penalty sentence, a State party’s observance of Article 6(2) also requires that the Article 7 prohibition against torture and cruel, inhuman or degrading treatment of punishment be complied with fully.<sup>23</sup> The Committee has also condemned the mandatory use of the death penalty as violating Article 6 for failing to consider whether it was the most appropriate penalty for the crime.<sup>24</sup>

The HRC has consistently held that the protections explicit and implicit within Article 6(2) must be given substantive meaning, and the failure to provide these protections in law or practice will violate these protections. Thus, a trial *in absentia* without notice and an opportunity to appear will clearly violate this guarantee.<sup>25</sup> However, even where literal compliance with the letter of the law may appear present, the HRC will delve into the substance of its application. For example, if a defendant is first granted access to defense counsel at the day of trial, the mere presence of counsel will not satisfy this requirement of the process, and the HRC has repeatedly held that this “axiomatic” component may not be substantively compromised.<sup>26</sup> To ensure that all such procedural guarantees are thoroughly and properly complied with, the HRC has held that all issues of this nature must be subject to review by a higher competent tribunal. The failure to provide for this review may itself trigger a violation of Article 6(2) in the presence of other circumspect factors.<sup>27</sup> Thus, the Committee has also found a violation of Article 6 where the state carried out the sentence of death while the complainant’s communication to the Committee was under review.<sup>28</sup>

**Article 6(3) Interpretation:** The HRC has derived from Article 6(3), a “supreme duty” to prevent acts of mass violence causing arbitrary loss of life and stressing the need for “[e]very effort...to avert the danger of war, especially thermonuclear war.”<sup>29</sup> The latter reference was expounded upon in greater detail in General Comment 14, which focused on the use of weapons of mass destruction. In General Comment 14, the HRC observed that the “designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today.”<sup>30</sup> However, the HRC has also held on more than one occasion that individuals protesting deployment and/or testing of nuclear weapons must establish a real and immediate threat to their lives for their case to be justifiable.<sup>31</sup>

**Article 6(4) Interpretation:** The first sentence of Article 6(4) guarantees those under sentence of death the right to seek a pardon or commutation of their sentence, and the second sentence imposes a requirement that there be in place the appropriate legal machinery to enable those under sentence of death to seek amnesty, pardon, or commutation of their sentence. While never expressly stated, Article 6(4) implies that the execution of the death sentence must be postponed at least until the proper conclusion of the relevant procedure.<sup>32</sup>

**Article 6(5) Interpretation:** Article 6(5) expressly prohibits States parties from imposing the death penalty on persons under the age of 18 at the time the crime was committed, despite their having committed a crime for which death is a legal punishment. Furthermore, a State party cannot circumvent this restriction by waiting until the person is over 18 to impose or render the sentence.<sup>33</sup> In contrast to other Covenant provisions involving juveniles – namely, Articles 3, 10(2)(b), 14(1) and 24(1) – Article 6(5) establishes an absolute age limit and does not rely on the domestic definition of the term “juvenile.” However, there is no absolute prohibition on the issuance of a death sentence to a pregnant woman. Thus, while a pregnant woman may not be executed during her pregnancy, her pregnancy does not forestall the sentence itself, merely its execution.

**Article 6(6) Interpretation:** While the drafters recognized that the death penalty existed in certain States parties to the Covenant, they declined to sanction its usage as evidenced by Article

6(6).<sup>34</sup> Furthermore, as noted above, the HRC considers the abolition of the death penalty to be “progress” in terms of States’ reports under Article 40. However, whether reintroduction of the death penalty would, *per se*, constitute a violation of Article 6(6) remains a topic of debate.<sup>35</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 6 requires States parties to protect the right to life by law, which means States parties have a legal obligation to construct, legislatively, judicially, and/or administratively, the legal mechanisms sufficient to guard the right of every person to life and to hold responsible those who violate Article 6. Such legal measures must include provisions for persons facing a possible sentence of death to receive a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal.

Article 6 also mandates that a State party limit the application of the death penalty to the most serious crimes and afford persons sentenced to death the right to seek a pardon or commutation of the sentence. Should a State party carry out the death penalty against a convicted person, it is obligated to do so humanely, and a State party must have legislative, judicial, or administrative measures in place to prevent the death sentence from being carried out on persons who are either pregnant or who committed a crime punishable by death while under the age of 18. Additionally, states must enforce legal protections for persons under arrest, including the provision of adequate food and medical treatment and proper investigation into cases of disappearance. Other, non-death penalty related positive measures required of states may include measures to limit malnutrition, epidemics, armed conflict, and proliferation or use of nuclear weapons.

## **Assessment Inquiry**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 6? Has State X ratified Optional Protocol 2?

What laws guarantee people under the jurisdiction of State X this type of protection? What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection? In addition to the matters noted, consider the following in your description:

- Type and number of crimes for which death is a scheduled punishment;
- Counter-terrorism plans, measures, and procedures;
- Procedures employed for executions;
- Due process guarantees, *e.g.*, criminal procedure codes;
- Appellate venues, including pardons;
- Nature and progress of efforts to abolish use of capital punishment;
- Restrictions on proliferation and availability of weapons;
- Prohibitions and/or proliferation of cultural or medical practices that implicate Article 6, including female genital mutilation and abortion;
- Police protection and regulation provisions related to protection against homicide;
- Legal aid systems;
- Social welfare legislation addressing abortion, euthanasia, infant mortality, malnutrition, and epidemics; and
- Legal measures limiting the use of military force and weapons of mass destruction.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to life, as

guaranteed under Article 6 and the State's own implementing legislative, judicial, and administrative measures, be well-publicized. Prosecutors, lawyers, judges, police officers, and other state officials involved in the handling of situations that involve, or might involve, the arbitrary deprivation of life must be informed of the rights to which suspects are entitled, and they must be sufficiently trained to adequately guarantee that those rights are provided. Specifically, state officials charged with the apprehension of suspects, supervision of persons under arrest, and investigation of disappearances should be well-informed of the legal standards prohibiting the arbitrary deprivation of life, and they should be made aware of the legal action that will be taken against them if they violate these standards. Also, the general public should be made aware of these standards and the methods whereby these officials are held accountable for their enforcement. Persons in custody should be informed of their right to the procedural guarantees outlined above and of the possibility of pardon, amnesty, or commutation of the sentence. State officials charged with the implementation of death sentences should be aware of and trained with regard to the exemptions due juveniles and pregnant women, and they should also be trained to execute death sentences humanely. Regarding positive measures to protect the right to life, the state should inform the public of its efforts to reduce generalized threats, such as life-threatening illnesses, weapons of mass destruction, and armed conflict.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 6 adequately published and distributed? How is the right of all persons to life publicized?

What special measures are taken to distribute these materials both within the formal legal sector to judges, lawyers, prosecutors, and police officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 6? What training programs are in place for both legal and non-legal professionals regarding the standards protecting against the arbitrary deprivation of life? Are state officials trained to investigate potential violations of the right to life by the state itself?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 6?

Are citizens and state officials informed of the procedural guarantees to all persons accused of a crime punishable by death and the possibility of pardon, amnesty, or commutation for all persons actually sentenced to death?

Are the state's initiatives aimed at lessening the risk to life posed by general threats, such as malnutrition, epidemics, and/or weapons of mass destruction publicized?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** All States parties have an obligation to ensure that legal processes are functional and available to implement the rights secured in Article 6. Thus, to protect the right to life from arbitrary violations by the state itself, the State party must provide a functioning, readily accessible mechanism capable of holding the state responsible for violations of the state's own legislation and/or Article 6. In order for the required procedural guarantees to be useful and accessible for a person accused of a capital crime, the State party must provide the accused with the necessary means of mounting a viable legal defense, including access to the procedure for pardons and commutations of sentences. Where substantiated claims exist that the state has failed to properly protect against the arbitrary deprivation of life, the state has a duty to investigate the circumstances surrounding the claim.

### **Assessment Inquiry**

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 6 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 6 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media;
- Special programs to address disappearances; and
- State initiatives aimed at lessening the risk to life posed by general threats, such as malnutrition, epidemics, and/or weapons of mass destruction.

Are the measures effective in preventing the abuse of the rights in Article 6?

Are there informal structures that limit the exercise of the rights in Article 6 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

What measures has State X taken to eliminate the risks posed by clandestine abortions, the practice of infanticide, the custom of dowry killings, and gender specific poverty and deprivation that is life threatening?

What measures has State X taken to control lethal and potentially lethal instrumentalities (e.g., army, weapons, etc.)?

**IV. Right to an Effective Remedy and its Enforcement:** States parties must ensure that persons accused of crimes punishable by death have access to the procedural guarantees outlined above and, if sentenced to death, are granted access to the means necessary to receive pardon, amnesty, or commutation of the sentence. If pardon, amnesty, or commutation of the sentence is granted, but the state is unable to administer it, state officials, as well as the accused persons, should have an enforceable remedy from the state body responsible. Effective means of enforcing criminal charges against state officials must also exist as redress for those instances in which someone acting in the name of the state itself intentionally and arbitrarily deprives a person of the right to life. Individuals representing persons who have died while under arrest or who have disappeared, for example, should be entitled to effective recourse against the state if the state is responsible for the death or has failed to investigate the death or disappearance.

Individuals should also have recourse in the event that life is put at imminent risk by malnutrition, disease, armed conflict, or weapons of mass destruction.

### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 6? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 6? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 6? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 6?

**V. Limitations and/or Derogations and Scope of Rights:** Article 4(2) specifies that, even in times of emergency threatening the life of the nation, a state may not derogate from Article 6. While in accordance with Article 5, nothing in Article 6 may be interpreted as implying the right of persons or groups to engage in an activity restricting the right of every human being to life, the relationship of this restriction to the controversial issues of abortion and euthanasia remains unclear. Furthermore, the language of Article 6 permitting the application of the death penalty does not provide explicit legal authority for the re-introduction of the death penalty in a domestic context where it has been previously abolished.

### ***Assessment Inquiry***

Are there any circumstances in which State X has sought to derogate from its obligation to guarantee the right to life as set forth in Article 6?

If State X has sought to derogate from any of the provisions of Article 6, did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why

these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to life as set forth in Article 6, or which recognize this right to a lesser extent? Has State X acted to limit or restrict the right to life as set forth in Article 6 in some other fashion?

Are any existing limitations or restrictions on the right to life in Article 6 guided by objective and reasonable criteria and specified by law? If State X currently has the death penalty, under what conditions is it applied?

Has State X cited another international instrument as a basis for limiting or restricting the right to life as set forth in Article 6? Has State X restricted other human rights guarantees?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to life as set forth in Article 6? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to life as set forth in Article 6?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to life as set forth in Article 1?

## Article 7: Prohibitions Against Torture

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

### General Commentary

Freedom from torture and other cruel, inhuman or degrading treatment is a basic and fundamental human right. In addition to the ICCPR, several other major international human rights instruments prohibit the use of torture and other cruel, inhuman or degrading treatment, including the:

- Universal Declaration of Human Rights (UDHR), Article 5;
- European Convention of Human Rights and Fundamental Freedoms (ECHR), Article 3;
- United Nations Declaration on the Protection of All Persons from Being Subject to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment;<sup>1</sup>
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its 2 Protocols;<sup>2</sup>
- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment [hereinafter CAT];<sup>3</sup> and
- U.N. Principles of Medical Ethics Relevant to Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>4</sup>

As such, the right to be free from such treatment is non-derogable, regardless of circumstance, including times of public emergency.

**General Interpretation:** The prohibition on torture has a special status under international law. As noted above, it is the subject of several international instruments. In each of these, this freedom from torture is assured without restriction. It is also made non-derogable in the major instruments addressing it, including the ICCPR.<sup>5</sup> Article 7 was prepared using Article 5 of the Universal Declaration of Human Rights (UDHR) as a basis; the drafting history emphasizes the substantive nature of the prohibition and that the concept of torture should be interpreted to cover a wide variety of treatment.<sup>6</sup>

Relying in part on its own expert views and in part on the wording of the article itself, the Human Rights Committee (HRC) has interpreted Article 7 broadly. It has declared that the “aim of the provisions of Article 7 . . . is to protect both the dignity and the physical and mental integrity of the individual.”<sup>7</sup> Thus, the Committee is of the opinion that Article 7 “clearly” applies to detainees, but also to “pupils and patients in educational and medical institutions.”<sup>8</sup> A state’s observance of Article 7 should be considered together with a state’s compliance with the positive rights to liberty and security of persons (Article 9) and obligation of states to treat those they detain with dignity and respect (Article 10).

What constitutes torture, cruel, inhuman, or degrading treatment in violation of Article 7 has not been specifically defined. In some of its cases, the Committee has indicated that assessing what constitutes torture is a subjective endeavor that depends on all of the circumstances of the case, including duration and manner of treatment, its physical and mental effects, and the state of the victim (e.g., sex, age, health).<sup>9</sup> There is also an element of proportionality involved in determining treatment to be tortuous or degrading.<sup>10</sup> The Committee has stated that the terms of Article 7 indicate that the scope of its protection required from States parties “goes far beyond torture as normally understood.”<sup>11</sup> Drawing distinctions and making definitions “depend on the kind, purpose, and severity of the particular treatment,” because Article 7 totally and unequivocally

prohibits any violation of its provisions. The question of what constitutes torture and cruel, inhuman, or degrading treatment should be complex and fluid and allowed to change over time.<sup>12</sup>

The Convention Against Torture (CAT) indicates that torture is defined as the intentional infliction of "severe pain or suffering, whether physical or mental . . . for such purposes as obtaining from him or a third person information or a confession." Its definition is not binding on interpretation of Article 7 but can be an "interpretational aid."<sup>13</sup> The Human Rights Committee recently considered the issue, finding a violation of Article 7 in the conduct of police while searching what turned out to be the wrong home over the objections of some committee members who contended police good faith belief that they had the correct house should preclude finding any violation.<sup>14</sup> In addition, the CAT provision differs from the ICCPR provision inasmuch as CAT limits its definition to acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>15</sup> The ICCPR, therefore, imposes greater restrictions and requirements on its States parties than does the CAT. Based on findings from communications considered by the Committee, torture may include the use of electric shock; forcing of detainees' heads under water; insertion of bottles or barrels into a detainee's anus; forcing of detainees to remain standing for several days and nights; use of physical beatings or treatment resulting in permanent physical damage; and use of psychological torture, including threats of torture or violence to friends or relatives and mock executions.

The Committee has considered the question of whether omissions (such as the withholding of food or water) can be classified as torture. The Human Rights Committee has considered at least one case relating to this issue. It concluded that the failure to address a detainee's mental deterioration constituted degrading treatment.<sup>16</sup> Furthermore, the HRC has observed that depriving prisoners of food as punishment in prison should not be tolerated,<sup>17</sup> and the Committee has noted that severe prison conditions can invoke Article 7 concerns.<sup>18</sup>

Medical experimentation can also violate Article 7, as the article's second sentence makes plain. While this portion of Article 7 was drafted with the atrocities of the Nazi concentration camps during World War II firmly in mind, commentators have advised that the drafters clearly recognized that the provision as formulated went much further. The HRC has noted the lack of information received with respect to this second sentence and has commented that, "in countries where science and medicine are highly developed...more attention should be given to the possible means to ensure observance of this provision."<sup>19</sup>

The number and variety of cases considered by the Human Rights Committee under Article 7 make a summary analysis of its case law unwieldy. In addition, the Committee's consideration of individual cases has often centered more on whether the evidence was sufficient to indicate that certain events had occurred because the events described were "so atrocious as they undoubtedly breach Article 7."<sup>20</sup>

The Committee has found violations of Article 7 in cases involving mental distress, methods of execution, refoulement (returning someone to a country where they would face certain danger of torture); corporal punishment; and conditions of detention.<sup>21</sup> The Committee has specifically noted that evidence obtained in violation of Article 7 should not be admissible in judicial proceedings.<sup>22</sup>

The Committee's views on Article 7 are also evident from its Concluding Observations on national reports pursuant to Article 40. For example, in 1997, the Committee expressed its concern regarding instances of ill treatment of minorities and foreigners by police in Germany and called for an independent complaint investigation mechanism (which is also relevant to Articles 9 and 10).<sup>23</sup> Also with respect to military and police forces, the Committee has observed that internal, and even informal, practices amounting to hazing may violate Article 7.<sup>24</sup> The Committee has indicated it regards domestic violence, rape, and other forms of violence against women as implicating Article 7 and that states should do more to prevent it.<sup>25</sup> Corporal punishments, such as whipping, as well as more extreme bodily harm, such as amputation of limbs, violates Article

7.<sup>26</sup> The Committee has stated that efforts to combat terrorism does not justify resort to violating Article 7.<sup>27</sup> This list is not comprehensive. Once a violation of Article 7 is found, there can be no justification, no mitigation. Article 7 rights are subject to no restrictions.<sup>28</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** The ICCPR requires States parties to ensure that the right to be free from torture and other cruel, inhuman or degrading treatment is respected and enforced. States parties must have three broad types of legislation to comply with Article 7. They must prohibit activities violating the terms of the prohibition and protect those under its jurisdiction from the activities of non-state actors that might violate the provisions of the prohibition. In addition, they must provide "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Such legislation need not define torture, cruel, inhuman, or degrading treatment, but it cannot limit any definition so as to narrow the application of its legal provisions from the broad scope prescribed by the ICCPR and the Committee.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 7?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Prohibition of detention incommunicado;
- Requirements for registration of detainees' names on a central register;
- Detention in places that are publicly recognized;
- Prohibition on use in legal proceedings of confessions or other evidence obtained through torture or other treatment contrary to Article 7; and
- Application of such protections and prohibitions to the benefit of students and those in institutions.

Has State X acceded to, incorporated into law or administrative rules, and/or consulted other relevant international standards, such as the United Nations Minimum Standard Rules for the Treatment of Prisoners, the United Nations' Code of Conduct for Law Enforcement Officials and the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice? If so, how have these standards influenced local law?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to be free from torture, cruel, inhuman or degrading treatment is well-publicized. All persons should be informed of their right to be free from such treatment and of the remedies that exist, should the prohibition on such treatment be violated. This requirement necessitates that a state have trained personnel able to investigate and prosecute violations of the state's legal framework implementing Article 7. In addition, as the Committee has instructed: state officials must be able to hold those "found guilty . . . responsible."<sup>29</sup> States must ensure that all officials, from those who receive reports and handle victims to those who investigate and prosecute, be adequately

trained.<sup>30</sup> In addition, state officials working with detainees, students, or those in institutions must be adequately trained on how to prevent, as well as how to handle allegations of, violations of Article 7's prohibitions.

### **Assessment Inquiry**

Are laws reflecting the rights in Article 7 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 7? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 7?

During all proceedings *vis a vis* State X, are detainees and others informed of the following:

- The right to be free from such treatment;
- The resources available to them to allege violation of this right; and
- The procedures involved in alleging violation of this right.

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** The ICCPR and the Committee do not require any specific provisions to enforce the prohibitions of Article 7, and they leave to the state the task of designing an effective means of implementing Article 7. The HRC has noted that "it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make a crime... it follows from Article 7, read together with Article 2 of the Covenant, that states must ensure an effective protection through some machinery of control."<sup>31</sup> To be useful and accessible, a state's efforts to comply with Article 7 should not be of a single type. Rather, as the Committee has suggested, a wide-ranging approach is preferred.

### **Assessment Inquiry**

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 7 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 7 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 7?

In particular, what measures have been taken to protect the rights of detainees to be free from such treatment? Of students? Of those in institutions, hospitals, sanatoria, etc.?

Are there informal structures that limit the exercise of the rights in Article 7 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 7 accessible? Are there obstacles to the use of these resources?

What measures has State X taken to eliminate instances of torture, but also degrading or inhumane treatment (e.g., the threat of domestic violence, practice of forced sterilization, and use of corporal punishment to enforce dress codes)? What measures has State X done to insure access to abortion in cases of rape?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that alleged victims have access to the legal machinery and/or officially designated personnel to protect their rights to be free from torture, cruel, inhuman, or degrading treatment. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have “effective remedies at their disposal, including the right to obtain compensation.”<sup>32</sup>

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 7? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is

sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 7? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 7? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 7?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 7 is non-derogable pursuant to Article 4(2), even during times of national emergency. In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the rights to be free from torture or inhuman treatment guaranteed under Article 7. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has sought to derogate from its obligation to prohibit torture as set forth in Article 7?

If State X has sought to derogate from any of the provisions of Article 7, did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which limit the prohibition on torture as set forth in Article 7? Has State X acted to limit or restrict the prohibition on torture as set forth in Article 7 in some other fashion?

Are any existing limitations or restrictions on the prohibition on torture as set forth in Article 7 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the prohibition on torture as set forth in Article 7?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition on torture as set forth in Article 7? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the prohibition on torture as set forth in Article 7?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition on torture as set forth in Article 7?

## Article 8: Prohibition Against Slavery

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labor;  
(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labor may be imposed as a punishment for a crime, the performance of hard labor in pursuance of a sentence to such punishment by a competent court;  
(c) For the purpose of this paragraph the term 'forced or compulsory labor' shall not include:
  - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
  - (ii) Any service of military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
  - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
  - (iv) Any work or service which forms part of normal civil obligations.

### General Commentary

Slavery was the subject of one of the first human rights conventions, the 1926 Slavery Convention, which prohibits slavery, as well as forced labor. Since then, human rights instruments have, without exception, maintained these prohibitions. Other international instruments prohibiting slavery and forced labor include the:

- Universal Declaration of Human Rights (UDHR), Article 4;
- European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 4(1);
- American Convention on Human Rights (ACHR), Article 6(1);
- African Charter on Human and People's Rights (ACHPR), Article 5;
- Special Conventions of the ILO, No. 29 (on Forced or Compulsory Labor)<sup>1</sup> and No. 105 (on Abolition of Forced Labor),<sup>2</sup>
- U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;<sup>3</sup>
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime;<sup>4</sup>
- Special Rapporteur of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography; and
- Special Rapporteur of the Commission on Human Rights on the Human Rights of Migrants.

Article 8, paragraphs 1 and 2, are non-derogable pursuant to Article 4 of the ICCPR.

**Article 8(1) Interpretation:** Article 8 requires that States parties take positive, active measures to ensure the prohibition of slavery, servitude, and slavery-like practices (including serfdom, debt bondage, and trafficking in women and children). Article 8(1) effectively prohibits these slavery-like practices, due to the extensive "historical background" involved in the characterization of slavery and the sheer abundance of documents denouncing it.<sup>5</sup> Furthermore, States parties should "establish more effective supervisory mechanisms" to ensure compliance with provisions of national legislation and relevant international standards.<sup>6</sup> Article 8(1) permits no exceptions to its prohibition of slavery. Recently, the Committee has frequently called on States parties to take

resolute measures to combat the scourge of human trafficking, which it has found to violate Article 8.<sup>7</sup>

**Article 8(2) Interpretation:** The drafting history of Article 8 reveals extensive debate over the exact terms to include in the article. After consideration, however, it was decided that “slavery” and “servitude” were conceptually distinct concepts and should be dealt with in separate paragraphs.<sup>8</sup>

The Human Rights Committee has maintained that detention for debt lacks the pivotal “element of economic exploitation”, and thus, it is not considered a “slavery-like practice.”<sup>9</sup> The HRC contends that slavery is defined by its strong traits of economic oppression and deeply rooted cultural traditions.<sup>10</sup> However, some practices involving debts can be in violation of Article 8. In 1976, the HRC recommended thorough studies be undertaken to identify the extent of bonded labor and suggested that more proactive measures be taken to abolish these practices.<sup>11</sup> Similar recommendations were made regarding child prostitution and labor.<sup>12</sup>

**Article 8(3) Interpretation:** Article 8(3) prohibits all forced labor amounting to slavery and slavery-like practices. Accordingly, the Human Rights Committee expressed concern regarding potential violations of Article 8 with respect to forced labor of trafficked women, bonded laborers in India, and Haitian child laborers in the Dominican Republic.<sup>13</sup>

However, Article 8(3) allows for some derogation from this prohibition with respect to forced or compulsory labor. First, compulsory labor is permissible in the context of a criminal sentence, provided some safeguards are observed. A sentence of hard labor must be imposed by a competent court. Pursuant to Article 8(3)(c)(i), States parties may compel prisoners to perform routine work during incarceration. This is justifiable and consistent with the “wording and historical background” of Article 8(3)(c)(i) and consonant with interpretations given the companion article in the ECHR, Article 4(3)(a).<sup>14</sup> However, one commentator has noted that the obligation of prison labor must “primarily aim at the social rehabilitation of prisoners . . . Similarly, the obligation to perform voluntary social work (in particular, as restitution for a crime) as a substitute for punishment, which is often provided for in modern laws for the protection of juveniles, does not represent forced labor, so long as the person concerned is able to choose between the two.”<sup>15</sup>

In addition to forced labor during incarceration, some types of forced or compulsory labor may be consonant with the ICCPR. This type of labor must be, in the first instance, voluntary, as it is the involuntary nature of some practices that is an important defining characteristic in terms of invoking Article 8.<sup>16</sup> These exceptions to Article 8(3)’s general prohibition originate in International Labor Organization Convention 29, which holds that labor may be made compulsory only for able-bodied males aged 18 to 45; the treaty also limits the number of working hours for such labor.<sup>17</sup> However, there is no mention of how the conditions for or limits on the imposition of forced labor are defined in these potential cases.

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 8 mandates a State’s commitment to ensuring freedom from slavery, slavery-like practices, forced/compulsory labor, and other types of political and economic oppression. Pursuant to Article 2, States must take legislative and administrative steps to forbid such action and establish punishment under criminal law for those persons and bodies that violate Article 8. Recognizing that economic exploitation is a central component of slavery and slavery-like practices, Article 8 requires States parties to take measures (e.g., land reforms) to lessen the “need” or demand for slave-like practices. Additionally, Article 8 states that all legislation defining crimes punishable by hard labor be regulated and used only for social rehabilitation. Similarly, any sentences requiring hard labor must be handed down by a competent court. Also, it is important for States parties to

identify the extent of bonded labor and trafficking in women and children and to enact measures to combat and outlaw these practices.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 8?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Matters and measures pertaining to slavery-like practices, such as debt bondage, serfdom, and women/child trafficking; and
- Application of Article 8's protections and prohibitions to the benefit of students and those in institutions.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** All persons should be informed of their right to be free from such treatment and of the remedies that exist in the event that their right to Article 8 protections be violated. This requirement necessitates that States parties allocate sufficient resources to and adequately train personnel charged with the investigation and prosecution of violations of the state's legal framework aimed at implementing Article 8. It also means that state officials in positions to work with detainees, students, or those in institutions must be adequately trained on how to prevent, as well as how to handle allegations of, Article 8 violations.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 8 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 8? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs? Include training provided to law enforcement officials.

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 8?

How is a person's right to be free from such treatment publicized? Specifically, are detainees and others informed, and how, of the following:

- The right to be free from such treatment;
- The resources available to them to allege violation of this right; and
- The procedures involved in alleging violation of this right.

Are students and those in institutions informed of their right to be free from such treatment?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** A precise prescription for how to implement the provisions of Article 8 is not self-evident from the supporting material, but it is clear that, to be useful and accessible, a state's efforts to comply with Article 8 should not be of a single type. Its efforts should include, but not be limited to: the publication of criminal laws condemning and punishing slavery; solicitation of input from the public over economic reforms that would strengthen a legal (and non-slave-dependent) economy; implementation of such economic reforms; and fostering of a general public awareness of the more underground slave-like practices, such as trafficking in women and children.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 8 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 8 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 8?

What measures have been taken to protect the rights of detainees to be free from such treatment, given that said detainee has not committed a serious crime and was not sentenced to hard labor by a competent court?

Are there informal structures that limit the exercise of the rights in Article 8 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 8 accessible? Are there obstacles to the use of these resources?

Is there an economic relationship between government officials and activities such as trafficking, etc.?

To what extent is State X cooperating in international efforts to combat Article 8 abuses? To what extent is State X cooperating with international and regional organizations or interfering with non-state actors?

What measures has State X taken to eliminate trafficking in women, prostitution, and slavery disguised as the performance of services?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that alleged victims have access to the legal machinery and/or officially designated personnel to protect their rights to be free from slavery, slavery-like practices or forced/compulsory labor. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 8? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 8? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 8? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 8?

Is there an administrative procedure to redress the effects of trafficking on the individual (e.g., documentation, protection, compliance with counselor conditions)? How are non-nationals treated in this regard?

Has State X developed a form of reparations or acknowledged/redressed former slavery practices?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 4 of the ICCPR specifies that paragraphs 1 and 2 of Article 8 are non-derogable. Forced labor and the instances in which it is appropriate are limited, as noted above. Trafficking in women and children should be considered non-derogable pursuant to Articles 8 and 4.

As previously discussed, the HRC has given indications that detention for debt is not a “slavery-like practice.”<sup>18</sup> Furthermore, it separates slavery from inhumane treatment on the grounds that slavery is characterized by economic burden and a state’s mores.<sup>19</sup>

In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the rights to be protected from being held in slavery or servitude guaranteed under Article 8. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights, or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has sought to derogate from its obligation to prohibit slavery as set forth in Article 8?

If State X has sought to derogate from any of the provisions of Article 8, did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the prohibition on slavery as set forth in Article 8? Has State X acted to limit or restrict the prohibition on slavery as set forth in Article 8 in some other fashion?

Are any existing limitations or restrictions on the prohibition on slavery as set forth in Article 8 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the prohibition on slavery as set forth in Article 8?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition on slavery as set forth in Article 8? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the prohibition on slavery as set forth in Article 8?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition on slavery as set forth in Article 8?

## Article 9: Right to Liberty and Security of Person

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*

4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

### General Commentary

Article 9 protects individuals against arbitrary and unlawful deprivation of liberty and security of person, obligating States parties to prohibit arbitrary deprivations. Thus, Article 9 does not prohibit all such restrictions on liberty of person, but rather, it requires States parties to define precisely in which instances deprivation of liberty may be permissible, as well as the necessary procedures to effect such a deprivation legally. Furthermore, Article 9 requires States parties to ensure that a person deprived of his or her liberty possesses sufficient information and opportunity to seek meaningful judicial review of the detention.<sup>1</sup>

The right to liberty of person is one of the oldest basic rights of an individual against the state, and its origins can be traced to the *Magna Charta Libertatum*. Other international instruments have addressed issues related to the right to liberty and security of the person, including:

- Universal Declaration of Human Rights (UDHR), Article 9;
- European Convention on Human Rights (ECHR), Article 5;
- American Convention on Human Rights (ACHR), Article 7; and
- African Charter on Human and People's Rights (ACHPR), Article 6.

In accordance with Article 4, Article 9 is a derogable right subject to restrictions during a period of public emergency. If preventive detention is used on public security grounds, it is subject to the same Article 9 protections that apply to "normal" detention. Furthermore, if criminal charges are brought in cases of preventive detention, "the full protection of Article 9(2) and (3), as well as Article 14, must also be granted."<sup>2</sup> Thus, special provisions to deal with security threats, such as terrorism, are not exempt from the protections of Article 9.<sup>3</sup>

**General Interpretation:** Article 9 contains both substantive and procedural protections. Article 9(1) establishes specific substantive rights of general application, and Articles 9 (2)-(5) provide procedural protections that are important for realizing these substantive guarantees.<sup>4</sup> Most of these protections are of general application, but certain rights, such as those provided in Article 9(3), are targeted at criminal cases.

**Article 9(1) Interpretation:** This general provision applies to all deprivations of liberty, and it provides protections that extend beyond cases involving traditional criminal justice. The HRC has noted that "the right to liberty and security of person has often been somewhat narrowly understood,"<sup>5</sup> and the HRC has clarified that Article 9 covers "all deprivations of liberty." Typical examples of non-criminal deprivations involve state restrictions on liberty arising from: "mental

impairment, vagrancy, drug addiction, educational purposes, [and] immigration control.”<sup>6</sup> However, more subtle restrictions, such as dress codes for women, may also implicate Article 9.<sup>7</sup> While there may be suspect or inappropriate grounds for detention, the reason for detention is not determinative of a deprivation of liberty within the context of Article 9. The nature of the detention itself is the central issue in an Article 9(1) deprivation of liberty analysis. In *Monja Jaona v. Madagascar*, the HRC examined a case where the complainant was subject to house arrest and detention in a military camp without charges. The HRC did not distinguish between the two forms of detentions in the Article 9(1) analysis and found both to be violative of Article 9(1).<sup>8</sup> The common denominator in these circumstances is the confinement to a limited space. Scholars have noted that only “severe deprivations of liberty” that involve detention in a confined location raise Article 9(1) issues. Broader restrictions raise issues involving freedom of movement, which are covered in Article 12.<sup>9</sup>

Although a state has a clear sovereign right to deprive a person of liberty, it is equally clear that this right is limited. Arrest and detention are only permissible if the law authorizes the arrest with sufficient specificity.<sup>10</sup> The detention itself—the arrest, the act of halting a person’s free movement—must be carried out according to established legal norms.<sup>11</sup> In addition, the grounds upon which the arrest is ordered and carried out must be legal. In *Domukovsky v. Georgia*, the state of Georgia asserted generally that an arrest was pursuant to international criminal cooperation agreement, but Georgian authorities failed to produce specific legal authority for the arrest. The HRC held that the failure to prove a specific legal basis for the arrest constituted a violation of Article 9(1).<sup>12</sup> In this regard, the term “law” does not encompass administrative provisions, and only national legislative acts available to all are generally sufficient.<sup>13</sup> A restriction on liberty of person by an administrative act is permissible only when it occurs in the enforcement of a law providing for such interference with adequate clarity and when it regulates the procedure to be observed. Whether a law provides adequate clarity depends on how specifically it defines the circumstances warranting detention, and detention based on general terms, such as “national security,” may be held to violate Article 9.<sup>14</sup>

Even if the detention or arrest is lawful, it must be reasonable, and the remand into custody must be necessary considering all circumstances. In *Van Alphen v. the Netherlands*, the HRC noted that the *Travaux Préparatoires* confirms that the Article 9(1) prohibition against “arbitrary” deprivations of liberty is broad. The HRC declared that the term “arbitrary” captures “elements of inappropriateness, injustice, lack of predictability...[and] remand into custody must be necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.”<sup>15</sup> Furthermore, this test can apply after the moment of detention or arrest. For example, an arrest or detention can be arbitrary if the detainee continues to be incarcerated after having completed a lawfully imposed term of detention or after a release order issues from an appropriate judicial officer.<sup>16</sup>

In addition to protections against arbitrary detention, Article 9(1) provides protection for security of person. In *Delgado Páez v. Columbia*, the HRC held that the Article 9(1) reference to security of person extends, not only to those persons in detention, but also to the population at large. The HRC stated:

It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that person is not arrested or otherwise detained...An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.<sup>17</sup>

Thus, the Article 9 duty to protect the security of person requires a state to control police actions prior to taking a person into actual custody.<sup>18</sup> Similarly, the HRC has held that Article 9(1) requires other state institutions to refrain from actions that might infringe on an individual’s liberty and security.<sup>19</sup> In circumstances where an infringement is alleged, Article 9 imposes a general duty to investigate potential wrongdoing.<sup>20</sup> Moreover, when the allegation involves a detainee,

the HRC has recommended that the investigation be conducted by an independent body “with authority to... initiate criminal and disciplinary proceedings.”<sup>21</sup>

**Article 9(2) Interpretation:** This paragraph addresses the right of individuals under arrest to receive information concerning the reasons for their arrest. At the time of arrest, individuals must be given a general description of the reasons for arrest, and this description must go beyond a mere reference to the legal basis for detainment. In *Drescher Caldas v. Uruguay*, the HRC held that Uruguay’s arrest of a person pursuant to “prompt security measures” failed to adequately describe the basis of the arrest. According to the HRC, Article 9(2) requires that the individual be able to discern “the substance of the complaint against him.”<sup>22</sup> However, Article 9(2) does not mandate a written arrest warrant, nor does it require a full explanation in the language of the person in custody. Article 9(2) only requires that the person under arrest be able to understand the specific legal charges against him or her. The requirement that this information be delivered “promptly” has been understood to mean as of the time of any initial interrogation, or within a short period of time.<sup>23</sup> Delays of as little as 72 hours have been held to violate this rule.<sup>24</sup> This requirement of timely information ensures that persons in custody receive sufficient information to submit a well-founded challenge to their incarceration.

**Article 9(3) Interpretation:** This provision requires that persons in custody receive prompt judicial processing of the case against them. The HRC noted in General Comment 8 that “in criminal cases any person arrested or detained has to be brought ‘promptly’ before a judge or other officer authorized by law to exercise judicial power.”<sup>25</sup> The duty to bring a detainee promptly before a judicial authority applies regardless of whether the detainee requests it.<sup>26</sup> What constitutes “promptly” is not specifically defined, but the HRC noted in General Comment 8 that it “must not exceed a few days.”<sup>27</sup> Subsequently, in their *Concluding Observations to State reports*, the HRC has indicated that judicial review should be made available with 48 hours.<sup>28</sup>

With regard to judicial review, the HRC has made clear that mere technical independence from the executive branch of government is not sufficient. In *Kulomin v. Hungary*, the state of Hungary maintained that the phrase in Article 9(3), “other officers authorized by law,” should include public prosecutors because ultimate oversight rested with parliament, as opposed to the executive. The HRC disagreed, holding:

The Committee considers that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an ‘officer authorized to exercise judicial power’ within the meaning of article 9(3).<sup>29</sup>

Some commentators have suggested that the Article 9(3) requirement that a person be brought before “a judge or other officer authorized by law” is consonant with the ECHR’s Article 5(3). On this basis, the European Court of Human Rights requirements that the “judicial assistant must be independent of the executive, personally hear the person concerned, and be empowered to direct pre-trial detention or release the person arrested” could apply in the context of Article 9(3).<sup>30</sup>

In terms of pretrial detention, the wording of Article 9(3) makes it clear that pre-trial detention should be the exception rather than the “general rule.” The HRC has stated further that “[p]re-trial detention should be...as short as possible.”<sup>31</sup> The limitation on pre-trial detention inherent in the requirement that a person is “entitled to trial with a reasonable time or to release” overlaps with the right to a speedy trial under Article 14(3)(c). However, the focus of the former is clearly pre-trial detention, and the latter is concerned with the total time elapsed before trial.<sup>32</sup>

Implicit within the bias against pre-trial detention is the right to release pending trial. In *Hill & Hill v. Spain*, the HRC noted that “bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the

jurisdiction of the State party.”<sup>33</sup> Furthermore, the mere fact that an accused possesses foreign nationality was not deemed sufficient proof of the latter.<sup>34</sup> However, in general, the HRC has accorded States parties “broad discretion” in this regard.<sup>35</sup>

**Article 9(4) Interpretation:** This paragraph stems from the Anglo-American concept of the right to *habeas corpus*.<sup>36</sup> Consistent with this concept, Article 9(4) entitles all persons who have been arrested or detained to have their detention reviewed in court without delay.<sup>37</sup> If the court cannot find the deprivation of liberty to be lawful, it must order the immediate release of the detained.<sup>38</sup> In this respect, lawfulness is given a substantive meaning. In *A. v. Australia*, the HRC held that a review of lawfulness would be meaningless if the court were limited to determining whether the detention was in “compliance...with domestic law.” According to the HRC, the judicial body charged with reviewing the detention must have “real and not merely formal” powers of review. Specifically, the HRC interpreted the phrase in Article 9(4), “and order his release,” to imply that the judicial review body must possess the power to order the release of the accused if it finds the detention to be unlawful.<sup>39</sup> In addition, the HRC has made clear that the term “court” implies review from a body with the requisite judicial character. In *Vuolanne v. Finland*, the HRC held that Article 9(4) was violated when military personnel were limited to a review of their detention order from a senior military officer. The HRC concluded that right to judicial review applied equally to the system of military justice.<sup>40</sup>

The HRC position on what constitutes judicial review “without delay” is vague, and it appears to depend on the nature of the deprivation of liberty and on the particular facts involved. One commentator has concluded that a decision regarding remand should normally be made within several weeks,<sup>41</sup> but other commentators have pointed to the HRC’s acceptance of delays that far exceeded this suggested guideline, terming HRC jurisprudence in this area “disappointing.”<sup>42</sup>

Similarly vague is the position of the HRC on the right to counsel. Though the HRC has raised the issue of access to representation in its analysis of Article 9(4), a clear right has yet to be established.<sup>43</sup> This ambiguity could have substantial consequences, for commentators have noted, “In practice, it is virtually impossible for people to challenge their detention without legal representation.”<sup>44</sup>

**Article 9(5) Interpretation:** This provision sets forth a right to compensation in the event of a violation of the rights in Article 9. While Article 9(5) does not describe how the compensation claim is to be implemented, the term “enforceable right” implies enforcement via a domestic authority.<sup>45</sup> The amount of compensation depends upon the state’s statutory provisions, but it could easily encompass non-pecuniary awards.<sup>46</sup> In addition, the term “unlawful” appears to indicate the victim may have a claim to compensation regardless whether the detention was brought about by culpable (e.g., negligent) conduct.<sup>47</sup> In general, the adequacy of this type compensation is problematic, and even many developed nations lack proper legal guarantees of compensation as contemplated under Article 9(5).<sup>48</sup>

## Assessment Guidelines

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 9 obligates States parties to enact reasonable and appropriate legal measures to protect the liberty and security of persons under their jurisdiction. Such measures should establish the appropriate grounds for and procedures to be followed in cases of detention. States parties should also take appropriate legislative and administrative measures to ensure that those detained are informed of the reasons for their detention at the time of arrest and are promptly provided with legal counsel and the specific legal information necessary to submit a remand. Furthermore, such measures should include provisions that protect against their arbitrary application and ensure that pre-trial detention is an exception and kept as short as possible. Provision must also be made for judicial review, control over detention, and prompt court hearings in the event that the detainee raises questions as to the legality of his detention. A remedy for unlawful detentions must be

established and maintained. All such legal and administrative provisions should be in accordance with the other basic provisions of the Covenant and applicable international law.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 9?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Criminal and administrative procedures involving arrest or detention;
- Rights of persons in custody to prompt information concerning their status;
- Legal aid services available to persons in custody;
- Alternatives to pre-trial detention;
- Rights to release upon completion of sentences served;
- Compensation for victims of unlawful arrest or detention;
- Procedural obstacles or inequalities that impair ensuring Article 9 rights;
- Exceptions to defendant's right to be informed regarding the reasons for detention and to seek prompt judicial review of such detention; and
- Exceptions to the right to counsel.

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** States parties must ensure that the rights of persons deprived of their liberty are respected. Thus, to protect an individual against arbitrary violations of liberty or security, the State party must provide a functioning, readily accessible mechanism capable of holding the state or, in the case of security, possibly individuals, responsible for violations of the state's own legislation and/or Article 9. The state must devote appropriate monetary and other resources to ensuring that appropriate state authorities enforce these protections in a timely and reasonable manner. The state must also ensure that judicial personnel dealing with cases of violations of Article 9's protections be "independent, objective, and impartial." Where substantiated claims exist that the state has failed to properly protect against the arbitrary deprivation of liberty or security, the state has a duty to investigate the circumstances surrounding the claim.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 9 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 9 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;

- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 9?

Are there informal structures that limit the exercise of the rights in Article 9 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 9 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 9. In particular, what measures has State X taken to eliminate house confinement for women as a customary sanction?

What legal protections are provided for administrative detainees? What measures has State X taken to ensure that the standards set forth in Article 9 are applied in cases of administrative detention?

**IV. Right To An Effective Remedy And Its Enforcement:** Article 9(5) places States parties under a legal obligation to grant detained persons prompt judicial review of the lawfulness of their detention. Judicial authorities must have the power to order immediate release, should the detention be found unlawful. Even if the detention or arrest is lawful, it must be reasonable, and the remand into custody must be necessary considering all circumstances. In terms of pretrial detention, the wording of Article 9(3) makes it clear that pre-trial detention should be the exception rather than the "general rule," and release on bail should be made available where appropriate. States parties must enact national regulations governing the implementation and amount of compensation in cases in which Article 9 has been violated, and this right of compensation should be readily available via a domestic authority.

### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 9? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;

- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 9? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 9? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 9? Are there independent authorities to review complaints of detainee mistreatment?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 9(1) broadly protects the right to liberty when personal liberty is curtailed to a narrowly-bounded location regardless of whether it is pursuant to criminal charges. These restrictions could include confinement for mental impairment, vagrancy, drug addiction, educational purposes, and immigration control, as well as jail or prison. While most Article 9 protections are of general application, certain rights, such as those provided in Article 9(3), are targeted at criminal cases, and in the case of the Article 9(3) limitation on pre-trial detention, there sometimes exists overlap with the right to a speedy trial under Article 14(3)(c). Less severe restrictions on personal liberty (e.g., limitations on domicile or residency, exile, confinement to an island, or expulsion from state territory) are not within the ambit of Article 9, but are within the ambit of other articles such as Articles 12.

The right of liberty and security of person may be restricted only in the case of a public emergency as defined within the meaning of Article 4. However, the HRC holds that certain restrictions continue to apply, despite a State party's declaration of a public emergency. If preventive detention is used for reasons of public security, it must be controlled by the same provisions as "normal" detention. Accordingly, the deprivation must not be arbitrary. It must be based on grounds and procedures established by law, and the reasons for the detention must be given. Court control of the detention must be available, as well as compensation in the case of a breach.

In accordance with Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the rights protected and established by Article 9. Moreover, no restriction of or derogation from these protections shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to liberty and security of person as set forth in Article 9?

If State X has derogated from any of the provisions of Article 9 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to liberty and security of person as set forth in Article 9, or which recognizes this right to a lesser extent? Has State X acted to limit or restrict the right to liberty and security of person as set forth in Article 9 in some other fashion?

Are any existing limitations or restrictions on the right to liberty and security of person as set forth in Article 9 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to liberty and security of person as set forth in Article 9?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to liberty and security of person as set forth in Article 9? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to liberty and security of person as set forth in Article 9?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to liberty and security of person as set forth in Article 9?

## Article 10: Right to Humane Treatment as a Detainee

1. *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
2. (a) *Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*  
*(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*
3. *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

### General Commentary

Article 10 guarantees that all persons deprived of their liberty should be treated with humanity and with respect for their dignity. The ICCPR helps ensure this guarantee by providing a separate right to humane treatment and to certain minimum conditions of pre-trial detention and imprisonment in Article 10. Most national bills of rights do not detail a similar separate right, but merely provide for the general prohibition of torture and inhuman or degrading treatment. However, Article 5 of the American Covenant on Human Rights (ACHR) and the European Prison Rules<sup>1</sup> do specify the right to humane treatment.

The HRC stressed in General Comment 21<sup>2</sup> that the following UN standards should be taken into account in interpreting and applying Article 10:

- Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977);
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. res. 43/179, U.N. Doc. A/43/49 (1988);
- Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, (annex) U.N. Doc. A/34/46 (1979);
- Principles of Medical Ethics relevant to Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982); and
- UN Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).

In addition, select other international standards are relevant to the analysis of Article 10 protections:

- Basic Principles for the Treatment of Prisoners, G.A. res. 45/111 (annex) U.N. Doc. A/45/49 at 200 (1990); and
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

While these international principles may not constitute binding international law, the HRC’s endorsement, as well as that of a substantial number of UN member states, provide support for their use in a detailed analysis of state compliance with the protections of Article 10.

Article 10 is not listed as a non-derogable right pursuant to Article 4. Consequently, in distinct contrast to the related protections provided in Article 7, Article 10 protections for persons deprived of their liberty may be subject to derogation in time of national emergency.

**General Interpretation:** Article 10 guarantees persons deprived of their liberty the right to humane treatment, and distinguishing this level of protection from the prohibition against torture and inhumane treatment provided in Article 7 has proven exceedingly difficult. Leading scholars have concluded that “the line between the two provisions is often blurred in HRC jurisprudence.”<sup>3</sup> These same scholars have summarized the distinction simply, by stating, “Article 10 seems to prohibit a less serious form of treatment than that prohibited in article 7.”<sup>4</sup>

Also, Article 10 imposes certain positive duties upon the state, such as rehabilitation and segregation of prisoners. These duties imply certain costs, and it is clear that states of varying economic strength may approach these differently. However, persons who are deprived of their liberty are guaranteed treatment that respects their humanity and dignity, and this basic standard does not depend on the material resources available to the State party. Thus, at a minimum, a state should be able to provide food, basic sanitation and health care, clothing, light, space to move about, and access to means of communication.<sup>5</sup> The HRC has clearly stated that these standards “must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>6</sup> Certain exceptions to this rule apply for juveniles and other detainees to the extent that their treatment should reflect their age and legal status, but Article 2(1)’s prohibition of discriminatory treatment should still apply within these two classes.

**Article 10(1) Interpretation:** This general paragraph ensures that all persons who are deprived of their liberty are guaranteed certain protections. Covered deprivations include confinement in criminal facilities, psychiatric facilities, work camps, and detention centers.<sup>7</sup> The drafting history indicates that the right to be “treated with humanity and with respect for the inherent dignity of the human person” should be interpreted as meaning that a person deprived of their liberty “is entitled to respect for his physical and moral dignity, to material conditions and treatment befitting that dignity and to sympathy and kindness.”<sup>8</sup> This broad provision for the humane and dignified treatment of prisoners and detainees serves as the basis for the positive obligations of States parties stated in Article 10(2) and 10(3), which are tailored to the criminal justice context.<sup>9</sup>

The HRC interprets Article 10(1) to complement the ban on torture and other cruel, inhuman or degrading treatment or punishment that is imposed by Article 7. Thus, lesser offensive behavior is also prohibited. In general, Article 10(1) provides that every attempt should be made to ensure enjoyment of all Covenant rights, “subject to the restrictions that are unavoidable in a closed environment.”<sup>10</sup> The relationship between the two has been summarized as follows: “Whereas Art. 7 primarily is directed at specific, usually violent attacks on personal integrity, Art. 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention.”<sup>11</sup>

Typical examples of Article 10(1) violations include restrictions on rights of communication, access to health care, and the right to challenge abusive treatment. In *Pietraroia v. Uruguay*, the HRC concluded that incommunicado detention lasting six months violated Article 10(1).<sup>12</sup> In *Morrison v. Jamaica*, the complainant alleged that he had been denied access to health care for a specific condition. The state failed to produce any evidence that they provided treatment, and the HRC concluded that denial of proper treatment constituted a violation.<sup>13</sup> During a prior case, *Collins v. Jamaica*, a complainant alleged he had been both beaten and subject to restrictions on his right of correspondence. Despite the fact that the state showed that they had relocated certain offending personnel, the HRC concluded that the failure of the state to properly investigate and remedy the situation eighteen months after the allegation constituted a violation of Article 10(1).<sup>14</sup>

As noted above, the HRC in General Comment 21 emphasized the applicability of various UN minimum standards of treatment. These standards are particularly relevant when analyzing the local legislative and administrative framework, and the HRC has made clear that states should report on “what concrete measures have been taken by competent authorities to monitor the effective application of the rules regarding the treatment of persons deprived of their liberty,” including “impartial supervision.”<sup>15</sup> In cases where a State party fails to meet a UN standard, the HRC has noted it, e.g., inadequacy of cell space, citing the relevant UN standard.<sup>16</sup> Not surprisingly, the HRC considers the education of competent authorities and confined persons as to rules and remedies to be a logical corollary of establishing the proper framework.<sup>17</sup> Furthermore, the HRC states that this framework should include separate institutions for “independent monitoring” of adherence to these standards.<sup>18</sup>

**Article 10(2) Interpretation:** This provision requires the segregation of accused persons from those already convicted and, within that group, juveniles from adults. This provision is designed to emphasize and protect their status as unconvicted persons, who enjoy the right to be presumed innocent provided in Article 14(2).<sup>19</sup> Article 10(2) focuses on “accused persons,” as opposed to persons in custody, and it could be argued that prior to formal charging it does not literally apply. However, the inherent logic of the article argues in favor of its application to all persons taken into criminal custody by the state.<sup>20</sup>

The drafting history of Article 10(2) implies that “strict segregation” between the accused and the convicted was intended.<sup>21</sup> Any derogation from this rule under 10(2)(a) should only be in the case of “exceptional circumstances,” and there is no exception provided in 10(2)(b) with regard to the separation of adults and juveniles. In *Pinkney v. Canada*, the HRC addressed whether the segregation requires that the two classes of detainees be housed in separate buildings. At least insofar as 10(2)(a) is concerned, the HRC concluded that segregation into separate buildings is not required, but rather only lodging in “separate quarters.”<sup>22</sup>

Regarding the age limits for being declared a “juvenile”, the HRC has stated that the juvenile age should “be determined by each State party in light of relevant social, cultural and other conditions.”<sup>23</sup> However, in the criminal justice context, the HRC, citing Article 6(5) has declared that “all persons under the age of 18 should be treated as juveniles,” and the States parties should report on whether they adhere to the UN Standard Minimum Rules for the Administration of Juvenile Justice (1987) (Beijing Rules).<sup>24</sup>

The Article 10(2)(b) right of juveniles to be “brought as speedily as possible for adjudication” has not been defined with precision. One commentator has suggested that Article 10(2) implies an obligation beyond the call for “prompt” action (applicable to all detainees) in Articles 9(3) and 14(3)(c). However, given its exceptional character and the phrasing of Article 10(2)(b), this extra right would be limited to the pre-trial detention period.<sup>25</sup>

**Article 10(3) Interpretation:** This paragraph specifies protections for the treatment of prisoners after conviction, and it emphasizes that such treatment should not be retributive in nature, but rather, post-conviction treatment should be aimed at achieving the reformation and social rehabilitation of the prisoners.<sup>26</sup> Article 10(3) does not specify which measures are necessary for the reformation and social rehabilitation of prisoners. Nevertheless, the HRC has noted the need for States parties to take legislative and administrative measures, as well as practical steps, to satisfy this provision. These measures include, but are not limited to: access to external contact with family, lawyers, and health care professionals; re-education, vocational guidance, training, and work programs inside and outside of the penitentiary establishment; and post-release assistance.<sup>27</sup> In terms of the last sentence addressing juveniles, the HRC has further specified that “treatment appropriate to their [the prisoners’] age and legal status” requires “shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation.”<sup>28</sup> Article 10(3)’s emphasis on rehabilitation and reform is somewhat controversial in the current global climate that has seen a resurgence in emphasis on retributive models of criminal justice, and therefore, it is not surprising that there is a lack of HRC jurisprudence where a complainant

has established him or herself to be a victim in the context of a state violation of Article 10(3).<sup>29</sup> Nevertheless, the HRC continues to cite this issue in Concluding Observations.<sup>30</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** States parties have an obligation under Article 10 to ensure that persons deprived of their liberty are treated humanely and with respect of human dignity. This obligation imposes a positive requirement complementing Article 7's ban on torture and the cruel and inhumane treatment of prisoners. Consequently, states must enact appropriate legislative and administrative measures to establish a minimum standard for humane conditions of detention, regardless of their economic status. This duty implies that states must provide detainees and prisoners with a minimum of services to satisfy their basic needs (food, space, clothing, light, etc.). Beyond the provision of basic needs, States parties must also take concrete legislative and administrative measures to promote the reformation and social rehabilitation of convicted prisoners, (including state provision for education, vocational training, useful work programs, family visits, etc.).

The State must also implement legislation and administrative codes that provide for the unique rights and privileges accorded juveniles and the accused because of their age and/or legal status (segregation, speedy time-to-trial, etc.). Furthermore, under Article 10, the aforementioned legislative and administrative measures should be in accordance with a number of applicable, non-binding international UN standards (some noted below).

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 10?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Whether criminal detention facilities correspond with the United Nations' Minimum Standard Rules for the Treatment of Prisoners;
- Whether police forces adhere to the United Nations Code Of Conduct For Law Enforcement Officials;
- Whether those in criminal or administrative custody are treated in accordance with the United Nations Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;
- Whether the treatment of juveniles in custody is in accordance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice; and
- Whether those in administrative custody are treated in accordance with the United Nations Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties must ensure that measures protecting the rights of persons deprived of their liberty are widely publicized. States parties must also assume the

responsibility to inform persons deprived of their right to liberty of the rights and procedural guarantees granted them by Article 10. In addition, states should ensure that arrested or detained persons have access to the rules, which those with authority over them must follow. States must also inform persons deprived of their liberty of their right to complain of violations of their Article 10 rights to a competent authority and to receive redress for such violation. Moreover, states must ensure that personnel having authority over persons deprived of their liberty undergo instruction in the guarantees granted detainees by Article 10 and other applicable provisions of the Covenant.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 10 adequately published and distributed? How does the state publicize the guarantee that all persons deprived of their liberty are to be treated humanely and with respect of human dignity?

What special measures are taken to distribute these materials both within the formal legal sector to judges, lawyers, prosecutors, and police officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 10? What training programs are in place for both legal and non-legal professionals regarding the standards guaranteeing humane and dignified treatment to persons deprived of their liberty? What resources have been devoted to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 10?

Are state officials trained to investigate potential violations of the right to humane and dignified treatment by the state and private individuals? How much has the state devoted to the prosecution of those who willfully or negligently violate the right to humane and dignified treatment?

What measures have been taken to ensure that the accused and juveniles are segregated properly in detention facilities? What measures ensure accelerated processing of juveniles in pre-trial detention? What measures have been taken to foster rehabilitation and reform of prisoners?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** States parties must ensure that the rights due persons deprived of their liberty are made available to state agencies, as well as to the general public. Moreover, persons in detention should be informed of their right to humane and dignified treatment, as well as the resources available to allege violations of this right. States parties must devote monetary and other resources to ensuring that legal and administrative measures implementing Article 10 are enforced. States are further obligated to implement concrete measures to monitor the effective application of Article 10 in the appropriate locales, including penitentiaries and other institutions where persons are detained. States must also take steps to ensure that this supervisory system remains impartial and uncorrupted.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 10 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 10 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 10?

Are there informal structures that limit the exercise of the rights in Article 10 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 10 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 10. What measures has State X taken to provide separate prison facilities for women, female guards for female prisoners, special protections for pregnant women, and access to rehabilitation?

What steps has State X taken to protect prisoners from exposure to communicable, life-threatening diseases, such as AIDS and tuberculosis? What steps have been taken to protect prisoners from medical experimentation?

**IV. Right To An Effective Remedy And Its Enforcement:** Article 10 places States parties under a legal obligation to grant detained persons humane and dignified treatment, including special protections for the accused and juveniles. In terms of the latter, extra precautions should be taken to expedite bringing accused juveniles to trial. States must also grant persons deprived of their liberty the ability to raise concerns regarding their treatment and, if appropriate, obtain adequate compensation if their right to humane and dignified treatment has been violated. Furthermore, states must consider such complaints and their remedies in a prompt and timely fashion. States parties must ensure that all remedies granted are enforced.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 10? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 10? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 10? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel - in particular, with regard to juveniles and the accused.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 10? Are there independent authorities to review complaints of detainee mistreatment?

What efforts has State X made to redress the problems of commingling (e.g., adult/child, male/female, etc.)?

**V. Limitations And/Or Derogations And Scope Of Rights:** States may derogate from Article 10 in those “exceptional circumstances” of public emergency that fulfill the conditions of Article 4. However, States parties may not justify derogations from their responsibility to provide a basic, minimum standard of humane treatment to those deprived of their liberty on the basis of the economic burden this may place upon the state. Furthermore, Article 10(1) provides that every attempt should be made to ensure enjoyment of all Covenant rights within the obvious limitations that follow from legal detention. Thus, wide-ranging restrictions of rights guaranteed by the Covenant, well beyond those necessarily accompanying the deprivation of personal liberty, may not be justified with mere reference to the permissibility of deprivation of liberty of person.

Article 10 guarantees persons deprived of their liberty the right to humane treatment, and distinguishing this level of protection from the prohibition against torture and inhumane treatment provided in Article 7 has proven exceedingly difficult. Both provisions may apply to a given set of circumstances. To the extent it is crucial to distinguish the two, Article 7 should be viewed as addressing specific attacks against the person, and Article 10 should be viewed as directed at inadequate detention facilities and treatment.

Regarding the special treatment of juveniles, the Article 6(5) definition of juveniles (those under age 18) should be applied as a minimum standard in the criminal context. Also, the Article 10(2)(b) right of juveniles to be “brought as speedily as possible for adjudication” should provide an expedited timeline, which is shorter than the normal “prompt” processing that is applicable to all detainees pursuant to Articles 9(3) and 14(3)(c).

In accordance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the rights protected and established by Article 10. Moreover, no restriction of or derogation from these protections shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to humane treatment as a detainee as set forth in Article 10?

If State X has derogated from any of the provisions of Article 10, did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced, and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to humane treatment as a detainee as set forth in Article 10, or which recognizes this right to a lesser extent? Has State X acted to limit or restrict the right to humane treatment as a detainee as set forth in Article 10 in some other fashion?

Are any existing limitations or restrictions on the right to humane treatment as a detainee as set forth in Article 10 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to humane treatment as a detainee as set forth in Article 10?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to humane treatment as set forth in Article 10? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to humane treatment as a detainee as set forth in Article 10?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to humane treatment as a detainee as set forth in Article 10?

## Article 11: Prohibition Against Detention for Inability to Fulfill a Contract

*No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.*

### General Commentary

Article 11 protects individuals' personal liberty by prohibiting their imprisonment solely on account of debt. This article is considered non-derogable under Article 4(2).

Other human rights instruments that have addressed issues related to the rights of individuals unable to fulfill contractual obligations include:

- European Convention on Human Rights (ECHR), Article 1 of the Fourth Additional Protocol; and
- American Convention on Human Rights (ACHR), Article 7(7).

**Interpretation:** Article 11 was included in the ICCPR to "prohibit imprisonment being used as an instrument by one individual against another in non-criminal cases and in cases such as those arising out of commercial and labour laws and civil obligations in general."<sup>1</sup> In this sense, it is a civil corollary to Article 9, which addresses the acceptable purposes for criminal detention.<sup>2</sup> Article 11 is also linked closely to Article 8(2) of the Covenant. Whereas originally Article 11 included the phrase "held in servitude" after the word "imprisoned", this phrase was later eliminated by the Commission on Human Rights in order to avoid redundancy.<sup>3</sup> Article 11 has neither been the subject of a General Comment, nor resulted in any individual communications under the First Optional Protocol. However, the HRC has cited States parties for legislative provisions that are inconsistent with Article 11.<sup>4</sup>

The scope of Article 11 is not limited to monetary debt, but rather, it covers all contractual obligations. During the drafting phase, the Commission on Human Rights determined that this article encompassed the "payment of debts, performance of services or the delivery of goods."<sup>5</sup> However, the drafters also clearly restricted the scope of the article to instances involving civil, contractual obligations. Non-contractual obligations do not fall within the scope of Article 11, even if they are considered binding upon the individual concerned.<sup>6</sup> Similarly, statutory obligations also fall outside this article's scope. Thus, the imprisonment of an individual who fails to fulfill an obligation delineated by private or public law is not prohibited under Article 11.<sup>7</sup>

During the drafting of Article 11, some concern was expressed regarding situations in which a debtor attempts to flee the country or intentionally makes himself unable to fulfill the obligation. The HRC addressed these concerns by specifying that individuals should not be imprisoned "merely on the ground of inability" to fulfill a contract. As a result, this article does not apply to criminal offenses such as negligence, fraudulent bankruptcy, or a failure to provide alimony under family law.<sup>8</sup> Additionally, Article 11 does not protect individuals who are capable of fulfilling their contract but refuse to do so. In this way, the HRC effectively excluded cases of fraud from the protection of the Covenant.

While Article 11 only specifies imprisonment as a prohibited deprivation of liberty, Article 31 of the Vienna Convention on the Law of Treaties suggests that the term "imprisoned" should be interpreted broadly and understood in the context of the common meaning of the word. Any deprivation of liberty on the basis of a failure to fulfill a contractual obligation, whether by a State party or a private creditor, would be proscribed by Article 11.<sup>9</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** To fully comply with Article 11 requirements, States parties must abolish any legislation that conflicts with the article's purpose. States should also provide statutory protections for debtors. Additionally, States parties should establish measures that provide lateral protections against private creditors. Given the ambiguity regarding the type of imprisonment that Article 11 prohibits, the State party should be precise when drafting legislation. For example, in cases of criminal offenses that may carry financial penalties enforced by civil law, the state may imprison those in default of such obligations (debtors). Accordingly, Article 11's prohibition of detention for debt does not address court-imposed deprivations of liberty to induce the realization of statutory obligations.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 11?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** Article 11 provides little guidance regarding the sort of imprisonment it prohibits for debt. Accordingly, it is important for States parties to publicize their legislative and administrative measures implementing Article 11. Similarly, States parties should ensure that appropriate resources are allocated and adequate training provided for state agencies charged with ensuring that imprisonment for debt does not occur.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 11 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 11? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 11?

How does the State party publicize a person's right to be free from deprivation of personal liberty in the event of inability to fulfill a contractual obligation? Does the State party adequately define which obligations fall under the scope of this protection? Does the State party make known the types of detention that are prohibited?

Specifically, how are detainees and others informed of the following:

- The parameters within which debtors may be imprisoned;

- The resources available to them to contest their imprisonment; and
- The procedures involved in claiming a violation of their rights.

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** To ensure the widespread effectiveness of Article 11, all parties and potential parties to a contractual agreement should be informed that, unless a criminal offense is committed, debtors who are unable to repay a debt will not be subject to limitations on their personal liberty.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 11 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 11 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 11?

Are there informal structures that limit the exercise of the rights in Article 11 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 11 accessible? Are there obstacles to the use of these resources?

What procedures exist for investigation and prosecution of state officials or private creditors who violate Article 11?

What steps has State X taken to protect the family members of debtors?

**IV. Right To An Effective Remedy And Its Enforcement:** If citizens are improperly imprisoned for genuine inability to fulfill a contractual obligation, an appropriate remedy should exist. This remedy should enable individuals whose Article 11 rights have been violated to obtain release from imprisonment, as well as compensation for their injury.

### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 11? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 11? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 11? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 11?

**V. Limitations And/Or Derogation And Scope Of Rights:** Article 11 is non-derogable, even in times of emergency. If citizens are unable to fulfill the obligation due to criminal reasons, they are not protected by Article 11.

In compliance with Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the prohibition against detention for inability to fulfill a contract. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize this prohibition or that it recognizes it to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has sought to derogate from its obligation to prohibit detention for inability to fulfill a contract as set forth in Article 11?

If State X has sought to derogate from any of the provisions of Article 11, did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the prohibition against detention for inability to fulfill a contract as set forth in Article 11? Has State X acted to limit or restrict the prohibition against detention for inability to fulfill a contract as set forth in Article 11 in some other fashion?

Are any existing limitations or restrictions on the prohibition against detention for inability to fulfill a contract as set forth in Article 11 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the prohibition against detention for inability to fulfill a contract as set forth in Article 11?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition against detention for inability to fulfill a contract as set forth in Article 11? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the prohibition against detention for inability to fulfill a contract as set forth in Article 11?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition against detention for inability to fulfill a contract as set forth in Article 11?

## Article 12: Freedom of Movement

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *The abovementioned rights shall not be subject to any restrictions except those which are provided for by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others, and are consistent with the other right recognized in the present Covenant.*
4. *No one shall be arbitrarily deprived of the right to enter his own country.*

### General Commentary

Article 12 guarantees individuals the right to leave and enter their own countries, to choose a residence, and to move freely within a country. It is an individual right of personal liberty that is of particular importance to aliens and stateless persons.

Other international instruments have addressed issues related to freedom of movement, including:

- Universal Declaration of Human Rights (UDHR), Articles 9 and 13;
- European Convention on Human Rights (ECHR), Articles 2-4 of the 4<sup>th</sup> Protocol and Article 1 of the 7<sup>th</sup> Protocol;
- American Convention of Human Rights (ACHR), Article 22; and
- African Charter of Human and Peoples Rights (ACHPR), Article 12.

**General Interpretation:** Article 12 guarantees, within established limits, freedom of movement; the right to leave any country; and the right not to be arbitrarily deprived of the right to enter one's own country. In addition, the language implies that States parties are obligated to refrain from interfering with the rights granted therein and prevent such interference by private parties.<sup>1</sup> The Human Rights Committee (HRC) indicates that the basic condition protected by Article 12, liberty of movement, is "indispensable" to the "free development" of individuals.<sup>2</sup> Still, Article 12 remains controversial;<sup>3</sup> and a wide variety of "legal rules and administrative measures adversely affect" implementation of some of its provisions.<sup>4</sup> Indeed, many states reserved against aspects of Article 12 when acceding to the Covenant.<sup>5</sup>

**Article 12(1) Interpretation:** The first paragraph of Article 12 secures the right to choose a residence within a country that one is lawfully within and to move about freely within that territory. However, these rights are not without limits. Consequently, the rights secured by Article 12 depend on the individual's legal status within the state. If the individual is "lawfully within the territory," he or she benefits from Article 12's protection. If not, then the protection is unavailable. As such, Article 12(1) does not guarantee a right of residency.<sup>6</sup> While Article 12(1) makes no explicit reference to citizenship, some experts hold the view that nationals of a country have a "de facto absolute right of residence"<sup>7</sup> and are thus always lawfully within their state. Thus, the issue of whether someone enjoys the rights guaranteed under Article 12(1) is of primary importance to aliens.<sup>8</sup> Alien residency for purposes of Article 12 is determined in accordance with the state's domestic legal system, in compliance with the state's international obligations.<sup>9</sup> However, once legal residency is established, an alien should enjoy the full protection of Article 12(1), and the HRC has objected to legal provisions restricting freedom of movement to citizens.<sup>10</sup>

Consistent with this reasoning, the Human Rights Committee has ruled that banishment constitutes a violation of Article 12(1). In *Mpandanjila et al. v. Zaire*,<sup>11</sup> the HRC held that an administrative measure banning a person deprived freedom of movement in violation of 12(1). The Committee has also implied that state orders or decisions which facially violate Article 12(1) are not entitled to any presumptive validity. In *Ackla v. Togo*,<sup>12</sup> the HRC held that, absent

explanation or support for an order prohibiting entry into the village where the complainant's home was located, the order violates Article 12(1), and the complainant was entitled to entry.

Article 12(1) implies the right move freely around the whole territory of the state. The Human Rights Committee has indicated that "enjoyment of this right must not be made dependent on any particular purpose or reason."<sup>13</sup> However, this is not to say that the right to move about is unlimited. States may limit freedom of movement, but only if they do so within the dictates of Article 12(3).

**Interpretation Article 12(2):** Article 12(2) guarantees the right to freely exit from any country. This right, though written in absolute terms, is subject to specific limitations that may be imposed pursuant to Article 12(3). The lack of qualification implies that the right to leave encompasses both short and long term travel.<sup>14</sup> Unlike the right to freedom of movement within a state, the right to leave is not dependant on the individual's status within the state. Those being deported are entitled to choose their destination, subject to the agreement of the destination state.<sup>15</sup>

The Human Rights Committee has decided a number of cases relating to Article 12(2) that have led to the recognition of a right to issuance of travel documents, possibly the only viable positive state action that will effectively guarantee the right to leave.<sup>16</sup> The Committee found that an unexplained denial of a valid request for issuance or renewal of a passport is a violation of Article 12(2).<sup>17</sup> It is not sufficient that an individual may be able to travel – for example, on documents provided by another country on humanitarian grounds – rather, there is a positive duty to issue passports.<sup>18</sup> The Human Rights Committee has noted generally that administrative and legal hurdles to travel may be problematic in terms of Article 12(2).<sup>19</sup> Moreover, certain generic burdens, such as exit visas, have been found to violate Article 12(2).<sup>20</sup>

However, restrictions are appropriate in certain obvious instances.<sup>21</sup> The Committee has also noted that Article 12(2), like Article 12(1) and other Covenant rights, implies a horizontal effect. In other words, states are obligated to ensure that private parties do not interfere with enjoyment of this right. The Committee, for example, has criticized prohibitions on women traveling without the prior consent of their husbands.<sup>22</sup>

**Interpretation Article 12(3):** The formulation of Article 12(3) for all its apparent similarity to other like provisions in the International Covenant on Civil (ICCPR) (such as those limitation clauses in Articles 18, 19, and 21) was the primary source of debate during the drafting of Article 12.<sup>23</sup> To be permissible, Article 12(3) requires that any limitations on the rights in Articles 12(1) and 12(2) must be set forth in the law, necessary, and relating to one of the specified grounds of exception: national security, public order, public health or morals, or the rights and freedoms of others. In addition, any such limitations must also be "consistent" with the other rights recognized in the Covenant. Necessity, in this context, implies proportionality or, alternatively, that the means chosen are appropriate and as minimally intrusive as possible.<sup>24</sup> Analysis by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities implies that a restriction is "necessary" only if it meets a "pressing public and social need."<sup>25</sup>

In its General Comments, the Human Rights Committee indicates its unfavorable view of restrictions on Article 12 rights: "[s]tates have often failed to show that the application of their laws restricting the [Article 12 rights] are in conformity with all the requirements referred to in article 12, paragraph 3."<sup>26</sup> However, the Committee has only dealt with a few communications concerning the "richer array of obstacles" presented by actual state practices and compliance with Article 12.

These cases have established the broad outlines of only some of the grounds for interference specified in Article 12(3). In *Celepli v. Sweden*, the Committee found no violation of Article 12 in a case involving the confinement of a Kurdish refugee suspected of terrorist acts within Sweden to his resident municipality. Sweden's response justified its action as being within the national security exception.<sup>27</sup> As noted above, pending court proceedings are justifiable reasons for

restricting Article 12 rights.<sup>28</sup> One school of thought contends that potential examples of the public health or morals grounds would include, respectively, preventing the spread of disease or curtailing prostitution.<sup>29</sup> However, the HRC may refuse to accept blanket assertions of such grounds, citing actions such as forcible resettlement of entire villages as a violation of Article 12.<sup>30</sup>

The rights and freedoms of others grounds, moreover, could conceivably encompass rights beyond those specified in the Covenant.<sup>31</sup> These grounds could permissibly include restrictions on persons seeking to leave to avoid obligations (such as child support), which could be framed in terms of protecting the rights of others, here dependent children.<sup>32</sup> Along these lines, the Committee has upheld restrictions on a majority preventing them from living in an area set aside specially for a minority.<sup>33</sup>

**Interpretation Article 12(4):** Article 12(4) was designed to recognize the “special relationship” between an individual and the country he or she considers his or her “own.”<sup>34</sup> The concept of ‘one’s own’ country implies, first, that one’s own country may be different from one’s country of nationality, and second, there is a general right to enter sovereign territory.<sup>35</sup> The drafting history reveals that this paragraph began as a general prohibition on the use of exile as a punishment.<sup>36</sup> Article 12(4) makes no distinction regarding its application, and thus, it applies generally, including to aliens and stateless persons.<sup>37</sup> It also implicitly prohibits the practice of “stripping a person of nationality” in order to deny them return.<sup>38</sup>

However, despite its broad language, Article 12(4) is not free from restriction. The Human Rights Committee has indicated that a state may permissibly require someone to prove some relationship with the country he or she has designated as his or her “own.” In *J.M. v. Jamaica*,<sup>39</sup> the HRC concluded that the complainant failed to substantiate his claim to Jamaican citizenship. In addition, any individual may be denied entry into a country he considers his own, but is not a national of, if such denial is not arbitrary. In *Stewart v. Canada*,<sup>40</sup> the HRC found no violation of Article 12(4) in Canadian deportation of a British citizen who was guilty of criminal offences and who had never applied for Canadian citizenship. Indeed, aliens wishing to claim a country as their own may be required to formalize their relationship with that country or risk possible deportation under domestic law.<sup>41</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Pursuant to Article 12, signatory states must guarantee freedom of movement to those lawfully within national borders, including the right to choose and establish residence. States must protect the right to leave any country. This right applies to aliens, legal or not, as well as citizens. In addition, States parties must further ensure that these rights are not subject to private party interference. States parties may develop restrictions on these rights, but to be permissible such restrictions must be a) set forth in the law; b) necessary; c) consistent with the other rights of the Covenant; and d) further the interests of national security, public order, public health or morals, or the rights and freedoms of others. States parties may not arbitrarily deprive a person, even an alien, of the right to enter a country they have deemed their own. However, to protect against abuse, aliens must have a demonstrable connection with the country.

### **Assessment Inquiry**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 12?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

How have counter-terrorism plans, measures, and procedures affected State X's guarantee of Article 12 rights? How does State X protect against private interference with these rights? What restrictions on Article 12 rights does State X allow? How has State X ensured that any and all such restrictions are a) set forth in the law; b) necessary; c) consistent with the other rights of the Covenant; and d) further the interests of national security, public order, public health or morals, or the rights and freedoms of others?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the rights to freedom of movement, to leave any country, and to return to one's own country are well-publicized. All persons should be informed of these rights as well as permissible limitations. This requirement means that a state must have trained personnel able to investigate and prosecute violations of the state's legal machinery protecting each person's rights to freedom of movement and to leave or return. All officials, including those who receive reports and handle victims and those who investigate and prosecute, must be adequately trained.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 12 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 12? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 12?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Freedom of movement is critical to personal development. Moreover, the right to leave or to return to a country can be integral to personal safety and well-being. A state party can provide for limitations on these rights, but any such limitations must accord with Article 12(3). States parties must also ensure that individuals are able to access their rights to choose their residence, leave, return, and move about the territory.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 12 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 12 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;

- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 12?

Are there informal structures that limit the exercise of the rights in Article 12 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 12 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 12. What measures has State X taken to eliminate marital/parental powers restricting movement of adult females and provide females with access to travel documentation?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that persons complaining of denial of their right to freedom of movement, to leave or to return, have access to the legal machinery and/or officially designated personnel to protect these rights. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 12? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 12? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 12? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 12?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 12 is derogable pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction or impermissible limitation of the right to freedom of movement, to leave or to return guaranteed under Article 12. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

#### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to freedom of movement as set forth in Article 12?

If State X has derogated from any of the provisions of Article 12 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to freedom of movement as set forth in Article 12, or which recognize this right to a lesser extent? Has State X acted to limit or restrict the right to freedom of movement as set forth in Article 12 in some other fashion?

Are any existing limitations or restrictions on the right to freedom of movement as set forth in Article 12 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to freedom of movement as set forth in Article 12?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to freedom of movement as set forth in Article 12? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to freedom of movement as set forth in Article 12?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to freedom of movement as set forth in Article 12?

## Article 13: Protection of Aliens Against Arbitrary Expulsion

*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

### General Commentary

Article 13 protects aliens against arbitrary expulsion, and it is the only Covenant right that is solely directed to the treatment of aliens. Pursuant to Article 2, “all individuals,” including aliens, are to be generally guaranteed Covenant rights. However, there are accepted distinctions between citizens and aliens. For example, Article 25 political rights are commonly reserved for citizens only.<sup>1</sup> Furthermore, the language of Article 13 is limited to only those aliens that “lawfully” reside within a state. To lawfully reside within a state, an alien must have legally entered the state as recognized by that domestic legal system. Whether residence creates a close relationship leading the alien to view that state as his/her “home country” is a separate question that may have implications under Article 12.<sup>2</sup> As indicated in the “national security” exception language, Article 13 is derogable within the meaning of Article 4(2).

Other international instruments have addressed issues related to the protection of aliens from the arbitrary expulsion, including:

- European Convention on Human Rights (ECHR), Article 4 of the 4<sup>th</sup> Optional Protocol (addressing collective expulsion) and Article 1 of the 7<sup>th</sup> Optional Protocol;
- American Convention on Human Rights (ACHR), Articles 22(6) and (9); and
- African Charter on Human and Peoples’ Rights (ACHPR), Article 12(4) and (5).

Article 13 is addressed to the procedures involved, as opposed to the substantive grounds at issue in an expulsion case. However, with regard to the procedures, it is clear that each and every alien is entitled to a separate procedure. Therefore, procedures involving collective expulsions are implicitly forbidden.<sup>3</sup>

**General Interpretation:** The HRC has interpreted the Article 13 concept of “expulsion” to include all forced departures, including extradition. In General Comment 15, the HRC states:

[Article 13] is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (arts. 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law may apply.<sup>4</sup>

In *Kindler v. Canada*, the HRC addressed whether the extradition of an illegal alien from Canada to the United States violated the provisions of Article 13. The HRC found in the beginning of its opinion that “extradition as such is outside the scope of the application of the Covenant...but that a State party’s obligations in relation to a matter itself outside the Covenant may still be engaged by reference to other provisions of the Covenant.”<sup>5</sup> Noting that the defendant had ample opportunity to be heard before Canadian courts, the HRC declined to re-evaluate the factual determinations of the Canadian courts, and the HRC concluded that the defendant had been granted the necessary procedural safeguards within the context of Article 13.<sup>6</sup> However, where a reservation to the Covenant seriously affects the application of Article 13 in deportation cases, the HRC has noted with concern that this may compromise other Covenant rights, such as the Article 7 prohibition against torture.<sup>7</sup> Therefore, where realization of another Covenant right is at stake, any restrictions on Article 13 maybe subject to heightened scrutiny consistent with Article 5.

**Lawful Expulsion:** While the protections of Article 13 are procedural, the HRC has determined that all expulsions must be in accordance with law, and to the extent a particular expulsion may not be in accordance with law, the HRC has indicated that Article 13 provides a basis for a limited substantive review to verify the proper procedure has been followed.<sup>8</sup> In *Maroufidou v. Sweden*, the complainant alleged that the Swedish government had failed to properly apply its Swedish Aliens Act. The HRC noted that it is not authorized to determine whether domestic authorities have interpreted their law properly, but rather, the HRC inquiry is into whether the State party applied the provisions “in good faith” without an abuse of power. Using this standard, the HRC concluded that the “Swedish authorities did interpret and apply the relevant provisions of Swedish law in good faith and in a reasonable manner and consequently...the decision was made ‘in accordance with the law.’”<sup>9</sup>

**Basic Procedural Guarantees:** Article 13 guarantees certain basic procedural rights: the right to a decision in an individual case; the right to review of that decision; and the right to representation during the review process. However, none of these require *per se* the involvement of judicial organs.<sup>10</sup> Commentators have concluded, “Any right to judicial consideration of an expulsion order would have to stem from Article 14, rather than Article 13.”<sup>11</sup> Regardless of whether the procedures are judicial or administrative, the HRC has made clear that “An alien must be given full facilities for pursuing his remedy against expulsion...”<sup>12</sup> The precise dimensions have yet to be fully elaborated in the case law, but the HRC has made it clear that, absent a reason based on “national security,” an alien should receive notice of a decision in writing and be given the opportunity to submit an argument against his expulsion to the “competent authority.”<sup>13</sup> For this right of appeal to be meaningful, the alien seeking review of the order should be granted a stay of deportation pending the conclusion of the appeal proceeding.<sup>14</sup>

**National Security:** The exception for “compelling reasons of national security” implies a sensitive factual determination. In that regard, the HRC has stated that it will not “test a sovereign state’s evaluation of an alien’s security rating.”<sup>15</sup> However, the fact that the HRC may not delve into the merits of a national security determination does not mean that a state may simply assert this provision as a justification. Commentators have considered the use of the term “compelling” to require that a state demonstrate some serious evidence of a threat to national security, and in those cases where the justification has been raised, there has been present evidence that national security was in fact threatened. Thus, a State party citing this clause as a basis for a summary deportation should be prepared to show at least some evidence that a threat was in fact present.<sup>16</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 13 requires States parties to protect aliens against arbitrary expulsions, which means States parties have a legal obligation to construct, legislatively, judicially, and/or administratively, the legal mechanisms sufficient to guard the right of aliens against arbitrary expulsion and to hold responsible those who violate Article 13. Such legal measures must include provisions that guarantee certain basic procedural protections: the right to a decision in an individual case; the right to review of that decision; and the right to representation during the review process. Furthermore, Article 13 mandates that the only exception to this rule is when a “compelling” national security interest is present. Should a State party seek to expel an alien based on national security grounds, there should be at least a showing of some evidence warranting this special treatment.

### **Assessment Inquiry**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social

origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 13?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Immigration laws generally and deportation procedures specifically;
- Due process guarantees, including, but not limited to, criminal procedure codes;
- Legal aid systems for aliens;
- Counter-terrorism plans, measures, and procedures; and
- National security legislation.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to protection against arbitrary expulsion, as guaranteed under Article 13 and the state's own implementing legislative, judicial, and administrative measures, be well-publicized. Prosecutors, lawyers, judges, police officers, immigration officers, and other state officials involved in the handling of situations that involve, or might involve, the arbitrary expulsion of an alien must be informed of the rights to which aliens are entitled and sufficiently trained to adequately guarantee that those rights are provided. Specifically, state officials involved in alien deportation procedures should be well informed of the legal standards prohibiting the arbitrary expulsion of aliens, and they should be made aware of the legal action that will be taken against them if they violate these standards. Also, the general public should be made aware of these standards and the methods whereby these officials are held accountable for their enforcement. Persons in custody should be informed of their right to a decision in an individual case; the right to review of that decision; and the right to representation during the review process. State officials charged with the implementation of expulsion orders should be aware of and trained with regard to the exception for national security interests.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 13 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, lawyers, prosecutors, customs and immigration officials, and police officers and without to social workers and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 13? What training programs are in place to train both legal and non-legal professionals regarding the standards protecting against the arbitrary expulsion of aliens? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 13?

Are state officials trained to investigate potential violations of the right to protection against arbitrary expulsions of aliens?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** All States parties have an obligation to ensure that legal processes are functional and available to implement the rights secured in Article 13. Thus, to protect against arbitrary violations by the

state itself, the State party must provide a functioning, readily accessible mechanism capable of holding the state itself responsible for violations of the state's own legislation and/or Article 13. In order for the required procedural guarantees to be useful and accessible for an alien subject to expulsion, the State party must provide the alien with notice in the form of a decision to expel and provide "full facilities" to appeal this decision. These facilities must include the right to representation during the appeal process.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 13 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 13 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article X?

Are there informal structures that limit the exercise of the rights in Article 13 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 13?

Has the state provided the necessary resources to make the rights in Article 13 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 13. What measures has State X taken to insure gender-neutral review of alien expulsion orders?

**IV. Right to an Effective Remedy and its Enforcement:** States parties must ensure that aliens subject to expulsion have access to the procedural guarantees outlined above and, if subject to an expulsion order, be granted access to the means necessary to review the decision and file an appeal. During the review period, a stay of expulsion should be issued. Effective means of

enforcing criminal charges against state officials must also exist as redress for those instances in which someone acting in the name of state itself intentionally and arbitrarily expels an alien.

### **Assessment Inquiry**

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 13? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 13? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 13? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 13?

**V. Limitations and/or Derogations and Scope of Rights:** Article 13 is the only Covenant right that applies solely to aliens that “lawfully reside” in a state. To achieve this status, an alien must have made a lawful entry. In terms of the scope of expulsion, Article 13 covers all obligatory departures, including extraditions. Recognizing the right of sovereign states to regulate affairs with citizens differently, the right of review under Article 13 does not *per se* require judicial review as contemplated in Article 14. While a state may derogate from Article 13, some evidence of national security concerns is required to justify the derogation, and restrictions should not jeopardize the enjoyment of other non-derogable rights.

### **Assessment Inquiry**

Are there any circumstances in which State X has derogated from its obligation to guarantee protection of aliens against arbitrary expulsion as set forth in Article 13?

If State X has derogated from any of the provisions of Article 13 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures

were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the protection of aliens against arbitrary expulsion as set forth in Article 13? Has State X acted to limit or restrict the protection of aliens against arbitrary expulsion as set forth in Article 13 in some other fashion?

Are any existing limitations or restrictions on the protection of aliens against arbitrary expulsion as set forth in Article 13 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the protection of aliens against arbitrary expulsion as set forth in Article 13?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the protection of aliens against arbitrary expulsion as set forth in Article 13? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the protection of aliens against arbitrary expulsion as set forth in Article 13?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the protection of aliens against arbitrary expulsion as set forth in Article 13?

## Article 16: Right to Recognition of Legal Personality

*Everyone shall have the right to recognition everywhere as a person before the law.*

### General Commentary

Article 16 secures all persons the right to recognition before the law. It is a prerequisite to all the other rights and freedoms guaranteed by the ICCPR, as well as other treaties. The right to recognition before the law is the right to be a person, to exist officially, and to be an individual who bears legal rights and responsibilities.

Other international instruments have addressed issues related to the right to legal personality, including:

- Universal Declaration of Human Rights (UDHR), Article 6;
- American Convention of Human Rights (ACHR), Article 3; and
- African Charter of Human and Peoples Rights (ACHPR), Article 5.

Indeed, the formulation of Article 16 is nearly identical to that of Article 6 of the Universal Declaration. In contrast to these instruments, the Council of Europe determined that the right to legal personality was inherent in and implicitly recognized by the other rights guaranteed by the European Convention on Human Rights (ECHR).

**General Interpretation:** The text of Article 16 is quite straightforward. Article 16 guarantees to “everyone” the right to recognition before the law “everywhere;” other international instruments have secured the right for “every person” or “every individual.”<sup>1</sup> In theory, this would indicate that the right to recognition guaranteed by Article 16 begins with birth and ends with death.<sup>2</sup> It would also indicate that all persons within a State party’s jurisdiction would be entitled to the right to enjoy the protection of the law as well as the obligations such protection entails, including the ability to conclude a contract.<sup>3</sup> Moreover, Article 16’s wording appears to allow no derogation absent reservation.

The summary records of the drafting committee and the Third Committee of the General Assembly indicate that the drafters’ primary concern was limiting the effect of Article 16 to granting a legal personality. That is, the drafters wanted to distinguish between the capacity to recognition before the law and the capacity to commit legal acts.<sup>4</sup> Apparently, the drafters at first desired to include recognition in the Universal Declaration, then later in the Covenant, of the civil capacity to act. But, the drafters could not reach agreement on limitations on this potentially far-reaching provision; instead, it was dropped entirely and replaced with the current formulation of Article 16.<sup>5</sup> However, limitations on capacity to commit civil legal actions are present in many countries and are largely unchallenged under Article 16. Practically, therefore, the absolutist wording of Article 16 is widely disregarded to varying extents and its protection is limited to the right to recognition before the law as a legal person; it does not protect the right to act with legal effect. Accordingly, limitations on the capacity to act – such as, not having reached the age of minority – should not violate Article 16.<sup>6</sup>

The Human Rights Committee has issued no general comment and considered only a few cases under Article 16. In these few cases, it has generally interpreted Article 16 narrowly, despite its potentially broad reach. In *Avellanal v. Peru*, for example, the HRC held admissible a case brought by the owner of two apartment buildings in Lima, Peru, in which the owner (a wife who owned the property prior to her marriage) argued that Peru’s laws denying a wife the opportunity to represent marital property in the courts violated her rights under Article 16. However, the HRC did not cite Article 16 in its decision, and instead, it resolved the case under Article 14(1) with respect to access to the courts.<sup>7</sup> In a case against Argentina, the HRC held implicitly that a

minor's inability to represent herself did not violate Article 16, nor did an Argentinean court's decision to grant a guardian (here the grandmother) standing to represent the minor in some proceedings but not others.<sup>8</sup> More recently, the Committee has signaled it may be reconsidering this viewpoint. In its review of some state reports under Article 40, the Committee has opined that customary arrangements allowing a woman's consent to be married to be exercised by another violate Article 16 (in addition to other Covenant provisions).<sup>9</sup>

Extra-judicial killings represent another evolution of the Committee's views. The HRC has held inadmissible at least two cases charging that the failure of a State Party to investigate an allegedly extra-judicial killing was a violation of Article 16 for not recognizing the deceased person's right to be recognized as a person before the law. Some members have dissented on the basis that, while Article 16's protection of the right to be a person before the law is extinguished upon death, it has "effects" lasting beyond death, such as testamentary bequests, organ donation and other similar issues. The dissenters objected to not considering the issue at all.<sup>10</sup> However, in its review of states reports, the Committee has declared that the practice of "disappearances," which involves kidnapping and potentially extra-judicial killing, deprives individuals of their capacity to exercise their other Covenant rights, thereby implicating Article 16.<sup>11</sup>

The Committee has indicated that emergency measures implemented by States parties facing conflict are also a source of concern. Thus, use of practices including prolonged administrative detention and not allowing certain categories of individual access to the same rights to judicial review of their detention enjoyed by the rest of the populace are incompatible with Article 16.<sup>12</sup> The Committee has also specifically reaffirmed that, pursuant to Article 4, Article 16's protection of recognition before the law is not derogable during times of emergency.<sup>13</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** The ICCPR obligates signatory states to recognize persons before the law and, thereby, to ensure that all persons benefit from the protection of the law. State legislation implementing Article 16 may contain exceptions, such as limitations on guardians representing minors or on the capacity of the mentally ill.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 16?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

How have Counter-terrorism plans, measures, and procedures affected State X's guarantee of Article 16 rights?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to be recognized before the law is well-publicized. All persons should be informed that they have the right to be so recognized and that they are bearers of legal rights and duties. This requirement means that a state must have trained personnel able to investigate and prosecute violations of the state's legal machinery protecting each person's right to a legal personality. All officials,

including those who receive reports and handle victims and those who investigate and prosecute, be adequately trained.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 16 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 16? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 16?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** A person's right to recognition before the law is essential to their right to exist, as well as their status as a bearer of other rights and duties under the law. Accordingly, a person's right to recognition before the law underpins the recognition and protection of all rights. A State party can provide for limitations on this right, as noted above, but any such limitation should be subject to review before courts and other governmental avenues of legal redress (such as hearings on benefits).

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 16 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 16 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 16?

In particular, what measures of protection have been taken to ensure that appropriate limitations on the right to legal existence, such as limitations on the capacity of minors or limitations on access to courts, are narrowly tailored?

Are there informal structures that limit the exercise of the rights in Article 16 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Has the state provided the necessary resources to make the rights in Article 16 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 16. What measures has State X taken to eliminate any limitations on the right to property, ability to contract, or right to enjoy full legal personality?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that persons complaining of denial of their right to recognition before the law have access to the legal machinery and/or officially designated personnel to protect their right to such recognition. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 16? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 16? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 16? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 16?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 16 is non-derogable pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the right to be recognized under the law guaranteed under Article 16. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to recognition of legal personality as set forth in Article 16?

If State X has derogated from any of the provisions of Article 16 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to recognition of legal personality as set forth in Article 16? Has State X acted to limit or restrict the right to recognition of legal personality as set forth in Article 16 in some other fashion?

Are any existing limitations or restrictions on the right to recognition of legal personality as set forth in Article 16 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to recognition of legal personality as set forth in Article 16?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to recognition of legal personality as set forth in Article 16? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to recognition of legal personality as set forth in Article 16?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to recognition of legal personality as set forth in Article 16?

## Article 17: Right to Privacy

1. *No one shall be subject to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

### General Commentary

Article 17 protects the individual against intrusions of privacy by the State and private parties. The Covenant's language provides broad protective rights that include one's family, home, correspondence, and honor and reputation within the sphere of privacy. Article 17 is a derogable right pursuant to Article 4(2) during times of national emergency.

Other international instruments have addressed issues related to rights of privacy, including:

- Universal Declaration of Human Rights (UDHR), Article 12;
- European Convention on Human Rights (ECHR), Article 8 and 12;
- American Convention on Human Rights (ACHR), Article 11(3), and Protocol 7, Article 5;
- U.N. Rules for the Protection of Juveniles Deprived of their Liberty; Article 87(e); and
- African Charter on the Rights and Welfare of the Child, Article 10.<sup>1</sup>

Significant differences between Article 8 of the ECHR and Article 17 of the ICCPR lie in their approaches to legal restrictions. Article 17 does not address legal restrictions in the interests of public order, such as national security, the prevention of crime, preservation of public health, or the protection of freedoms and rights of others'. The lack of specific language leads some critics to conclude that Article 17 does not provide adequate protection in controlling state interference.<sup>2</sup>

**General Interpretation:** Article 17 requires States parties to provide both horizontal and vertical protections by law; that is, it must take measures to prevent arbitrary state interference as well as arbitrary interference between individuals. This differs from Article 8 of the ECHR because it does not provide protection against violations by private parties. The drafters of Article 17 were hesitant to include protection against private sector interference because this might necessitate changes in the private law system and the notion that such responsibility fell to local legislation. However, "it was pointed out that the article, which was couched in general terms, merely enunciated principles, leaving each State free to decide how those principles were to be put into effect."<sup>3</sup>

In addition, the language of Article 17 dictates a "non-interference" approach, so that while the state is responsible for providing protection against interference, it is not responsible for promoting privacy.<sup>4</sup> In a communication involving Canada, the Human Rights Committee (HRC) ruled against a Polish woman who had failed to secure entry visas for her daughter and grandson living in Poland. The Committee ruled that since these persons had lived apart for 17 years, it did not constitute a family, and the State party did not have the obligation to reestablish the family relationship. "Articles 17 and 23 provide that no one shall be subjected to arbitrary or unlawful interference with his family and that the family is entitled to protection by the State; these articles are not applicable since, except for a brief period of 2 years some 17 years ago, A. S. and her adopted daughter have not lived together as a family."<sup>5</sup>

**Article 17(1) Interpretation:** The HRC has broadly defined the protection of the right to privacy by including both the concept of "arbitrary" interference as well as "unlawful" interference. Presumably the term "arbitrary" applies to instances in which the State party acts within its legal framework and "unlawful" applies to circumstances in which the State party or an individual acts contrary to law. The phrase "arbitrary" is also seen in articles 6(1), 9(1), and 12(4).

While the protection from “arbitrary interference with his privacy, family, home or correspondence” and “attacks upon his honour and reputation” was lifted directly from the UDHR, the expression “arbitrary interference” was debated during the drafting of Article 17. Some felt that, when combined with the term ‘unlawful,’ ‘arbitrary’ was redundant. Others felt that an important distinction existed between the two terms, and “that its retention was not only appropriate, but necessary.”<sup>6</sup> By enacting relevant legislation a state might interfere in a manner that, while lawful, is also arbitrary. The General Comment also defends the expression “arbitrary” as an important term that can force State party legislation to comply with the objectives of the Covenant.

In the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims, and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>7</sup>

According to General Comment 16, the Human Rights Committee interprets the prohibition of “unlawful” interference to mean that “interference authorized by the States can only take place on the basis of law, which itself must comply with the provisions, aims, and objectives of the Covenant.”<sup>8</sup> In addition, the Committee supports this definition in the holding on *Aumeeruddy-Cziffra v. Mauritius*, in which it states that when the “situation results from the legislation itself, there can be no question of regarding this interference as ‘unlawful’ within the meaning of article 17 (1) in the present cases.”<sup>9</sup>

However, the Committee is delving more deeply into interference with privacy undertaken in accordance with existing legislation. These issues have arisen frequently in the context of electronic surveillance (wire-tapping) and legislation pertaining to abortion and homosexuality. The Committee has indicated that legislation allowing wire-tapping is capable of abuse and should be subject to some independent oversight, specifically judicial oversight.<sup>10</sup> Where wire-tapping is conducted pursuant only to administrative measures, the Committee has instructed states to adopt appropriate legislation specifying oversight mechanisms.<sup>11</sup> The decision by subsidiary states of a federal state to classify homosexuality as a criminal offense has also drawn the Committee’s criticism.<sup>12</sup> So too, the Committee has objected to the criminalization of all abortions as an interference with the right to privacy (as well as potentially the right to life).<sup>13</sup> Most recently, with respect to efforts to combat terrorism, the Committee has noted its concern with the possibility that some measures implemented by States parties may violate protections of freedom of expression and privacy, especially of those of foreign extraction present on the territory of the State party.<sup>14</sup>

The ICCPR’s definition of “privacy” was taken directly from Article 12 of the UDHR and received minimal attention during the drafting phase. There is also little substantial discussion on the scope of the term in the General Comments. While the Committee has declined to formally define the term privacy in the General Comments on Article 17, the Committee did issue the following definition in its ruling on *Coeriel and Aurik v. The Netherlands*: “The Committee considers that the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.”<sup>15</sup>

This paragraph also confers upon individuals the right to family and home, free from arbitrary and unlawful intrusions. Because of the subjective nature of these two concepts, States parties are required to include their societal definition of “family” and “home” in their country report. Generally the HRC interprets these concepts broadly and includes “All those comprising the family as understood in the society of the State party concerned.”<sup>16</sup> Recently, the Committee objected to the expulsion of hundreds of Uzbekistani citizens of Tajik descent from their homes (and subsequent resettlement 250 miles away).<sup>17</sup>

The Committee considers the term “home” to mean “the place where a person resides or carries out his usual occupation.”<sup>18</sup> According to one scholar, this definition includes all dwellings and property (seasonal, houseboats, camping mobiles, garages and gardens), as well as business and commercial space. Under Article 17(1), these spaces should be protected from all forms of surveillance (video, audio, wire tapping), and this protection should not be contingent on the legal ownership or rental status of the property.<sup>19</sup>

Regarding “correspondence,” General Comment 16 advocates, “the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*.”<sup>20</sup> To this end, the Committee states that all correspondence should be delivered intact and without interception or disturbance.<sup>21</sup> While correspondence clearly includes communication via telephone, fax, and mail, it should also include the unhindered transmission of electronic mail. States parties do not absolve themselves from this responsibility when methods of correspondence are privatized.<sup>22</sup>

Some limitations are acceptable under this aspect of 17(1). For example, States parties often permit the interference and censorship of inmates’ mail in prison systems.<sup>23</sup> However, States parties must ensure that these restrictions do not violate the purpose and aims of the Covenant. In *Estrella v. Uruguay*, the Committee established that “[t]his requires that any such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application.”<sup>24</sup>

Finally, Article 17 protects against “unlawful attacks on [an individual’s] honour and reputation.” This language was also drawn from Article 12 of the UDHR. Notably, the Covenant’s protection here is narrower in scope than the protections granted to privacy, family, home, and correspondence. This discrepancy relates to “the human rights conflict between freedom of expression and protection of personality,” and it implies that “a person’s honor and reputation are attributes of his or her privacy less deserving of protection than his or her family, home, or correspondence.”<sup>25</sup> Markedly, Article 17 does not protect against all attacks. According to the *Travaux*,

The insertion of ‘unlawful’ before ‘attacks’ was intended to meet the objection that, unless qualified, the clause might be construed in such a way as to stifle free expression of public opinion. It was thought that the law could protect the individual only against ‘unlawful’ or ‘abusive’ or ‘unwarranted’ attacks on his honour or reputation, and that fair comments or truthful statements which might effect an individual’s honour or reputation should not be considered as ‘attacks on his honour and reputation.’<sup>26</sup>

The right to privacy also provokes questions regarding the controversial issue of autonomy over one’s body, speech, and actions. These freedoms are protected by Article 17 insofar as they exist within a person’s sphere of privacy and do not violate the rights of others.<sup>27</sup> However, some activities that are deemed objectionable are outlawed for the protection of the general public. As a result, States parties’ protection of privacy does not always include socially unacceptable behaviors such as the abuse of alcohol, nicotine, and drugs, or self-harming actions such as suicide, self-mutilation, or euthanasia.<sup>28</sup> The extreme consequence of overly protective legislation could be a repressive society that infringes upon the freedom of self-expression.

**Article 17(2) Interpretation:** This provision ensures that the State party provides protection of privacy against interference. The drafters of Article 17 debated the inclusion of the second paragraph, because Article 2 of the Covenant also obligates States parties to provide legislation, remedies, and enforcement of the rights in the Covenant. Ultimately, the Commission on Human Rights concluded that paragraph two was not redundant. “It was not enough to recognize the right of everyone not to be *subjected* to arbitrary or unlawful attacks on his honour or reputation; his right to be *protected* by the law against such interference or attacks must also be expressly recognized.”<sup>29</sup> However, the Commission felt that the term “protection” should not be interpreted as a positive obligation by the State to censor views, as this would be a violation of the freedom of opinion and expression.<sup>30</sup>

## Assessment Guidelines

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 17 requires States parties to protect the right to privacy by law, therefore obligating States parties to construct, legislatively, judicially, and/or administratively, the legal mechanisms sufficient to guard the right of every person to privacy of family, home, or correspondence and to hold responsible those who violate Article 17. The Committee mandates that States parties include in their country report information regarding the government bodies that are allowed to authorize such interferences of privacy. States should also include information on those bodies that exercise approved infringements of these rights.

### Assessment Inquiry

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 17?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Searches pursuant to established law of persons, homes, or property;
- Legislation regarding medical treatment; *i.e.*, mandatory blood samples, treatment without permission;
- Counter-terrorism plans, procedures, and measures;
- Legislation on data protection, surveillance regulation, and wire tapping;
- Legislation on emerging private electronic communication services;
- Legislation that has a narrow definition of family, not including different cultural definitions and excluding relationships beyond blood and statutory relationships; *i.e.*, non-married partners;
- Legal measures that restrict one's manner of appearance, *i.e.* clothing, hair, beards;
- Prison systems, *i.e.*; correspondence and rights of family visitation;
- Definitions of family in immigration legislation;
- Medical data, including that relating to abortion and HIV/AIDS;
- Sexual behavior (including reproduction); and
- Interference in the privacy of women and children to the detriment of rights they enjoy under other treaty obligations.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to privacy, as guaranteed under Article 17 and their own implementing legislative, judicial, and administrative measures, be well-publicized. Prosecutors, lawyers, judges, police officers, and other state officials involved in the handling of situations that involve, or might involve, interference to one's privacy, family, or correspondence must be informed of the rights to which suspects are entitled and sufficiently trained to adequately guarantee that those rights are provided. Specifically, state officials charged with the investigation of suspects should be well informed of the legal standards prohibiting the interference of privacy, and they should be made aware of the legal action that will be taken against them if they violate these standards. Also, the general public should be made aware of these standards and the methods whereby these officials are held accountable for their enforcement.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 17 adequately published and distributed? How is the right of all persons to privacy publicized?

What special measures are taken to distribute these materials both within the formal legal sector to judges, lawyers, prosecutors, and police officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 17? What training programs are in place for both legal and non-legal professionals regarding the standards protecting against the arbitrary interference of privacy? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 17?

Are citizens and state officials informed of the procedural guarantees to all persons being investigated by the state or private party?

Are state officials trained to investigate potential violations of the right to privacy by the state itself?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** All States parties have an obligation to ensure that legal processes are functional and available to implement the rights secured in Article 17. Thus, to protect the right to privacy from arbitrary violations by the state itself, the State party must provide a functioning, readily accessible mechanism capable of holding the state itself responsible for violations of the state's own legislation and/or Article 17.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 17 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 17 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 17?

Are there informal structures that limit the exercise of the rights in Article 17 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 17?

Has the state provided the necessary resources to make the rights in Article 17 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 17. What measures has State X taken to provide special protection against rape, forced sterilization, and pregnancy testing as a condition of employment?

**IV. Right to an Effective Remedy and its Enforcement:** States parties must ensure that persons complaining of denial of their freedoms relating to privacy be granted access to legal machinery and/or officially designated personnel to protect their rights and freedoms. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 17? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 17? Has State X initiated special programs to raise awareness of the possibility of

pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 17? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 17?

**V. Limitations and/or Derogations and Scope of Rights:** Pursuant to Article 4(2), the right to privacy is not included as a non-derogable right, and therefore, it can be suspended in the event of an emergency threatening the life of the nation.

***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to privacy as set forth in Article 17?

If State X has derogated from any of the provisions of Article 17 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to privacy as set forth in Article 17? Has State X acted to limit or restrict the right to privacy as set forth in Article 17 in some other fashion?

Are any existing limitations or restrictions on the right to privacy as set forth in Article 17 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to privacy as set forth in Article 17?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to privacy as set forth in Article 17? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to privacy as set forth in Article 17?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to privacy as set forth in Article 17?

## Article 18: Freedom of Thought, Conscience, and Religion

1. *Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

### General Commentary

Article 18 is the only one of the several rights dealing with the personal liberties inherent to privacy, thought, and communication (e.g., Articles 17, 18, 19, and 20) that is protected from state interference by Article 4(2). An indisputably important right, the freedom of thought, conscience and religion is at once controversial and yet still agreed to by the many states -- representing many religions and beliefs -- that drafted the Covenant. Indeed, unlike any other provision of the Covenant, no states have filed reservations regarding their observance of Article 18.<sup>1</sup>

Other international instruments have addressed issues related to the right to freedom of religion and conscience including:

- Universal Declaration of Human Rights, (UDHR), Article 18;
- European Convention on Human Rights, (ECHR), Article 9; and
- United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief.<sup>2</sup>

**General Interpretation:** Article 18 guarantees the basic freedoms to have a religion or belief (including the freedom from coercion to choose a particular religion or belief); to manifest it alone or with others within certain limited restrictions; and to educate one's children in conformity with one's beliefs. The text of the article originated from a draft prepared by the United States and was similar to the text adopted for Article 18 of the Universal Declaration on Human Rights.<sup>3</sup> At least one commentator has identified a public/private confluence that is apparent in all of that has been termed the "rights of political freedoms"<sup>4</sup> (those rights of thought, communication, and privacy, as described in the UDHR<sup>5</sup>). That is, each of these basic rights of thought and communication is at once public and private, individual and collective. One thinks in private, but when one communicates one's thoughts, whether to a trade union or in worship, it becomes public. Thought, conscience, worship, etc. are individual actions, but inasmuch as the right to do so is phrased in terms of a "freedom" -- that is, defensively -- they have a collective character.<sup>6</sup> The many different angles from which one can view the concept of freedom of religion and belief complicates interpretation somewhat, and there will always be overlap, sometimes significant, with the rights and freedoms guaranteed in Articles 17, 19, and 20.

**Article 18(1) Interpretation:** Article 18(1) guarantees an individual the right to have a religion or belief system or to adopt one. As such, it is quite broad.<sup>7</sup> It "encompasses freedom of thought on all matters, personal conviction and the commitment to religion and beliefs" and thereby protects "theistic, non-theistic, and atheistic beliefs, as well as the right not to profess any religion or belief."<sup>8</sup> These freedoms are protected unconditionally: no limitations whatsoever are permitted.<sup>9</sup>

The right to choose a religion includes the right to change beliefs or to stop believing altogether.<sup>10</sup> Accordingly, states parties are obligated not to interfere with an individual's religious beliefs through any means of manipulation.<sup>11</sup> Obviously, certain coercive activities, such as indoctrination or the use of drugs, whether performed by a state or a private party, are disallowed. It is an open question whether more mundane forms of influence, such as advertising, are likewise suspect. It

appears that the pivotal question rests on the degree of coercion involved.<sup>12</sup> States parties are also not allowed to prescribe membership in a religion, though there can be state religions as long as not belonging to them is possible.<sup>13</sup> Requiring registration of religious sects or prohibiting participation in public life of those not belonging to “approved” religions is also condemned by the Committee.<sup>14</sup>

**Article 18(2) Interpretation:** As implied above, Article 18(2) prohibits coercion that might impair or impede freedom of religion; it makes no distinction whether that coercion is state-sponsored or private. Thus, states parties have an obligation, borne of the “defensive” nature of what constitutes a “freedom,” to ensure that persons under their jurisdiction are free from coercion with respect to religion.<sup>15</sup> Coercion can be physical or psychological, direct or indirect.<sup>16</sup> Of special concern to the Committee are coercive measures such as registration of minority religions, special state funding for some religions, and measures that impede teaching of minority religions in public schools.<sup>17</sup>

The Committee has also indicated some concerns about instances when domestic laws concerning religion have a discriminatory political impact. One example is religiously grounded qualifications for public service, which the Committee has condemned.<sup>18</sup>

**Article 18(3) Interpretation:** The personal, private practice of religion may not be restricted.<sup>19</sup> As noted above, Article 18(1) protects the freedom to think and believe absolutely. However, once a person’s beliefs are taken beyond the private and into the public sphere (where the manifestation of their beliefs can affect others), actions based on belief can be limited.<sup>20</sup> Accordingly, it is the manifestation of religious belief or conviction, the actions taken or defended in the name of religion that may impact society and invoke consideration by the Human Rights Committee.

Article 18(1) spells out four forms of “manifesting” a religion or belief: “worship, observance, practice, and teaching.”<sup>21</sup> These terms are not susceptible to easy definition. Upon careful analysis of the French text of the Article, one noted scholar maintains that the term ‘worship’ implies the “typical form of religious prayer” while “practice” and “observance” encompasses a broader range of activity, including for example dress and diet.<sup>22</sup> In this school of thought, “teaching” could include “every form of imparting the substance of a religion or belief,” noting that it must occur within the confines of Article 18(4).<sup>23</sup> “Practice,” however, is an especially problematic term, as it could conceivably include “every action or omission motivated by religion or belief.” The drafting history appears to indicate that the term should be limited to only “that conduct obviously related to a religious conviction,”<sup>24</sup> but even this interpretation may be difficult to apply.

Given this potential ambiguity, commentators have also emphasized that because “such activities can interfere with the rights of others, or even pose a danger to society,” the freedom to act upon, to manifest one’s religious convictions is not absolute.<sup>25</sup> Article 18(3) indicates that restrictions on these public manifestations are permissible only if such limitations are a) set forth in the law; b) necessary; c) further the protection of either the public safety, order, health, or morals, or the fundamental rights and freedoms of others. The term ‘necessary’ implies the same proportionality (the methods chosen must be proportional to the goal) as it does elsewhere in the Covenant (such as Article 19).<sup>26</sup> Obviously, these are broad categories.

However, these categories do have boundaries. In contrast to Article 19, there is no national security exception in the ‘public’ category (of safety, order, health or morals), which is consistent with the fact that Article 18 is non-derogable under Article 4(2). Also, the limitations in Article 18(3) apply only to the manifestation of religious belief, not the right to be free from coercion or the right to undertake religious or moral education in Articles 18(1) and 18(4).<sup>27</sup> Difficulties will be encountered, for example, in terms of Article 18’s horizontal effects: realizing the human rights of women or children may conflict with others religious freedoms. That making decisions related to such conflicts may be problematic merely highlights the importance of Article 18.

In any case, these limitations are to be strictly construed, lest they swallow the freedom itself.<sup>28</sup> Not all of the public limitation criteria have been defined by the Human Rights Committee. However, it has observed that the term “public morals” should be used in a neutral, pluralistic manner and limitations based thereupon should not be derived from a single tradition.<sup>29</sup> State party legislation directed non-discriminatorily towards a public safety goal, such as the prevention of injury, may overcome religious obligations.<sup>30</sup> While some commentators have expressed concern that the “public order” could justify more “national security” oriented limitations, the Human Rights Committee has indicated that “public order” is more benign.<sup>31</sup> Further, it has been argued that the term “public order” in Article 18(3) is different from that used elsewhere in the Covenant, that it is more constricted, allowing only restrictions “to avoid disturbances to the order in the narrow sense.”<sup>32</sup>

One of the actions based on belief the Human Rights Committee has had occasion to deal repeatedly is the issue of conscientious objection. In early cases, it held that Article 18 did not guarantee any form of conscientious objection, whether to military service or to pay taxes or other state obligations.<sup>33</sup> In *L.T.K. v. Finland*, the Committee found the communication of a conscientious objector inadmissible because the author was not prosecuted or sentenced because of his religious beliefs, but because of his actual refusal to serve.<sup>34</sup>

However, in its General Comment, the HRC noted that a right to conscientious objection “can be derived” from Article 18.<sup>35</sup> This reversal appears to be based on the decisions of a growing number of states recently to exempt conscientious objectors from compulsory service.<sup>36</sup> In recent years, the Committee has actively encouraged States parties to enact or strengthen domestic legal protections for conscientious objectors.<sup>37</sup> Nevertheless, the Committee has not seen fit to extend conscientious objection to the obligation to pay taxes; instead, it has indicated that refusal to pay taxes falls outside the scope of protection of the article.<sup>38</sup>

The final criterion noted in Article 18(3) for restriction on action based on belief is also potentially quite broad: the fundamental rights and freedoms of others. There have been no cases decided by the Committee on this basis. However, the Committee has noted some concrete examples in its comments on states parties’ reports.<sup>39</sup> Scholarly works have argued for some basic limitations, noting that the term ‘fundamental rights’ should be interpreted to imply international minimum human rights standards, such as those established by the ICCPR and the ICESCR.<sup>40</sup>

**Interpretation of Article 18(4):** Article 18(4) relates solely to religious and moral education and thus cannot be seen as a dictate on education in general.<sup>41</sup> Indeed, here Article 18 resonates with Article 17’s protections: private convictions, and educating children according to them, are a matter of the family, not the state. Thus, Article 18(4) includes parents and legal guardians and can thereby be seen as a guarantee of the right to educate children according to the parent’s wishes and convictions free from state interference.<sup>42</sup> The HRC in its General Comment indicates that the education covered by 18(4) is that which is related to the teaching of a religion or a belief.<sup>43</sup> States parties are not obligated to undertake any positive measures to guarantee the right, nor do states violate 18(4) by not providing religious education in public schools.<sup>44</sup> However, public instruction of religion is possible as long as it is done in a nondiscriminatory fashion and provision is made for exemptions and alternatives to accommodate the wishes of parents and guardians.<sup>45</sup> Governments can also provide for the academic study or instruction of religion and morals or ethics as long as such instruction has a more historical or academic character and is not indoctrination.<sup>46</sup>

## Assessment Guidelines

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Pursuant to Article 18, ICCPR signatory states must ensure the freedom of thought, conscience and religion, including the freedom from coercion and the freedom of parents to guide religious or moral

education of their children. States parties must enact legislation to embody and protect these freedoms. In addition, states parties must take steps to ensure that persons within its jurisdiction are protected from forms of private coercion. State legislation implementing Article 18 may contain exceptions to the manifestation of such thought, conscience or religion, but they must be necessary, set forth in the law, and designed to accomplish one of the criteria in Article 18(3).

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 18?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, procedures, and measures;
- Use of “culture” or “state religion” as a basis for restrictions on Article 18 rights;
- Administrative measures, such as registration, for minority religious sects, institutions, or schools;
- “Assimilation” requirements, such as oaths of consciences, pledges of allegiance, national songs, etc.;
- Procedural exceptions or inequities that exist with respect to ensuring Article 18 compliance; and
- The status of conscientious objectors.

How does State X protect against private interference with these rights? What restrictions on Article 18 rights does State X allow? How has State X ensured that any and all such restrictions are a) prescribed by law; and b) necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the rights and limitations with respect to freedom of thought, conscience and religion are well-publicized. All persons should be informed of their freedoms and any corresponding limitations on the manifestation and practice of their religion. This requirement means that a state must have trained personnel able to investigate and prosecute violations of the state’s legal machinery protecting each person’s freedom of thought, conscience, and religion, freedom to practice their religion, and freedom to guide their children’s religious education. All officials, including those who receive reports and handle victims and those who investigate and prosecute, must be adequately trained.

### ***Assessment Inquiry***

Are laws, measures, and/or constitutional provisions reflecting the freedom of thought, conscience, or religion adequately published and distributed so that all relevant government officials have access to them?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 18? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 18?

How do such training programs address the distinction between religion and “cults?” Are distinctions made between extremist beliefs and cults? What distinctions are made between religious and political activity? How are state officials instructed to decide when practicing a religion crosses over into political activism (e.g., creationism, anti-abortion activism)?

How do state officials – including those who may be representing a state party abroad as part, for example, of state sponsored participation in an international peacekeeping effort or state funded international aid organizations, deal with individuals of special vulnerabilities (e.g., children, refugees, IDPs, those suffering from mental impairment)?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Curtailing or coercing a person’s freedom of thought, conscience or religion places their personal identity in jeopardy. The right to freedom of thought, conscience or religion is a fundamental tenet of personal liberty. A state party can provide for limitations on the manifestation of this freedom, but such limits must correspond with the requirements of 18(3). Thus, the limits must be prescribed by law, necessary, and designed to accomplish the protection of public order, morals, health, safety, or the fundamental rights of others. The right to be free from coercion and the right of parents to guide the religious and moral education of their children should not be limited. Given the importance of these freedoms and the limited nature of potential restrictions, it is especially important that these rights be made known and accessible to all.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 18 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X’s efforts to secure the rights in Article 18 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 18?

In particular, what measures of protection have been taken to ensure that appropriate limitations, especially those related to public morals, safety and order, are narrowly tailored?

How does the State deal with alternatives to mandatory military service, and how are potential objectors informed of their rights?

Are there informal structures that limit the exercise of the rights in Article 18 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 18?

Has the state provided the necessary resources to make the rights in Article 18 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 18. What measures has State X taken to eliminate any limitations on ability to change or express religion, such as third party consent requirements?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that persons complaining of denial of their freedoms relating to religion have access to the legal machinery and/or officially designated personnel to protect their rights and freedoms, including allegations that their fundamental rights have been violated by another's religious practices. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 18? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is

sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 18? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 18? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 18?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 18 is non-derogable pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the right to be recognized under the law guaranteed under Article 18. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has sought to derogate from its obligation to guarantee freedom of thought, conscience, religion, and belief as set forth in Article 18?

If State X has sought to derogate from any of the provisions of Article 18 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced, and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize freedom of thought, conscience, and religion as set forth in Article 18? Has State X acted to limit or restrict freedom of thought, conscience, and religion as set forth in Article 18 in some other fashion?

Are any existing limitations or restrictions on freedom of thought, conscience, and religion as set forth in Article 18 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting freedom of thought, conscience, and religion as set forth in Article 18?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the freedom of thought, conscience, and religion as set forth in Article 18? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of freedom of thought, conscience, and religion as set forth in Article 18?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the freedom of thought, conscience, and religion as set forth in Article 18?

## Article 19: Freedom of Expression and Opinion

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - a. *For respect of the rights or reputations of others;*
  - b. *For the protection of national security or of public order (ordre public), or of public health or morals.*

### General Commentary

Article 19 protects a right the United Nations has struggled with since its creation. Shortly after its founding, the U.N. convened a Conference on Freedom of Expression and prepared a draft international instrument on freedom of expression. The Commission on Human Rights had, until 1952, an additional sub-commission on information. However, despite its efforts, the area of protection of freedom of expression remains one where some consider the U.N. has “achieved very little.”<sup>1</sup>

Simply stated, Article 19 secures for individuals a key component of individual liberty, the right to form his or her own opinions free from outside influence and to defend them without fear of external repression.<sup>2</sup> However, this is not to say that the state may never interfere or restrict an individual’s right to expression of his or her opinions: when such expression ultimately has an impact on the rights of others or directly threatens participation in the life of the society, the state may act.<sup>3</sup>

Article 19 was modeled on Article 19 of the Universal Declaration. Similar protections are to be found in other major international human rights, including:

- Universal Declaration of Human Rights (UDHR), Article 19;
- European Convention on Human Rights (ECHR), Article 10;
- American Convention of Human Rights (ACHR), Article 13; and
- African Charter of Human and Peoples’ Rights (ACHPR), Article 9.

**General interpretation:** The nature of Article 19 is simultaneously sweeping and restrictive. It first divides freedom of expression into two freedoms, that to hold opinions and that to express them, the latter of which also includes the right to “seek” such opinions and information and specifies a variety of media. The third paragraph indicates that such broad protection is not absolute, but indicates that inasmuch as freedom carries with it responsibilities these freedoms can be restricted. Such restrictions must be necessary and provided for by law. To be “necessary,” the article implies respect of the rights or reputations of others or for the protection of the nation.

Article 19 bears the imprint of Western states influence, which prevailed over a more restrictive draft protecting “political liberty” had been offered by the Soviet Union.<sup>4</sup> The question of including a provision protecting freedom of opinion and expression was apparently not in doubt, rather debate centered on formulation of the restrictions.<sup>5</sup> The Western influence on the drafting can further be seen in the formulation of the Article itself. The “right” to freedom of opinion is absolute. Only the right to “seek” or “impart” information is restricted, and then in limited fashion.

The Human Rights Committee has issued one, quite limited general comment. In addition, it has considered numerous cases under Article 19. The Comment does little more than reiterate the text of the article and note that state reporting has lacked a focus on what the Human Rights

Committee considers appropriate to the subject matter of the article. For example, the HRC notes that many States parties have “confine[d] themselves to mentioning that freedom of expression is guaranteed under the Constitution or the law.”<sup>6</sup> The HRC indicated it desired information about the laws, rules, or measures that either “defines the scope of freedom of expression or which sets forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.”<sup>7</sup> In addition, the General Comment notes that there are implied “special duties and responsibilities” that inhere to the protected right of freedom of expression and that “for this reason certain restrictions on the right are permitted.”<sup>8</sup> However, the Committee stressed that any such restriction cannot put the basic right itself in any jeopardy and must be in accord with the limits noted in Article 19(3).

Article 19 rights – holding and expressing opinions as well as seeking and disseminating information – are among those most likely to encounter increasing restrictions as States parties tighten their security policies.<sup>9</sup> Moreover, the possibility of abuses against individual liberties is not the only potential problem for respect for human rights implicated by the fight against terrorism. States parties are likely to claim greater rights to keep their own activities and information private. Data privacy, freedom of information, and wiretapping are likely to be key subject matters for future tests to States parties’ protection of Article 19 rights.

**Article 19(1) Interpretation:** The first paragraph of Article 19 establishes one of the strongest protections for Covenant rights. The drafting history indicates that freedom of holding opinions was added to the freedom to express only after a significant debate over whether the “private matter, belonging to the realm of the mind” should be paired with a public matter of expression in Article 19(2).<sup>10</sup> The absolutist language of Article 19(1) indicates that in addition to enjoining States parties from interfering with the rights of those within their jurisdiction to hold opinions and express them, they must also protect these rights against third party interference.<sup>11</sup> The Human Rights Committee has said little in the specific context of Article 19(1), other than to note that the right to hold opinions cannot be subject to exception or restriction.<sup>12</sup> Moreover, there have been no individual communication decisions specifically dealing with Article 19(1).

**Article 19(2) Interpretation:** Article 19(2) is quite broad; however, its text does not indicate whether there is any distinction to be made with respect to expression or seeking information. Thus, as one commentator noted, it protects “de facto the entire area of (public) freedom of expression and information.”<sup>13</sup> It appears, therefore, that every type of expression communicable is protected by Article 19(2), subject to the restrictions in Article 19(3).<sup>14</sup> The paragraph mentions several types of media, but also notes that it protects expression in “any other media.” Likewise, the protection of expression is also not to be limited by “frontiers.” It is also important to recognize that it is the expression, the communication of ideas – not their implementation – that is protected. Accordingly, criminal action cannot be protected.<sup>15</sup>

In contrast to some Western states’ formulation of freedom of expression, Article 19(2) also protects the right to seek information. Indeed, it appears to thereby protect the act of seeking information, which is in contrast to the previous formulation of this right in Article 19 of the Universal Declaration. However, this right to seek is apparently implicitly limited to “generally accessible” (e.g., not appropriate secret, such as State secrets or personal privacy) information.<sup>16</sup> It is not clear, either from the text of Article 19, or the jurisprudence or commentary associated with it, whether this provision obligates States parties to take positive measures to assist persons in seeking information by granting access.

The Human Rights Committee has focused closely on Article 19(2), especially with respect to how in practice the constitutional and other legal guarantees of freedom of expression are implemented. During consideration of state reports, the Committee has inquired into a variety of related subject matters, including censorship, limitations on freedom of expression for military personnel, prior restraints, criminal liability for publications, libel and sedition laws, and restrictions on types of propaganda.<sup>17</sup> The HRC has also established that punishment for exercising the right to expression violates article 19 unless justified by the limitations in article

19(3).<sup>18</sup> Consequently, restrictions on freedom of expression tend either to attack the medium of expression (e.g., through censorship) or to seek to prevent “undesirable expression” through state control (e.g., prohibition on assemblies or unions).<sup>19</sup>

The HRC has considered a number of cases on differing types of expression. It has determined that political expression is protected.<sup>20</sup> The Committee also views freedom of the press as protected expression, having noted in its General Comment that “control of the media would interfere in the right of everyone to freedom of expression.”<sup>21</sup>

Obviously, there will be wide variation in what different countries and cultures deem appropriate expression. Accordingly, the HRC has developed in its case law the doctrine of a “margin of discretion.”<sup>22</sup> In *Hertzberg v. Finland*, the Committee decided that it could not find a violation of Article 19 in a Finnish broadcaster’s decision to censor two programs about homosexuality. However, the Committee noted that “public morals differ widely [and there] is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.”<sup>23</sup> Subsequent decisions helped to frame and outline the parameters of this margin, though the Committee continues to accord national authorities significant deference.<sup>24</sup>

**Article 19(3) Interpretation:** Paragraph 3 sets the basic limitations permissible under the ICCPR on the right to freedom of expression. Essentially, any limitation on the rights set forth under paragraph 2 must meet the three criteria listed to be permissible: it must be established by law, necessary, and further one of the two listed purposes (respect for the rights or reputation of others or the protection of public morals, health or national security). The first two are straightforward: if a limitation on freedom of expression is not set forth in the written law or if it is greater than what is necessary to accomplish the protection of one of the two listed purposes, it is not permissible. Some members of the Committee have indicated that the term “necessary” implies proportionality; the law must be appropriate and adapted to achieving one of the enumerated ends.<sup>25</sup> The question is whether a limitation is permissible then comes down to what constitutes respect for the rights or reputation of others or the protection of national security or public order or public health.

The jurisprudence is uneven. There are no cases addressing public health. *Hertzberg*, noted above, is the most important case regarding public morals, in which the HRC noted the variance in public morals from country to country.<sup>26</sup> The national security limitation is to be invoked “when the political independence or the territorial integrity of the State is at risk.”<sup>27</sup> The drafting history appears to indicate that prevention of disorder and crime was the primary intention. Thus, limitations on the rights of expression of members of the military, on the freedom of prison detainees to seek information, and on the release of confidential or sensitive information are permissible. Scholarly work indicates that there is a common international approach to the concept of public order; thus, national laws permitting freedom of expression cannot be too restrictive, such as limiting expression to only that which furthers a particular religious belief or social system.<sup>28</sup> The Committee has taken a similar stance, condemning overly broad restrictions – such as anti-State organizations – as unjustified by national security grounds. The Committee noted that “the Covenant does not permit restrictions on the expression of ideas merely because they coincide with those held by an enemy entity or may be considered to create sympathy with that entity.”<sup>29</sup>

The limitation dealing with the “rights and reputation of others” is potentially quite broad.<sup>30</sup> It is clear that freedom of expression can have an impact on other individuals. Accordingly, the right to express carries the special responsibility to take care of the privacy, reputation, and other rights of other individuals. The actual exercise of the right can be limited by the state to ensure this.<sup>31</sup> For example, public or private broadcasting organs have a responsibility to use their expression, their influence in an objective, impartial manner, lest they transgress the rights of others. Likewise, the Committee is of the opinion that school teachers exercise such influence that restraints on their expression may be justified to “ensure that legitimacy is not given by the

school system to the expression of views which are discriminatory.”<sup>32</sup> Similarly, paragraph 3 could imply that States parties have a special responsibility to ensure that individual reputations are not intentionally infringed upon (such as through libel laws, broadcast restrictions, defamation laws).<sup>33</sup> Privacy of the individual may also trump the right to seek information.<sup>34</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Pursuant to Article 19, ICCPR obligates signatory states to protect the right of individuals to hold and express opinions in the media of their choice as well as the right to seek information. State legislation implementing Article 19 may contain exceptions, but they must be in accord with Article 19(3).

### **Assessment Inquiry**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 19?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, procedures, and measures;
- Media for dissemination of opinion and access thereto, including to foreign media sources;
- Administrative measures, such as registration, for organizations or institutions out of favor with, or considered, “anti-State;”
- Procedural exceptions or inequities that exist with respect to ensuring Article 18 compliance; and
- The status of conscientious objectors.

How does State X protect against private interference with these rights? What restrictions on Article 19 rights does State X allow? How has State X ensured that any and all such restrictions are a) provided by law; b) necessary; c) for the respect of the rights or reputations of others; or d) for the protection of national security or of public order (*ordre public*), or of public health or morals.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to freedom of expression is well-publicized. All persons should be informed of their right to express themselves and to seek information as well of their concomitant responsibilities to the rights and reputations of others. This requirement means that a state must have trained personnel able to investigate and prosecute violations of the state’s legal framework for freedom of expression or seeking information. In addition, it means that state officials must be trained to make the subtle distinctions of when expression is to be permitted or limited based on the criteria set forth in Article 19(3). All officials, including those who receive reports and handle victims and those who investigate and prosecute, must be adequately trained.

### **Assessment Inquiry**

Are laws, measures, and/or constitutional provisions reflecting the right to freedom of expression

adequately published and distributed so that all relevant government officials have access to them?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 19? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 19?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Freedom of expression is a cornerstone of individual liberty, including individual privacy. A state party can provide for limitations on this right, as noted above, but it must provide for the ability to challenge restrictions (to, for example, ensure that they are necessary) and to redress violations (such as through anti-defamation laws).

#### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 19 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 19 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 19?

What measures has State X taken to ensure permissible limitations on the right to expression (e.g., time, place, and manner restrictions) are narrowly tailored?

How often does the state invoke national security, public health, or public order as justification for restrictions on expression?

Are there informal structures that limit the exercise of the rights in Article 19 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;

- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 19?

Has the state provided the necessary resources to make the rights in Article 19 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 19. What measures has State X taken to eliminate pornography depicting women as objects in degrading or inhuman circumstances?

Are similar protections available for children?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that persons complaining of denial of their right to freedom of expression have access to the legal machinery and/or officially designated personnel to protect their right to expression. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but they also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article X? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures. How does State X make use of the "margin of discretion" accorded to the responsible national authorities by the HRC?

What procedures exist for the investigation and prosecution of state officials for violations of Article X? Has State X initiated special programs to raise awareness of the possibility of pursuing

remedies in cases of violation of the rights, obligations, or freedoms of Article X? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article X?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 19 is derogable pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the right to freedom of expression guaranteed under Article 19. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to freedom of expression and opinion as set forth in Article 19?

If State X has derogated from any of the provisions of Article 19 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced, and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to freedom of expression and opinion as set forth in Article 19? Has State X acted to limit or restrict the right to freedom of expression and opinion as set forth in Article 19 in some other fashion?

Are any existing limitations or restrictions on the right to freedom of expression and opinion as set forth in Article 19 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to freedom of expression and opinion as set forth in Article 19?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to freedom of expression and opinion as set forth in Article 19? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the right to freedom of expression and opinion as set forth in Article 19?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to freedom of expression and opinion as set forth in Article 19?

## Article 20: Prohibition of Propaganda for War and Advocacy of Hatred

1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

### General Commentary

Article 20 addresses “propaganda for war” and advocacy of hatred constituting incitement to discrimination. The prohibitions demanded by Article 20 are a direct response to the aftermath of World War II and Nazism.<sup>1</sup> There is no comparable provision to Article 20 found in any other major human rights instrument, though related provisions can be found in

- American Convention on Human Rights, (ACHR), Art 13(5); and
- United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>2</sup>

While once discussed only rarely and then often in the context of repressive regimes, Article 20 is likely to gain greater currency in the future. It is likely that intersections will develop between this Covenant prohibition and other areas of international law; for example, efforts to combat terrorism may implicate Article 20’s prohibitions. Also, international humanitarian law and international criminal law have begun to address the responsibility of heads of states and media figures for incitement to discrimination, hostility, and violence. Indeed, the ad hoc United Nations Tribunals for the Former Yugoslavia and Rwanda have, or are, prosecuting individuals for offences bearing a substantial relationship to Article 20.<sup>3</sup>

**General Interpretation:** In the context of the ICCPR, Article 20 is both unique and unusual. It is the only provision in the ICCPR setting forth an absolute demand for States parties to enact particular legislation and prohibit specific, albeit largely undefined, conduct.<sup>4</sup> It can be seen as creating “as special state duty to take preventive measures . . . to enforce the right to lie and equality.”<sup>5</sup> In addition to directly urging States parties to enact legislation, Article 20 also represents a limitation on other rights set forth by the ICCPR. While there are other articles in the Covenant, namely 18(3), 19(3), 21 and 22(2), containing limitation clauses, they generally a) are limited to the subject matter of the particular article, and b) only authorize state interference with the right specified in certain instances. Article 20, in contrast, is of greater breadth: it urges the creation of restrictions in the law that may have an impact on a variety of rights specified elsewhere in the Covenant. Nevertheless, the drafting history and much commentary have focused on the relationship between Article 19’s right of freedom of expression and Article 20’s prohibition on a particular type of expression.<sup>6</sup>

The origins of Article 20 are certainly grounded in the anti-discrimination aspects of the ICCPR. First raised in 1947 by the Soviet expert member of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, it was debated as part of the overall provision on discrimination (Article 26) and of freedom of expression (Article 19). Some drafting delegations were concerned that the recent experience with the effects of the extreme manipulative power of modern propaganda, while others deemed the limitations in Article 19(3) sufficient.<sup>7</sup> As with significant portions of the drafting of the Covenant, Cold War politics also crept into this debate. Western delegations pushed for the primacy of freedom of expression (which was and is “essential” to human rights and democracy). Other countries argued that limitations on personal political liberty were necessary to promote peace and non-discrimination.<sup>8</sup> The debate was unresolved and substantial opposition remained when the provision was adopted.<sup>9</sup> Several nations eventually reserved against aspects of Article 20.<sup>10</sup>

**Article 20(1) Interpretation:** The lack of definition, given the loaded terms contained in Article 20, has made interpretive analysis of the Article difficult. On the one hand, it is simple in its basic purpose: the drafting history and the text indicate the article is directed towards the prohibition, through national legislation, of propaganda for war. However, the term 'propaganda' is a subjective and broad one. For instance, are preparations in the normal course of self-defense (such as policy papers or parades displaying tanks or other armaments) subsumed under this term?<sup>11</sup> Likewise, the term "war" is not defined. Does the term refer only to international armed conflicts, or does it encompass civil war and internal conflicts as well?<sup>12</sup>

The Human Rights Committee (HRC), in its General Comment, restates the obligation under Article 20 and notes that some States parties have not enacted the necessary legislation.<sup>13</sup> It also indicates that 'propaganda' should be understood to include "all forms" and that 'war' encompasses any "act of aggression or breach of the peace contrary to the U.N. Charter," a formulation that resulted from a close debate on whether or not the General Comment might be an obstacle or an encouragement to self-determination efforts.<sup>14</sup> In sum, however, it is probably most useful to interpret Article 20(1) within the confines of its original purpose: "as a response to war and racial hatred spurred by the propaganda machinery of the Third Reich."<sup>15</sup>

**Article 20(2) Interpretation:** The second paragraph of Article 20 broadly demands that States parties prohibit advocacy of national, racial, or religious hatred when such advocacy tends to encourage discrimination, hostility or violence.<sup>16</sup> Because the entire text is written in the alternative, advocacy of religious hatred that only leads to discrimination is to be proscribed as much as advocacy of national hatred that leads to actual violence.<sup>17</sup> It does not matter insofar as the Human Rights Committee is concerned whether the aim is internal or external, the scope of Article 20 is broad.<sup>18</sup>

In the only individual communication dealing with Article 20, in which a right-wing group complained that its advocacy against persons of Jewish descent had resulted in the curtailment of its access to the public telephone system in violation of Article 19, the HRC found the communication inadmissible, citing Canada's obligation to prohibit such advocacy.<sup>19</sup> However, the Committee has condemned incidents of discrimination in Ukraine and the lack of action on the part authorities to address them citing Article 20.<sup>20</sup> Likewise, it has called for greater ethnic diversity in police forces with similar reference to Article 20.<sup>21</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 20 imposes a specific duty on States parties to prohibit war propaganda and the advocacy of hatred constituting incitement to discrimination, hostility, or violence with national legislation. It remains controversial whether States parties must actually criminalize such behavior. It is clear, however, that States parties themselves are to refrain from such conduct and deter it or prevent it when practiced by private parties.

### **Assessment Inquiry**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 20?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, or procedures;
- Prohibitions on incitement to genocide; and
- Whether State X consulted other relevant international provisions on the prohibition of propaganda for war and advocacy of hatred that constitute incitement to discrimination, hostility, or violence, such as Article 13(5) of the American Convention on Human Rights (ACHR) and Article 4 of the International Convention for the Elimination of Racial Discrimination (CERD).

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** The Committee has provided relatively little effective guidance for the successful implementation of the prohibitions of Article 20 beyond reiterating the obligation to enact legislation. The definitions provided for loaded terms leave much to be desired. However, it is clear that a state party's compliance with Article 20 will require extensive training, especially given the need to balance other commitments made under the ICCPR (such as Article 18 and 19). Accordingly, state personnel must be trained to impartially investigate and prosecute violations of the state's legal machinery protecting against such propaganda or advocacy. The state provisions related to Article 20 should be well-publicized.

### ***Assessment Inquiry***

Are laws, measures, and/or constitutional provisions reflecting the prohibition on such propaganda or advocacy adequately published and distributed so that all relevant government officials have access to them?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 20? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 20?

Public pronouncements can violate Article 20. Consider the public statements of government and nongovernmental organizations and the possibility that such statements might encourage actions in violation of Article 20. What standard of care is being exercised?

Are there training programs to educate the public about the specific subtleties that inhere to the type of conduct addressed by Article 20? Are there training programs that educate the public about the events surrounding World War II that gave rise to the creation of Article 20?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** The HRC's General Comment indicates clearly that the propaganda and advocacy described in Article 20 are contrary to public policy.<sup>22</sup> It follows that the public should be aware of the legal standard prohibiting propaganda for war and the advocacy of hatred. Moreover, in addition to the legislation demanded by Article 20, a state has an obligation to establish appropriate machinery for processing complaints alleging a violation of Article 20. Officials charged with enforcing the law should be aware of what constitutes an Article 20 prohibition and should be trained in the proper administration of the sanction against those acting in violation of the law.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 20 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 20 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 20?

Are there informal structures that limit the exercise of the rights in Article 20 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 20?

Has the state provided the necessary resources to make the rights in Article 20 accessible? Are there obstacles to the use of these resources?

In particular, what measures of redress or complaint exist with respect to the prohibition against propaganda for war and the advocacy of racial, religious, or national hatred inciting discrimination or violence based on such hatred?

**IV. Right To An Effective Remedy And Its Enforcement:** As noted previously, the Human Rights Committee has indicated that some sanction is a necessary component to the laws mandated by Article 20. Regardless, the enforcement measures chosen and any accompanying remedy must be effective.

### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 20? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations,

including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 20? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 20? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 20?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 20 is derogable pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the protection from the propaganda or advocacy addressed by Article 20. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to prohibit propaganda for war and advocacy of hatred as set forth in Article 20?

If State X has derogated from any of the provisions of Article 20 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the prohibition of propaganda for war and advocacy of hatred as set forth in Article 20? Has State X acted to limit or restrict the prohibition of propaganda for war and advocacy of hatred as set forth in Article 20 in some other fashion?

Are any existing limitations or restrictions on the right to freedom of expression and opinion as set forth in Article 19 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the prohibition of propaganda for war and advocacy of hatred as set forth in Article 20?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the prohibition of propaganda for war and advocacy of hatred as set forth in Article 20? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the prohibition of propaganda for war and advocacy of hatred as set forth in Article 20?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the prohibition of propaganda for war and advocacy of hatred as set forth in Article 20?

## Article 21: Freedom of Assembly

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

### General Commentary

The right of freedom of assembly, as guaranteed and protected by Article 21, provides one of the foundations for the proper functioning of democracy and the basis for a vibrant civil society. It does so by facilitating the gathering of individuals, promoting the development of diverse political and other types of opinions, and ensuring the individual's ability to participate effectively in public life. Because the right to freedom of assembly is so essential to democracy, States parties are under a "stronger duty to ensure the right with positive measures..."<sup>1</sup> While this right exists independent of other fundamental rights and freedoms, it may also be considered as a natural complement to the right to freedom of association.

Other international instruments have addressed the right of freedom of assembly, including:

- Universal Declaration of Human Rights (UDHR), Article 20;
- European Convention on Human Rights (ECHR), Article 11;
- African Charter of Human and Peoples Rights (ACHPR), Article 11;
- American Declaration on the Rights and Duties of Man, Article 21; and
- American Convention on Human Rights (ACHR), Articles 15.

Given the importance of this right to labor unions, there are a number of international instruments created and concluded under the auspices of the International Labor Organization (ILO) which also address freedom of assembly.<sup>2</sup>

**General Interpretation:** The Human Rights Committee (HRC) has not issued a General Comment on Article 21, and it has considered only one complaint under the Optional Protocol. Therefore, interpretation of the right at this point is limited to the text of the Article itself, HRC Concluding Observations, as well as scholarly commentary on the topic.

Article 21 obligates States parties to "recognize" the right to freedom of assembly. The drafting history of this article indicates that the right to freedom of assembly was generally conceived of as a 'natural' right, inherent in the people and not derived from the permission or authority of the state.<sup>3</sup> Calling upon States parties to recognize the right, the text suggests that the right to freedom of assembly is a fundamental human right that exists independent of the Covenant itself.<sup>4</sup> The "must recognize" phrasing also suggests a State party obligation to take positive measures to guarantee the right from interference by state authorities but by private parties as well.<sup>5</sup> Such positive measures may vary and are essentially left to domestic law, but they may include traffic control, police protection, and similar measures aimed at facilitating a peaceful and orderly gathering of individuals.

Freedom of assembly encompasses only those "intentional, temporary gatherings of several persons for a specific purpose."<sup>6</sup> Assemblies may be held indoors or outdoors, and they may take the form of a stationary gathering such as a mass meeting or demonstration, or gatherings such as a protest-march. Participation in these types of assemblies may be restricted to certain individuals or unrestricted and open to the public.<sup>7</sup> However, exactly what may constitute an "assembly" is left to domestic law and the jurisprudence of the Human Rights Committee.

Freedom of assembly may be a fundamental right, but it is not considered an absolute right. In other words, the protections afforded to the right to freedom of assembly are not unlimited. Under certain well-defined circumstances, a state may limit the exercise of this right. There are several

restrictions contained in the language of the article, most of which are similar to those contained in Articles 12, 18, 19, and 22.

**Peaceful Assembly:** According to the text of Article 21, only peaceful assemblies are protected. Indeed, this language may convey a positive duty to regulate and protect against violent protest. Peacefulness is not judged according to the opinions expressed at an assembly, but according to the actions of those assembled.<sup>8</sup> If assembly participants are armed then it is not a peaceful one, even if the armaments are not used.<sup>9</sup> However, unarmed confrontations are not per se problematic. Leading scholars have noted that civil disobedience can be peacefully accomplished.<sup>10</sup> Although violent assemblies can be prohibited or disbanded by official state action, states do not have carte blanche in doing so just because the assembly is outside the protection of Article 21.<sup>11</sup> Moreover, merely because an assembly is violent does not exempt it from protection under the Covenant. An assembly may also be a form of exercising those rights protected under Articles 17, 18, 19, 22, or 25.<sup>12</sup>

**Permissible Restrictions:** States parties enjoy the authority to restrict the right to freedom of expression the freedom, so long as those restrictions are: a) imposed in “conformity with the law;” b) are necessary in a democratic society; c) to accomplish one of the following specific purposes: “national security or public safety, public order, the protection of public health or morals, or the protection of rights and freedoms of others.” The formulation of these restrictions, although similar to other articles of the Covenant, is nonetheless different in several important respects. Articles 12, 18, and 19 require that restrictions enacted by states on the rights specified therein be “necessary,” which has been interpreted to indicate proportional to the permissible goal of the restriction.<sup>13</sup> Article 21, in contrast, requires that state measures restricting freedom of assembly must not only be proportionate but also meet a “minimum democratic standard.”<sup>14</sup>

The broad phrase “in conformity with the law” is distinct from the formulations mandating a legal basis for restrictions on other rights found elsewhere in the Covenant.<sup>15</sup> According to experts, the difference may indicate that States parties need not actually prescribe measures interfering with freedom of assembly in a law, but may do so through administrative measures.<sup>16</sup>

The categories of interests under which the state may permissibly institute restrictions on the right to freedom of assembly are also relatively straightforward. Like similar provisions in Articles 12-14, 19, and 22, state measures designed to protect national security must be in response to serious threats, political or military, to the nation as a whole.<sup>17</sup> The “public safety” interest is akin to the similar provision in Articles 18 and 22 and indicates that States parties may disrupt assemblies when they threaten the safety of either those assembling or others.<sup>18</sup> “Public order” is as difficult to precisely define as it is in other Covenant articles, but it may permit states parties to enact notification or licensing schemes with respect to public assembly.<sup>19</sup> The sparse case-specific jurisprudence does not provide clear guidance as to the HRC’s view of Article 21.<sup>20</sup> Nevertheless, what is clear is that the prohibition of a peaceful assembly for the sake of public order must remain a last resort only.<sup>21</sup>

With respect to the protection of public health and morals, these interests are to be interpreted similarly: as what the U.S. legal system terms a “time, place, or manner” type restriction, and not a reason to ban an assembly.<sup>22</sup> Restrictions on the exercise of Article 21 rights may be necessary to protect the rights of others; a common example of this need relates to respect for the private property of others. Article 21 protects assemblies organized and conducted on private property, but it does not tip the balance of in favor of those exercising their right to assemble. The state is obligated to ensure that the property owner’s rights are respected, but also that similar respect is had for the importance of the right to freedom of assembly and the ability to exercise it free from discrimination.<sup>23</sup> Assemblies may also threaten enjoyment of other Covenant rights, such as the right to privacy. For example, access to health and abortion services can implicate Article 21 rights, and the state may be required to protect an individual’s right to assemble against threats to life.

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** The ICCPR obligates signatory states to recognize the freedom of assembly, which it must do through positive measures, not just through proclaiming the right to exist via legislation. States must take steps to ensure that persons within its jurisdiction are protected from forms of private interference with their rights to assembly. State legislation implementing Article 21 may restrict the right, but only if such restrictions are necessary for a democratic society, in conformity with the law, and in furtherance of one of the criteria listed in Article 21. States may also interfere with the right to assembly via formal or informal administrative measures, but only pursuant to a valid legal basis for the interference.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 21?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, or procedures; and
- New technologies and implications for Article 21 rights.

What exceptions to the right of freedom of assembly exist or are specified in the measures themselves? Are such exceptions in conformity with the law and necessary for a democratic society? Is their effect in furtherance of the interests specified in Article 21?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to peaceful assembly is well-publicized. All persons should be informed of their freedom to do so as well as of any corresponding limitations on exercising the right. Accordingly, states must publicize the right and have trained personnel able to investigate and prosecute violations of the legal framework that protects or outlines the right to freedom of assembly. All officials, including those who receive reports and handle victims and those who investigate and prosecute, must be adequately trained.

### ***Assessment Inquiry***

Are laws, measures, and/or constitutional provisions protecting or limiting freedom of assembly adequately published and distributed so that all relevant government officials have access to them?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 21? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 21?

What training programs have been initiated to educate law enforcement and other officials about the limits on restrictions on freedom of assembly, possible gray areas or instances requiring special attention to ensure protection of these freedoms, and how to handle complaints of denial of recognition? What resources have been dedicated to such training programs? Have recent protests provided lessons to be incorporated into such training and has the state taken the opportunity to do so (e.g., recent worldwide protests against globalization)?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Freedom of peaceful assembly is a fundamental right, and it is essential for the formation and development of political freedom and a democratic society. Limitations, whether imposed by a State party or a private party, must correspond with the requirements of Article 21. Given the importance of the right, it must be made accessible to all, and states should only prohibit assemblies as a last resort.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 21 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 21 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 21?

What licensing or notification scheme exists with respect to assemblies in State X? Does the system scrutinize the purpose (stated or assumed) of an assembly? Does it track how long it may take to obtain the required permissions, licenses, etc., to hold a public assembly? Are there expedited appeal procedures for review of denials?

In particular, what measures of protection have been taken to ensure that appropriate limitations, especially those related to public morals, safety and order, are narrowly tailored? Does the state take into account reasons other than protest that prompt the exercise of Article 21 rights (such as education, intellectual gatherings, religious meetings, etc)?

Are there informal structures that limit the exercise of the rights in Article 21 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;

- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 21?

Has the state provided the necessary resources to make the rights in Article 21 accessible? Are there obstacles to the use of these resources?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that persons complaining of denial of their freedom to peaceful assembly have access to the legal procedures and/or officially designated personnel to protect their rights and freedoms, including allegations that their right to assemble has been violated by another. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but they also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 21? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 21? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 21? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 21?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 21 is derogable pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the right to assembly under the law guaranteed under Article 21. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee freedom of assembly as set forth in Article 21?

If State X has derogated from any of the provisions of Article 21 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize freedom of assembly as set forth in Article 21? Has State X acted to limit or restrict freedom of assembly as set forth in Article 21 in some other fashion?

Are any existing limitations or restrictions on freedom of assembly as set forth in Article 21 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting freedom of assembly as set forth in Article 21?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy freedom of assembly as set forth in Article 21? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of freedom of assembly as set forth in Article 21?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy freedom of assembly as set forth in Article 21?

## Article 22: Freedom of Association

1. *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
3. *Nothing in this article shall authorize States Parties to the International Labor Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

### General Commentary

Article 22 guarantees freedom of association, and it should be viewed as companion provision to Article 21's protection of the right of freedom of assembly. As one commentator has phrased it, the freedoms of association, assembly, and expression live in an "overlapping zone between civil and political rights."<sup>1</sup> Both are necessary to promote individual and collective participation in public affairs, and the development of personal values. Indeed, the drafting history indicates that the freedom of assembly and freedom of association were briefly considered together in the context of drafting a single provision that would encompass both freedoms. However, the drafters eventually concluded that the two freedoms merited independent treatment.

Other international instruments have addressed issues related to freedom of association, including:

- Universal Declaration of Human Rights (UDHR), Article 20;
- European Convention on Human Rights (ECHR), Article 11(1);
- American Convention on Human Rights (ACHR), Article 16; and
- African Charter of Human and Peoples Rights (ACHPR), Article 8.

The Human Rights Committee has not issued a General Comment on Article 22, and it has considered only a few cases involving Article 22 claims. Therefore, insight into how to interpret the scope and nature of Article 22 is to be found mostly in the text of the Article, pertinent HRC Concluding Observations, and scholarly commentary.

**Article 22(1) Interpretation:** States parties are obligated to ensure that everyone, citizens and non-citizens alike, enjoy the right to freedom of association. In this regard, the phrasing of this article is similar to that of Articles 9, 12, 16, 18, and 19.<sup>2</sup> The drafting committee did not include any further definition of "association," and it did not limit the types of association that fall within the scope of the article (religious, sports, cultural, social, etc.). Accordingly, the prospective scope of Article 22's protection may be considered very broad.<sup>3</sup> Nevertheless, it is plausible that associations must have a public character because a purely private association is clearly protected by the reach of Article 17.<sup>4</sup>

An important component of association is its voluntary nature. Thus, if the range of existing associations do not allow for the voluntary association of a group of people, they must be able to create an environment where their association will be voluntary. The freedom to associate with others must include the freedom to create a context and found an association, in which like-minded persons would associate, as necessary.<sup>5</sup> States parties are obligated as part of their ICCPR undertaking to respect the right to association and not to restrict the right or ability of individuals--or groups of individuals--to create associations.<sup>6</sup> This includes establishing and maintaining a legal framework in which persons may create associations that have legal and juridical character. There is an exception to this ability to found and maintain new associations, however. Any reading of Articles 20 and 22 must necessarily imply that states are obliged to prohibit associations that have as a part of their purpose the advocacy of views prohibited by

Article 20.<sup>7</sup> Similarly, an association pursuing the destruction or limitation of the rights specified in the Covenant would run afoul of a consistent reading of Articles 5 and 22.<sup>8</sup>

Like several other articles of the Covenant that protect political rights, States parties are also obligated, by virtue of the general phrasing of the article, to protect the right of freedom of association from private interference.<sup>9</sup> In addition to the ability to found associations, persons exercising their freedom to associate must be allowed not to join an association.<sup>10</sup> In addition to the freedom to join or not join associations, it has been argued that the freedom protected by Article 22 includes the right to choose which associations to join.<sup>11</sup> Thus, this protection means not only guaranteeing the right to make such choices, but also the establishment and/or maintenance of a legal regime that allows and supports such choices.<sup>12</sup>

Trade unions are given special attention in both Article 22(1) and 22(3). Although more extensively regulated in international agreements established under the auspices of the International Labour Organization (ILO) and in the International Covenant on Economic Social and Cultural Rights (ICESCR), the drafters included reference to these special associations for fear of implying that the freedom to form or join trade unions was somehow not a civil right.<sup>13</sup> Accordingly, the protection of Article 22 is more limited than found in ILO treaties or the ICESCR.<sup>14</sup> Nevertheless, one of the few cases considered by the Human Rights Committee under Article 22 and the Optional Protocol did involve trade unions.<sup>15</sup> In addition, the Committee frequently expresses its concerns regarding restrictions of the rights pertaining to labor unions and their members.<sup>16</sup>

**Article 22(2) Interpretation:** Like Article 21 and similar Covenant articles which allow for specific limitations to rights and freedoms, Article 22 envisages certain limitations on the right to freedom of association. In other words, the right to freedom of association is not an absolute right. According to the language of the article, there are several well defined circumstances in which this right may be restricted. First, legitimate restrictions must be “prescribed by law.” In contrast to Article 21, which also requires that restrictions on freedom of assembly be “in conformity with the law,” Article 22 establishes a greater legislative responsibility for the State party: it must actually enact a law, not an administrative measure.<sup>17</sup> Any restrictions so prescribed must also be “necessary in a democratic society” and required in order to accomplish one of the following specific purposes: “protection of national security, public safety, public order, public health or morals, or the protection of rights and freedoms of others.”

Circumstances in which the state may permissibly restrict the right to freedom of association may be interpreted similarly to those in Article 21.<sup>18</sup> Thus, state measures aimed at protecting “national security” must be in response to serious threats, political or military, to the nation as a whole, while measures aimed at protecting “public safety” are narrower and limited to the safety of persons.<sup>19</sup> Also, like Article 21’s use of the term, the pursuit of “public order” permits States parties to establish legal requirements with respect to the lawfulness of associations as well as notification or licensing schemes.<sup>20</sup> However, the Committee has taken special concern with restrictions that disallow the formation of political parties and nongovernmental organizations, especially human rights organizations.<sup>21</sup>

Restrictions on the right to freedom of association for the “protection of public health and morals” are necessarily directed at the activity of associations; accordingly, they may be interpreted consonant with similar restrictions on freedom of expression.<sup>22</sup> The same is true of restricting association to “protect the rights of others.”<sup>23</sup>

The most significant difference between Article 22 restrictions and those of other, similar articles is that Article 22 contains provisions allowing States parties to specially restrict the rights of association of members of the armed forces and the police. However, Article 22(2) does not permit the state to restrict personnel employed by law enforcement and other public services from actually forming labor unions. Similar to the ‘prescribed by law’ requirement of more general limitations on association, restrictions applicable only to the police or military must be “lawful.”

But, they do not have to be necessary in a democratic society or serve any of the listed purposes mentioned above. While what public employees are encompassed by “members of the armed forces and of the police” is not elucidated either by Article 22 or by the HRC. One school of thought contends that it is properly understood to be limited to those exercising formal, “police-type” law enforcement functions. However, this loose definition might still include “quasi-police” such as customs, firemen, tax inspectors, or forestry officials.<sup>24</sup>

**Article 22(3) Interpretation:** Article 22 is also somewhat unique because it contains a specific savings clause referencing another international instrument, the 1948 ILO Convention. Only Article 6 has a similar reference to an international agreement, the Genocide Convention. The drafting committee records show this provision was added not for its legal effect, but in order to ensure that the hard work of the ILO protecting the right to freedom of association was not eclipsed.<sup>25</sup>

### **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** The ICCPR obligates signatory states to guarantee to all the right of freedom of association, including the right to found new associations or to not join one or more. This right must be guaranteed through positive measures. States parties must also ensure that persons within its jurisdiction are protected from private interference with their right to associate. However, States parties may provide for restrictions, which must be proclaimed by law, on the right to associate of members of the armed forces or of the police. State legislation implementing Article 22 may also generally restrict the right, but only if such restrictions are necessary for a democratic society, prescribed by law, and in furtherance of one of the criteria listed in Article 22.

#### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 22?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, or procedures;
- New technologies and implications for Article 22 rights;
- Rights to found new associations or to choose not to join any associations; and
- Restrictions are placed on the rights of members of the armed forces or of the police.

What exceptions to the freedom to associate exist? Are such exceptions in conformity with the law and necessary for a democratic society? Is their effect in furtherance of the interests specified in Article 22?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the right to associate, to found new associations, or not to associate is well-publicized, including any appropriate limitations or restrictions on this right. All persons should be informed of their freedom to do so as well as of any corresponding limitations on their exercise of their rights. Accordingly, states must publicize the right and have trained personnel able to investigate and

prosecute violations of the legal framework that protects or outlines the right to freely associate. All officials, including those who receive reports and handle victims and those who investigate and prosecute, must be adequately trained.

### ***Assessment Inquiry***

Are laws, measures, and/or constitutional provisions protecting or limiting freedom to associate adequately published and distributed so that all relevant government officials have access to them?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 22? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 22?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Freedom of association is, like freedom of expression or of peaceful assembly, basic to the proper functioning of a democratic society. Limitations, whether imposed by a State party or a private party, must correspond with the limitations on restrictions set forth in Article 22. The legal machinery regarding the creation of new associations or the joining of existing associations must conform to the rights set forth in Article 22.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 22 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 22 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 22?

In particular, what measures of protection have been taken to ensure that appropriate limitations, especially those related to public morals, safety and order, are narrowly tailored?

What is the nature of the legal machinery of State X pertaining to the founding of new associations? What licensing or notification scheme exists with respect to associations in State X? What explanations has State X proffered to justify these limitations?

Are there informal structures that limit the exercise of the rights in Article 22 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 22?

Has the state provided the necessary resources to make the rights in Article 22 accessible? Are there obstacles to the use of these resources?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that persons complaining of denial of their freedom to associate or not associate have access to the legal procedures and/or officially designated personnel to protect their rights and freedoms, including allegations that their association rights have been violated. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 22? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect

to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 22? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 22? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 22?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 22 is derogable pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activity aimed at the destruction of the right to association guaranteed under Article 22. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee freedom of association as set forth in Article 22?

If State X has derogated from any of the provisions of Article 22 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize freedom of association as set forth in Article 22? Has State X acted to limit or restrict freedom of association as set forth in Article 22 in some other fashion?

Are any existing limitations or restrictions on the freedom of association as set forth in Article 22 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting freedom of association as set forth in Article 22?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy freedom of association as set forth in Article 22? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of freedom of association as set forth in Article 22?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to freedom of association as set forth in Article 22?

## Article 23 Family and Marriage

1. *The family is the nature and fundamental group unit of society and is entitled to protection by society and the State.*
2. *The right of men and women of marriageable age to marry and to found a family shall be recognized.*
3. *No marriage shall be entered into without the free and full consent of the intending spouses.*
4. *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

### General Commentary

Article 23 addresses the substantive rights and protections enjoyed by two interrelated social and legal institutions: family and marriage. Among the various rights set forth in Article 23 are the right to family, the right to marry, freedom of marriage, and the right to found a family. This article also establishes institutional protections to family and marriage and to the children of dissolved marriages. The rights and protections provided by Article 23 are considered derogable pursuant to Article 4(2) in times of officially proclaimed public emergencies.

Other international instruments have addressed the nature and scope of the right to form a family and to marry, including:

- Universal Declaration of Human Rights (UDHR), Article 16;
- International Covenant on Economic, Social, and Cultural Rights (ICESCR), Article 10;
- European Convention on Human Rights (ECHR), Articles 8 and 12;
- European Social Charter (ESC), Article 16;<sup>1</sup>
- American Convention on Human Rights (ACHR), Article 16;
- African Charter on Human and Peoples' Rights (ACHPR), Article 18;
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 16; and
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

Family and marital rights and institutional guarantees have achieved considerable recognition by international human rights instruments, beginning with the adoption of the UDHR. This phenomenon likely stems from the importance and status which both institutions enjoy throughout a variety of cultures and societies. However, the protections afforded to family and marriage by the ICCPR are stronger than those included in the provisions of other instruments such as Article 12 of the ECHR.<sup>2</sup>

A number of complaints involving alleged violations of Article 23 have been communicated to the Human Rights Committee (HRC), in accordance with the individual complaint mechanism established by the Optional Protocol. Although most of these cases allege violations of Article 17 family rights as well, the decisions of the Committee, combined with the General Comments, provide useful guidance in understanding several of Article 23's substantive provisions regarding the family. No individual complaints have specifically alleged violations of those marital rights and freedoms set forth in Article 23, paragraphs 2 and 3.<sup>3</sup>

**General Interpretation:** The importance and uniqueness of Article 23 flows from the nature of the protections and guarantees it affords to the family and marriage. Other provisions of the Covenant, such as Article 17 in particular, recognize rights related to the family and its members, but these rights are mostly negative in nature and attach to individual persons. Article 17, for instance, protects individuals by prohibiting any arbitrary or unlawful interference with their private and family life. In contrast, Article 23 establishes the positive duty of States parties to provide guarantees and take legislative action aimed at protecting and strengthening the family as an institution. In addition, Article 23 sets forth the obligation of States parties to ensure marital rights of both spouses on the principle of equality, and it protects children in the event a marriage is

dissolved. While distinctions between Articles 17 and 23 may be somewhat difficult to discern, the significance and uniqueness of Article 23 stems from the positive obligations it imposes on States parties to guarantee protection of the family as an institution.<sup>4</sup>

The term “family,” as it is used in Article 23, has been broadly construed to include groups of individuals bound together by a wide variety of formal or informal, as well as marital or extra-marital, relations. No standard definition of “family” presently exists due largely to differences in national and regional values and practices.<sup>5</sup> Nevertheless, there are several criteria, or minimal requirements, used to assess the existence of a family for purposes of applying Article 23. For example, these include blood relations, legal relations, in addition to “life together, economic ties, a regular and intense relationship, etc.”<sup>6</sup> Formal marital (e.g., husband-wife) or familial (parent-child) relationships do not necessarily establish a family in and of themselves. Rather, these relations must exhibit “some degree of effective family life.”<sup>7</sup> In *A.S. v. Canada*, the HRC found that, after seventeen years of separation, familial relations no longer existed between a woman and her daughter and grandson. Their formal relationships alone were not enough to qualify them as a family.<sup>8</sup> In other words, a variety of living arrangements may be construed as giving rise to familial relations, and therefore entitled to protection by the state and society, provided they are effective. Notably, traditional marriages are not considered a necessary prerequisite to establishing family life.<sup>9</sup>

**Article 23(1) Interpretation:** Article 23(1) is aimed at protecting the family against contemporary threats to the various functions it has historically performed within society. The language adopted by Article 23(1) mirrors that of Article 16 of the UDHR verbatim. Both articles contain two elements, in particular, that reveal the importance that international human rights law attaches to the family, and how states are obligated to guarantee the protection of the family.

First, Article 23(1) recognizes the family as the “natural and fundamental” unit of society. This language demonstrates universal agreement, irrespective of culture or social tradition, that the family functions in a variety of ways to benefit society as a whole. However, over time, many of these functions, including protective, educational, judicial, and economic roles, have either been transferred to public institutions or been lost altogether.<sup>10</sup> By emphasizing the important relationship between family and society, Article 23(1) implicitly seeks to ensure that the interests of families receive heightened consideration in the legal systems of States parties.

Second, Article 23(1) explicitly entitles the family to a protected existence as a social institution and obligates the State, as well as society itself, to ensure this protection. According to the HRC, protection takes the form of “legislative, administrative, or other measures” that provide the family with justiciable rights.<sup>11</sup> These measures may differ from state to state. For instance, the HRC has declared that sufficient legal protections “depend on different social, economic, political and cultural conditions and traditions.”<sup>12</sup> Nonetheless, all States parties are obliged to undertake adequate measures guaranteeing the unity of the family, and they must recognize the fact that family members enjoy a right to live together.<sup>13</sup> Moreover, States parties are under a positive obligation to provide the family with financial support, including, but not limited to, certain forms of financial assistance or favorable tax treatment.<sup>14</sup> Article 23(1) is also novel to the extent it guarantees protection for the family and obligates non-state, or social institutions, to take appropriate measures to provide this protection. Typically, the normative effect of international instruments binds States parties, not the non-state institutions or persons therein. However, this provision suggests that social institutions, possibly including faith-based organizations, may be obligated to take measures to protect the family.

**Article 23(2) Interpretation:** Article 23(2) indicates that States parties should recognize the right to marry and the right to found a family. Although Article 23(2) affirms the right to marry, this right should not necessarily be viewed as absolute. The text of Article 23(2) itself provides for a legitimate limitation on the right to marry. The article expressly limits this right to “men and women of marriageable age.” While the Covenant itself provides no guidance as to what constitutes a marriageable age, the General Comment 19 states that a marriageable age is one that allows

each individual to “give his or her free and full personal consent.”<sup>15</sup> Viewed in light of the minimum age requirement of 15 set by a UN General Assembly Resolution, adopted in association with the implementation of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, States parties appear bound to set a minimum age for marriage no lower than age 15.<sup>16</sup>

Other restrictions on “free and full consent” have been addressed by the Committee, including the pledging by others of girls in marriage for economic gain, bride prices, polygamy, and female genital mutilation as part of the marriage pact.<sup>17</sup> Certain historical prohibitions on marriage involving degree of kinship, mental incapacity, prevention of bigamy and polygamy may be permissible under Article 23, provided these restrictions are narrowly construed.<sup>18</sup> Prohibitions on marriage that restrict inter-racial or inter-religious marriages would be discriminatory in nature and would violate Article 23(2) and Article 2(1).<sup>19</sup> At this time, the Committee, despite lobbying, has declined to address the issue of same-sex marriages within the context of Article 23. It is therefore unclear whether the right to marry set forth in Article 23(2) is limited to marriages between men and women only.

The right to found a family, guaranteed by Article 23(2), is somewhat related to the right to marry. While persons enjoying the right to marry, *i.e.*, “men and women of marriageable age,” are also guaranteed the right to found a family, marriage is not considered a pre-requisite to exercising this right.<sup>20</sup> The right to found a family is considered independent from marriage, and it has been interpreted to involve instead “the possibility to procreate and live together.”<sup>21</sup> In fact, the focus of this provision is the protection against state or private interference in procreation. The HRC recognizes that States parties may adopt family planning measures provided these measures are neither discriminatory nor coercive in nature.<sup>22</sup> And, to the extent States parties adopt non-discriminatory restrictions on natural as well as artificial procreation, they must be narrowly interpreted.<sup>23</sup> Finally, the HRC has declared that Article 23(2) obligates States parties to take appropriate measures aimed at guaranteeing family unity and facilitating family reunification.<sup>24</sup>

**Article 23(3) Interpretation:** Article 23(3) recognizes freedom of marriage and guards against forced or arranged marriages by requiring the consent of the intending spouses. Each of the intending spouses must individually communicate his or her “free and full consent” to the competent authorities.<sup>25</sup> This consent requirement also imposes a duty on States parties to restrict individuals incapable of communicating consent due to mental defect or the influence of drugs and alcohol from exercising the freedom to marriage.<sup>26</sup>

**Article 23(4) Interpretation:** Article 23(4) addresses the equality of spouses in the context of marriage and provides special protection to children at the dissolution of a marriage. Article 23(4) does not vest individual spouses with justiciable rights. Instead, it obligates States parties to facilitate equality between spouses and eventually eliminate gender-based discrimination “as to marriage, during marriage, and at its dissolution.” Specifically, States parties are bound to take what Article 23(4) identifies as “appropriate measures” in order to promote the equality of rights and responsibilities of spouses. For example, this equality could encompass protections for single parent families and against discrimination in inheritance laws.<sup>27</sup> The HRC has noted that requiring one intending spouse to forfeit his or her nationality or acquire a new one in order to marry would undermine equality as to marriage.<sup>28</sup> States parties therefore should adopt legislation or enact regulations that eliminate this form of discrimination. Likewise, States parties should guarantee the right of either spouse to retain the use of his or her original family name.<sup>29</sup> Article 23(3) also obliges States parties to abolish gender-based discrimination during marriage in matters involving spousal rights as regards child-rearing and education, family finances, and other aspects of family and household maintenance.<sup>30</sup> At the time a marriage dissolves, either by death, divorce, or declaration of nullity, both spouses should be guaranteed equality, pursuant to law, with respect to inheritance, marital property, alimony, and child custody.<sup>31</sup> According to the HRC, each individual parent enjoys a right to regular contact with his or her child following the dissolution of marriage.<sup>32</sup>

In addition to providing for equality among men and women before, during, and after a marriage, Article 23(4) is also aimed at protecting the interests of children upon the dissolution of marriage. Although States parties enjoy substantial discretion in determining what measures are appropriate, they are required to adopt legislation governing child custody and alimony at the very least.<sup>33</sup> Moreover, given that a greater number of states have ratified the Convention on the Rights of the Child, the higher standard prevalent therein – e.g., “best interests of the child” – is applicable in the context of the ICCPR language “necessary protection.”<sup>34</sup> The special protection proscribed by Article 23(4) is limited to legitimate children. Those children born outside of the marriage, and therefore considered illegitimate, do not fall within the scope of protections required by this article. Instead, their rights and welfare would appear to be regulated by Article 24.

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** The ICCPR obligates States parties to protect and strengthen the family as an institution and ensure the marital rights of both spouses on the principles of equality and non-discrimination. States parties are also bound to establish a legislative and administrative framework for guaranteeing these rights. They must adopt similar measures in order to protect the family from private persons, as well as state officials.

### **Assessment Inquiry**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 23?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Establishment of marriage and the family as special institutions in private law system;
- Conceptualization and legal definition of “family;”
- Possibility for both religious and civil marriages;
- Grounds and procedures for legal separation and divorce;
- Financial support and assistance to families with and without dependent children;
- Social welfare legislation aimed at providing protection to children;
- Incentives for social institutions to support and protect families; and
- Alimony, inheritance laws, and child custody laws.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the rights and limitations with respect to the rights to marry and found a family, as well as freedom of marriage, are well-publicized. All persons should be informed of these rights and institutional protections, as well as any corresponding limitations on these rights and protections. This requirement means that a state must have trained personnel able to investigate and prosecute violations of the legal machinery that protects the institutions of family and marriage. All officials, including those who receive reports, handle complaints and those who investigate and prosecute, must be adequately trained.

### ***Assessment Inquiry***

Are laws, measures, and/or constitutional provisions for the protection of the family and marriage adequately published and distributed so that all relevant state officials have access to them?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 23? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 23?

What training programs have been initiated to educate state officials, social workers, and the clergy, about the limits on restrictions on marital rights and family protections, possible gray areas or instances requiring special attention to ensure these rights and protections, and how to handle complaints of denial of recognition? What resources have been dedicated to such training programs?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** The Covenant defines the family as the fundamental building block of society. While it is understood that different cultures define family differently, Article 23 establishes basic principles to be recognized across cultures. Because the question of family crosses public-private boundaries, it is essential that the Article 23 rights and guarantees are communicated to, and understood by, private individuals, social workers, the clergy, and state authorities.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 23 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 23 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 23?

To what extent has State X encouraged social institutions to protect the family and offer support to marriages? In particular, what measures of protection have been taken to ensure that appropriate limitations, especially those related to prohibitions on the freedom of marriage are narrowly construed?

Are there informal structures that limit the exercise of the rights in Article 23 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 23?

Has the state provided the necessary resources to make the rights in Article 23 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 23. What measures has State X taken to eliminate age distinctions in right to marry, third party marital consent requirements, polygamy, prohibitions on mixed religious marriages, limitation on rights of re-marriage, restrictions on child custody, limitations on ownership and administration of marital property, restrictions on the right to a name or nationality, and limitations on inheritance rights?

**IV. Right To An Effective Remedy And Its Enforcement:** States parties must ensure that persons complaining of denial of their marital and family rights, or a violation of the institutional guarantees afforded to the family and marriage, have access to the legal machinery and/or officially designated personnel to protect their rights and freedoms, including allegations that their fundamental rights have been violated by private individuals in addition to the state. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 23? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 23? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 23? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 23?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 23 is a derogable right pursuant to Article 4(2). In compliance with ICCPR Article 5, neither states, nor groups, nor individuals may engage in activities aimed at the destruction of the rights and protections of family and marriage guaranteed by Article 23. Moreover, no restriction of or derogation from this prohibition shall be permitted on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

#### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the rights and freedoms attached to family and marriage as set forth in Article 23?

If State X has derogated from any of the provisions of Article 23 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the rights and freedoms attached to family and marriage as set forth in Article 23? Has State X acted to limit or restrict the rights and freedoms attached to family and marriage as set forth in Article 23 in some other fashion?

Are any existing limitations or restrictions on the rights and freedoms attached to family and marriage as set forth in Article 23 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the rights and freedoms attached to family and marriage as set forth in Article 23?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights and freedoms attached to family and marriage as set forth in Article 23? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the rights and freedoms attached to family and marriage as set forth in Article 23?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights and freedoms attached to family and marriage as set forth in Article 23?

## Article 24: Rights of the Child

1. *Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State.*
2. *Every child shall be registered immediately after birth and shall have a name.*
3. *Every child has the right to acquire a nationality.*

### General Commentary

Article 24 guarantees specific basic rights of the child. Historically, rights of the child have been limited under international law, and the limited nature of Article 24 reflects the circumstances present at the time of the drafting of the ICCPR.<sup>1</sup> Article 24 protections are not considered non-derogable fundamental human rights protections within the purview of Article 4. However, children do enjoy the general protections of other Covenant provisions, which are in a number of cases non-derogable.

Other international instruments have addressed issues related to rights of the child, including:

- United Nations Universal Declaration of Human Rights (UDHR), Article 25(2);
- United Nations 1959 Declaration on the Rights of the Child;<sup>2</sup>
- American Convention on Human Rights (ACHR), Article 19; and
- Convention of the Rights of the Child (CRC).

Of these, the CRC is the acknowledged source of the most current and specific definitions of the rights of the child. The CRC is broad, covering a wide range of civil and political rights, as well as economic, social, and cultural rights. Compliance with the CRC provisions is monitored through a specialized Committee on the Rights of the Child.<sup>3</sup> The CRC has gained widespread acceptance internationally, and the United States remains one of only a handful of countries that has yet to ratify the CRC. Thus, the CRC jurisprudence is a rich source of interpretative guidance, and consistent with Article 5, the jurisprudence under Article 24 should not be considered to limit any protection secured under the CRC.

The Human Rights Committee (HRC) has not addressed a significant number of individual complaints based on Article 24. The majority of HRC guidance is found in General Comment 17 and various remarks within Concluding Observations attached to country reports.<sup>4</sup> In these remarks, the HRC has outlined the need to both combat pernicious crimes against children such as prostitution, pornography, and trafficking, and at the same time, commit resources to the rehabilitation of the child victims.<sup>5</sup>

**General Interpretation:** The HRC has made clear that Article 24 imposes a duty upon States parties to pass special protective legislation and that the specific rights provided in the text of Article 24 are not the only ones that are recognized by the Covenant. Children are generally considered to be “individuals” that enjoy the full range of rights under the Covenant. In terms of special protective legislation, substantial deference is given to the domestic legal system, acknowledging sovereign discretion on this topic.<sup>6</sup> This deference is common in the context of economic, social, and cultural rights, which these special protections typically encompass.

Implicitly, there are a number of other special protections that should be addressed, and most of these deal with the non-discriminatory application of social, economic, and cultural rights. Without providing an exhaustive list, the HRC has identified the following issues as important and warranting special consideration: 1) infant mortality; 2) malnutrition; 3) exploitation; 4) narcotic drugs; 5) education; 6) foster care; 7) right to proper treatment within a family; and 8) children in armed conflict.<sup>7</sup> Some or all of these special considerations may apply in a given context, and in cases where a number may apply, the HRC has cited Article 24 generally to criticize a state’s failure to address broad-based phenomena, such as street children and abandoned children.<sup>8</sup>

Similarly, where accepted cultural practices deprive children of other rights on a broad scale, e.g., female genital mutilation, the HRC has concluded that Article 24 works in conjunction with other articles to provide broad protection.<sup>9</sup>

Article 24 emerged from a debate that revolved around a draft version put forth by Poland and Yugoslavia that sought to protect the rights of children born out of wedlock. Substantial concerns were raised that any guarantee of completely equal status for illegitimate children *vis-à-vis* legitimate children might threaten the right to family included in Article 23.<sup>10</sup> This fundamental concern is reflected in the structure of Article 24 and in HRC commentary.

**Article 24(1) Interpretation:** The wording of Article 24(1), like its source, Article 2(1), does not establish independent, subjective rights, but rather a duty of non-discrimination in certain enumerated areas “as required by his status as a minor.” The distinction was drawn to prevent discrimination in the application of laws to minors, but at the same time to avoid guaranteeing absolute equality in all areas to illegitimate children, as in the case of the laws of inheritance, which are not specific to minors.<sup>11</sup> However, citing Articles 2 and 26, the HRC has taken a broader view by requesting States parties to address in their country reports what measures have been taken to eliminate “discrimination in every field, including inheritance.”<sup>12</sup>

Despite the reliance on the term “minor,” the definition of the term is not provided. General Comment 17 states:

[T]he Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. In this respect, States should indicate in their reports the age at which the child attains his majority in civil matters and assumes criminal responsibility.<sup>13</sup>

Furthermore, commentators have noted that a minor child is not identical to a minor adolescent, and while the age of criminal liability, which is in many cases 14-15 years of age, may serve as a general guideline, the current state of the law is not well-defined.<sup>14</sup> There are other Covenant provisions that have special applications to minors as well, e.g., Article 10(3) requiring the separation of “juvenile” offenders. In any case, where States parties have allowed age-based protections to be applied at the discretion of the parent or guardian, e.g., reduction in minimum age for marriage, the HRC has declared these provisions to be suspect.<sup>15</sup> A substantial case can be made that the CRC prescribed age of 18 is the customary norm defining the age to which minors enjoy special protection.

**Article 24(2) Interpretation:** The purpose of this paragraph is to promote the recognition of a child’s legal personality directly after birth and thereby impede trafficking and other special threats to infants. The HRC has noted that illegitimate children are particularly at risk of this type of treatment.<sup>16</sup> The registration process should provide for both a family name and a name freely chosen by the parents.<sup>17</sup> Given the central role registration plays in the enjoyment of all other legal rights, special attention should be focused on securing and sustaining a systematic approach to registration.

**Article 24(3) Interpretation:** This provision is designed to ensure that a child is not unfairly discriminated against because he or she is stateless. However, a state is not *per se* required to grant a child its nationality. Rather, a State must take internal and external measures to permit the acquisition of nationality in a non-discriminatory manner.<sup>18</sup> Thus, the vague wording of Article 24(3) requires some interpretation to give it meaning. At least one commentator has asserted that this provision should be read to give children a *jus soli* claim to nationality of the State party where they reside if they would otherwise be rendered stateless.<sup>19</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 24 generally reinforces the obligations of Articles 2 and 26, requiring each State party to guarantee the non-discriminatory application of Covenant rights to children. In accordance with their special status as minors within the legal system, the HRC has made it clear that children are entitled to special protection commensurate with the capacity of the state. Explicitly, the State party must provide for registration, naming, and acquisition of legal personality in a non-discriminatory manner. Implicitly, there are a number of other special protections that should be addressed, and most of these deal with the non-discriminatory application of social, economic, and cultural rights. Without providing an exhaustive list, the HRC has identified the following issues as important warranting special consideration: 1) infant mortality; 2) malnutrition; 3) exploitation; 4) narcotic drugs; 5) education; 6) foster care; 7) right to proper treatment within a family; and 8) children in armed conflict.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 24?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, and procedures;
- Registration and naming of infants and the acquisition of legal personality;
- Inheritance laws;
- Social welfare legislation addressing infant mortality, malnutrition, narcotic drugs, foster care, and child abuse;
- Criminal legislation addressing trafficking, narcotics, child pornography, sexual abuse, and other forms of child exploitation;
- Juvenile participation in the armed forces; and
- Child labor legislation.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** The topic of children's rights is both broad and specialized in the context of Article 24. All state enforcement authorities should be educated and equipped to apply the general human rights laws with an understanding of their special application to children. In the context of Article 24, enforcement authorities may be understood to be broader in scope than usual and may include for example public health professionals, teachers, and social workers, as well as other specialized service providers.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 24 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector? What special measures are taken to inform parents and children of the rights and duties particular to children?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 24? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable to children? What resources are dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 24?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Because children, as minors, lack legal capacity in most circumstances, Article 24 requires that special measures be taken to ensure that parents, guardians, social workers, doctors, and other responsible parties be apprised of, and equipped to pursue, the rights of children. Special procedures and enforcement measures may be necessary to ensure that legal rights are guaranteed for children. For example, simple, clear registration procedures should be readily available for new parents. Also, given the delicate and sometimes unique vulnerability of children, state authorities should be organized in a manner that addresses all aspects of child exploitation including rehabilitation—and not simply enforcement of select criminal provisions. Thus, the state should both combat pernicious crimes against children such as prostitution, pornography, and trafficking, and at the same time, commit resources to the rehabilitation of the child victims.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 24 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 24 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, children's ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 24?

Are there informal structures that limit the exercise of the rights in Article 24 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 24?

Has the state provided the necessary resources to make the rights in Article 24 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 24. What measures has State X taken to eliminate limitations on access to education and health care?

Are state officials required to consider the impact on children when formulating new policies? Describe examples of State X's efforts to secure the rights in Article 24 for all children.

**IV. Right To An Effective Remedy And Its Enforcement:** Children or, as appropriate, their guardians are entitled to an effective remedy and compensation in cases when the state fails to provide an effective remedy. Given the vulnerable position of children, special remedies may be required and additional resources may need to be committed to effectively realize the rights of children. For example, special administrative remedies may be required to ensure that the registration and naming of infants and the acquisition of legal personality may be handled on an expedited basis.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 24? How are these remedies tailored to the needs of children? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy;
- Effect of political affiliation on pursuit of such remedy;
- Special statutes of limitation in sex abuse cases;
- Special complaint procedures; and
- Special witness protection programs and counseling services.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 24? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 24?

Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel. Consider special programs such as enforcement actions aimed at the prevention of child exploitation and the rehabilitation of victims.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 24?

**V. Limitations And/Or Derogations And Scope Of Rights:** Article 24 is a derogable right pursuant to Article 4(2) during times of national emergency. In terms of the scope of Article 24 rights, Article 5 is relevant in at least several capacities. First, rights of the child are more specifically elaborated in the CRC. Thus, Article 5(2) prevents a state from using the Covenant as a basis for denying or limiting other rights guaranteed in the CRC. The fact that the Covenant might not recognize a right (*e.g.*, the economic, social and cultural rights specified in the CRC) cannot justify a state's refusal to recognize the right citing the ICCPR. Second, a state may not cite Article 24 as a basis for denying inheritance rights to illegitimate children if they are otherwise secured in applicable domestic or international law. Finally, the issue of rights for illegitimate children creates tensions with the Article 23 right to family, and developments in the jurisprudence of the two articles should be monitored for further definition in the scope of one or the other article.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the rights of the child as set forth in Article 24?

If State X has derogated from any of the provisions of Article 24 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the rights of the child as set forth in Article 24? Has State X acted to limit or restrict the rights of the child as set forth in Article 24 in some other fashion?

Are any existing limitations or restrictions on the rights of the child as set forth in Article 24 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the rights of the child as set forth in Article 24?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights of the child as set forth in Article 24? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of the rights of the child as set forth in Article 24?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the rights of the child as set forth in Article 24?

## Article 25: Rights to Vote, Petition, and Participate in Government

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) To have access, on general terms of equality, to public service in his country.*

### General Commentary

Article 25 guarantees rights of political participation to all citizens of States parties – including the right to be involved in the conduct of public affairs, the right to vote and be elected to public office, and the right to seek public service positions on an equal basis. These protections are not considered non-derogable under Article 4(2).

Other international human rights instruments have also addressed the issue of political participation, including

- Universal Declaration on Human Rights (UDHR), Article 21;
- Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5(c);
- Convention on the Elimination of Discrimination Against Women (CEDAW), Articles 7-9;
- American Convention on Human Rights (ACHR), Article 23;
- African [Banjul] Charter on Human and Peoples' Rights (ACHPR), Article 13; and
- Convention on the Political Rights of Women.

Although the European Convention on Human Rights (ECHR) has no clear counterpart to article 25, the third article of the First Protocol does express a similar concept in much narrower language.<sup>1</sup>

**General Interpretation:** Article 25 is the primary vehicle for addressing the political rights facet of the International Covenant on Civil and Political Rights. During the drafting phase, a majority of the States agreed the Covenant should include such an article, and there was minimal subsequent debate.<sup>2</sup>

Unlike civil rights, whose purpose is to protect against undue state interference, political rights protect an individuals' role in the political decision-making process and require positive enforcement measures by the States parties.<sup>3</sup> Article 25 does more than delineate State party obligations, for it also outlines subjective individual rights. The drafters used the article's opening phrase to emphasize these individual rights over the State party obligations: "Every citizen shall have the right and the opportunity..."<sup>4</sup> Although the article limits the rights to citizens, the Covenant does not stipulate how a State party determines citizenship. The criteria for citizenship are left to the discretion of States parties, but this issue should be included in their reports to the HRC.<sup>5</sup>

The rights enumerated in Article 25 are closely tied to Articles 19, 21, and 22 of the Covenant. The HRC has stated that in order to ensure the full enjoyment of Article 25 rights, the "free communication of information and ideas" – including a free press and other media – is essential, as are the freedoms of assembly and association.<sup>6</sup>

The rights guaranteed by Article 25 are also related to the right to self-determination contained in Article 1(1). However, while Article 1 gives peoples the right to determine their political status and choose their form of government, Article 25 addresses individuals' political participation rights within that established framework. Therefore, unlike Article 1 violations, alleged individual

infringements of Article 25 can be the subject of communications under the first Optional Protocol.<sup>7</sup>

In General Comment 25, the HRC also declared that, in the enjoyment of Article 25 rights, no distinction may be made among citizens based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions “between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility under Article 25,” though this has yet to be tested in any jurisprudence.<sup>8</sup> Article 25 does not prohibit States parties from conferring rights of political participation on non-citizens, as shown in General Comment 25(3): “State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.”<sup>9</sup>

The text found in the ICCPR allows for different electoral systems and recognizes the importance of participation in public life for all peoples. Although Article 25 allows for different systems of government, the HRC has written that Article 25 “lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”<sup>10</sup> Still, a number of political systems seem compatible with Article 25, including Westminster systems, presidential systems, bicameral systems, unicameral systems, unitary systems, and federal systems.<sup>11</sup>

**Article 25(a) Interpretation:** Paragraph (a) presents a general statement of the right to political participation and holds the State party accountable for ensuring that right. The first half of 25(a) guarantees citizens the right “to take part in the conduct of public affairs.” This concept refers to the exercise of legislative, executive and administrative power, as well as all aspects of public administration and all levels of policy formulation and implementation. The second half of 25(a) delineates the nature of citizens’ participation: either “directly” or “through freely chosen representatives.”

Examples of direct participation include serving as a member of the government or deciding constitutional or public issues via a referendum. In some cases, citizens may have the opportunity to participate directly in popular assemblies or consultative bodies. Where a mode of direct participation exists, “no distinction should be made between citizens as regards their participation on the grounds mentioned in Article 2(1), and no unreasonable restrictions should be imposed.”<sup>12</sup>

Examples of indirect participation include electing representatives who then implement governmental power in accordance with the law. In order to comply with Article 25, elected bodies must exercise real control in the government of the state. In cases where the elected body is merely an advisory group or does not have real control over the government, a State party may be in violation of Article 25.<sup>13</sup>

The HRC has determined that Article 25 does not give citizens the right to determine their mode of participation, and it only guarantees citizens the right of direct participation in public affairs in the specific instances of paragraphs (b) and (c). In *Marshall v Canada*, the HRC interpreted the article in this way: “Surely it cannot be the meaning of Article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.”<sup>14</sup>

The HRC made further comments on minority political rights in General Comment 23, which interprets Article 27, requiring States parties to adopt “measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>15</sup> In *Lansman v Finland* and *Lansman et al. v Finland*, the HRC interpreted this requirement to mean that minorities do have rights of direct political participation in decisions that impact their traditional cultural activities.<sup>16</sup> These decisions indicate a broader interpretation of Article 25 than the

previous assessments, and they suggest that direct participation rights may also be derived from article 27.<sup>17</sup> Pursuant to this reasoning, Article 25 should also extend similar protection to persons with disabilities, who might otherwise face obstacles to effective participation.

**Article 25(b) Interpretation:** Paragraph (b) is a specific application of the general rule expressed in paragraph (a), and it governs citizens' rights to direct and indirect participation by means of elections. This paragraph ensures voting rights for all citizens, with the "reasonable restrictions" allowed by the article's preamble. In the drafting phase, suggested potential restrictions included a minimum age requirement or the exclusion of mentally ill persons.<sup>18</sup> However, in General Comment 25, the HRC states that any such restrictions must be based on "objective and reasonable criteria,"<sup>19</sup> and it is unreasonable to restrict citizens' right to vote because of physical disability, illiteracy, educational or property requirements, or party membership.<sup>20</sup> While the drafters agreed on the need for universal and equal suffrage, the majority determined that both direct and indirect suffrage were acceptable.<sup>21</sup> Though this flexibility allows for some discretion as to electoral structure, administration of the electoral process itself should be systematic and predictable in accordance with rule of law. Thus, arbitrary postponement of scheduled elections is inconsistent with Article 25.<sup>22</sup>

Unlike Article 3 of the 1<sup>st</sup> Additional Protocol to the ECHR, Article 25(b) does not specify which government positions should be filled by election.<sup>23</sup> Instead, this subparagraph calls for elections that are "genuine" and "periodic" – both vague terms that were pulled from the UDHR. Together, these terms imply that elections must be held at regular intervals and provide voters with a free choice among legitimate alternatives.

Paragraph (b) calls for "genuine periodic elections" in order to maintain accountability of elected representatives. The HRC has elaborated on this concept in General Comment 25, indicating that genuine elections have the following qualities:

"Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind."<sup>24</sup>

In the subsequent paragraph of the General Comment, the HRC states the parties should establish an independent electoral authority to monitor the election process.<sup>25</sup> The HRC also suggests that campaign finance restrictions and outside election observers might be useful in securing genuine elections.<sup>26</sup>

The description of "genuine periodic elections" was also intended to leave States parties the power to regulate their own electoral systems, so long as each vote carried equal weight.<sup>27</sup> In effect, this calls for a "one person, one vote" system. General Comment 25 indicates that the "drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely."<sup>28</sup> In *Matyus v. Slovakia*, the HRC found a violation of Article 25 because the electoral system failed to provide for an even distribution of voters among districts.<sup>29</sup>

Paragraph (b) also calls for secret ballots to protect the expression of the will of the electors. This was the least disputed electoral quality, and it can be considered the "best guarantee for free elections, mainly protecting minorities against the majority."<sup>30</sup> This concept includes actions taken to guarantee the secrecy of the vote and "implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted."<sup>31</sup> Additionally, the State should provide security and scrutiny of the counting process and should ensure access to judicial review or other equivalent process.

The HRC has interpreted paragraph (b) to include positive state obligations beyond the maintenance of genuine elections. States parties must also take effective measures to ensure that all citizens have the opportunity to vote, regardless of region, language, literacy, education, poverty, or other disadvantaged status. This may require voter education and voter registration campaigns.<sup>32</sup>

Article 25(b) also protects the right of citizens to stand for election. For Article 25(b) to be an effective guarantor of voting rights, there must be a free choice of candidates. Any restrictions on candidacy must be based on objective and reasonable criteria, and persons otherwise eligible to stand for election should not be excluded because of discriminatory requirements. Legitimate restrictions may include a minimum age, and restrictions on the right to stand for election may be more limiting than restrictions on the right to vote.<sup>33</sup> In its jurisprudence, the HRC has indicated that both membership in a fascist party and the occupation of a position deemed incompatible with elected office are legitimate reasons to restrict candidacy.<sup>34</sup>

Article 25 allows a State party to deprive citizens of their rights under paragraph (b) when it has objective and reasonable criteria regulated by law. For example, States parties may deny persons convicted of serious crimes their right to vote. However, in such cases, the length of suspension must be proportionate to the offence.<sup>35</sup>

The HRC has determined that 15 years is an excessive period of suspension. In a series of individual communications against Uruguay from 1977 to 1979, the country's *Acto Institucional* No. 4 of 1 September 1976 was called into question. The Act restricted the political rights of all citizens who had been candidates for elected office from a certain political party in 1966 and 1971. These citizens were deprived of their political rights – including the right to vote – for a period of 15 years. The HRC did not accept the state's argument that it had availed itself of the right of derogation and concluded that “by prohibiting the authors of the communication from engaging in any kind of political activity for a period as long as 15 years, the State party has unreasonably restricted their rights under article 25 of the Covenant.”<sup>36</sup>

Even without overt discrimination or illegal interference, it is possible that modern elections suffer from structural flaws that tend to perpetuate the existence of a ‘ruling elite’ and uphold a limited number of political parties and agendas. These systematic defects may innately contradict article 25, but it is unlikely that the HRC will address these complex issues under this article. However, other articles may be used to address these underlying structural problems that limit access to the political system. For example, women may have traditionally been excluded from political life, and it may require the state to take special measures to ensure proper political participation as required by Article 25 operating in conjunction with Articles 3 and 26.<sup>37</sup>

**Article 25(c) Interpretation:** This subparagraph deals with the “right and opportunity of citizens to have access on general terms of equality to public service positions.”<sup>38</sup> This includes objective and reasonable criteria for appointment, promotion, suspension and dismissal. The drafters intended this paragraph to preclude a privileged class from dominating the public service sector.<sup>39</sup>

Article 25(c) does not guarantee citizens a public service position, only a fair opportunity to obtain one.<sup>40</sup> Like the restrictions on the right to stand for election, the HRC has indicated that the restrictions on the right to be appointed to public office can be more limiting than on the right to vote. Paragraph (c) prohibits discrimination on the basis of political opinion. However, traditionally some public service appointments, such as the head of a state's secret service, have been influenced by political views, and such political input at senior levels remains uncontested under article 25.

The HRC has not provided a clear definition of public service. In addition to unelected positions within the executive, judicial, legislative, and executive branches, HRC jurisprudence has also included those employed in public education. The process of privatization may reduce the

number of public service jobs, but in *B.d.B. v The Netherlands*, the HRC indicated that a State party “is not relieved of obligations under the Covenant when some of its functions are delegated to other autonomous organs.”<sup>41</sup>

Paragraph (c) also requires States parties to protect the working environment of current public servants. In *Paez v Colombia*, the author was a public school teacher who claimed to have been harassed by the local religious authorities and persecuted by the Colombian government. The HRC concluded that “this constant harassment and the threats against his person (in respect of which the State party failed to provide protection) made the author’s continuation in public service teaching impossible.”<sup>42</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation to Enact Appropriate Legislation:** To comply with Article 25, a state must enact legislation that establishes political participation rights. States must establish legal provisions that define citizenship and prescribe restrictions on citizens’ rights to vote, stand for election, or seek public service positions.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 25?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

How have Counter-terrorism plans, measures, and procedures affected State X’s guarantee of Article 25 rights?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:**

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 25 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 25? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 25?

Is corruption and bribery associated with a public office a punishable offense?

Are civic education programs in place to ensure that all individuals are aware of their political rights?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Article 25 rights are only effective if methods of direct and indirect political participation are readily available and useful to citizens. To this end, States parties must make a positive effort to ensure all eligible persons can exercise their right to vote. This may require voter education and registration campaigns, voting information in minority languages, and photographs and symbols on voting materials.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 25 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 25 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 25?

Is abusive interference with voter registration and coercion of voters prohibited by penal law? Are such laws strictly enforced?

Where registration of voters is required, is it facilitated by the State? Are there obstacles to such registration? If residence requirements apply to registration, are they reasonable? Do they exclude the homeless from the right to vote? Are citizens abroad entitled to vote?

Are there informal structures that limit the exercise of the rights in Article 25 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 25?

Has the state provided the necessary resources to make the rights in Article 25 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 25. In addition, what measures has State X taken to promote provisions securing and promoting equal access to public affairs and public office?

Are special provisions in place to ensure that those who are not eligible to vote may have their political views considered, e.g., children, non-citizens, and non-residents?

**IV. Right To An Effective Remedy And Its Enforcement:** Citizens are entitled to an effective remedy and/or compensation when the State party fails to uphold the rights guaranteed under Article 25. Citizens are also entitled to judicial review of election results.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 25? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 25? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 25? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 25? Specifically, has the State party provided for a central election authority? If so, is the authority structured and resourced to handle difficulties as they arise in elections? Does it provide for a cross-section of political views?

**V. Limitations And/Or Derogations And Scope Of Rights:** Pursuant to Article 4(2), Article 25 is a derogable right during times of national emergency. Under ordinary circumstances, Article 25 permits limitations on the rights of political participation; however, those limitations must be

specified by law and have objective and reasonable criteria. While the scope of Article 25 is restricted to citizens, in keeping with Article 5, States parties should not use this as a basis for denying rights to non-citizens or conferring rights to non-citizens in a discriminatory manner.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee rights of political participation as set forth in Article 25?

If State X has derogated from any of the provisions of Article 25 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the rights of political participation as set forth in Article 25? Has State X acted to limit or restrict the rights of political participation as set forth in Article 25 in some other fashion?

Are any existing limitations or restrictions on the rights of political participation as set forth in Article 25 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the rights of political participation as set forth in Article 25?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights of political participation as set forth in Article 25? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of rights of political participation as set forth in Article 25?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the rights of political participation as set forth in Article 25?

## Article 26: Right to Equality Before the Law and Equal Protection

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### General Commentary

Article 26 provides an independent basis, as opposed to accessory, for securing “equality” in the enjoyment of human rights. Though this article is typically cited in conjunction with the more accessory provisions found in Articles 2 and 3, it does not depend on them, nor is it wholly subsumed within them. However, an understanding of its complex relationship with these related articles has proven difficult to articulate. The drafting history underlying Article 26 is both lengthy and contentious, and an analysis of the *Travaux Préparatoire* is particularly nuanced.<sup>1</sup> Nevertheless, three basic themes can be identified in the text of Article 26: non-discrimination, equality before the law, and equal protection of the law. In General Comment 18, the HRC emphasized the significance of these principles:

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights....Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>2</sup>

Consequently, a state is obligated to apply the principle of non-discrimination in the design of laws (“equal protection”) and enforcement of the law (“equality before the law”).<sup>3</sup>

Other international instruments have addressed issues related to the right to equality before the law, including:

- Universal Declaration of Human Rights (UDHR), Article 7;
- European Convention on Human Rights (ECHR), Article 14;
- American Convention on Human Rights (ACHR), Articles 1 and 24;
- International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 3;
- Convention on Elimination of Discrimination Against Women (CEDAW); and
- Convention on the Elimination of All Forms of Racial Discrimination (CERD).

As the last two conventions underscore, certain types of discrimination—in the cases cited, gender and race—are considered so pernicious as to warrant entirely separate conventions. Regardless of whether a state has adopted one of these conventions, discrimination may be systemic and warrant special protection, and these two categories are sometimes protected through positive discrimination in the form of “affirmative action,” which is utilized to offset institutionalized discrimination. The Human Rights Committee (HRC) has sanctioned the propriety of this type of protective discrimination as a permissible expression of the principle of equality under the Covenant.<sup>4</sup>

In accordance with Article 4(1), protection against discrimination on the basis of race, color, sex, language, religion or social origin is a non-derogable right, and therefore, discrimination on these bases is not permitted even in the event of an emergency threatening the life of the nation.

However, because Article 4(1) does not precisely track the language of Article 26, the status of all Article 26 protections may not be non-derogable, e.g., political or other opinion.

**General Interpretation:** Despite the ambiguous relationship between the Article 2 and 26 prohibitions against discrimination, the Human Rights Committee has clearly distinguished Article 2 on the basis of its accessory character. In *Danning v. The Netherlands*, the HRC, citing the Vienna Convention on the Law of Treaties, stated that the “ordinary meaning” of Article 26 should prevail.<sup>5</sup> Thus, the fact that the *Travaux Préparatoires* is “inconclusive” should not lead to the conclusion that the protections are redundant.<sup>6</sup> The HRC noted that Article 26 “derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated or protected by public authorities.”<sup>7</sup>

The HRC later elaborated on this theme in General Comment 18:

In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right...In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.<sup>8</sup>

Examples of non-Covenant rights within the ambit of Article 26 include economic and social rights as well as additional civil and political rights. In terms of the former, the HRC has held that the economic right to social security—while not a Covenant right—falls within the protection of Article 26 once a state chooses to grant it.<sup>9</sup> In terms of the latter, the HRC has found that, while the Covenant does not explicitly provide for the right to conscientiously object to military service, Article 26 protects against discrimination where national legislation provides for special treatment such as alternative public service.<sup>10</sup> Similarly, the HRC has taken a critical view of state health care and education programs that failed to address the needs of women in a non-discriminatory manner.<sup>11</sup>

**Equality Before the Law:** The concept of equality before the law essentially requires judges and other state officials charged with the enforcement of human rights provisions to refrain from arbitrary conduct in the execution of their duties. Prohibited arbitrary conduct includes both the failure to treat similarly situated individuals equally and the failure to distinguish differently situated individuals and treat them accordingly. Thus, enforcement decisions that discriminate based on any of the prohibited categories in Article 26 warrant scrutiny to determine whether there are arbitrary, as opposed to reasonable and objective, considerations involved. This inquiry is difficult because discrimination is increasingly subtle, and decisions do not typically reflect prohibited discrimination overtly. Thus, while Article 14 also includes the concept of equality before the law, the principle has proven difficult to enforce, and consequently, jurisprudence on the topic is limited. Further complicating the matter is that the distinction between “equality before the law” and “equal protection of the laws” may be obscured in situations where an enforcement official seeks to enforce a law that violates “equal protection” principles.<sup>12</sup>

The HRC treatment of potential arbitrary government conduct has demonstrated a cautious approach. In *Blom v. Sweden*, the HRC examined whether the processing of a private school’s application for certain government authorizations and benefits “was unduly prolonged.”<sup>13</sup> The HRC concluded that the eight months of processing did not evidence discrimination.<sup>14</sup> In *Guathier v. Canada*, the HRC examined whether the denial of parliamentary press pass to a journalist constituted an arbitrary denial of his Article 26 rights. While the majority found the complaint to be inadequately substantiated, four members found the denial of the pass “without specifically identifying the reasons” to be “arbitrary” and a violation of Article 26.<sup>15</sup>

**Equal Protection of the Laws:** The concept of equal protection of the laws requires lawmakers to refrain from formulating and issuing legal provisions that discriminate against individuals on the basis of certain impermissible distinctions. The term “equal protection” was introduced in the 14<sup>th</sup>

Amendment to the U.S. Constitution to ensure the abolition of slavery. Its use has now expanded to cover a number of issues that are essential for realization of equality in the enjoyment of human rights.<sup>16</sup>

**Discrimination:** The HRC has made clear that the definition of impermissible discrimination focuses on substance as opposed to form. In General Comment 18, the HRC states, “[T]he term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction, or preference which is based on [the enumerated grounds], and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>17</sup>

Cultural and social practices can create a climate of discrimination that impermissibly restricts the rights of individuals, and States parties should scrutinize these practices with the understanding that “prevailing social attitudes cannot justify the failure by the State party to comply with its obligations.”<sup>18</sup> The HRC has been particularly explicit when addressing the problem in the context of women’s rights. Citing Articles 3 and 26 together, the HRC has urged States parties to “sensitize the population...by eradicating all traditional and stereotypical attitudes that deny women equality.”<sup>19</sup> In a similar vein, the HRC has called for vigorous enforcement of anti-trafficking and domestic violence legislation.<sup>20</sup>

**Permissible Discrimination:** While state differentiation on any of the enumerated grounds warrants scrutiny, certain types of differentiation may not per se result in “discrimination” that violates Article 26. For example, as noted above, discriminatory affirmative action legislation may be an appropriate remedy for institutionalized discrimination. Furthermore, other types of discriminatory legislation may be permissible. Whether discriminatory legislation violates Article 26 depends on whether “the criteria for such differentiation are reasonable and objective and [whether] the aim is to achieve a purpose which is legitimate under the Covenant.”<sup>21</sup> This HRC test is fact intensive, and it calls for a detailed examination of all the factors involved in a particular case. The result of this case-by-case approach has been that HRC decisions yield very limited guidance as to how to evaluate future cases.<sup>22</sup>

For example, imposing periods of alternative public service on conscientious objectors that exceed the normal duration of military service may, or may not, be held to be “objective and reasonable.” In *Järvinen v. Finland*, the HRC held that four extra months were “reasonable and objective.”<sup>23</sup> The HRC reviewed the *ratio legis* and determined that the legislation was based on “practical considerations” and lacked a “discriminatory purpose.”<sup>24</sup> While the HRC concluded the impact of the legislation worked to the “detriment” of conscientious objectors, the HRC also concluded that the legislation was “not merely for the convenience of the State alone.”<sup>25</sup> Contrast *Foin v. France* where the HRC found that an extra year of alternative service did in fact violate Article 26. The State party asserted generally that the purpose of the additional year was to “test” the conscientious objector’s philosophical commitment, but the HRC considered this general rationale to be an insufficient justification for discrimination “on the basis of his conviction of conscience,” and thus, the discrimination failed the reasonable and objective test.<sup>26</sup>

In addition to the *ratio legis*, the HRC examines the discriminatory impact of legislation, and a benign purpose will not necessarily insure that legislation will satisfy the requirements of Article 26. In *Adam v. Czech Republic*, the HRC examined the Czech government’s rejection of non-citizen restitution claims, which originated from descendants of political refugees. The HRC concluded that the imposition of a citizenship requirement was “unreasonable” discrimination when the state had caused the departure of the claimants’ parents as political refugees.<sup>27</sup> State arguments regarding the benign intent of the legislature were rejected, and the HRC noted, “Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory.”<sup>28</sup> While impact is clearly important, the HRC may narrowly construe discriminatory impact of legislation. In a case involving restrictions against non-French language advertising in Quebec, the HRC ruled that it restricted both French and

English speaking merchants, and therefore, it did not constitute a violation against the complainants “on the ground of their language.”<sup>29</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** Article 26 generally reinforces the obligations of Articles 2 and 3 and expands their application, requiring each State party to guarantee the non-discriminatory application of all laws. In this regard, the HRC has made it clear that Article 26 covers all rights, not only those of the Covenant, that are provided in the domestic legal system. Explicitly, the State party must ensure “equal protection of the laws.” The concept of equal protection of the laws requires lawmakers to refrain from formulating and issuing legal provisions that discriminate against individuals on the basis of certain impermissible distinctions. The HRC has made clear that the definition of impermissible discrimination focuses on substance as opposed to form. While state differentiation on any of the enumerated grounds warrants scrutiny, certain types of differentiation may not *per se* result in “discrimination” that violates Article 26. The HRC tests suspect treatment and legislation to determine whether the criteria for differentiation are “reasonable and objective” and whether these criteria are tailored to achieve a legitimate Covenant purpose. This test implies an examination of both the purpose and impact of the legislation itself, and a facially benign legislative purpose will not suffice if the legislation unreasonably or subjectively restricts the enjoyment of human rights otherwise secured in the Covenant or domestic legal system.

### **Assessment Inquiry**

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 26?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, or procedures;
- Cultural or social practices that might create a climate of discrimination;
- Especially vulnerable classes of individuals, including but not limited to nomads, internally displaced, mentally impaired, etc.;
- Compulsory military service and the terms and conditions of alternative service;
- Health care and education programs relating to women;
- Family law and specifically any associated gender based distinctions;
- Social welfare legislation including social security, health care, and pensions;
- Education legislation and specifically any terms and conditions on access; and
- Restitution legislation addressing claims against the state.

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** Discrimination in the enjoyment of legal rights is construed broadly in the context of Article 26. All state enforcement authorities should be educated and equipped with an understanding of the necessity to avoid any impermissible discrimination. In the context of Article 26, enforcement authorities may be understood to be broader in scope than usual and should include all government officials charged with dispensation of benefits or otherwise authorized to restrict rights and privileges.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 26 adequately published and distributed?

What special measures are taken to distribute these materials both within the formal legal sector to judges, prosecutors, lawyers, and enforcement officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 26? What training programs are in place for both legal and non-legal professionals regarding the special rights and duties applicable? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article X?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** Because discrimination may be both subtle and pervasive, Article 26 requires that special scrutiny be applied to the actions of government officials with decision-making authority. The concept of equality before the law essentially requires judges and other state officials charged with the enforcement of human rights provisions to refrain from arbitrary conduct in the execution of their duties. Prohibited arbitrary conduct includes both the failure to treat similarly situated individuals equally and the failure to distinguish differently situated individuals and treat them accordingly. Thus, enforcement decisions that discriminate based on any of the prohibited categories in Article 26 warrant scrutiny to determine whether there are arbitrary, as opposed to reasonable and objective, considerations involved.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 26 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 26 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 26?

Are there informal structures that limit the exercise of the rights in Article 26 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;

- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 26?

Has the state provided the necessary resources to make the rights in Article 26 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 26. What measures has State X taken to eliminate discrepancies in punishment for crimes such as adultery, customs and traditions that impede access to better employment and equal pay, and gender-based limitations on access to government services including education?

Are state institutions and services administered in a non-discriminatory manner?

**IV. Right To An Effective Remedy And Its Enforcement:** Individuals are entitled to an effective remedy and compensation in cases when the state fails to provide an effective remedy. Given the vulnerable position of certain groups to discrimination, special remedies may be required and additional resources may need to be committed to effectively realize the rights of individuals in certain groups. For example, special administrative remedies may be required to ensure that individuals subject to potentially "arbitrary" government decisions have a means of challenging the rationale for the decision.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 26? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to,
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect

to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 26? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 26? Consider special programs such as enforcement actions aimed at the prevention of improper discrimination, e.g., equal employment opportunity commissions or other institutions charged with eliminating impermissible discrimination. Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 26?

**V. Limitations And/Or Derogations And Scope Of Rights:** In accordance with Article 4(1), protection against discrimination on the basis of race, color, sex, language, religion or social origin is a non-derogable right, and therefore, discrimination on these bases is not permitted even in the event of an emergency threatening the life of the nation. However, because Article 4(1) does not precisely track the language of Article 26, some Article 26 protections may be derogable. In times of national emergency, derogations based on political or other opinion, national origin, property, birth or other status should be monitored closely. In terms of the scope of Article 26 rights, Article 5 is particularly relevant in terms of certain classes of individuals, women and racial minorities, which have extensive rights and guarantees provided in CEDAW and CERD. Thus, Article 5(2) prevents a state from using the Covenant as a basis for denying or limiting other rights guaranteed in CEDAW and CERD. The fact that the Covenant might not recognize a right (e.g., rights specified in the aforementioned) cannot justify a state's refusal to recognize the right citing the ICCPR. Also, a state may not cite Article 26 as a basis for denying permissible discriminatory rights to protect certain classes of individuals if they are otherwise secured in applicable domestic or international law.

### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to guarantee the right to equality before the law and equal protection as set forth in Article 26?

If State X has derogated from any of the provisions of Article 26 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize the right to equality before the law and equal protection as set forth in Article 26? Has State X acted to limit or restrict the right to equality before the law and equal protection as set forth in Article 26 in some other fashion?

Are any existing limitations or restrictions on the right to equality before the law and equal protection as set forth in Article 26 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting the right to equality before the law and equal protection as set forth in Article 26?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to equality before the law and equal protection as set forth in Article 26? Does State X prohibit by law non-state actors from engaging in activities

aimed at the limitation or restriction of the right to equality before the law and equal protection as set forth in Article 26?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy the right to equality before the law and equal protection as set forth in Article 26?

## Article 27: Protections for Minorities

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

### General Commentary

Article 27 specifies distinct rights owed by States parties to specific types of individuals that may be present on the territory of any State party. The issue of protecting minorities specifically was hotly debated during the drafting of the ICCPR, especially as between countries favoring an assimilation approach and those favoring granting specific protections.<sup>1</sup> In recent decades, the issue has again appeared in the context of the drafting of international instruments with provisions protecting collective rights and the specific rights of indigenous persons.<sup>2</sup> In addition to the ICCPR, other major international human rights instruments providing for related or similar protections for persons belonging to minorities of their rights to enjoy, practice, or use their specific culture, religion or language, including the:

- European Convention of Human Rights (ECHR), Article 14;
- European Charter for Regional or Minority Languages;<sup>3</sup>
- United Nations International Covenant on Economic, Social, and Cultural Rights (ICESCR), Article 2;
- United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- UNESCO Declaration on Fundamental Principles concerning the Contribution to the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War;<sup>4</sup>
- United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; and
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.<sup>5</sup>

**General Interpretation:** The Human Rights Committee has endeavored to ensure that the rights guaranteed by Article 27, which are dealt with elsewhere in the Covenant both explicitly and implicitly, are not subsumed.<sup>6</sup> The Committee has emphasized that Article 27 supplements other rights that members of minorities, as individuals, are already entitled to enjoy and, further, that these rights should be protected as collective, cultural rights and not be subsumed under other, personal rights.<sup>7</sup> For example, the HRC has emphasized that Article 27 has a decidedly different character than other articles. On the one hand, the latter articles are of general application, while Article 27 addresses specific issues pertaining to minorities. On the other, like the Article 2(1) obligation to ensure Covenant rights are provided to those on a state's territory, regardless of citizenship, Article 27 obligates states to protect those who belong to a particular group and does not require those protected to be citizens of the state.<sup>8</sup> Likewise, Article 27 is distinct from Article 1: the right to enjoy, practice, or use one's own culture, religion, or language is not contiguous with the right to self-determination.<sup>9</sup>

In terms of cases, the Human Rights Committee has interpreted Article 27 frequently, and quite flexibly. Article 27 has been the subject of a vigorous and rich Committee practice. In addition, there are significant parallels to be drawn between the practice of the Committee on this subject and the work of other treaty bodies, especially the Committees on Economic, Social, and Cultural Rights (CESCR) and on the Elimination of Racial Discrimination (CERD).<sup>10</sup> What follows is only a brief summary.

The HRC has made clear that Article 27 is "directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned" thereby

enriching all of the society.<sup>11</sup> However, the Committee has also indicated that the enjoyment of Article 27 rights should not prejudice either the sovereignty or the territorial integrity of the State party.<sup>12</sup> The HRC in a pair of related decisions concerning the rights of the Saami people in Finland has indicated that economic activity can be cultural, that adapting modern techniques to such activity does not make it any less cultural, and, most importantly, that it will give states latitude in its determinations whether state activity that benefits the entire state has a negative impact on a minority culture.<sup>13</sup>

A number of important questions have been raised in the context of State party observance of Article 27. One such question with which commentators and United Nations experts alike struggle is “who is a minority?” No fixed definition exists. The Committee has indicated generally that the term is understood to encompass “those who belong to a group and who share in common a culture, a religion, and/or a language.”<sup>14</sup> The Committee has not accommodated States parties’ assertions that minorities do not exist in its territory.<sup>15</sup> Likewise, the Committee has not countenanced particularly restrictive definitions of who may constitute a minority.<sup>16</sup>

The question of majority status may play a role in determining who is a minority. Thus, a group constituting a majority within a State party (e.g., speakers of English in Canada) cannot comprise a minority, even if they are numerically inferior to others within a particular locale (e.g., Quebec).<sup>17</sup> The Committee has indicated that the “concept of minority” cannot be limited to those who are nationals of the state concerned.<sup>18</sup> Neither can the definition of a minority be confined to one indicator of minority status.<sup>19</sup> In addition, the term “minority” is intended to encompass everyone who is not part of the majority, whatever their distinctiveness. Thus, States parties cannot limit the definition to include only “national” minorities or only the largest of the minority groups.<sup>20</sup>

The Committee has also generally indicated a lack of specificity about what the term “culture” may encompass. The text of the article can be read to equate ethnicity with culture. However, the Committee has noted that “ethnic, religious, and linguistic minorities have a right to their own cultural life.”<sup>21</sup> Other questions that may complicate the issue of who may constitute a minority include caste systems and indigenous groups (especially those who may be nomadic across state borders).<sup>22</sup> Both are effectively treated as minorities, though the latter are also separately the subjects of international legal instruments, the Human Rights Committee has indicated that indigenous peoples are minorities for purposes of Article 27.<sup>23</sup>

In its consideration of states’ reports, the Committee has regularly taken issue with instances of harassment, xenophobia, racism, and discrimination occurring on the territory of a State party.<sup>24</sup> It has also frequently addressed state practice with respect to its treatment of minorities, addressing issues such as discrimination in police treatment and competition for use of public and private land.<sup>25</sup>

## **Assessment Guidelines**

**I. State Has A Legal Obligation To Enact Appropriate Legislation:** The ICCPR requires signatory states to ensure that ethnic, religious, or linguistic minorities that exist in the state are not denied the right to enjoy, practice, or use their culture, religion, or language, as appropriate. State legislation implementing Article 27 must be carefully crafted in terms of its scope. A State party to the Covenant may not restrictively define membership in a minority.

In addition, the practices protected by Article 27, most notably culture, manifest themselves in many forms. States may therefore be obligated to provide positive legal protections to ensure that minority group members are able to exercise their cultural rights freely and/or participate in decisions that affect their rights to do so. Likewise, Article 27 expressly protects religious and linguistic minorities. States therefore shall not prescribe or enforce a state religion or a single language, though a state may have an “official” language. However, states are not required to go to extreme measures.

### ***Assessment Inquiry***

What constitutional guarantees are there for people under the jurisdiction of State X, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that State X will respect and ensure the rights contained in Article 27?

What laws guarantee people under the jurisdiction of State X this type of protection?

What administrative rules or decisions guarantee people under the jurisdiction of State X this type of protection?

In addition to the matters noted, consider the following in your description:

- Counter-terrorism plans, measures, or procedures;
- Patterns in or frequency of occurrences of harassment, racism, xenophobia, or discrimination;
- Denials of the existence of minorities on State X's territory; and
- Use by State X of qualifications or classifications of minorities (e.g., "national minorities").

Given that minorities often suffer mistreatment at the hands of state law enforcement officials, has State X consulted, as part of its efforts to comply with Article 27, other relevant international standards, such as the United Nations Minimum Standard Rules for the Treatment of Prisoners, the United Nations' Code of Conduct for Law Enforcement Officials, and the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice? If so, how have these standards influenced local law?

**II. Legal Standards Should Be Publicized And State Officials Charged With Enforcement Should Be Properly Trained:** States parties have an obligation to ensure that the protection of minorities, as guaranteed under Article 27 and the State's own implementing legislative, judicial, and administrative measures, be well-publicized. Prosecutors, lawyers, judges, police officers, and other state officials involved in the handling of situations that involve, or might involve, abuse of the protection of minorities must be informed of the rights to which suspects are entitled and sufficiently trained to adequately guarantee that those rights are provided. Also, the general public should be made aware of these standards and the methods whereby these officials are held accountable for their enforcement.

### ***Assessment Inquiry***

Are laws reflecting the rights in Article 27 adequately published and distributed? How is the protection of ethnic, religious, or linguistic minorities publicized?

What special measures are taken to distribute these materials both within the formal legal sector to judges, lawyers, prosecutors, and police officers and without to teachers, social workers, and the non-governmental sector?

Are state officials given specific training on the relevant standards involved in the enforcement of the rights embodied in Article 27? What training programs are in place for both legal and non-legal professionals regarding the standards protecting against the arbitrary interference of the protection of minorities? What resources have been dedicated to such training programs?

Are state officials given specific training on the relevant traditional, historical, religious or cultural attitudes that may cause improper gender-based discrimination in the enforcement of the rights embodied in Article 27?

Are citizens and state officials informed of the procedural guarantees to all persons being investigated by the state or private party?

Are state officials trained to investigate potential violations of the protection of minorities by the state itself?

**III. Covenant Rights Should Be Made Useful And Accessible To Individuals:** All States parties have an obligation to ensure that legal processes are functional and available to implement the rights secured in Article 27. Thus, to ensure that the protection of minorities is not subject to arbitrary violations by the state itself, the State party must provide a functioning, readily accessible mechanism capable of holding the state itself responsible for violations of the state's own legislation and/or Article 27.

### ***Assessment Inquiry***

Has State X taken the necessary measures to make sure the legal standards and procedures regarding the rights in Article 27 are accessible to all individuals within the jurisdiction of State X? Describe examples of State X's efforts to secure the rights in Article 27 for all individuals, regardless of location or status. Consider the following in this description:

- Existing enforcement mechanisms such as the police, national human rights institutions, ombudsman, etc.;
- Legal aid;
- Counter-terrorism plans;
- Human rights training in state institutions, including the formal school system;
- Human rights materials in the necessary languages and tailored to the audience level;
- Informal human rights training outside the academic context;
- Mechanisms employed to overcome systemic challenges to the dissemination of information (e.g., geographic barriers); and
- Use of formal and informal media.

Are the measures effective in preventing the abuse of the rights in Article 27?

Are there informal structures that limit the exercise of the rights in Article 27 that State X could do more to address? What do reformers recommend to address these barriers? Consider the following in this discussion and, in particular, the effect of a combination of any of the following:

- Alien, refugee, stateless or IDP status;
- Distinctions based on gender, marital status, or sexual orientation;
- Distinctions based on wealth, mental or physical health, and age;
- Discrimination on the basis of race or ethnicity;
- Business practices;
- Social mores and cultural practices;
- Religious practices;
- Linguistic issues; and
- Political tensions.

Are there state programs that promote tolerance for differences in how individuals choose to exercise their rights in Article 27?

Has the state provided the necessary resources to make the rights in Article 27 accessible? Are there obstacles to the use of these resources?

Describe examples of State X's efforts to protect the equal rights of women to enjoy the protections in Article 27. What measures has State X taken to monitor and restrict minority

cultural, religious, or language rights that could limit a woman's access to equal enjoyment of Covenant rights?

**IV. Right to an Effective Remedy and its Enforcement:** States parties must ensure that persons complaining of denial of their freedoms relating to the protection of minorities be granted access to legal machinery and/or officially designated personnel to protect their rights and freedoms. Alleged victims must not simply be able to bring suspected violations to the attention of state officials, but also must have effective remedies at their disposal.

#### ***Assessment Inquiry***

Has State X provided a meaningful remedy for violation of the rights, obligations, or freedoms set forth in Article 27? What is the nature of the legal foundation for such remedy (e.g., constitution, statute, or administrative)? Describe the nature of, the process for pursuing, and any limitations, including direct and indirect obstacles, on the exercise of this remedy. Please take account of the following in your description:

- Procedural obligations;
- Uniformity of availability of such remedy;
- Expenses related to pursuing such remedy, including the possibility of compensation for an established violation of a Covenant provision;
- Effect of personal status on pursuit of such remedy, including but not limited to:
  - Alien, refugee, or IDP,
  - Gender, marital, or sexual orientation,
  - Wealth/poverty, mental or physical health, or age,
  - Race or ethnicity, or
  - Linguistic capability;
- Effect of cultural or religious precepts on pursuit of such remedy; and
- Effect of political affiliation on pursuit of such remedy.

If such remedy is judicial, consider also the status of the independence of the judiciary charged with jurisdiction over this remedy. If State X is a federal state, consider whether this jurisdiction is sufficient to make the remedy effective. What enforcement powers exist for exercise with respect to enforcing this remedy? Consider issues relating to compensation, injunctive or similar equitable relief, and administrative measures.

What procedures exist for the investigation and prosecution of state officials for violations of Article 27? Has State X initiated special programs to raise awareness of the possibility of pursuing remedies in cases of violation of the rights, obligations, or freedoms of Article 27? Describe such programs, taking into account questions of earmarking of sufficient resources and training and empowerment of personnel.

Has State X established indirect means, such as ombudspersons or notice and comment procedures, of seeking a remedy for violation of the rights, obligations, or freedoms of Article 27?

**V. Limitations and/or Derogations and Scope of Rights:** Pursuant to Article 4(2), the protection of minorities is not included as a non-derogable right, and therefore, it can be suspended in the event of an emergency threatening the life of the nation.

#### ***Assessment Inquiry***

Are there any circumstances in which State X has derogated from its obligation to protect minorities as set forth in Article 27?

If State X has derogated from any of the provisions of Article 27 did it do so in accordance with Article 4? Did State X proclaim the existence of a state of emergency and inform the United

Nations Secretary General of the derogation measures and the reasons why these measures were adopted? How were measures in derogation introduced and what time limits, if any, were attached to these measures?

Does State X have any existing laws, conventions, regulations, or customs which do not recognize minority rights and protections as set forth in Article 27, or which recognize these rights and protections to a lesser extent? Has State X acted to limit or restrict minority rights and protections as set forth in Article 27 in some other fashion?

Are any existing limitations or restrictions on minority rights and protections as set forth in Article 27 guided by objective and reasonable criteria and specified by law?

Has State X cited another international instrument as a basis for limiting or restricting minority rights and protections as set forth in Article 27?

Are there any groups, individuals, or other non-state actors engaged in activities that limit or restrict the ability of others to enjoy minority rights and protections as set forth in Article 27? Does State X prohibit by law non-state actors from engaging in activities aimed at the limitation or restriction of minority rights and protections as set forth in Article 27?

What administrative, judicial, or other measures has State X taken in response to non-state actors engaged in activities that limit or restrict the ability of others to enjoy minority rights and protections as set forth in Article 27?

## **APPENDICES**

# International Covenant on Civil and Political Rights

*Adopted and opened for signature, ratification and accession by  
General Assembly resolution 2200A (XXI) of 16 December 1966*

*Entry into force 23 March 1976, in accordance with Article 49*

## **Preamble**

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

## **PART I**

### **Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## **PART II**

### **Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

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

### **Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

### **Article 4**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

### **Article 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## **PART III**

### **Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

### **Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

### **Article 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3.
  - (a) No one shall be required to perform forced or compulsory labour;
  - (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
  - (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
    - (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

## **Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## **Article 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

## **Article 11**

No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.

## **Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

### **Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

### **Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### **Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

#### **Article 16**

Everyone shall have the right to recognition everywhere as a person before the law.

#### **Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### **Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### **Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### **Article 21**

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### **Article 22**

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

### **Article 23**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

### **Article 24**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

### **Article 25**

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

### **Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### **Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## **PART IV**

### **Article 28**

1. There shall be established a Human Rights Committee (hereafter referred to

in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

#### **Article 29**

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for re-nomination.

#### **Article 30**

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

#### **Article 31**

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

#### **Article 32**

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if re-nominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of

these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

### **Article 33**

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

### **Article 34**

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

### **Article 35**

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

### **Article 36**

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

### **Article 37**

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

### **Article 38**

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

### **Article 39**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
  - (a) Twelve members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.

### **Article 40**

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
  - (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
  - (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

### **Article 41**

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

#### **Article 43**

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### **Article 44**

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

#### **Article 45**

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

### **PART V**

#### **Article 46**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

#### **Article 47**

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

### **PART VI**

#### **Article 48**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

#### **Article 49**

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

#### **Article 50**

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

#### **Article 51**

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

#### **Article 52**

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

**Article 53**

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

# OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

*Adopted and opened for signature, ratification and accession by  
General Assembly resolution 2200A (XXI) of 16 December 1966*

*Entry into force 23 March 1976, in accordance with Article 9*

## **The States Parties to the present Protocol,**

Considering that in order further to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Have agreed as follows:

### **Article 1**

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

### **Article 2**

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

### **Article 3**

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

### **Article 4**

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.

2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

### **Article 5**

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

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

(a) The same matter is not being examined under another procedure of international investigation or settlement;

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

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

#### **Article 6**

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

#### **Article 7**

Pending the achievement of the objectives of resolution 1514(XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

#### **Article 8**

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

#### **Article 9**

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force

three months after the date of the deposit of its own instrument of ratification or instrument of accession.

#### **Article 10**

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

#### **Article 11**

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

#### **Article 12**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

#### **Article 13**

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under article 8;
- (b) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;
- (c) Denunciations under article 12.

#### **Article 14**

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

## **SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AIMING AT THE ABOLITION OF THE DEATH PENALTY**

*Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989*

### **The States Parties to the present Protocol,**

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

### **Article 1**

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

### **Article 2**

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.
3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

### **Article 3**

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

#### **Article 4**

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

#### **Article 5**

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

#### **Article 6**

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.
2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

#### **Article 7**

1. The present Protocol is open for signature by any State that has signed the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

#### **Article 8**

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

#### **Article 9**

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

#### **Article 10**

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Reservations, communications and notifications under article 2 of the present Protocol;
- (b) Statements made under articles 4 or 5 of the present Protocol;
- (c) Signatures, ratifications and accessions under article 7 of the present Protocol;
- (d) The date of the entry into force of the present Protocol under article 8 thereof.

#### **Article 11**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

## ENDNOTES



## ENDNOTES

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### Introduction

<sup>1</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (March 23, 1976).

<sup>2</sup> JOHN P. HUMPHREY, *Human Rights and the United Nations: A Great Adventure* 10 (Transnational Publishers, 1984).

<sup>3</sup> *Id.* at 13; United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Berans 1153, October 24, 1945.

<sup>4</sup> Universal Declaration on Human Rights (UDHR), G.A. Res. 217A (III), at 721, U.N. Doc A/810 (1948).

<sup>5</sup> International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, Jan. 3, 1976.

<sup>6</sup> DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 13 (Clarendon Press Oxford, 1994) [hereinafter MCGOLDRICK].

<sup>7</sup> ICCPR, *supra* note 1, art. 40(1).

<sup>8</sup> *J.B. v. Canada*, Communication No. 118/1982, (22 October 1992) CCPR/C/46/D/255/1987.

<sup>9</sup> The commentary developed for the ICCPR Index has been published in a separate book, which is entitled *A Practical Guide to the International Covenant on Civil and Political Rights*. This text serves as a reference manual for those who are looking for a quick background on the ICCPR.

<sup>10</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2000) at ix [hereinafter JOSEPH, SCHULTZ, AND CASTAN].

<sup>11</sup> The official name of this instrument is "Convention for the Protection of Human Rights and Fundamental Freedoms", September 3, 1952, 213 U.N.T.S. 222.

<sup>12</sup> Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW) G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, at 193, U.N. Doc. A/34/46 (September 3, 1981).

### Establishing the Analytical Framework

#### Article 2

<sup>1</sup> *Cf.* Article 2 of the British and US drafts from 1947, as well as the 1948 draft by the Drafting Committee in E/800, 12.

<sup>2</sup> NOWAK, MANFRED, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 28 (N.P. Engel, 1993).

<sup>3</sup> *Id.* at 33.

<sup>4</sup> American Convention on Human Rights (ACHR), July 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

<sup>5</sup> African Charter on Human and Peoples' Rights (ACHPR), O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982).

<sup>6</sup> NOWAK, *supra* note 2, at 28.

<sup>7</sup> MCGOLDRICK, DOMINIC, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 270 (Clarendon Press Oxford, 1994).

<sup>8</sup> NOWAK, *supra* note 2, at 28; *See Luciano Weinberger Weisz v. Uruguay*, Communication No. 028/1978 (29 October 1980), CCPR/C/11/D/28/1978; *Luyeye Magana ex-Philibert v. Zaire*, Communication No. 090/1981 (21 July 1983), CCPR/C/19/D/90/1991.

<sup>9</sup> NOWAK, *supra* note 2, at 36.

<sup>10</sup> *Id.* at 37-38.

<sup>11</sup> MCGOLDRICK, *supra* note 7, at 271.

<sup>12</sup> NOWAK, *supra* note 2, at 41-42.

<sup>13</sup> *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. 035/1978 (9 April 1981) ¶ 9.2 (b) 2 (i) 5, CCPR/C/12/D/35/1978.

<sup>14</sup> NOWAK, *supra* note 2, at 43-51.

<sup>15</sup> *See Luciano Weinberger Weisz v. Uruguay*, *supra* note 8, ¶ 15.

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- <sup>16</sup> See *A. and S.N. v. Norway*, Communication No. 224/1987 (12 July 1988), CCPR/C/33/D/224/1987.  
<sup>17</sup> Human Rights Committee, *Concluding Observations: Yemen*, CCPR/C/79/Add.51 (1995) ¶ 260.  
<sup>18</sup> Gen. Cmt. 3, *supra* note 16, ¶ 1.  
<sup>19</sup> Human Rights Committee, *Concluding Observations: Uzbekistan*, CCPR/CO/71/UZB (2001) ¶ 22.  
<sup>20</sup> Gen. Cmt. 3, *supra* note 16, ¶ 2.  
<sup>21</sup> NOWAK, *supra* note 2, at 57-58.  
<sup>22</sup> See *id.* at 59.  
<sup>23</sup> See *id.* at 61-62.  
<sup>24</sup> Human Rights Committee, *Concluding Observations: Venezuela*, CCPR/C/71/VEN ¶ 14.  
<sup>25</sup> *Luyeye Magana ex-Philibert v. Zaire*, *supra* note 8, ¶ 9.  
<sup>26</sup> *Edgardo Dante Santullo Valcada v. Uruguay*, Communication No. 009/1977 (26 October 1979) ¶ 11, CCPR/C/8/D/9/1977.  
<sup>27</sup> Human Rights Committee, *Concluding Observations: Uruguay*, CCPR/C/79/Add.19 (1993) ¶ 7.  
<sup>28</sup> *Masslotti and Baritussio v. Uruguay*, Communication No. 25/1978 (26 January 1982) ¶ 13, CCPR/C/16/D/25/1978.  
<sup>29</sup> NOWAK, *supra* note 2, at 64-65.  
<sup>30</sup> MCGOLDRICK, *supra* note 7, at 279-80.

### Article 3

- <sup>1</sup> BOSSUYT, MARC, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/2929 § 34, at 77 (Martinus Nijhoff Publishers, 1987).  
<sup>2</sup> Human Rights Committee, General Comment 28, 68<sup>th</sup> Sess., U.N. Doc CCPR/C/21/Rev.1/Add.10 (2000), ¶ 2.  
<sup>3</sup> TRAVAUX PRÉPARATOIRES, *supra* note 1, A/2929 Chapt. V, § 31, at 75.  
<sup>4</sup> Convention On The Political Rights Of Women, July 7, 1954, 193 U.N.T.S. 135.  
<sup>5</sup> Convention On Nationality Of Married Women, August 11, 1958, 309 U.N.T.S. 65.  
<sup>6</sup> Convention On The Elimination Of All Forms Of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, at 193, U.N. Doc. A/34/46 (1981).  
<sup>7</sup> Declaration On The Elimination Of Violence Against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).  
<sup>8</sup> Declaration On The Protection Of Women And Children In Armed Conflict, G.A. Res. 3318 (XXIX), 29 U.N. GAOR Supp. No. 31, at 146, U.N. Doc. A/96/31 (1974).  
<sup>9</sup> Convention On The Consent To Marriage, Minimum Age for Marriage and Registration of Marriages, December 9, 1964, 521 U.N.T.S. 231.  
<sup>10</sup> ILO Convention, No. 100 (Equal Remuneration For Men And Women), May 23, 1953, 165 U.N.T.S. 303.  
<sup>11</sup> ILO Convention, No. 111 (Discrimination With Respect To Employment), June 15, 1960, 362 U.N.T.S. 31.  
<sup>12</sup> UNESCO Convention Against Discrimination In Education, May 22, 1962, 429 U.N.T.S. 93.  
<sup>13</sup> NOWAK, MANFRED, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 69-70 (N.P. Engel, 1993).  
<sup>14</sup> Gen. Cmt. 28, *supra* note 2.  
<sup>15</sup> NOWAK, *supra* note 13, at 69.  
<sup>16</sup> Human Rights Committee, CCPR General Comment 4, 13<sup>th</sup> Sess., (1981), ¶ 2.  
<sup>17</sup> Gen. Cmt. 28, *supra* note 2, ¶ 3.  
<sup>18</sup> Human Rights Committee, *Concluding Observations: Senegal*, CCPR/C/79/Add.82 (1997) ¶ 12.  
<sup>19</sup> Gen. Cmt. 28, *supra* note 2, ¶ 3.  
<sup>20</sup> *Id.*  
<sup>21</sup> *Id.* ¶ 8.  
<sup>22</sup> *Id.* ¶ 10.  
<sup>23</sup> *Id.* ¶ 11.  
<sup>24</sup> *Id.* ¶ 12.  
<sup>25</sup> *Id.* ¶ 14.  
<sup>26</sup> *Id.* ¶ 15.  
<sup>27</sup> *Id.* ¶ 16.  
<sup>28</sup> *Id.* ¶ 17.  
<sup>29</sup> *Id.* ¶ 18.  
<sup>30</sup> *Id.* ¶ 19.

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- <sup>31</sup> *Id.* ¶ 20.  
<sup>32</sup> *Id.* ¶ 21.  
<sup>33</sup> *Id.* ¶ 22.  
<sup>34</sup> *Id.* ¶ 23-7.  
<sup>35</sup> *Id.* ¶ 28.  
<sup>36</sup> *Id.* ¶ 29.  
<sup>37</sup> *Id.* ¶ 31.  
<sup>38</sup> *Id.* ¶ 32.

#### Article 5

- <sup>1</sup> Human Rights Committee, Report of the Human Rights Committee, *Concluding Observations: Sudan*, CCPR/A/46/40 (1991) ¶ 517.  
<sup>2</sup> *H. G. B. and S. P. v. Trinidad & Tobago*, Communication No. 268/1987 (28 November 1989) ¶ 6.2, CCPR/C/37/D/268/1987.  
<sup>3</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS; CCPR COMMENTARY 98 (N.P. Engel, 1993).  
<sup>4</sup> Buergenthal, Thomas, *To Respect and To Ensure: State Obligations and Permissible Derogations*, in LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE CCPR, 86-87 (Columbia University Press, 1981).  
<sup>5</sup> NOWAK, *supra* note 3, at 98-100.  
<sup>6</sup> Buergenthal, *supra* note 4, at 86.  
<sup>7</sup> *Lopez Burgos v. Uruguay*, Communication No. 052/1979, (29 July 1981) ¶ 12.3, CCPR/C/13/D/52/1979.  
<sup>8</sup> Buergenthal, *supra* note 4, at 30.

#### Analyzing Implementation: Provisions of General Application

#### Article 4

- <sup>1</sup> Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), ¶ 2.  
<sup>2</sup> *Id.* ¶ 1.  
<sup>3</sup> U.S. CONSTITUTION, art. I, § 9, cl. 2.  
<sup>4</sup> See Human Rights Committee, *Concluding Observations: Senegal*, U.N. Doc. CCPR/C/79/Add.10 (1992) ¶ 5.  
<sup>5</sup> MCGOLDRICK, DOMINIC, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 301 (Clarendon Press, Oxford, 1994).  
<sup>6</sup> See Human Rights Committee, *Concluding Observations: Israel*, CCPR/C/79/Add.93 (1998), ¶ 11.  
<sup>7</sup> Gen. Cmt. 29, *supra* note 1, ¶ 3.  
<sup>8</sup> MCGOLDRICK, *supra* note 5, at 303-4.  
<sup>9</sup> Gen. Cmt. 29, *supra* note 1, ¶ 3.  
<sup>10</sup> *Id.* ¶¶ 3, 4.  
<sup>11</sup> UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION OF MINORITIES, SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION OF PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ANNEX, U.N. Doc. E/CN.4/1985/4 (1984), ¶¶ 39-41, 51-54; see also Human Rights Committee, *Concluding Observations: Bolivia*, CCPR/C/79/Add.74 (1997) ¶ 14 (declaring the term “commoción interior” – internal disturbance – to be too broad to accord with Article 4).  
<sup>12</sup> Greek Case, Y.B. ECHR 45 Report, (1969).  
<sup>13</sup> See, e.g., Human Rights Committee, *Concluding Observations: Syria*, CCPR/CO/71/SYR (2001) ¶ 6; *Concluding Observations: Egypt*, CCPR/C/79/Add.23 (1993) ¶ 9.  
<sup>14</sup> Gen. Cmt. 29, *supra* note 1, ¶ 4.  
<sup>15</sup> See also, SIRACUSA PRINCIPLES, *supra* note 11; see also Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights; Final Report of Sub-Commission Special Rapporteur on Human Rights and States of Emergency, U.N. Doc. E/CN.4/Sub.2/1997/19 and Add.1 (1997).  
<sup>16</sup> See, e.g., [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, November 4, 1950, 213 U.N.T.S. 222.

<sup>17</sup> See Gen. Cmt. 29, *supra* note 1, ¶ 7; *Concluding Observations: Israel*, CCPR/C/79/Add.93 (1998) ¶ 21 (condemning use of administrative detention as incompatible with Article 7, one of the non-derogable articles listed in Article 4).

<sup>18</sup> Gen. Cmt. 29, *supra* note 1, ¶ 7; see also *Concluding Observations: Dominican Republic*, CCPR/C/79/Add.18, (1993) ¶ 4; *Concluding Observations: Uruguay*, CCPR/C/79/Add.90, (1998) ¶ 8; *Concluding Observations: Kyrgyzstan*, CCPR/CO/69/KGZ (2000) ¶ 12.

<sup>19</sup> Gen. Cmt. 29, *supra* note 1, ¶ 9.

<sup>20</sup> *Id.* ¶¶ 10, 11.

<sup>21</sup> *Id.* ¶¶ 12-14.

<sup>22</sup> *Id.* ¶¶ 14-17.

<sup>23</sup> *Id.* ¶ 17.

<sup>24</sup> Human Rights Committee, *Concluding Observations: Azerbaijan*, CCPR/C/79/Add.38 (1994) ¶ 297; *Concluding Observations: Syrian Arab Republic*, CCPR/CO/71/SYR (2001) ¶ 6; *Concluding Observations: Dominican Republic*, CCPR/C/79/Add.18 (1993) ¶ 4.

<sup>25</sup> JOAN F. HARTMAN, *Derogation from Human Rights Treaties in Public Emergencies*, 22 Harvard International Law Journal 1 (1981), 17; Siracusa Principles, *supra*, Nos. 51-54.

<sup>26</sup> HARTMAN, *supra*, at 17.

#### Article 14

<sup>1</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 236-38 (N.P. Engel, 1993).

<sup>2</sup> *Id.* at 238.

<sup>3</sup> Human Rights Committee, CCPR General Comment 13, 21<sup>st</sup> Sess., (1984), ¶ 4.

<sup>4</sup> *Id.* ¶ 15.

<sup>5</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, *The International Covenant on Civil and political Rights: Cases, Materials, and Commentary* 279 (Oxford University Press, 2000).

<sup>6</sup> NOWAK, *supra* note 1, at 237-38.

<sup>7</sup> *H.T.B. v. Canada*, Communication No. 534/1993 (3 November 1993) ¶ 4.3, CCPR/C/49/D/534/1993.

<sup>8</sup> Gen. Cmt. 13, *supra* note 4, ¶ 2.

<sup>9</sup> NOWAK, *supra* note 1, at 245.

<sup>10</sup> LAWYERS COMMITTEE FOR HUMAN RIGHTS, *WHAT IS A FAIR TRIAL?* (1995), at 12.

<sup>11</sup> NOWAK, *supra* note 1, at 245.

<sup>12</sup> *Ato del Avellanal v. Peru*, Communication No. 202/1986 (31 October 1988) ¶¶ 2.1, 10.1, 11, CCPR/C/34/D/202/1986.

<sup>13</sup> LAWYERS COMMITTEE, *supra* note 10, at 10.

<sup>14</sup> Gen. Cmt. 13, *supra* note 4, ¶ 4.

<sup>15</sup> Human Rights Committee, *Concluding Observations: Guatemala*, CCPR/CO/72/GTM (2001) ¶ 20.

<sup>16</sup> NOWAK, *supra* note 1, at 245-46.

<sup>17</sup> *Bahamonde v. Equatorial Guinea*, Communication No. 468/1991 (10 November 1993) ¶ 9.4, CCPR/C/49/D/468/1991.

<sup>18</sup> Human Rights Committee, *Concluding Observations: Republic of Moldova*, CCPR/CO/75/MDA (2002) ¶ 12; see also *Concluding Observations: Uzbekistan*, CCPR/CO/71/UZB (2001) ¶ 14.

<sup>19</sup> *Karttunen v. Finland*, Communication No. 387/1989 (5 November 1992) ¶ 7.2, CCPR/C/46/D/387/1989.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ¶ 7.3.

<sup>23</sup> Gen. Cmt. 13, *supra* note 4, ¶ 3.

<sup>24</sup> NOWAK, *supra* note 1, at 246.

<sup>25</sup> Gen. Cmt. 13, *supra* note 4, ¶ 5.

<sup>26</sup> *Richards v. Jamaica*, Communication No. 535/1993 (31 March 1997) ¶ 7.2, CCPR/C/59/D/535/1993.

<sup>27</sup> *Maleki v. Italy*, Communication No. 699/1996 (27 July 1999) ¶¶ 9.3-10, CCPR/C/66/D/699/1996.

<sup>28</sup> LAWYERS COMMITTEE, *supra* note 10, at 11.

<sup>29</sup> NOWAK, *supra* note 1, at 246.

<sup>30</sup> LAWYERS COMMITTEE, *supra* note 10, at 11.

<sup>31</sup> Gen. Cmt. 13, *supra* note 4, ¶ 6.

<sup>32</sup> NOWAK, *supra* note 1, at 247-48.

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- <sup>33</sup> *Van Meurs v. the Netherlands*, Communication No. 215/1986 (23 July 1990) ¶¶ 6.2, CCPR/C/39/D/215/1986.
- <sup>34</sup> NOWAK, *supra* note 1, at 249-53.
- <sup>35</sup> Human Rights Committee, *Concluding Observations: Syria Arab Republic*, CCPR/CO/71/SYR (2001) ¶ 15.
- <sup>36</sup> *Polay Campos v. Peru*, Communication No. 577/1994 (9 January 1998) ¶¶ 8.8, CCPR/C/61/D/577/1994.
- <sup>37</sup> Gen. Cmt. 13, *supra* note 4, ¶ 7.
- <sup>38</sup> NOWAK, *supra* note 1, at 254.
- <sup>39</sup> *Moraël v. France*, Communication No. 207/1986 (28 July 1989) ¶ 9.5, CCPR/C/36/D/207/1986.
- <sup>40</sup> *López v. Spain*, Communication No. 777/1997 (25 November 1999) ¶ 6.4, CCPR/C/67/D/777/1997.
- <sup>41</sup> Gen. Cmt. 13, *supra* note 4, ¶ 7.
- <sup>42</sup> NOWAK, *supra* note 1, at 254.
- <sup>43</sup> Human Rights Committee, *Concluding Observations: Argentina*, CCPR/CO/70/ARG (2000) ¶ 10.
- <sup>44</sup> Human Rights Committee, *Concluding Observations: Italy*, CCPR/C/79/Add. 94 (1998) ¶ 15.
- <sup>45</sup> Gen. Cmt. 13, *supra* note 4, ¶ 8.
- <sup>46</sup> LAWYERS COMMITTEE, *supra* note 10, at 15.
- <sup>47</sup> Gen. Cmt. 13, *supra* note 4, ¶ 8.
- <sup>48</sup> *Id.*
- <sup>49</sup> *Id.*
- <sup>50</sup> *Id.* ¶ 9.
- <sup>51</sup> NOWAK, *supra* note 1, at 256.
- <sup>52</sup> *Phillip v. Trinidad and Tobago*, Communication No. 594/1992 (3 December 1998) ¶ 7.2, CCPR/C/64/D/594/1992.
- <sup>53</sup> Gen. Cmt. 13, *supra* note 4, ¶ 9.
- <sup>54</sup> *Id.*
- <sup>55</sup> *O.F. v. Norway*, Communication No. 158/1983 (26 October 1984) ¶ 5.5, CCPR/C/23/D/158/1983.
- <sup>56</sup> *Harward v. Norway*, Communication No. 451/1991 (16 August 1994) ¶¶ 9.4-5, CCPR/C/51/D/451/1991.
- <sup>57</sup> See *Yasseen & Thomas v. Guyana*, Communication No. 676/1996 (31 March 1998) ¶¶ 9.4-5, CCPR/C/62/D/676/1996.
- <sup>58</sup> Gen. Cmt. 13, *supra* note 4, ¶ 9.
- <sup>59</sup> *Id.* ¶ 10.
- <sup>60</sup> NOWAK, *supra* note 1, at 257.
- <sup>61</sup> *Thomas v. Jamaica*, Communication No. 614/1995 (25 May 1999) ¶ 9.5, CCPR/C/65/D/614/1995.
- <sup>62</sup> NOWAK, *supra* note 1, at 257.
- <sup>63</sup> *Reid v. Jamaica*, Communication No. 355/1989 (14 July 1994) ¶ 14, CCPR/C/51/D/355/1989.
- <sup>64</sup> *Id.*
- <sup>65</sup> Gen. Cmt. 13, *supra* note 4, ¶ 11.
- <sup>66</sup> LAWYERS COMMITTEE, *supra* note 10, at 16; NOWAK, *supra* note 1, at 258.
- <sup>67</sup> Human Rights Committee, *Concluding Observations: Slovakia*, CCPR/C/79/Add.79 (1997) ¶ 19.
- <sup>68</sup> *Reid v. Jamaica*, Communication No. 355/1989 (14 July 1994) ¶ 14, CCPR/C/51/D/355/1989.
- <sup>69</sup> *Id.*
- <sup>70</sup> NOWAK, *supra* note 1, at 259.
- <sup>71</sup> *Id.*
- <sup>72</sup> *Hill v. Spain*, Communication No. 526/1993 (2 April 1997) ¶ 14.3, CCPR/C/59/D/3526/1993.
- <sup>73</sup> Gen. Cmt. 13, *supra* note 4, ¶ 12.
- <sup>74</sup> LAWYERS COMMITTEE, *supra* note 10, at 19.
- <sup>75</sup> *Grant v. Jamaica*, Communication No. 353/1988 (4 April 1994) ¶ 8.5, CCPR/C/50/D/353/1988.
- <sup>76</sup> *Id.*
- <sup>77</sup> *Garcia Fuenzalida v. Ecuador*, Communication No. 480/1991 (12 July 1996) ¶ 9.5, CCPR/C/57/D/480/1991.
- <sup>78</sup> Gen. Cmt. 13, *supra* note 4, ¶ 13.
- <sup>79</sup> *Id.*
- <sup>80</sup> NOWAK, *supra* note 1, at 263.
- <sup>81</sup> Gen. Cmt. 13, *supra* note 4, ¶ 14.
- <sup>82</sup> LAWYERS COMMITTEE, *supra* note 10, at 20.
- <sup>83</sup> NOWAK, *supra* note 1, at 264.

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<sup>84</sup> *Id.* at 265.

<sup>85</sup> Gen. Cmt. 13, *supra* note 4, ¶ 16.

<sup>86</sup> *Id.* ¶ 17.

<sup>87</sup> *Domukovsky, et. al. v. Georgia*, Communication Nos. 623/1995, 624/1995, 626/1995, and 627/1995 (29 May 1998) ¶ 18.11, CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/627/1995, and CCPR/C/62/D/628/1995.

<sup>88</sup> *Lumley v. Jamaica*, Communication No. 662/1995 (30 April 1999) ¶ 7.3, CCPR/C/65/D/662/1995.

<sup>89</sup> *Hill v. Spain*, Communication No. 526/1993 (2 April 1997) ¶ 14.3, CCPR/C/59/D/526/1993.

<sup>90</sup> *Currie v. Jamaica*, Communication No. 377/1989 (31 March 1994) ¶ 13.5, CCPR/C/50/D/377/1989.

<sup>91</sup> *Bailey v. Jamaica*, Communication No. 709/1996 (17 September 1999) ¶ 7.4, CCPR/C/66/D/709/1996.

<sup>92</sup> NOWAK, *supra* note 1, at 266-68.

<sup>93</sup> *Id.* at 268.

<sup>94</sup> Gen. Cmt. 13, *supra* note 4, ¶ 18.

<sup>95</sup> *W.J.H. v. The Netherlands*, Communication No. 408/1990 (31 July 1992) ¶ 6.3, CCPR/C/45/D/408/1990.

<sup>96</sup> See NOWAK, *supra* note 1, at 269-70; LAWYERS COMMITTEE, *supra*, at 21.

<sup>97</sup> Gen. Cmt. 13, *supra* note 4, ¶ 19.

<sup>98</sup> NOWAK, *supra* note 1, at 272-73.

### Article 15

<sup>1</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 275-77 (N.P. Engel, 1993).

<sup>2</sup> BOSSUYT, MARC, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/4625, § 19, at 325 (Martinus Nijhoff Publishers, 1987).

<sup>3</sup> Human Rights Committee, *Concluding Observations: Democratic Peoples Republic of Korea*, CCPR/CO/72/PRK (2001) ¶ 14.

<sup>4</sup> NOWAK, *supra* note 1, at 276.

<sup>5</sup> *A.R.S. v. Canada*, Communication No. 91/1981 (28 October 1981) ¶ 5.3, CCPR/C/14/D/91/1981.

<sup>6</sup> TRAVAUX PRÉPARATOIRES, *supra* note 2, A/4625, § 17, at 327.

<sup>7</sup> *Id.*, A/4625, § 18, at 328.

<sup>8</sup> NOWAK, *supra* note 1, at 279-80.

<sup>9</sup> TRAVAUX PRÉPARATOIRES, *supra* note 2, A/2929, Chapt. IV, § 96, at 330.

<sup>10</sup> *Id.*, A/4625, § 16, at 331-32.

<sup>11</sup> NOWAK, *supra* note 1, at 281.

<sup>1</sup> Convention Against Torture, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

<sup>2</sup> Convention on the Rights of the Child, art. 44, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

<sup>3</sup> Convention on the Suppression and Punishment of the Crime of Apartheid, art. 7, G.A. Res. 3068 (XXVIII), *opened for signature* 30 November 1993, 18 July 1976;

<sup>4</sup> BOSSUYT, MARC, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/2929, Chapt. VII, § 12, at 531 (Martinus Nijhoff Publishers, 1987).

<sup>5</sup> ICCPR, art. 28(2).

<sup>6</sup> MCGOLDRICK, DOMINIC, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 44 (Clarendon Press Oxford, 1994), at 44.

<sup>7</sup> See Reporting Obligations of States Parties to the International Covenants on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, Note of the Secretary General, U.N. Doc. A/39/484 (184).

<sup>8</sup> See *Effective Implementation of International Instruments on Human Rights*, Note of the Secretary General, U.N. General Assembly, 57<sup>th</sup> Sess., U.N. Doc. A/57/399 (2002).

<sup>9</sup> TRAVAUX PRÉPARATOIRES, *supra* note 5, A/2929, Chapt. VII, § 161, at 617; NOWAK, *supra* note 4, at 547.

<sup>10</sup> TRAVAUX PRÉPARATOIRES, *supra* note 5, A/2929, Chapt. VII, § 162, at 617-8; NOWAK, *supra* note 4, at 547.

<sup>11</sup> MCGOLDRICK, *supra* note 7, at 101.

<sup>12</sup> *Id.* at 92.

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<sup>13</sup> Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comments Adopted by the Human Rights Committee: Introduction*, HRI/GEN/1/Rev.5 (2001) at 110.; MCGOLDRICK, *supra* note 7, at 93.

<sup>14</sup> See, e.g., Human Rights Committee, *Concluding Observations: Burundi*, CCPR/C/79/Add.9 (1992) ¶ 2.

<sup>15</sup> See Human Rights Committee, *Report of the Human Rights Committee*, CCPR/A/56/40 (2001) ¶ 51 (HRC adopted new reporting guidelines and rules in 1999).

<sup>16</sup> See Human Rights Committee, *Report of the Human Rights Committee*, CCPR/A/56/40 (2001) ¶ 55.

<sup>17</sup> See MICHAEL O'FLAHERTY, HUMAN RIGHTS AND THE UN: PRACTICE BEFORE THE TREATY BODIES 30 (2<sup>nd</sup> ed. 2002).

<sup>18</sup> *Id.* at 30.

<sup>19</sup> *Id.* at 32-34.

<sup>20</sup> See also ICCPR, art. 48, 49 (accession and ratification procedures).

<sup>21</sup> Human Rights Committee, *Concluding Observations: Portugal*, CCPR/C/79/Add.77 (1997) ¶ 4.

<sup>22</sup> *Id.*

### Article 50

<sup>1</sup> American Convention on Human Rights, art. 28, July 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

<sup>2</sup> *Id.*

<sup>3</sup> [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 56, November 4, 1950, 213 U.N.T.S. 222.

<sup>4</sup> MCGOLDRICK, DOMINIC, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 6, 58 (Clarendon Press, Oxford, 1994).

<sup>5</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 636-37 (N.P. Engel, 1993).

<sup>6</sup> MCGOLDRICK, *supra* note 4, at 270.

### Analyzing Implementation: Substantive Human Rights Protections

#### Article 1

<sup>1</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 6-7 (N.P. Engel, 1993).

<sup>2</sup> Human Rights Committee, CCPR General Comment 12, 21<sup>st</sup> Sess. (1984), ¶ 1.

<sup>3</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

<sup>4</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, G.A. Res. 2625 (XXV) (24 October 1970).

<sup>5</sup> NOWAK, *supra* note 1, at 7.

<sup>6</sup> *Id.* at 9.

<sup>7</sup> *Id.*

<sup>8</sup> See *Diergaardt et al v. Namibia*, Communication No. 760/1997 (25 July 2000), CCPR/C/69/D/760/1996 (observing that whether or not the complainant belongs to a “people” is not an issue for the HRC).

<sup>9</sup> NOWAK, *supra* note 1, at 9.

<sup>10</sup> See *id.* at 13; Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/51/18 (1996), General Recommendation XXI, 48<sup>th</sup> Sess., at 125, ¶ 7.

<sup>11</sup> See Gen. Cmt. 12, *supra* note 2, ¶ 2 (“Article 1 enshrines an inalienable right of all peoples...”).

<sup>12</sup> See SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 100 (Oxford University Press, 2000); NOWAK, *supra* note 1, at 17. (because the Optional Protocol only allows the HRC to consider complaints submitted by individuals, Nowak notes that some have advanced the argument that “a violation of the collective right of self-determination of peoples may not be the subject of an individual communication.”).

<sup>13</sup> See *Mikmaq v. Canada*, Communication No. 78/1980 (29 July 1984), CCPR/C/22/D/78/1980. (held inadmissible for lack of representative capacity of the complainant); *Kitok v. Sweden*, Communication

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No. 197/1985 (10 August 1988), CCPR/C/33/D/197/1985. (same); *Croes v. the Netherlands*, Communication No. 164/1984 (16 November 1988), CCPR/C/34/D/164/1984 (held inadmissible for failure to exhaust domestic remedies).

<sup>14</sup> See MCGOLDRICK, DOMINIC, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 247 (Clarendon Press, Oxford, 1994); Gen. Cmt. 12, *supra* note 2, ¶ 3.

<sup>15</sup> MCGOLDRICK, *supra* note 13, at 249.

<sup>16</sup> *Id.*

<sup>17</sup> Gen. Cmt. 12, *supra* note 2, ¶ 2.

<sup>18</sup> *Id.* ¶ 4.

<sup>19</sup> See MCGOLDRICK, *supra* note 13, at 249 (regarding the HRC questioning of socialist states, including East Germany, North Korea, and the USSR).

<sup>20</sup> *Id.* at 249-50.

<sup>21</sup> See, e.g., JOSEPH, SCHULTZ, AND CASTAN, *supra* note 9, at 101-103; NOWAK, *supra* note 1, at 22-23.

<sup>22</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 9, at 101.

<sup>23</sup> *Id.* at 104.

<sup>24</sup> MCGOLDRICK, *supra* note 13, at 250-251.

<sup>25</sup> Gen. Cmt. 12, *supra* note 2, ¶ 5.

<sup>26</sup> *Id.* ¶ 6.

<sup>27</sup> See U.N. CHARTER, art. 73, 74 (Trust Territories).

<sup>28</sup> Cf. ICCPR, art. 2(1) (regarding the limitation on States parties' obligation to respect and ensure ICCPR rights to those persons within their jurisdiction).

<sup>29</sup> MCGOLDRICK, *supra* note 13, at 251-52.

## Article 6

<sup>1</sup> See Human Rights Committee, *Concluding Observations: Yemen*, CCPR/CO/75/YEM (2002) ¶ 18; *Concluding Observations: Peru*, CCPR/C/79/Add.8 (1992) ¶ 8.

<sup>2</sup> Human Rights Committee, CCPR General Comment 6, 16<sup>th</sup> Sess., (1982), ¶¶ 1, 3.

<sup>3</sup> NOWAK, MANFRED, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 123 (N.P. Engel, 1993).

<sup>4</sup> Human Rights Committee, General Comment 28, 68<sup>th</sup> Sess., U.N. Doc CCPR/C/21/Rev.1/Add.10 (2000), ¶10.

<sup>5</sup> Human Rights Committee, *Concluding Observations: Guatemala*, CCPR/CO/72/GTM (2001) ¶ 19; see also *Concluding Observations: Moldova*, CCPR/CO/75/MDA (2002) ¶ 18 (abortion use as a means of contraception may contribute to high maternal mortality); *Concluding Observations: Poland*, CCPR/C/79/Add.10 (1999) ¶ 11 (noting that, in addition to strict laws on abortion, limited accessibility of contraceptives, lack of sexual education in schools, and in sufficiency of family planning implicated Covenant articles, including Article 6).

<sup>6</sup> *Camargo (husband of Maria Fanny Suarez de Guerrero) v. Colombia*, Communication No. 45/1979 (31 March 1982) ¶ 13.3, CCPR/C/15/D/45/1979.

<sup>7</sup> Human Rights Committee, *Concluding Observations: Lesotho*, CCPR/C/79/Add.106 (1999), ¶¶ 11, 12; *Concluding Observations: Senegal*, CCPR/AC/79/Add.82 (1997) ¶ 12.

<sup>8</sup> *Bleier vs. Uruguay*, Communication No. 30/1978 (29 March 1982) ¶11.1, CCPR/C/15/D/30/1978; *Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato v. Uruguay*, Communication No. 84/1981 (27 February 1981) ¶ 9.2, CCPR/C/17/D/84/1981.

<sup>9</sup> Gen. Cmt. 6, *supra* note 2, ¶ 3.

<sup>10</sup> *Herrera v. Colombia*, Communication No. 161/1983 (2 November 1987) ¶ 10.3, CCPR/C/31/D/161/1983.

<sup>11</sup> BOSSUYT, MARC, *GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, A/3764, § 114-15, at 123-24 (Martinus Nijhoff Publishers, 1987).

<sup>12</sup> NOWAK, *supra* note 3, at 111.

<sup>13</sup> Gen. Cmt. 6, *supra* note 2, ¶ 2.

<sup>14</sup> See *E.W. et al. v. The Netherlands*, Communication No. 429/1990 (8 April 1993), CCPR/C/47/D/429/1990.

<sup>15</sup> Gen. Cmt. 6, *supra* note 2, ¶ 6.

<sup>16</sup> *Kindler v. Canada*, Communication No. 470/1991 (18 November 1993) ¶14.6, CCPR/C/48/D/470/1991.

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- <sup>17</sup> Second Optional Protocol to the ICCPR, December 15, 1989, GA Res. 44/128, U.N. Doc. CCPR/OP2/DP (1989).
- <sup>18</sup> Gen. Cmt. 6, *supra* note 2, ¶ 7.
- <sup>19</sup> Human Rights Committee, *Concluding Observations: Sudan*, CCPR/C/79/Add.85 (1997), ¶ 8; see also *Concluding Observations: Egypt*, CCPR/C/79/Add.23 (1993) ¶ 8 (regarding terrorism statute specifying multiple acts which can result in imposition of death).
- <sup>20</sup> Human Rights Committee, *Concluding Observations: Yemen*, CCPR/C/79/Add.51 (1995) ¶ 25.
- <sup>21</sup> *Id.* ¶ 7.
- <sup>22</sup> NOWAK, *supra* note 3, at 118.
- <sup>23</sup> *Id.* at 117.
- <sup>24</sup> *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (5 December 2000) ¶¶ 8.2, CCPR/C/70/D/806/1998.
- <sup>25</sup> *Mbenge v. Zaire*, Communication No. 16/1977 (25 March 1983) ¶¶ 14.1, 17, CCPR/C/18/D/16/1977.
- <sup>26</sup> *E.g., Reid v. Jamaica*, Communication No. 250/87 (21 August 1990), CCPR/C/39/D/250/1987.
- <sup>27</sup> See *Burrell v. Jamaica*, Communication No. 546/1993 (1 August 1996), CCPR/C/57/D/546/1993.
- <sup>28</sup> *Ashby v. Trinidad and Tobago*, Communication No. 580/1994 (19 April 2002) ¶ 10.8, CCPR/C/74/D/580/1994.
- <sup>29</sup> Gen. Cmt. 6, *supra* note 2, ¶ 2.
- <sup>30</sup> Human Rights Committee, CCPR General Comment 14, 23<sup>rd</sup> Sess., (1984), ¶¶ 4, 5.
- <sup>31</sup> *E.W. et. al. v. the Netherlands*, Communication No. 429/1990 (8 April 1993) ¶ 6.4, CCPR/C/47/D/429/1990; *Bordes and Temeharo v. France*, Communication No. 645/1995 (30 July 1996) ¶ 5.4, CCPR/C/57/D/645/1995.
- <sup>32</sup> NOWAK, *supra* note 3, at 121.
- <sup>33</sup> *Id.* at 120.
- <sup>34</sup> TRAVAUX PRÉPARATOIRES, *supra* note 11, A/3764, § 111, at 127-28.
- <sup>35</sup> NOWAK, *supra* note 3, at 115.

## Article 7

- <sup>1</sup> United Nations Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), Annex, U.N. GAOR Supp. No. 34, at 91, U.N. Doc. A/10034 (1975).
- <sup>2</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, *entered into force* February 1, 1989.
- <sup>3</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).
- <sup>4</sup> U.N. Principles of Medical Ethics Relevant to Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, U.N. GAOR Supp. No. 51, at 211, U.N. Doc. A/37/51 (1982).
- <sup>5</sup> NOWAK, MANFRED, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 126 (N.P. Engel, 1993).
- <sup>6</sup> *Id.* at 128.
- <sup>7</sup> Human Rights Committee, CCPR General Comment 20, 44<sup>th</sup> Sess., (1992), ¶ 2 (replacing General Comment 7).
- <sup>8</sup> Human Rights Committee, CCPR General Comment 20, 16<sup>th</sup> Sess., (1982), ¶ 2.
- <sup>9</sup> See *Vuolanne v. Finland*, Communication No. 265/1987 (2 May 1989), CCPR/C/35/D/265/1987.
- <sup>10</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 151 (Oxford University Press, 2000).
- <sup>11</sup> Gen. Cmt. 7, *supra* note 7, ¶ 2.
- <sup>12</sup> *Id.*, ¶ 2.
- <sup>13</sup> NOWAK, *supra* note 5, at 129.
- <sup>14</sup> *Rojas Garcia v. Colombia*, Communication No. 687/1996 (16 May 2001) ¶ 10.5, dissenting opinion Mr. Ando and Mr. Shearer, CCPR/C/71/D/687/1996.
- <sup>15</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 3, Article 1, ¶ 1.
- <sup>16</sup> See *Williams v. Jamaica*, Communication No. 609/1995 (17 November 1997), CCPR/C/61/D/609/1995.
- <sup>17</sup> Human Rights Committee, *Concluding Observations: Russian Federation*, CCPR/C/79/Add.54 (1995) ¶ 17.

- <sup>18</sup> Human Rights Committee, *Concluding Observations: Republic of Moldova*, CCPR/CO/75/MDA (2002) ¶ 9; *Concluding Observations: Argentina*, CCPR/CO/70/ARG (2000) ¶ 11.
- <sup>19</sup> Gen. Cmt. 7, *supra* note 7, ¶ 2.
- <sup>20</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 10, at 153.
- <sup>21</sup> *Ng v. Canada*, Communication No. 469/1991 (7 January 1994) ¶ 16.4, CCPR/C/49/D/469/1991 (use of gas chamber violates Article 7); Gen. Cmt. 20, *supra* note 8, ¶ 9 (refoulement); See *A.R.J. v. Australia*, Communication No. 692/1996 (11 August 1997), CCPR/C/8/D/692/1996 (returning complainant to nation where he would face corporal punishment would violate Article 7); *Edwards v. Jamaica*, Communication No. 529/1993 (19 August 1997), CCPR/C/55/D/529/1993 (prison conditions); Gen. Cmt. 20, *supra* note 8, ¶¶ 6, 11; cf. *Johnson v. Jamaica*, No. 588/1994 (5 August 1996), CCPR/C/56/D/588/1996 (death row phenomenon not Article 7 violation on grounds of mental distress).
- <sup>22</sup> *Sahadeo v. Republic of Guyana*, Communication No. 278/1996 (21 December 2001) ¶ 9.3, CCPR/C/73/D/728/1996.
- <sup>23</sup> Human Rights Committee, *Concluding Observations: Germany*, CCPR/C/79/Add.73 (1997) ¶ 11; see also Human Rights Committee, *Concluding Observations: Morocco*, CCPR/C/79/Add.113 (1999) ¶ 16.
- <sup>24</sup> See Human Rights Committee, *Concluding Observations: Poland*, CCPR/C/79/Add.110 (1999), ¶ 15 (army practice of “fala” whereby new recruits are humiliated and abused).
- <sup>25</sup> Human Rights Committee, *Concluding Observations: Hungary*, CCPR/CO/74/HUN (2002) ¶ 10; Human Rights Committee, *Concluding Observations: Jamaica*, CCPR/C/79/Add.83 (1997) ¶ 12; Human Rights Committee, *Concluding Observations: Peru*, CCPR/C/79/Add.72 (1996) ¶ 15 (rape); see also Human Rights Committee, *Concluding Observations: Lesotho*, CCPR/C/79/Add.106 (1999) ¶ 12 (female genital mutilation as violence against women implicating Art. 7).
- <sup>26</sup> Human Rights Committee, *Concluding Observations: Yemen*, CCPR/CO/75/YEM (2002) ¶ 16;
- <sup>27</sup> Human Rights Committee, *Concluding Observations: Peru*, CCPR/C/79/Add.67 (1996) ¶ 35.
- <sup>28</sup> See *Mukong v. Cameroon*, Communication No. 458/1991 (10 August 1994), CCPR/C/51/D/458/1991 (state argued its prison conditions were result of economic problems).
- <sup>29</sup> Gen. Cmt. 20, *supra*, ¶ 1.
- <sup>30</sup> Human Rights Committee, *Concluding Observations, Slovakia*, CCPR/A/52/40 (1997) ¶ 377.
- <sup>31</sup> Gen. Cmt. 20, *supra*, ¶ 1.
- <sup>32</sup> Gen. Cmt. 20, *supra*, ¶ 1.

## Article 8

- <sup>1</sup> Special Conventions of the ILO on Forced Labor, No. 29, May 1, 1932, 39 UNTS 55.
- <sup>2</sup> Special Conventions of the ILO on Abolition of Forced Labor, No. 105, January 17, 1959, 320 U.N.T.S. 291.
- <sup>3</sup> U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271.
- <sup>4</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I), (2001).
- <sup>5</sup> NOWAK, MANFRED, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 146-48 (N.P. Engel, 1993).
- <sup>6</sup> Human Rights Committee, *Concluding Observations: Brazil*, CCPR/C/79/Add.66 (1996) ¶ 336.
- <sup>7</sup> Human Rights Committee, *Concluding Observations: Brazil*, CCPR/CO/73/AZE (2002) ¶ 15; *Concluding Observations: Republic of Moldova*, CCPR/CO/75/MDA (2002) ¶ 10; *Concluding Observations: Czech Republic*, CCPR/CO/72/CZE (2001) ¶ 13.
- <sup>8</sup> BOSSUYT, MARC, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/2929, Chapt. VI, § 18, at 167 (Martinus Nijhoff Publishers, 1987).
- <sup>9</sup> NOWAK, *supra* note 5, at 148-49.
- <sup>10</sup> *Id.* at 145.
- <sup>11</sup> Human Rights Committee, *Concluding Observations: India*, CCPR/C/79/Add.81 (1997) ¶ 29
- <sup>12</sup> Human Rights Committee, *Concluding Observations: Portugal*, CCPR/C/79/Add.77 (1997) ¶ 19; *Concluding Observations: India*, CCPR/C/79/Add.81 (1997) ¶ 29; Human Rights Committee, *Concluding Observations: Brazil*, CCPR/C/79/Add.66 (1996) ¶ 319, 336.
- <sup>13</sup> Human Rights Committee, *Concluding Observations: Japan*, CCPR/C/79/Add.102 (1998) ¶ 29; *Concluding Observations: India*, CCPR/C/79/Add.810 (1997) ¶¶ 15, 29; Human Rights Committee, *Concluding Observations: Dominican Republic*, CCPR/C/79/Add.18 (1993) ¶ 5.

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- <sup>14</sup> NOWAK, *supra* note 5, at 153.  
<sup>15</sup> *Id.* at 154.  
<sup>16</sup> NOWAK, *supra* note 5, at 149.  
<sup>17</sup> ILO Convention No. 29, On Forced or Compulsory Labor, articles 11, 12, & 13, May 1, 1932, 39 U.N.T.S. 55.  
<sup>18</sup> NOWAK, *supra* note 5, at 149.  
<sup>19</sup> *Id.* at 145.

## Article 9

- <sup>1</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 160 (N.P. Engel, 1993).  
<sup>2</sup> Human Rights Committee, CCPR General Comment 8, 16<sup>th</sup> Sess., (1982), ¶ 4.  
<sup>3</sup> Human Rights Committee, *Concluding Observations: Spain*, CCPR/C/79/Add.61 (1996) ¶ 12.  
<sup>4</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 211 (Oxford University Press, 2000).  
<sup>5</sup> Gen. Cmt. 8, *supra* note 2, ¶ 1.  
<sup>6</sup> *Id.*  
<sup>7</sup> Human Rights Committee, *Concluding Observations: Sudan*, CCPR/C/79/Add.85 (1997) ¶ 22.  
<sup>8</sup> *Monja Jaona v. Madagascar*, Communication No. 132/1982 (1 April 1985) ¶¶ 12.2-14, CCPR/C/24/D/132/1982.  
<sup>9</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 4, at 211.  
<sup>10</sup> DINSTEIN, YORAM, *Right to Life, Physical Integrity, and Liberty*, in LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: CCPR COMMENTARY 130 (Columbia University Press, 1981).  
<sup>11</sup> NOWAK, *supra* note 1, at 171.  
<sup>12</sup> *Domukovsky v. Georgia*, Communication Nos. 623/1995, 624/1995, 626/1995, & 627/1995 (29 May 1998) ¶ 18.2; CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, & CCPR/C/62/D/627/1995.  
<sup>13</sup> BOSSUYT, MARC, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/C.3/SR.863, §36 (Martinus Nijhoff Publishers, 1987).  
<sup>14</sup> Human Rights Committee, *Concluding Observations: Sudan*, CCPR/C/79/Add.85 (1998) ¶ 13.  
<sup>15</sup> *Van Alphen v. the Netherlands*, Communication No. 305/1988 (15 August 1990) ¶ 5.8, CCPR/C/39/D/305/1988.  
<sup>16</sup> *Mpandanjila, et. al. v. Zaire*, Communication No. 138/1983 (26 March 1986) ¶ 9, CCPR/C/27/D/138/1983.  
<sup>17</sup> *Delgado Páez v. Colombia*, Communication No. 195/1985 (23 August 1990) ¶ 5.5, CCPR/C/39/D/195/1985.  
<sup>18</sup> *Leehong v. Jamaica*, Communication No. 613/1995 (12 August 1999) ¶ 9.3, CCPR/C/66/D/613/1995.  
<sup>19</sup> *Jayawardena v. Sri Lanka*, Communication No. 916/2000 (22 July 2002) ¶ 7.2, CCPR/C/75/D/916/2000.  
<sup>20</sup> *Tshishimbi v. Zaire*, Communication No. 542/1993 (25 March 1996) ¶ 5.4, CCPR/C/53/D/542/1993.  
<sup>21</sup> Human Rights Committee, *Concluding Observations: Azerbaijan*, CCPR/CO/73/AZE (2001) ¶ 9.  
<sup>22</sup> *Drescher Caldas v. Uruguay*, Communication No. 43/1979 (21 July 1983) ¶ 13.2, CCPR/C/19/D/43/1979.  
<sup>23</sup> NOWAK, *supra* note 1, at 174-75.  
<sup>24</sup> Human Rights Committee, *Concluding Observations: Ukraine*, CCPR/CO/73/UKR (2001) ¶ 17; *Concluding Observations: Uzbekistan*, CCPR/A/CO/71/UZB (2001) ¶ 12.  
<sup>25</sup> Gen. Cmt. 8, *supra* note 2, ¶ 2.  
<sup>26</sup> Human Rights Committee, *Concluding Observations: Republic of Korea*, CCPR/C/79/Add.122 (2000) ¶ 13.  
<sup>27</sup> Gen. Cmt. 8, *supra* note 2, ¶ 2.  
<sup>28</sup> Human Rights Committee, *Concluding Observations: Zimbabwe*, CCPR/C/79/Add.89 (1998) ¶ 17; *Concluding Observations: Czech Republic*, CCPR/CO/72/CZE (2001) ¶ 17.  
<sup>29</sup> *Kulomin v. Hungary*, Communication No. 521/1992 (22 March 1996) ¶ 11.2-3, CCPR/C/50/D/521/1992.  
<sup>30</sup> NOWAK, *supra* note 1, at 176-77. (citing *Schiesser*, Judgment of 4 December 1979, Series A 34, 30).  
<sup>31</sup> Gen. Cmt. 8, *supra* note 2, ¶ 3.

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- <sup>32</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 4, at 225.
- <sup>33</sup> *Hill & Hill v. Spain*, Communication No. 526/1993 (23 June 1997) ¶ 12.3, CCPR/C/59/D/526/1993.
- <sup>34</sup> *Id.*
- <sup>35</sup> NOWAK, *supra* note 1, at 178.
- <sup>36</sup> *Id.*
- <sup>37</sup> Gen. Cmt. 8, *supra* note 2, ¶ 1.
- <sup>38</sup> NOWAK, *supra* note 1, at 179.
- <sup>39</sup> *A. v. Australia*, Communication No. 560/1993 (3 April 1997) ¶ 9.5, CCPR/C/59/D/560/1993.
- <sup>40</sup> *Vuolanne v. Finland*, Communication No. 265/1987 (7 April 1989) ¶ 9.6, CCPR/C/35/D/265/1987.
- <sup>41</sup> NOWAK, *supra* note 1, at 179.
- <sup>42</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 4, at 233.
- <sup>43</sup> *See, e.g., Berry v. Jamaica*, Communication No. 330/1988 (3 April 1997) ¶ 11.1, CCPR/C/50/D/330/1993.
- <sup>44</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 4, at 233.
- <sup>45</sup> NOWAK, *supra* note 1, at 182.
- <sup>46</sup> DINSTEIN, *supra* note 9, at 135.
- <sup>47</sup> MUHAMMAD, NOOR, *Due Process of Law for Persons Accused of Crime*, in LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: CCPR COMMENTARY, 145 (Columbia University Press, 1981).
- <sup>48</sup> NOWAK, *supra* note 1, at 180-81.

#### Article 10

- <sup>1</sup> European Prison Rules, Recommendation No. R (87) 3, Committee of Ministers of the Council of Europe, February 12, 1987.
- <sup>2</sup> Human Rights Committee, CCPR General Comment 21, 44<sup>th</sup> Sess. (1992) ¶ 5.
- <sup>3</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 188 (Oxford University Press, 2000).
- <sup>4</sup> *Id.* at 184.
- <sup>5</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 188-89 (N.P. Engel, 1993).
- <sup>6</sup> Gen. Cmt. 21, *supra* note 2, ¶ 4.
- <sup>7</sup> Gen. Cmt. 21, *supra* note 2, ¶ 2.
- <sup>8</sup> BOSSUYT, MARC, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/4045, § 79, at 224 (Martinus Nijhoff Publishers, 1987).
- <sup>9</sup> Gen. Cmt. 21, *supra* note 2, ¶ 8.
- <sup>10</sup> *Id.* ¶ 3.
- <sup>11</sup> NOWAK, *supra* note 5, at 188.
- <sup>12</sup> *Pietraroia v. Uruguay*, Communication No. 44/1979 (9 April 1981) ¶ 17, CCPR/C/12/D/44/1979.
- <sup>13</sup> *Morrison v. Jamaica*, Communication No. 663/1995 (25 November 1998) ¶ 8.8, CCPR/C/64/D/663/1995.
- <sup>14</sup> *Collins v. Jamaica*, Communication No. 240/1987 (14 November 1991) ¶ 8.6, CCPR/C/43/D/240/1987.
- <sup>15</sup> Gen. Cmt. 21, *supra* note 2, ¶ 6.
- <sup>16</sup> Human Rights Committee, *Concluding Observations: Poland*, CCPR/C/79/Add.10 (1999) ¶ 21.
- <sup>17</sup> Gen. Cmt. 21, *supra* note 2, at ¶ 7.
- <sup>18</sup> Human Rights Committee, *Concluding Observations: Poland*, *supra* note 14, ¶ 350.
- <sup>19</sup> Gen. Cmt. 21, *supra* note 2, ¶ 9.
- <sup>20</sup> NOWAK, *supra* note 5, at 190.
- <sup>21</sup> TRAVAUX PRÉPARATOIRES, *supra* note 8, A/4045 § 80, at 227.
- <sup>22</sup> *Pinkney v. Canada*, Communication No. 27/1978 (29 October 1981) ¶ 30, CCPR/C/14/D/27/1977.
- <sup>23</sup> Gen. Cmt. 21, *supra* note 2, ¶ 13.
- <sup>24</sup> *Id.* ¶ 13.
- <sup>25</sup> NOWAK, *supra* note 5, at 190.
- <sup>26</sup> TRAVAUX PRÉPARATOIRES, *supra* note 8, A/4045, § 75-77, 44-5, 81, at 231-2.
- <sup>27</sup> Gen. Cmt. 21, *supra* note 2, ¶¶ 10, 11.
- <sup>28</sup> *Id.* ¶ 13.
- <sup>29</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 3, at 196.
- <sup>30</sup> Human Rights Committee, *Concluding Observations: Belgium*, CCPR/C/79/Add.99 (1998) ¶ 19.

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## Article 11

<sup>1</sup> BOSSUYT, MARC, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/4045, § 89, at 239 (Martinus Nijhoff Publishers, 1987).

<sup>2</sup> NOWAK, MANFRED, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 193 (N.P. Engel, 1993).

<sup>3</sup> TRAVAUX PRÉPARATOIRES, *supra* note 1, A/2929, Chapt. VI, § 48, at 239.

<sup>4</sup> Human Rights Committee, *Concluding Observations: Cyprus*, CCPR/C/79/Add.39 (1994) ¶ 319.

<sup>5</sup> TRAVAUX PRÉPARATOIRES, *supra* note 1, A/2929, Chapt. VI, § 46, at 238.

<sup>6</sup> TRAVAUX PRÉPARATOIRES, *supra* note 1, A/4045, Chapt. VI, § 89, at 239.

<sup>7</sup> NOWAK, *supra* note 2, at 194.

<sup>8</sup> *Id.* at 195.

<sup>9</sup> *Id.*

## Article 12

<sup>1</sup> See SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 245 (Oxford University Press, 2000).

<sup>2</sup> Human Rights Committee, General Comment 27, 67<sup>th</sup> Sess., U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), ¶ 1.

<sup>3</sup> NOWAK, MANFRED, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 198 (N.P. Engel, 1993).

<sup>4</sup> Gen. Cmt. 27, *supra* note 2, ¶ 10.

<sup>5</sup> NOWAK, *supra* note 3, at 200.

<sup>6</sup> Gen. Cmt. 27, *supra* note 2, ¶ 4; see also Human Rights Committee, CCPR General Comment 15, 27<sup>th</sup> Sess., (1984), ¶¶ 5-6 (discussing limitations on right of aliens to enter).

<sup>7</sup> NOWAK, *supra* note 3, at 201.

<sup>8</sup> *Id.*

<sup>9</sup> Gen. Cmt. 27, *supra* note 2, ¶ 4; NOWAK, *supra*, at 202.

<sup>10</sup> Human Rights Committee, *Concluding Observations: Armenia*, CCPR/C/79/Add.100 (1998) ¶ 7.

<sup>11</sup> *Mpandanjila et al. v. Zaire*, Communication No. 138/1983 (26 March 1986) ¶ 9, CCPR/C/27/D/138/1983.

<sup>12</sup> *Ackla v. Togo*, Communication No. 505/1992 (10 April 1996) ¶ 10, CCPR/C/56/D/505/1992.

<sup>13</sup> Gen. Cmt. 27, *supra* note 2, ¶ 5.

<sup>14</sup> NOWAK, *supra* note 3, at 204.

<sup>15</sup> Gen. Cmt. 27, *supra* note 2, ¶ 8.

<sup>16</sup> NOWAK, *supra* note 3, at 205; see also Gen. Cmt. 27, *supra* note 2, ¶ 9.

<sup>17</sup> *Vidal Martins v. Uruguay*, Communication No. 57/1979 (23 March 1982) ¶ 9, CCPR/C/15/D/57/1979;

*Montero v. Uruguay*, Communication No. 106/1981 (31 March 1983) ¶ 10, CCPR/C/18/D/106/1981.

<sup>18</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 1, at 251; see also *Lichtensztein v. Uruguay*, Communication No. 77/1980 (31 March 1983), CCPR/C/18/D/77/1980.

<sup>19</sup> Gen. Cmt. 27, *supra* note 2, ¶ 10.

<sup>20</sup> Human Rights Committee, *Concluding Observations: Syrian Arab Republic*, CCPR/CO/71/SYR (2001) ¶ 21; *Concluding Observations: Gabon*, CCPR/CO/70/GAB (2000) ¶ 16.

<sup>21</sup> See *Gonzalez del Rio v. Peru*, Communication No. 263/87 (6 November 1990), CCPR/C/46/D/263/1987 (pending criminal or other judicial proceedings justify travel restrictions).

<sup>22</sup> See JOSEPH, SCHULTZ, AND CASTAN, *supra* note 1, at 252 (citing HRC’s Concluding Comments on Lebanon’s 1997 report to the Committee).

<sup>23</sup> NOWAK, *supra* note 3, at 206.

<sup>24</sup> Gen. Cmt. 27, *supra* note 2, ¶ 14.

<sup>25</sup> NOWAK, *supra* note 3, at 211 (citing Draft Declaration on the Right to Leave and Return prepared by the Sub-Commission).

<sup>26</sup> Gen. Cmt. 27, *supra* note 2, ¶ 16.

<sup>27</sup> *Celepli v. Sweden*, Communication No. 456/1991 (2 August 1994) ¶ 9.2, CCPR/C/51/D/456/1991.

<sup>28</sup> See *Gonzalez del Rio v. Peru*, *supra* note 20; see also *Peltonen v. Finland*, Communication No. 492/1992 (29 July 1994), CCPR/C/51/D/492/1992 (denial of a passport for failing to answer mandatory military service was justifiable under “public order” exception); NOWAK, *supra* note 3, at 214 (strongly undermining the *Peltonen* decision).

- <sup>29</sup> NOWAK, *supra* note 3, at 215.
- <sup>30</sup> Human Rights Committee, *Concluding Observations: Belgium*, CCPR/C/79/Add.99 (1998) ¶ 19.
- <sup>31</sup> NOWAK, *supra* note 3, at 216.
- <sup>32</sup> *Id.* at 217.
- <sup>33</sup> *Lovelace v. Canada*, Communication No. 024/1977 (30 July 1981) ¶ 15, CCPR/C/13/D/24/1977 (addressing First Nation reservation in Canada).
- <sup>34</sup> Gen. Cmt. 27, *supra* note 2, ¶ 19.
- <sup>35</sup> *Stewart v. Canada*, Communication No. 538/1993 (16 December 1996) ¶¶ 12.2, 12.3, 12.4, CCPR/C/58/D/538/1993.
- <sup>36</sup> NOWAK, *supra* note 3, at 218-19.
- <sup>37</sup> *Id.* at 219; Gen. Cmt. 27, *supra* note 2, ¶ 20.
- <sup>38</sup> NOWAK, *supra* note 3, at 219; Gen. Cmt. 27, *supra* note 2, ¶ 21.
- <sup>39</sup> *J.M. v. Jamaica*, Communication No. 165/1984 (26 March 1986) ¶¶ 5.3, 7, CCPR/C/27/D/165/1984.
- <sup>40</sup> *Stewart v. Canada*, *supra* note 33, ¶ 12.10.
- <sup>41</sup> *Id.*, ¶ 12.5.

### Article 13

- <sup>1</sup> Human Rights Committee, CCPR General Comment 15, 27<sup>th</sup> Sess., (1986), ¶¶ 1, 2, 3.
- <sup>2</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 224-25 (N.P. Engel, 1993).
- <sup>3</sup> Gen. Cmt. 15, *supra* note 1, ¶ 10.
- <sup>4</sup> *Id.* ¶ 9.
- <sup>5</sup> *Kindler v. Canada*, Communication No. 470/1991 (18 November 1993) ¶ 6.1, CCPR/C/48/D/470/1991.
- <sup>6</sup> *Id.* ¶ 6.6.
- <sup>7</sup> Human Rights Committee, *Report of the Human Rights Committee, Concluding Observation: Hong Kong Special Administrative Region*, CCPR/A/55/40 (2000), ¶ 245.
- <sup>8</sup> NOWAK, *supra* note 2, at 227.
- <sup>9</sup> *Maroufidou v. Sweden*, Communication No. 58/1979 (8 April 1981) ¶ 10.2, CCPR/C/12/D/58/1979.
- <sup>10</sup> *Id.*
- <sup>11</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 272 (Oxford University Press, 2000).
- <sup>12</sup> Gen. Cmt. 15, *supra* note 2, ¶ 10.
- <sup>13</sup> *Giry v. Dominican Republic*, Communication No. 193/1985 (15 August 1985) ¶ 5.5, CCPR/C/39/D/193/1985.
- <sup>14</sup> NOWAK, *supra* note 2, at 230.
- <sup>15</sup> *V.M.R.B. v. Canada*, Communication No. 236/1987 (18 July 1988) ¶ 6.3, CCPR/C/33/D/236/1987.
- <sup>16</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 11, at 274.

### Article 16

- <sup>1</sup> See, e.g., American Convention on Human Rights, art. 3, July 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123; African [Banjul] Charter on Human and Peoples' Rights, art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3 Rev.5, 21 I.L.M. 58.
- <sup>2</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 285 (N.P. Engel, 1993).
- <sup>3</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 202 (Oxford University Press, 2000).
- <sup>4</sup> NOWAK, *supra* note 2, at 283.
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*; see also JOSEPH, SCHULTZ, AND CASTAN, *supra* note 3, at 202.
- <sup>7</sup> See *Avellanal v. Peru*, Communication No. 202/1986 (12 August 1988), CCPR/C/34/D/202/1986.
- <sup>8</sup> *De Gallicchio and Vicario v. Argentina*, Communication No. 400/1990 (27 April 1995) ¶¶ 10.2, 10.3, CCPR/C/34/D/202/1986.
- <sup>9</sup> Human Rights Committee, *Concluding Observations: Sudan*, CCPR/C/79/Add.85 (1997) ¶ 11; *Concluding Observations: Algeria*, CCPR/C/79/Add.95 (1998) ¶ 13.
- <sup>10</sup> See, e.g., *Inostroza et al. v. Chile*, Communication No. 717/1996 (16 September 1999), CCPR/C/66/D/717/1996; see also *Vargas v. Chile*, Communication No. 718/1996, (24 September 1999), dissenting opinion Ms. Chanet and Mr. Yrigoyen, CCPR/C/66/D/718/1996/Rev.1.

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- <sup>11</sup> Human Rights Committee, *Concluding Observations: Algeria*, CCPR/C/79/Add.95 (1998) ¶ 13; *Concluding Observations: Uruguay*, CCPR/C/79/Add.90 (1998) ¶ 7; see also *Concluding Observations: Kuwait*, CCPR/CO/69/KWT (2000) ¶ 19
- <sup>12</sup> Human Rights Committee, *Concluding Observations: Israel*, CCPR/C/79/Add.93 (1998) ¶ 21.
- <sup>13</sup> *Id.*; Human Rights Committee *Concluding Observations: Croatia*, CCPR/CO/71/HRV (2001) ¶ 9; see also ICCPR art. 4.

#### Article 17

- <sup>1</sup> African Charter on the Rights and Welfare of the Child, art. 10, 1990, OAU Doc. CAB/LEG/24.9/49 (November 29, 1999).
- <sup>2</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 290-91 (N.P. Engel, 1993).
- <sup>3</sup> BOSSUYT, MARC, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/2929 Chapt. VI, § 100, at 341 (Martinus Nijhoff Publishers, 1987).
- <sup>4</sup> NOWAK, *supra* note 2, at 290.
- <sup>5</sup> A. S. v. *Canada*, Communication No. 68/1980 (31 March 1981) ¶ 8.2, CCPR/C/12/D/68/1980.
- <sup>6</sup> TRAVAUX PRÉPARATOIRES, *supra* note 3, A/4625, § 19, at 325.
- <sup>7</sup> Human Rights Committee, CCPR General Comment 16, 32<sup>nd</sup> Sess., (1988), ¶ 4.
- <sup>8</sup> *Id.* ¶ 3.
- <sup>9</sup> *Aumeeruddy-Cziffra v. Mauritius*, Communication No. 35/1978 (9 April 1981) ¶ 9.2(b)2(i)4, CCPR/C/12/D/35/1978.
- <sup>10</sup> See, e.g., Human Rights Committee, *Concluding Observations: Belarus*, CCPR/C/79/Add.86 (1997) ¶ 15; *Concluding Observations: Slovakia*, CCPR/C/79/Add.79 (1997) ¶ 23; *Concluding Observations (Hong Kong): United Kingdom*, CCPR/C/79/Add.57 (1995) ¶ 18.
- <sup>11</sup> Human Rights Committee, *Concluding Observations: Jamaica*, CCPR/C/79/Add.83 (1997) ¶ 20.
- <sup>12</sup> Human Rights Committee, *Concluding Observations: Romania*, CCPR/C/79/Add.111 (1999) ¶ 16; Human Rights Committee, *Concluding Observations: United States of America*, CCPR/C/79/Add.50 (1999) ¶ 287.
- <sup>13</sup> Human Rights Committee, *Concluding Observations: Chile*, CCPR/C/79/Add.104 (1999) ¶ 15.
- <sup>14</sup> Human Rights Committee, *Concluding Observations: Sweden*, CCPR/CO/74/SWE (2002) ¶ 12.
- <sup>15</sup> *Coeriel and Aurik v. The Netherlands*, Communication No. 453/1991 (9 December 1994) ¶ 10.2, CCPR/C/52/D/453/1991.
- <sup>16</sup> Gen. Cmt. 16, *supra* note 7, ¶ 5.
- <sup>17</sup> Human Rights Committee, *Concluding Observations: Uzbekistan*, CCPR/CO/71/UZB (2001) ¶ 16.
- <sup>18</sup> Gen. Cmt. 16, *supra* note 7, ¶ 5.
- <sup>19</sup> NOWAK, *supra* note 2, at 302-03.
- <sup>20</sup> Gen. Cmt. 16, *supra* note 7, ¶ 8.
- <sup>21</sup> *Id.*
- <sup>22</sup> NOWAK, *supra* note 2, at 304.
- <sup>23</sup> *Pinkney v. Canada*, Communication No. 27/1978 (29 October 1981) ¶ 34, CCPR/C/14/D/27/1977.
- <sup>24</sup> *Estrella v. Uruguay*, Communication No. 74/1980 (23 March 1983) ¶ 9.2, CCPR/C/18/D/74/1980.
- <sup>25</sup> NOWAK, *supra* note 2, at 305-06.
- <sup>26</sup> TRAVAUX PRÉPARATOIRES, *supra* note 3, A/2929, Chapt. VI, §103, at 344.
- <sup>27</sup> NOWAK, *supra* note 2, at 297.
- <sup>28</sup> *Id.* at 297.
- <sup>29</sup> TRAVAUX PRÉPARATOIRES, *supra* note 3, A/2929, Chapt. VI, § 104, at 346.
- <sup>30</sup> *Id.*

#### Article 18

- <sup>1</sup> NOWAK, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 310 (N.P. Engel, 1993).
- <sup>2</sup> United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief, G.A. Res. 36/55, 36 U.N. GAOR Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981).
- <sup>3</sup> NOWAK, *supra* note 1, at 311-312.
- <sup>4</sup> NOWAK, *supra* note 1, at 312
- <sup>5</sup> Universal Declaration of Human Rights, art. 18-22, G.A. Res. 217A (III), U.N. Doc A/810 (1948).
- <sup>6</sup> NOWAK, *supra* note 1, at 312-15.

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- <sup>7</sup> *Id.* at 316 (French text of the Article makes clear that non-religious beliefs are protected).
- <sup>8</sup> Human Rights Committee, CCPR General Comment 22, 48<sup>th</sup> Sess., (1993), ¶¶ 1, 2; *Cf. M.A.B. W.A.T. and J-A.Y.T v. Canada*, Communication No. 570/1993 (25 April 1984), CCPR/C/50/D/570/1993 (religion based solely on narcotic consumption not protected by Article 18).
- <sup>9</sup> Gen. Cmt. 22, *supra* note 8, ¶ 3. *See, e.g.*, Human Rights Committee, *Concluding Observations: Egypt*, CCPR/C/79/Add.23 (1993) ¶ 12 (condemning restrictive legal provisions regarding religion and the denial of authorities that religious minorities exist in the country).
- <sup>10</sup> Gen. Cmt. 22, *supra* note 8, ¶ 5; Human Rights Committee, *Concluding Observations: Jordan*, CCPR/C/79/Add.35 (1994) ¶ 235.
- <sup>11</sup> NOWAK, *supra* note 1, at 314-15.
- <sup>12</sup> *Id.* at 315.
- <sup>13</sup> Gen. Cmt. 22, *supra* note 8, ¶ 9; NOWAK, *supra* note 1, at 317; *see, e.g.*, Human Rights Committee, *Report of the Human Rights Committee*, CCPR/A/46/40 (1991) ¶ 517 (states parties may “defend its culture and national religion” but cannot deviate from the fundamental values of the Covenant in doing so; rather, state must find a way to reconcile its obligation to ensure respect for human rights with its freedom to choose a particular social system).
- <sup>14</sup> Human Rights Committee, *Concluding Observations: Czech Republic*, CCPR/CO/72/CZE (2001) ¶ 22 (religious registration laws condemned); *Concluding Observations: Germany*, CCPR/CO/79/Add.73 (1996) ¶ 16 (condemning fact that membership in an unrecognized religious sect may disqualify individuals from public office).
- <sup>15</sup> NOWAK, *supra* note 1, at 317-318.
- <sup>16</sup> Gen. Cmt. 22, *supra* note 8, ¶ 5 (“threat of physical force or penal sanctions” or “policies or practices having the same intention or effect” are prohibited); SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 374 (Oxford University Press, 2000).
- <sup>17</sup> *See, e.g.*, Human Rights Committee, *Concluding Observations: Israel*, CCPR/C/79/Add.93 (1998) ¶ 28 (public funding preferences); *Concluding Observations: Finland*, CCPR/C/79/Add.91 (1998) ¶ 21 (same); Human Rights Committee, *Concluding Observations: Paraguay*, CCPR/C/79/Add.48 (1995), ¶ 212 (favored position for Catholicism and restrictions on teaching other religions in public school); *Concluding Observations: Costa Rica*, CCPR/C/79/Add.31 (1994) ¶ 9 (same); *see also Waldman v. Canada*, Communication No. 694/1996 (5 November 1999), CCPR/C/67/D/694/1996 (public funding of religious schools must be undertaken on a nondiscriminatory basis).
- <sup>18</sup> Human Rights Committee, *Concluding Observations: Estonia*, CCPR/C/79/Add.59 (1995) ¶ 27 (condemning “oath of conscience” requirement as restricting conscientious objectors from public service); *see also Concluding Observations: Zambia*, CCPR/C/79/Add.62 (1996) ¶ 18 (condemning requirement that those attending state school must sing national anthem and salute flag); *Concluding Observations: Belarus*, CCPR/C/79/Add.5 (1992) ¶ 6 (classifying persons belonging to any religions as a distinct “nationality”).
- <sup>19</sup> NOWAK, *supra* note 1, at 319 (systematic review of the limited permissible restrictions of Article 18(3) “leads to the conclusion that the private freedom to practice actively a religion or belief” may not be subject to any restrictions pursuant to” 18(3)).
- <sup>20</sup> *Id.* at 315; *see, e.g., J.v.K, C.M.G.v.K.-S. v. The Netherlands*, Communication No. 483/1991 (31 July 1992), CCPR/C/45/D/483/1991 (conscientious objectors to nuclear weapons refusal to pay taxes is manifestation of conviction and falls within the permissible limitations on Article 18 freedoms).
- <sup>21</sup> *See also* NOWAK, *supra* note 1, at 320.
- <sup>22</sup> NOWAK, *supra* note 1, at 321; Gen. Cmt. 22, *supra* note 7, ¶ 4 (“observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations [and] the wearing of distinctive clothing . . .”).
- <sup>23</sup> NOWAK, *supra* note 1, at 321.
- <sup>24</sup> *Id.* at 321-22.
- <sup>25</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 15, at 375-76.
- <sup>26</sup> NOWAK, *supra* note 1, at 325.
- <sup>27</sup> Gen. Cmt. 22, *supra* note 8, ¶ 8.
- <sup>28</sup> *Id.* (the HRC’s General Comment specifically emphasizes the lack of a national security exception); *Cf. JOSEPH, SCHULTZ, AND CASTAN, supra* note 15, at 377 (many ‘national security’ measures could potentially be justified based on the permissible ‘public order’ limitation).
- <sup>29</sup> Gen. Cmt. 22, *supra* note 8, ¶ 8.

<sup>30</sup> See, e.g., *Singh Bhinder v. Canada*, Communication No. 208/1986 (28 November 1989), CCPR/C/37/D/208/1986 (national legislation directed in a nondiscriminatory fashion towards protecting from injury or electric shock requiring construction workers to wear hard hats can trump religious obligation to wear a turban).

<sup>31</sup> See, e.g., *Coeriel and Aurik v. the Netherlands*, Communication No. 453/1991 (9 December 1994), CCPR/C/52/D/453/1991 (Dutch residents sought to change their names in accordance with their ordination as Hindu priests; the HRC declared communication inadmissible under Article 18 but held that questions relating to the Dutch laws regulating name changes were matters of public order).

<sup>32</sup> NOWAK, *supra* note 1, at 327.

<sup>33</sup> See JOSEPH, SCHULTZ, AND CASTAN, *supra* note 15, at 380; see also NOWAK, *supra* note 1, at 322-23.

<sup>34</sup> *L.T.K. v. Finland*, Communication No. 185/1984 (9 July 1985) ¶ 5.2, CCPR/C/25/D/185/1984.

<sup>35</sup> Gen. Cmt. 22, *supra* note 7, ¶ 11

<sup>36</sup> *Id.*; see also *Westerman v. the Netherlands*, Communication No. 682/1996 (13 December 1999), CCPR/C/67/D/682/1996 (same).

<sup>37</sup> Human Rights Committee, *Concluding Observations: Belarus*, CCPR/C/79/Add.86 (1997) ¶ 16 (urging state to create conscientious objector status in domestic laws); *Concluding Observations: France*, CCPR/C/79/Add/80 (1997) ¶ 19 (individuals should be able to claim objector status even after entering the military service); *Concluding Observations: Spain*, CCPR/C/79/Add.61 (1996) ¶¶ 15, 20 (same); *Concluding Observations: Russian Federation*, CCPR/C/79/Add.54 (1995) ¶¶ 21, 39 (alternatives to military service should not be punitive in nature).

<sup>38</sup> See *Dr. J.P. v. Canada*, Communication No. 446/1991 (8 November 1991), CCPR/C/43/D/446/1991 (because the action taken fell outside the scope of Article 18 protection, the Committee declared the communication inadmissible).

<sup>39</sup> See Human Rights Committee, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CCPR/CO/73/UK-CCPR/CO/73/UKOT (2002) ¶ 14 (condemning increase in violent attacks individuals on the basis of their perceived religion following recent terrorist acts); *Concluding Observations: Iran (Islamic Republic of)*, CCPR/C/79/Add.25 (1993) ¶ 9 (condemning death sentence pronounced, in violation of his Article 6 rights, on Salman Rushdie for his literary work); see also *Concluding Observations: Iran (Islamic Republic of)*, CCPR/C/79/Add.25 (1993) ¶ 15 (recognition of an official religious belief does not automatically eliminate discrimination on basis of religion).

<sup>40</sup> NOWAK, *supra* note 1, at 329.

<sup>41</sup> *Id.* at 331.

<sup>42</sup> *Id.*

<sup>43</sup> Gen. Cmt. 22, *supra* note 8, ¶ 6.

<sup>44</sup> NOWAK, *supra* note 1, at 332.

<sup>45</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 15, at 383.

<sup>46</sup> See *Hartikainen v. Finland*, Communication No. 40/1978 (9 April 1981), CCPR/C/12/D/40/1978; see also *Delgado Paez v. Colombia*, Communication No. 195/1985 (23 August 1990), CCPR/C/39/D/195/1985 (state does not violate Article 18 by allowing Catholic church to decide who may teach religion and in what manner so long as state takes steps to ensure that there is no discrimination in exercise of right to religious education, particularly with respect to religions other than Catholicism).

## Article 19

<sup>1</sup> MCGOLDRICK, DOMINIC, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 459* (Clarendon Press Oxford, 1994).

<sup>2</sup> NOWAK, MANFRED, *U.N COVENANT ON CIVIL AND POLITICAL RIGHTS; CCPR COMMENTARY 336-37* (N.P. Engel, 1993).

<sup>3</sup> *Id.*

<sup>4</sup> NOWAK, *supra* note 2, at 338.

<sup>5</sup> *Id.*

<sup>6</sup> Human Rights Committee, CCPR General Comment 10, 19<sup>th</sup> Sess., (1983), ¶ 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* ¶ 4.

<sup>9</sup> See, e.g., Human Rights Committee, *Concluding Observations: Sweden*, CCPR/CO/74/SWE (2002) ¶ 12(a) (“State party must ensure that measures taken under the international campaign against terrorism are fully in conformity with the Covenant. The State party is requested to ensure that the concern over terrorism is not a source of abuse”).

<sup>10</sup> NOWAK, *supra* note 2, at 339.

<sup>11</sup> See International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art. 2(1); *Id.* at 340.

<sup>12</sup> Gen. Cmt. 10, *supra* note 6, ¶ 1.

<sup>13</sup> NOWAK, *supra* note 2, at 340.

<sup>14</sup> See, e.g., *Ballantyne et al. v. Canada*, Communication No. 359/1989 (5 May 1993), CCPR/C/47/D/359/1989 (Article 19 necessarily protects any form of subjective idea or opinion capable of transmission, including commercial speech).

<sup>15</sup> NOWAK, *supra* note 2, at 341-42.

<sup>16</sup> *Id.* at 343; see also Human Rights Committee, *Concluding Observations: The Former Yugoslav Republic of Macedonia*, CCPR/C/79/Add.96 (1998) ¶ 12 (restrictions on importation of foreign printed materials may violate Article 19).

<sup>17</sup> See MCGOLDRICK, DOMINIC, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 461 (Clarendon Press Oxford, 1994).

<sup>18</sup> *Beatriz Weismann and Alcides Lanza Perdomo v. Uruguay*, Communication No. 8/1977 (3 April 1980) ¶ 16, CCPR/C/9/D/8/1977.

<sup>19</sup> See, e.g., NOWAK, *supra* note 2, at 345-47.

<sup>20</sup> See, e.g., *Mpandanjila et al. v. Zaire*, Communication No. 138/1983 (26 March 1986), CCPR/C/27/D/138/1983; see also, *Kivenmaa v. Finland*, Communication No.412/1990 (10 June 1994), CCPR/C/50/D/412/1990; see also Human Rights Committee, *Concluding Observations: Moldova*, CCPR/CO/75/MDA (2002) ¶ 14 (condemning inconsistent regulation of radio broadcasting service as impeding of non-discrimination with respect to political opinion).

<sup>21</sup> Gen. Cmt. 10, *supra* note 6, ¶ 2; see also Human Rights Committee, *Concluding Observations: Vietnam*, CCPR/CO/75/VNM (2002) ¶ 18 (laws which do not allow privately owned media are contrary to Article 19).

<sup>22</sup> *Hertzberg v. Finland*, Communication No. 61/1979, (2 April 1982) ¶10.3, CCPR/C/15/D/61/1979.

<sup>23</sup> *Id.*

<sup>24</sup> MCGOLDRICK, *supra* note 1, at 468-69.

<sup>25</sup> *Faurisson v. France*, Communication No.550/1993, (16 December 1996) dissenting opinion Ms. Evatt and Mr. Kretzmer, ¶ 8, CCPR/C/58/D/550/1993.

<sup>26</sup> See SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 396 (Oxford University Press, 2000), (citing *Delgado Paez v. Colombia*, Communication No. 195/1985 (23 August 1990), CCPR/C/39/D/195/1985 (to note that obligating the teaching of religion in a particular manner does not violate Article 19 given the special relationship between Colombia and the Catholic Church)).

<sup>27</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 25, at 400; see also *Kim v. Republic of Korea*, Communication No. 574/1994 (4 January 1999), CCPR/C/64/D/574/1994 (HRC found in favor of author in complaint regarding his conviction under South Korea's statute making it illegal to praise and promote North Korean ideology).

<sup>28</sup> NOWAK, *supra* note 2, at 357.

<sup>29</sup> Human Rights Committee, *Concluding Observations: Republic of Korea*, CCPR/C/79/Add.122 (2000) ¶ 9; see also *Concluding Observations: Slovakia*, CCPR/C/79/Add.79 (1997) ¶ 22 (crime of disseminating information abroad "which harms the interest" of Slovakia overly broad and incompatible with Article 19(3)).

<sup>30</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 25, at 407.

<sup>31</sup> See Human Rights Committee, *Concluding Observations: Monaco*, CCPR/CO/72/MCO (2001) ¶ 19 (restrictions on freedom of expression should be narrowly tailored to the permissible interest they are to serve); NOWAK, *supra* note 2, at 349-351.

<sup>32</sup> *Ross v. Canada*, Communication No. 736/1997 (18 October 2000) ¶ 11.6, CCPR/C/70/D/736/1997.

<sup>33</sup> NOWAK, *supra* note 2, at 353; see also Human Rights Committee, *Concluding Observations: Cambodia*, CCPR/C/79/Add.108 (1999) ¶ 18 (prohibition of publications on the basis of vague and broad criteria, such as causing harm to political stability' is incompatible with Article 19(3)).

<sup>34</sup> ICCPR, *supra* note 11, art. 17.

## Article 20

<sup>1</sup> NOWAK, MANFRED, *U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 359 (N.P. Engel, 1993).

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- <sup>2</sup> United Nations Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, 660 U.N.T.S. 195 (January 4, 1969).
- <sup>3</sup> See Human Rights Committee, *Concluding Observations: Burundi*, CCPR/C/79/Add.41 (1994) ¶ 11.
- <sup>4</sup> See Human Rights Committee, CCPR General Comment 11, 19<sup>th</sup> Sess., (1983), ¶ 1.
- <sup>5</sup> NOWAK, *supra* note 1, at 359.
- <sup>6</sup> *Id.* at 360; MCGOLDRICK, DOMINIC, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 480 (Clarendon Press Oxford, 1994).
- <sup>7</sup> NOWAK, *supra* note 1, at 360-361.
- <sup>8</sup> *Id.* at 362; MCGOLDRICK, *supra* note 6, at 480.
- <sup>9</sup> MCGOLDRICK, *supra* note 6, at 480.
- <sup>10</sup> *Id.* at 481-82.
- <sup>11</sup> NOWAK, *supra* note 1, at 363.
- <sup>12</sup> MCGOLDRICK, *supra* note 6, at 481, 486-88; NOWAK, *supra* note 1, at 364.
- <sup>13</sup> Gen. Cmt. 11, *supra* note 4, ¶ 1.
- <sup>14</sup> *Id.* ¶ 2; MCGOLDRICK, *supra* note 6, at 486-88.
- <sup>15</sup> NOWAK, *supra* note 1, at 363.
- <sup>16</sup> *Cf.*, Human Rights Committee, *Report of the Human Rights Committee, Concluding Observations, Sweden*, CCPR/A/41/40, (1986) ¶¶ 151-154 (Sweden contended that such advocacy should not be prohibited as to do so would conflict with enforcement of Article 19 and it was better to allow those advocating war to expose themselves to public scrutiny).
- <sup>17</sup> NOWAK, *supra* note 1, at 365.
- <sup>18</sup> See Gen. Cmt. 11, *supra* note 4, ¶ 2.
- <sup>19</sup> *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981 (6 April 1983) CCPR/C/18/D/104/1981.
- <sup>20</sup> Human Rights Committee, *Concluding Observations: Switzerland*, CCPR/CO/73/CH (2001) ¶ 8; *Concluding Observations: Ukraine*, CCPR/C/79/Add.52 (1995) ¶ 322.
- <sup>21</sup> Human Rights Committee, *Concluding Observations: Guyana*, CCPR/C/79/Add.121 (2000) ¶ 20.
- <sup>22</sup> Gen. Cmt. 11, *supra*, ¶ 2.

## Article 21

- <sup>1</sup> NOWAK, MANFRED, *U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 370-71 (N.P. Engel, 1993).
- <sup>2</sup> See also Human Rights Committee, *Concluding Observations: Mexico*, CCPR/C/79/Add.32 (1994) ¶ 10 (noting with concern the repression of striking workers, which violates Article 21).
- <sup>3</sup> NOWAK, *supra* note 1, at 372.
- <sup>4</sup> See BOSSUYT, MARC, *GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, 415 (Martinus Nijhoff Publishers, 1987).
- <sup>5</sup> NOWAK, *supra* note 1, at 375-76 ("the individual should be protected against all kinds of interference with the exercise of his freedom of assembly").
- <sup>6</sup> *Id.* at 373.
- <sup>7</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 426 (Oxford University Press, 2000).
- <sup>8</sup> NOWAK, *supra* note 1, at 374.
- <sup>9</sup> *Id.* at 375.
- <sup>10</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 7, at 426.
- <sup>11</sup> See *id.*; NOWAK, *supra* note 1, at 375; Human Rights Committee, *Concluding Observations: Belarus*, CCPR/C/79/Add.86 (1998) ¶ 9 (noting with concern allegations of law enforcement engaging in ill-treatment of peaceful demonstrators).
- <sup>12</sup> NOWAK, *supra* note 1, at 376.
- <sup>13</sup> See Human Rights Committee, General Comment 27, 67<sup>th</sup> Sess., (1999), ¶ 14. NOWAK, *supra*, at 325 (Article 18); *Faurisson v. France*, Communication No.550/1993 (16 Dec. 1996) ¶ 8, CCPR/C/58/D/550/1993.
- <sup>14</sup> NOWAK, *supra* note 1, at 379 (this minimum standard is somewhat vague, but generally should reinforce values such as "pluralism, tolerance, and broadmindedness"); See Human Rights Committee, *Concluding Observations: Cyprus*, CCPR/C/79/Add.39 (1994) ¶ 323 (restrictions on freedom of assembly should be limited).
- <sup>15</sup> See ICCPR, art. 12, 18, 19, 22.
- <sup>16</sup> NOWAK, *supra* note 1, at 378.

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<sup>17</sup> *Id.* at 380.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; *Cf. Kivenmaa v. Finland*, Communication No. 412/1990 (10 June 1994), CCPR/C/50/D/412/1990.

<sup>20</sup> See JOSEPH, SCHULTZ, AND CASTAN, *supra* note 7, at 429-31.

<sup>21</sup> NOWAK, *supra* note 1, at 381.

<sup>22</sup> *Id.* at 381-82; see also Human Rights Committee, *Concluding Observations: The Netherlands*, CCPR/CO/72/NET (2001) ¶ 20 (general requirement of prior permission from police chief is problematic restriction on exercise of Article 21 rights); Human Rights Committee, *Concluding Observations: Republic of Korea*, CCPR/C/79/Add.114 (1999) ¶ 18 (prohibition on all assemblies on major roads is overbroad restriction on Article 21 rights).

<sup>23</sup> NOWAK, *supra* note 1, at 382.

## Article 22

<sup>1</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 385 (N.P. Engel, 1993).

<sup>2</sup> *Id.* at 387.

<sup>3</sup> *Id.* at 386.

<sup>4</sup> See SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 432 (Oxford University Press, 2000) (*citing P.S. v. Denmark*, Communication No. 397/1990 (22 July 1992) ¶ 5.3, CCPR/C/45/D/397/1990.)

<sup>5</sup> NOWAK, *supra* note 1, at 388.

<sup>6</sup> *Id.* at 387.

<sup>7</sup> *Id.* at 393, 396.

<sup>8</sup> See *M.A. v. Italy*, Communication No. 117/1981 (10 April 1984) ¶ 13.3, U.N. Doc. Supp. No. 40 (A/39/40) at 190.

<sup>9</sup> NOWAK, *supra* note 1, at 396.

<sup>10</sup> *Gauthier v. Canada*, Communication No. 633/1995 (5 May 1999) ¶ 6.5, CCPR/C/65/D/633/1995.

<sup>11</sup> NOWAK, *supra* note 1, at 388.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 389; see also JOSEPH, SCHULTZ, AND CASTAN, *supra* note 4, at 434.

<sup>14</sup> NOWAK, *supra* note 1, at 390-91.

<sup>15</sup> *J.B. v. Canada*, Communication No. 118/1982 (22 October 1992), CCPR/C/46/D/255/1987.

<sup>16</sup> See, e.g., Human Rights Committee, *Concluding Observations: Bolivia*, CCPR/C/79/Add.74 (1997) ¶¶ 16, 24, 27 (intimidation against trade union members by police); Human Rights Committee, *Concluding Observation: Argentina*, CCPR/C/79/Add.46 (1995) ¶¶ 155, 162 (attacks on trade union members); *Report of the Human Rights Committee, Concluding Observations: Dominican Republic*, CCPR/A/48/40 (1993) ¶ 450 (concern regarding persecution of trade union organizers).

<sup>17</sup> NOWAK, *supra* note 1, at 385.

<sup>18</sup> See Human Rights Committee, *Concluding Observations: Iran (Islamic Republic of)*, CCPR/C/79/Add.25 (1993) ¶ 15 (deploring limitations on the exercise of Covenant-protected rights and linking rights to assembly and association).

<sup>19</sup> NOWAK, *supra* note 1, at 394-95; *cf.* Human Rights Committee, *Concluding Observations: Belarus*, CCPR/C/79/Add.86 (1998) ¶ 19; *Human Rights Committee, Concluding Observations: Nigeria*, CCPR/C/79/Add.65 (1996) ¶ 289 (detention of officers of human rights organizations is interference with the significant and important role played by such organizations and in violation of Articles 9 and 22).

<sup>20</sup> NOWAK, *supra* note 1, at 395; see also Human Rights Committee, *Concluding Observations: Togo*, CCPR/C/79/Add.36 (1994) ¶ 256 (restrictive conditions on the right to associate are incompatible with Article 22).

<sup>21</sup> See Human Rights Committee, *Concluding Observations: Azerbaijan*, CCPR/CO/73/AZE (2001) 47, ¶ 23; *Concluding Observations: Uzbekistan*, CCPR/CO/71/UZB (2001) ¶¶ 22-24; *Concluding Observations: Kuwait*, CCPR/CO/69/KWT (2000) ¶¶ 38-39, 43.

<sup>22</sup> NOWAK, *supra* note 1, at 385.

<sup>23</sup> *Id.* at 396.

<sup>24</sup> *Id.* at 398.

<sup>25</sup> *Id.* at 399.

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## Article 23

<sup>1</sup> European Social Charter, art. 16, February 26, 1965, 529 U.N.T.S. 89.

<sup>2</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 402 (N.P. Engel, 1993).

<sup>3</sup> See SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 466 (Oxford University Press, 2000).

<sup>4</sup> NOWAK, *supra* note 2, at 406, and JOSEPH, SCHULTZ, AND CASTAN, *supra* note 3, at 443.

<sup>5</sup> Human Rights Committee, CCPR General Comment 19, 39<sup>th</sup> Sess., (1990), ¶ 2.

<sup>6</sup> *Balaguer Santacana v. Spain*, Communication No. 417/1990 (27 July 1994) ¶¶10.2, CCPR/C/51/D417/1990.

<sup>7</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 3, at 446.

<sup>8</sup> *A.S. v. Canada*, Communication No. 68/1980 (31 March 1981) ¶ 8.2(b), CCPR/C/12/D/68/1980.

<sup>9</sup> *Hendriks v. the Netherlands*, Communication No. 201/1985 (12 Aug. 1988) ¶ 10.3, CCPR/C/33/D/201/1985.

<sup>10</sup> NOWAK, *supra* note 2, at 404.

<sup>11</sup> Gen. Cmt. 19, *supra* note 5, ¶ 3.

<sup>12</sup> *Aumeeruddy-Sziffra et al v. Mauritania*, Communication No. 35/1978 (9 April 1981) ¶ 9.2(b)2(ii)1, CCPR/C/12/D/35/1978.

<sup>13</sup> *Id.*, ¶ 9.2(b)2(i)2.

<sup>14</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 3, at 443-44.

<sup>15</sup> Gen. Cmt. 19, *supra* note 5, ¶ 4.

<sup>16</sup> Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. res. 2018 (XX), 20 U.N. GAOR Supp. (No. 14) at 36, U.N. Doc. A/60141 (1965); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 1763 A (XVII), (1962); see also Human Rights Committee, *Concluding Observations: Venezuela*, CCPR/CO/71/VEN (2001) ¶ 18 (condemning state party practice of allowing marriages involving 14 year old girls).

<sup>17</sup> Human Rights Committee, *Concluding Observations: Gabon*, CCPR/CO/70/GAB (2000) ¶ 9; *Concluding Observations: Zimbabwe*, CCPR/C/79/Add.89 (1998) ¶ 12.

<sup>18</sup> Gen. Cmt. 19, *supra* note 5, ¶ 4; NOWAK, *supra* note 2, at 410.

<sup>19</sup> NOWAK, *supra* note 2, at 410.

<sup>20</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 3, at 454.

<sup>21</sup> Gen. Cmt. 19, *supra* note 5, ¶ 5.

<sup>22</sup> *Id.*

<sup>23</sup> NOWAK, *supra* note 2, at 414.

<sup>24</sup> Gen. Cmt. 19, *supra* note 5, ¶ 5; see also *Aumeeruddy-Sziffra et al v. Mauritania*, *supra* note 12, ¶¶ 9.2(b)-9.2(c).

<sup>25</sup> Gen. Cmt. 19, *supra* note 5, ¶ 4.

<sup>26</sup> NOWAK, *supra* note 2, at 415.

<sup>27</sup> See Human Rights Committee, *Report of the Human Rights Committee, Concluding Observations: Senegal*, CCPR/A/48/40 (1993) ¶ 105 (establishing the husband as the only head of household); Convention on the Elimination of All Forms of Discrimination Against Women, art. 16(1)(d), December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. No. 46, at 193, U.N. Doc. A/34/46; Human Rights Committee, *Concluding Observations: Iraq*, CCPR/C/79/Add.84 (1997) ¶ 13.

<sup>28</sup> See Human Rights Committee, *Concluding Observations: Israel*, CCPR/C/79/Add.93 (1998) ¶ 27; *Concluding Observations: Denmark*, CCPR/C/79/Add.68 (1997) ¶ 19 (family reunification dependant on nationality).

<sup>29</sup> Gen. Cmt. 19, *supra* note 5, ¶ 7.

<sup>30</sup> *Id.* ¶ 8.

<sup>31</sup> NOWAK, *supra* note 2, at 418.

<sup>32</sup> *Hendriks v. the Netherlands*, *supra* note 9, ¶ 10.4.

<sup>33</sup> NOWAK, *supra* note 2, at 421.

<sup>34</sup> See Convention on the Rights of the Child, art. 3, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989).

## Article 24

<sup>1</sup> See SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 467 (Oxford University Press, 2000).

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<sup>2</sup> United Nations 1959 Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. No. 16, at 19, U.N. Doc. A/4354 (1959).

<sup>3</sup> JOSEPH, SCHULTZ, AND CASTAN, at 468.

<sup>4</sup> *Id.* at 493.

<sup>5</sup> *Id.* at 482-84.

<sup>6</sup> Human Rights Committee, CCPR General Comment 17, 35<sup>th</sup> Sess., (1989), ¶¶ 1-3.

<sup>7</sup> *Id.* ¶ 3.

<sup>8</sup> Human Rights Committee, *Concluding Observations: Romania*, CCPR/C/79/Add.111 (1999) ¶ 5.

<sup>9</sup> Human Rights Committee, *Concluding Observations: Zimbabwe*, CCPR/C/79/Add.89 (1998) ¶ 12.

<sup>10</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 423 (N.P. Engel, 1993).

<sup>11</sup> *Id.* at 432.

<sup>12</sup> Gen. Cmt. 17, *supra* note 6, ¶ 5.

<sup>13</sup> *Id.* ¶ 4.

<sup>14</sup> NOWAK, *supra* note 10, at 428.

<sup>15</sup> Human Rights Committee, *Concluding Observations: Syrian Arab Republic*, CCPR/CO/71/SYR (2001) ¶ 20.

<sup>16</sup> Gen. Cmt. 17, *supra* note 6, ¶ 7.

<sup>17</sup> NOWAK, *supra* note 10, at 432.

<sup>18</sup> Gen. Cmt. 17, *supra* note 6, ¶ 8.

<sup>19</sup> NOWAK, *supra* note 10, at 434.

## Article 25

<sup>1</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS; CCPR COMMENTARY 436 (N.P. Engel, 1993).

<sup>2</sup> *Id.* at 438.

<sup>3</sup> *Id.* at 436.

<sup>4</sup> BOSSUYT, MARC, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A/2929 Chapt. VI, § 171, at 471 (Martinus Nijhoff Publishers, 1987).

<sup>5</sup> Human Rights Committee, CCPR General Comment 25, 57<sup>th</sup> Sess., (1996), ¶ 3.

<sup>6</sup> *Id.* ¶¶ 8, 25, 26.

<sup>7</sup> *Id.* ¶ 2.

<sup>8</sup> *Id.* ¶ 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* ¶ 2.

<sup>11</sup> SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASE MATERIALS, AND COMMENTARY 497 (Oxford University Press, 2000).

<sup>12</sup> Gen. Cmt. 25, *supra* note 4, ¶ 6.

<sup>13</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 10, at 498.

<sup>14</sup> *Marshall v Canada*, Communication No. 205/1986 (3 December 1991) ¶ 5.4, CCPR/C/43/D/205/1986.

<sup>15</sup> Human Rights Committee, CCPR General Comment 23, 50<sup>th</sup> Sess., (1994), ¶ 7.

<sup>16</sup> *Lansman (Ilmari) et al. v. Finland*, Communication No. 511/1992 (8 November 1994) ¶¶ 9.5, 9.6, CCPR/C/52/D/511/1992; *Lansman (Jouni E.) et al. v. Finland*, Communication No. 671/1995 (22 November 1996) ¶¶ 10.4, 10.5, CCPR/C/58/D/671/1995.

<sup>17</sup> JOSEPH, SCHULTZ, AND CASTAN, *supra* note 10, at 501.

<sup>18</sup> TRAVAUX PRÉPARATOIRES, *supra* note 3, A/2929, Chapt. VI, § 117, at 473.

<sup>19</sup> Gen. Cmt. 25, *supra* note 4, ¶ 4

<sup>20</sup> *Id.* ¶ 10.

<sup>21</sup> TRAVAUX PRÉPARATOIRES, *supra* note 3, A/2929, Chapt. VI, § 172, at 472.

<sup>22</sup> Human Rights Committee, *Concluding Observations: Congo*, CCPR/C/79/Add.118 (2000) ¶ 20.

<sup>23</sup> NOWAK, *supra* note 1, at 443.

<sup>24</sup> Gen. Cmt. 25, *supra* note 4, ¶ 19.

<sup>25</sup> *Id.* ¶ 20.

<sup>26</sup> *Id.* ¶ 19.

<sup>27</sup> TRAVAUX PRÉPARATOIRES, *supra* note 3, A/2929, Chapt. VI, § 174, at 474-75.

<sup>28</sup> Gen. Cmt. 25, *supra* note 4, ¶ 21.

<sup>29</sup> *Matyus v. Slovakia*, Communication No. 923/2000 (22 July 2002) ¶ 9.2, CCPR/C/75/D/923/2000.

- <sup>30</sup> NOWAK, *supra* note 1, at 448.
- <sup>31</sup> Gen. Cmt. 25, *supra* note 4, ¶ 20.
- <sup>32</sup> *Id.* ¶¶ 11, 12.
- <sup>33</sup> *Id.* ¶ 4.
- <sup>34</sup> *M.A. v Italy*, Communication No. 117/1981 (10 April 1984) ¶ 13.3, CCPR/C/\*D/117/1981; *Debreczeny v The Netherlands*, Communication No. 500/1992 (4 April 1995) ¶ 9.3, CCPR/C/53/D/500/1992.
- <sup>35</sup> Gen. Cmt. 25, *supra* note 4, ¶ 14.
- <sup>36</sup> *Silva v Uruguay*, Communication No. 34/1978 (8 April 1981) ¶ 9, CCPR/C/12/D/34/1978.
- <sup>37</sup> Human Rights Committee, *Concluding Observations: Guatemala*, CCPR/CO/72/GTM (2001) ¶ 25.
- <sup>38</sup> Gen. Cmt. 25, *supra* note 4, ¶ 23.
- <sup>39</sup> NOWAK, *supra* note 1, at 450.
- <sup>40</sup> *Kall v Poland* Communication No. 552/1993 (29 September 1997) ¶ 13.6, CCPR/C/60/D/552/1993).
- <sup>41</sup> *B.d.B. v The Netherlands*, Communication No. 273/1988 (2 May 1989) ¶ 6.5, CCPR/C/35/D/273/1988.
- <sup>42</sup> *Paez v Colombia*, Communication No. 195/1985 (23 Aug. 1990) ¶ 5.9, CCPR/C/39/D/195/1985. (Accordingly, the HRC found a violation of article 25(c)).

## Article 26

- <sup>1</sup> NOWAK, MANFRED, U.N COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 462-65 (N.P. Engel, 1993).
- <sup>2</sup> Human Rights Committee, CCPR General Comment 18, 37<sup>th</sup> Sess., (1989), ¶ 1.
- <sup>3</sup> NOWAK, *supra* note 1, 466-69.
- <sup>4</sup> Gen. Cmt. 18, *supra* note 2, ¶ 10.
- <sup>5</sup> *Danning v. The Netherlands*, Communication No. 180/1984 (9 April 1987) ¶¶ 12.2-3, CCPR/C/29/D/180/1984.
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> Gen. Cmt. 18, *supra* note 2, ¶ 12.
- <sup>9</sup> *Pauger v. Austria*, Communication No. 716/1996 (30 April 1999) ¶ 10.2, CCPR/C/65/D/716/1996.
- <sup>10</sup> *Järvinen v. Finland*, Communication No. 295/1988 (15 August 1990) ¶¶ 6.3-7, CCPR/C/39/D/295/1988.
- <sup>11</sup> Human Rights Committee, *Concluding Observations: Poland*, CCPR/C/79/Add.110 (1999) ¶ 11.
- <sup>12</sup> NOWAK, *supra* note 1, at 466-67.
- <sup>13</sup> *Blom v. Sweden*, Communication No. 191/1985 (4 April 1988) ¶ 10.3, CCPR/C/32/D/191/1985.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Gauthier v. Canada*, Communication No. 633/1995 (5 May 1999) partly dissenting opinion by Members Lord Colville, Elizabeth Evatt, Ms. Cecilia Medina Quiroga, and Mr. Hipólito Solari Yrigoyen, CCPR/C/65/D/633/1995.
- <sup>16</sup> NOWAK, *supra* note 1, at 459.
- <sup>17</sup> Gen. Cmt. 18, *supra* note 2, ¶ 7.
- <sup>18</sup> Human Rights Committee, *Report of the Human Rights Committee, Concluding Observations: Poland*, CCPR/A/47/40 (1992) ¶ 133.
- <sup>19</sup> Human Rights Committee, *Concluding Observations: Kyrgyzstan*, CCPR/CO/69/KGZ (2000) ¶ 13.
- <sup>20</sup> *Id.* at ¶ 14; see also, Human Rights Committee, *Concluding Observations: Senegal*, CCPR/C/79/Add. 82 (1997) ¶ 12; see also, *Report of the Human Rights Committee, Concluding Observations: Austria*, CCPR/A/47/40 (1992) ¶ 122.
- <sup>21</sup> Gen. Cmt. 18, *supra* note 2, ¶ 13.
- <sup>22</sup> See SARAH JOSEPH, JENNY SCHULTZ, AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 540 (Oxford University Press, 2000).
- <sup>23</sup> *Järvinen v. Finland*, *supra* note 9, ¶ 6.4, CCPR/C/39/D/295/1988.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.* ¶ 6.5.
- <sup>26</sup> *Foin v. France*, Communication No. 666/1995 (9 November 1999) ¶ 10.3, CCPR/C/67/D/666/1995.
- <sup>27</sup> *Adam v. Czech Republic*, Communication No. 586/1994 (25 July 1996) ¶ 12.5, CCPR/C/57/D/586/1994.
- <sup>28</sup> *Id.* ¶ 12.7.

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<sup>29</sup> *Ballantyne, Davidson, and McIntyre v. Canada*, Communication No. 385/1989 (5 May 1993) ¶ 11.5, CCPR/C/47/D/385/1989.

## Article 27

<sup>1</sup> NOWAK, MANFRED, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 481 (N.P. Engel, 1993).

<sup>2</sup> See, e.g., African (Banjul) Charter on Human and Peoples Rights.

<sup>3</sup> European Charter for Regional or Minority Languages, January 3, 1998, E.T.S. No. 148.

<sup>4</sup> Declaration on Fundamental Principles concerning the Contribution to the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, November 22, 1978, UNESCO General Conference, 20th Sess., UNESCO Standard-Setting Instruments, IV.C. (1994).

<sup>5</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, Annex, 47 U.N. GAOR Supp. No. 49, at 210, U.N. Doc. A/47/49 (1993).

<sup>6</sup> Human Rights Committee, CCPR General Comment 23, 50<sup>th</sup> Sess., (1994), ¶¶ 1, 9.

<sup>7</sup> *Id.* ¶ 9.

<sup>8</sup> *Id.* ¶¶ 4, 5.1, 5.2.

<sup>9</sup> *Id.* ¶¶ 2 and 3.1.

<sup>10</sup> See, e.g., CERD General Recommendation XXIII, 51st Sess., (1997), On the Rights of Indigenous Peoples, A/52/18 (1997) 122; CESCR General Comment 13 (Twenty-first session, 1999): Article 13: The Right to Education, E/2000/22 (1999) 111.

<sup>11</sup> Gen. Cmt. 23, *supra* note 6, ¶ 9.

<sup>12</sup> *Id.*, ¶ 3.2.

<sup>13</sup> *Länsman et al. v. Finland*, Communication No. 671/95 (22 November 1996) ¶ 10.7, CCPR/C/58/D/671/1995.

<sup>14</sup> Gen. Cmt. 23, *supra* note 6, ¶ 5.1.

<sup>15</sup> See, e.g., Human Rights Committee, *Concluding Observations: France*, CCPR/C/79/Add.80 (1997) ¶ 24; *Concluding Observations: Egypt*, CCPR/C/79/Add.23 (1993) ¶ 12.

<sup>16</sup> See, e.g., Human Rights Committee, *Concluding Observations: Germany*, CCPR/C/79/Add.73 (1997) ¶ 13 (“ethnic or linguistic groups who have a traditional area of settlement in particular regions” too restrictive).

<sup>17</sup> *Ballantyne, et al. v. Canada*, Communication Nos. 359/1989, 385/1989 (5 May 1993) ¶ 11.2, CCPR/C/47/D/359/1989 and 385/1989/Rev.1.

<sup>18</sup> Human Rights Committee, *Concluding Observations: Japan*, CCPR/C/79/Add.28 (1993) ¶ 112.

<sup>19</sup> See, e.g., Human Rights Committee, *Concluding Observations: Italy*, CCPR/C/79/Add.37 (1994) ¶ 281 (condemning action limiting minority to mean only linguistic minorities present on the state’s territory).

<sup>20</sup> See Human Rights Committee, *Concluding Observations: Ukraine*, CCPR/C/79/Add.52 (1995) ¶ 322 (condemning use of the restriction “national” minorities); *Concluding Observations: Slovenia*, CCPR/C/79/Add.40 (1994) ¶ 12 (condemning legislation which singled out only the Italian, Hungarian, and Roma groups as minorities).

<sup>21</sup> Human Rights Committee, *Report of the Human Rights Committee, Concluding Observations: Luxembourg*, CCPR/A/48/40 (1993) ¶ 134.

<sup>22</sup> See Human Rights Committee, *Concluding Observations: Czech Republic*, CCPR/CO/72/CZE (2001) ¶¶ 8, 11.

<sup>23</sup> Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994); see also *Kitok v. Sweden*, Communication No. 197/85 (10 August 1988), CCPR/C/33/D/197/1985; Human Rights Committee, *Concluding Observations: India*, CCPR/C/79/Add.81 (1997) ¶ 5 (caste system); *Concluding Observations: Brazil*, CCPR/C/79/Add.66 (1996) ¶ 337 (minorities and indigenous communities should have access to health care).

<sup>24</sup> See e.g., Human Rights Committee, *Concluding Observations: Dominican Republic*, CCPR/C/79/Add.18 (1993) ¶ 7; *Concluding Observations: Hungary*, CCPR/C/79/Add.22 (1993) ¶ 10.

<sup>25</sup> See, e.g., Human Rights Committee, *Concluding Observations: Norway*, CCPR/C/79/Add.112 (2000) ¶ 16 (discrimination in competition for use of public and private lands for traditional practices); *Concluding Observations: Israel*, CCPR/C/79/Add.93 (1998) ¶ 24 (destruction of “illegal” Palestinian homes despite difficult of obtaining “legitimate” building permits); *Concluding Observations: Sudan*, CCPR/C/79/Add.85 (1997), ¶ 20 (failure to ensure ability to use minority languages in official communications and proceedings); *Concluding Observations: United Kingdom of Great Britain and*

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*Northern Ireland*, CCPR/C/79/Add.55 (1995) ¶ 421 (condemning the fact that racial minorities are disproportionately subject to stop and search practices by law enforcement).