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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR29-22-2805** **MOTION TO STRIKE STATE'S NOTICE OF INTENT TO SEEK DEATH PENALTY ON GROUNDS OF INTERNATIONAL LAW AND MEMORANDUM IN SUPPORT OF MOTION**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, hereby moves this Court to Strike State's Notice Pursuant to Idaho Code § 19-4004A on the grounds that Idaho's death penalty scheme violates its obligations under international treaties.

Idaho's death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. U.S. CONST., Art. VI, cl. 2; *see* Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 PERSP. AM. HIST. 233, 264 (1984); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1083, 1101-10 (1992); *see also* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 616-19 (2008). Mr. Kohberger also maintains that the failure to comply with international law violates his right to due process under the Fourteenth Amendment to the United States Constitution as well as Article I, Section 13 of the Idaho Constitution.

I. International Treaties

On December 10, 1948, the United Nations General Assembly adopted and proclaimed the Universal Declaration of Human Rights. United Nations General Assembly Resolution 217 A (III), 10 December 1948 (*See* Exhibit A). The United States was among the forty-eight States that voted for the adoption of the Declaration (the vote was 48 in favor, none against and 8 abstentions).

The Declaration is the first of a series of instruments prepared by the United Nations Commission for Human Rights. In 1988 the United States signed the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and ratified it in 1994 (*See* Exhibit D). In 1977, the United States signed the International Covenant on Economic, Social and Cultural Rights (*See* Exhibit C) but did not ratify it, and the International Covenant on Civil and Political Rights, which it ratified in 1992. This Court is requested, pursuant to IRE R. 201, to take

judicial notice of these instruments. A true and correct copy of each of these instruments is attached hereto and incorporated herein by reference.

A. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights ("ICCPR") (*See* Exhibit B) prohibits "cruel, inhuman or degrading treatment or punishment." ICCPR, Art. 7. Article 6, Section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." Article 6, Section 2 states:

> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Finally, Article 10, Section 1, states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

The ICCPR was ratified by the United States in 1992. Under Article 6 of the United States Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884). Consequently, this Court is bound by the ICCPR.

1. Reservations at Ratification

However, at ratification, the Senate made a number of reservations. Of importance to this Court, they include:

I. The Senate's advice and consent is subject to the following reservations:

> (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.
>
> (3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.
>
> (4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15.

U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992) (available at http://hrlibrary.umn.edu/usdocs/civilres.html) (*See* Exhibit E). Eleven countries objected to the Senate's declaration that it was not actually adopting Article 6, which permits the death penalty only for the worst crimes and forbids it for children under 18 years of age. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence,* 3 Northwestern J. Int'l Human Rights 1, p. 6 (2005) (*See* Exhibit F). Nine countries objected to reservation I(3), which attempts to claim that the United States' national understanding of cruel and unusual punishment controls, as if an international treaty was merely a readoption of domestic law. *Id*. at 7.

Plainly, the position the Senate took in contrary to the fundamental nature of multilateral treaties.

> Even Justice Antonin Scalia was a proponent of uniform interpretation of multilateral treaty provisions and respecting others' reasonable interpretations. See Justice Antonin Scalia, Speech to the American Enterprise Institute (Feb. 21, 2006), https://www.tmcnet.com/usubmit/2006/02/22/1397738.htm ("The object of a treaty is to have nations agree on a particular course of action. And if I'm interpreting a provision of the treaty that has already been interpreted by several

> other signatories, I am inclined to follow the interpretation taken by those other signatories so long as it's within the realm of reasonableness . .. where [their interpretations are] within the bounds of the ambiguity contained in the text, I think it's a good practice to look to what other signatories to the treaty have said. Otherwise, you're going to have a treaty that's interpreted different ways by different countries, and that's certainly not the object of the exercise.").

Timothy Lynch, *The ICCPR, Non-Self-Execution, and DACA Recipient's Right to Remain in the United States,* 34 GEO. IMMIGR. L. J. 323, 344 n. 103 (2020).

Most importantly, this Court must understand that the ICCPR **does not permit** what the Senate claims to have done. Article 4 only permits derogations during times of national emergency, and expressly states that no party can derogate an essential article even in an emergency- here, the right to life, and the right to be free from torture. Ash, at 7. Thus, even if the Senate's decision to make these reservations was to prevent the international understanding of cruel and unusual punishment from forbidding the death penalty (an odd concern, given that the document expressly permits the death penalty) the Senators had no power to derogate Article 7. Indeed, the United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000).

In *Roper v. Simmons*, 543 U.S. 551, 567 (2005), our United States Supreme Court disagreed with the position of the Missouri Attorney General that the reservations the Senate took to killing children showed a national consensus in favor of the practice. The Court went on to cite the treaty as supporting its ultimate decision to find that the Eighth Amendment does not permit the execution of children by our government. *Id.* at 576. Unfortunately, the argument that the ICCPR ought to be enforced as written and the invalidity of the Senators' reservations was not argued.

2. Self-Execution of the ICCPR

There is yet another hurdle- in 2008, our Supreme Court decided that the judicial branch plays no part in enforcing treaties unless they are "self-executing." *Medellin v. Texas*, 552 U.S. 491, 513-14 (2008). And naturally, the Senate claimed an "understanding" that Articles 6 and 7 of the ICCPR are *not* "self-executing."

There are at least three issues that this Court is therefore required to address. First, is the ICCPR "self-executing"? Second, if not, what role does it play in our judicial system? Because the answer to the second question obviates the need to answer the first, this Court should start there. According to the Senate's first implementation report to the Human Rights Committee, the U.S. claimed,

> the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional provisions or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For this reason, it was not considered necessary to adopt special implementing legislature to give effect to the Covenant's provisions in domestic law.

Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Initial Report of States Parties Due in 1993, Addendum, United States of America, U.N. Doc CCPR/C/81/Add.4, Aug. 24, 1994, at 8 (*See* Exhibit G). *See also* Core Document forming Part of the Reports of States Parties, United States of America, U.N. DOC. HRI/CORE/1/Add.49 (1994), at ¶ 141 ("[T]he basic rights and fundamental freedoms guaranteed by the [ICCPR] (other than those the United States took a reservation) have long been protected as a matter for federal constitutional and statutory law . .."") (*See* Exhibit H). Additionally, the United States took the position that courts should look to the covenant in interpreting American law. Human Rights Committee, Comments on the United States of America, 10, issued Apr. 7, 1995, U.N. DOC. CCPR/C/79/Add.50 (1995) at ¶ 11 (*See* Exhibit I).

As for the Courts, despite the ICCPR's non-self-executability, pursuant to the *Charming Betsy* canon of interpretation, they are to construe federal law so as to comport with international treaties. "An act of Congress should be construed in accordance with international law where it is possible to do so without distorting the statute." *Filartiga v. PenaIrala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) *(quoting Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 67 (1804)). *See also* RESTATEMENT FOURTH OF FOREIGN RELATIONS LAW, § 309(1) ("[Where fairly possible, courts in the United States will construe federal statutes to avoid conflict with a treaty provision."). *See generally* Ralph G Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Interpretation*, 43 VAND. L. REV. 1103 (1990).

While the *Charming Betsy* canon has never been used when interpreting the constitution, the statements mentioned above by the United States in terms of its execution of the ICCPR lend themselves to the conclusion that the judiciary should construe the rights of our citizens with the understanding that the protections of the ICCPR set a minimum level. To do otherwise would mean the judiciary was putting our country in breach of a treaty.

That the United States Supreme Court has not considered this should not be surprising. As the Court noted in *Medellin*:

> That this Court has rarely had occasion to find a treaty non-self-executing is not all that surprising. See post, at 1379 (BREYER, J., dissenting). To begin with, the Courts of Appeals have regularly done so. *See, e.g., Pierre v. Gonzales*, 502 F.3d 109, 119–120 (C.A.2 2007) (holding that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is non-self-executing); *Singh v. Ashcroft*, 398 F.3d 396, 404, n. 3 (C.A.6 2005) (same); *Beazley v. Johnson*, 242 F.3d 248, 267 (C.A.5 2001) (holding that the International Covenant on Civil and Political Rights is non-self-executing). Further, as noted, Congress has not hesitated to pass implementing legislation for treaties that in its view require such legislation.

Medellin, 552 U.S. at 522 n. 12. The Court did find that the Senate had prevented judicial enforcement of the ICCPR in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). However, it

does not appear the Court considered the various statements the Senate made to the Human Rights Committee as to what it mean by non-self-executing. Additionally, that case was considering whether to create some form of international common law in federal courts. The Court declined, but held:

> While we agree with Justice SCALIA to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.

Id. at 731.

Thus, the United States Supreme Court has never truly considered the full history of the ICCPR and how it is binding on courts in our country. As previously stated, the Senate has agreed that our courts should consider the Covenant when considering the rights afforded by our laws and constitutions, and further, that it believes anything granted in the ICCPR is already the law in this country.

The Defense in this matter argues that this Court should consider the ICCPR in its entirety, especially Articles 6 and 7, when construing Mr. Kohberger's rights guaranteed by the Idaho and United States Constitutions and be sure not to construe those rights in a way that would violate this country and state's international obligations under the covenant.

II. Application to Idaho

Idaho's death penalty scheme violates the ICCPR, and thereby the Eighth Amendment and Art. I Sec. 6. Because of the improprieties of the capital selection process, the way in which citizens are selected for death goes well beyond the "most serious crimes" in violation of Article 6, Section 2. Because of the conditions under which the condemned are incarcerated and the

excessive delays between sentencing and execution under the Idaho death penalty system, the implementation of the death penalty in Idaho constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article 7 of the ICCPR.

The unconstitutional broadness of Idaho's death penalty scheme is covered in detail in Mr. Kohberger's Motion to Strike State's Notice of Intent to Seek the Death Penalty on Grounds of Arbitrariness. In addition to the arguments made there, this Court must consider what the Human Rights Committee has found to be "most serious crimes" under the Covenant. The Human Right Committee has stated that this "must be read restrictively to mean that the death penalty should be a quite exceptional measure." Human Rights Committee, general comment No. 6, para. 7, HRI/GEN/1/Rev.1. (1982) (*See* Exhibit J). In its Concluding Observations to the United States in 2014, which is the last time the United States fulfilled its obligation by filing a report, the Committee noted that the states continue to kill a disproportionate number of African Americans. CCPR/C/USA/CO/4 (2014), at ¶ 8 (*See* Exhibit K). The unconstitutionally discriminatory aspect of the death penalty in this country is only possible because states such as Idaho maintain death regimes that permit prosecutors and juries to pick and choose whom to kill from amongst every first degree murder case.

The cruel, inhuman, and degrading nature of Idaho's death penalty is covered by Mr. Kohberger's Motion to Strike State's Notice of Intent to Seek Death on Grounds of Means of Execution. Idaho's death row and the incredible wait (assuming Idaho ever has a viable method for killing people) while on death row also violate Article 7 and Article 10, and thereby prohibition on cruel and unusual punishment. Life on death row was recently described by death row inmate Gerald Pizzuto, Jr. in his recent sworn habeas corpus petition (*See* Exhibit L):

46. Death row in Idaho is typified by isolation.

47. For instance, death-row inmates in IDOC's custody live by themselves in single cells.

48. Such inmates typically spend twenty-three hours a day in their cells and are let out only to shower, have "recreation," and for other limited exceptions, such as medical appointments.

49. The "recreation" that is afforded to a death-row inmate generally involves an hour outside, by himself, with no exercise equipment and, at most, something along the lines of a soccer ball.

50. In addition, death-row inmates have no access to programming made available to other IMSI prisoners, including educational and vocational opportunities.

51. Death-row inmates also have no ability to work at jobs within the prison, such as in the kitchen or in the laundry, which other prisoners do.

52. Death-row inmates are limited to a single face-to-face visit per year, other than with their legal team.

53. For every other visit the inmates have, they are separated from their visitor by glass.

54. Prisoners who are not on death row are allowed to have more face-to-face visits with friends, family, spiritual advisors, and so forth.

55. IDOC has a policy in place (control number 319.02.01.002) that purports to create a framework for regularly reviewing the security classification, housing conditions, and working opportunities applicable to inmates under sentence of death.

56. However, in practice, on information and belief, no IMSI inmate under sentence of death is ever given a meaningful review.

57. Instead, every IMSI inmate under sentence of death is indefinitely maintained under the restrictive conditions described above without regard to their disciplinary records, health status, psychological assessments, and so forth.

58. On information and belief, if Mr. Pizzuto were not treated as a death-row inmate by IDOC, he would—like other such prisoners—be given a meaningful review and a meaningful opportunity to become eligible for different conditions, such as increased socialization, more programming, less time restricted to his cell, working opportunities, etc.

Pizzuto v. Commission of Pardons and Parole, Case. No. CV01-22-888, p. 6-7 (signed and notarized Jan. 14, 2022) (attached). Mr. Pizzuto's experience is supported by the SOPs for death row maintained by the Idaho Department of Corrections (hereinafter "IDOC"), which require anyone under sentence of death to automatically go into solitary confinement, or as they call it, "restrictive housing." IDOC, *Inmates under Sentence of Death*, Control Number 319.02.01.002, p. 2 (Rev. June 5, 2017) (*See* Exhibit M). Additionally, Mr. Pizzuto's most recent case shows that in addition to the torture of solitary, he is now forced to undergo mock executions. *Pizzuto v. Tewalt*, Slip Copy, 2023 WL 4901992 (D.Idaho, 2023).

Idaho's Death Row is far from unique. *See*, Morel Pontier, *Cruel But Not Unusual the Automatic Use of Solitary Confinement on Death Row: A Comparison of the Housing Policies of Death-Sentenced Prisoners and Other Prisoners Throughout the United States*, 26 TEX. J. ON C.L. & C.R. 117, 134 (2021). However, this system, which *de facto* places these men in solitary confinement for years on end has been declared a violation of this nation's ICCPR obligations.

"The [Human Rights] Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. […]" Human Rights Comm., General Comment 20, Article 7 (Forty-fourth session, 1992), ¶ 6 (*See* Exhibit N), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 30, U.N. Doc. HRI/GEN/1/Rev.1 (1994). In *T. Gómez de Voituret v. Uruguay*, Commc'n No. 109/1981, at 168, ¶¶ 12.2-13, U.N. Doc. A/39/40 (Apr. 10, 1984) (*See* Exhibit O) the Committee found a violation of Art. 10(1) because T. Gómez de Voituret "was kept in solitary confinement for several months in conditions which failed to respect the inherent dignity of the human person". In *R. S. Antonaccio v. Uruguay*, Commc'n No. 63/1979, at 119-20, ¶¶ 16-20, U.N. Doc. A/37/40 (Oct. 28, 1981) (*See* Exhibit P), the Committee held that both Art. 7 and Art. 10(1) had been

violated because the author was held in an underground cell and denied the medical attention his condition required.

"The human rights expert urged the US Government to adopt concrete measures to eliminate the use of prolonged or indefinite solitary confinement under all circumstances." Office of the High Commission for Human Rights News, US: "Four decades in solitary confinement can only be described as torture" – UN rights expert (Oct. 7, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13832&LangID=E#sthash.jaL4P Rh6.dpuf (quoting Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Juan Mendez) (*See* Exhibit Q). There is really no doubt that Idaho's death row is in violation of the ICCPR. Because of this, this Court must strike the death penalty.

CONCLUSION

Based upon the foregoing and argument to be presented at the hearing hereon, this Court is respectfully requested to grant this Motion that:

(a) the State's Notice of Intent to Seek Death Penalty be struck;

(b) the Court seat a jury which is not "death-qualified";

(c) the Court preclude the admission of any evidence of aggravating circumstances during the trial of this case; and,

(d) the Court not instruct the jury on any aggravated punishment.

DATED this 4 day of September, 2024.

BY: 

JAY WESTON LOGSDON
INTERIM CHIEF PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the ___5___ day of September, 2024, addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net

EXHIBIT A

Universal Declaration of Human Rights

Preamble

Whereas 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,
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
Whereas it is essential to promote the development of friendly relations between nations,
Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
Now, therefore,
The General Assembly,
Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by

teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

EXHIBIT B

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 I 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 judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of 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 judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that 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 fulfil a contractual obligation. Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented 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 judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

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

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

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

(c) To be tried without undue delay;

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

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

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

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

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

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

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

Article 15

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

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

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

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4. 2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of 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 I 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 tie 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

1. 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 I 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.

EXHIBIT C

No. 14531

MULTILATERAL

International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on 16 December 1966

Authentic texts of the Covenant: English, French, Chinese, Russian and Spanish.

Registered ex officio *on 3 January 1976.*

MULTILATÉRAL

Pacte international relatif aux droits économiques, sociaux et culturels. Adopté par l'Assemblée générale des Nations Unies le 16 décembre 1966

Textes authentiques du Pacte : anglais, français, chinois, russe et espagnol.

Enregistré d'office le 3 janvier 1976.

INTERNATIONAL COVENANT[1] ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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,

[1] Came into force in respect of the following States on 3 January 1976, i.e., three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or accession, in accordance with article 27 (1):*

State	Date of deposit of the instrument of ratification or accession (a)
Barbados**	5 January 1973 *a*
Bulgaria**	21 September 1970
Byelorussian Soviet Socialist Republic**	12 November 1973
Chile	10 February 1972
Colombia	29 October 1969
Costa Rica	29 November 1968
Cyprus	2 April 1969
Denmark**	6 January 1972
Ecuador	6 March 1969
Finland	19 August 1975
German Democratic Republic**	8 November 1973
Germany, Federal Republic of (With a declaration of application to Berlin (West).)***	17 December 1973
Hungary**	17 January 1974
Iran	24 June 1975
Iraq**	25 January 1971
Jamaica	3 October 1975
Jordan	28 May 1975
Kenya**	1 May 1972 *a*
Lebanon	3 November 1972 *a*
Libyan Arab Republic**	15 May 1970 *a*
Madagascar**	22 September 1971
Mali	16 July 1974 *a*
Mauritius	12 December 1973 *a*
Mongolia**	18 November 1974
Norway**	13 September 1972
Philippines	7 June 1974
Romania**	9 December 1974
Rwanda**	16 April 1975 *a*
Sweden**	6 December 1971
Syrian Arab Republic**	21 April 1969 *a*
Tunisia	18 March 1969
Ukrainian Soviet Socialist Republic**	12 November 1973
Union of Soviet Socialist Republics**	16 October 1973
Uruguay	1 April 1970
Yugoslavia	2 June 1971

Subsequently, the Covenant came into force for the following States three months after the date of the deposit of their own instrument of ratification or instrument of accession, in accordance with article 27 (2).

State	Date of deposit of the instrument of ratification
Australia (With effect from 10 March 1976.)	10 December 1975
Czechoslovakia** (With effect from 23 March 1976.)	23 December 1975

*Several of the 35 instruments deposited being accompanied by reservations, and the Covenant being silent about reservations, the Secretary-General pursuant to the instructions of the General Assembly (resolutions 598 (VI)† and 1452B (XIV)‡) consulted the States concerned on whether they objected to the entry into force in accordance with article 27 (1). In the absence of objections within 90 days from the date of circulation (3 October 1975) of the depositary notification, the Secretary-General notified the States concerned that the Covenant had entered into force on 3 January 1976.

† United Nations, *Official Records of the General Assembly, Sixth Session, Supplement No. 20* (A/2119), p. 84.

‡ *Ibid., Fourteenth Session, Supplement No. 16* (A/4354), p. 56.

** See p. 84 of this volume for the texts of the declarations and reservations made upon ratification or accession.

*** See p. 98 of this volume for the text of the declarations relating to the declaration made upon ratification by the Federal Republic of Germany concerning application to Berlin (West).

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 freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political 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 take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4. The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

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 to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted 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. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

(*a*) remuneration which provides all workers, as a minimum, with:
  (i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;

(*b*) safe and healthy working conditions;

(*c*) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(*d*) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8. 1. The States Parties to the present Covenant undertake to ensure:

(*a*) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(*b*) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(*c*) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(*d*) the right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize[1] to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9. The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10. The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11. 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(*a*) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(*b*) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

[1] United Nations, *Treaty Series*, vol. 68, p. 17.

Article 12. 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(*a*) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(*b*) the improvement of all aspects of environmental and industrial hygiene;

(*c*) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(*d*) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13. 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(*a*) primary education shall be compulsory and available free to all;

(*b*) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(*c*) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(*d*) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(*e*) the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14. Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15. 1. The States Parties to the present Covenant recognize the right of everyone:

(*a*) to take part in cultural life;

(*b*) to enjoy the benefits of scientific progress and its applications;

(*c*) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16. 1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (*a*) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant.

(*b*) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17. 1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18. Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and

Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19. The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or as appropriate for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20. The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21. The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22. The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23. The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24. 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 25. 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 V

Article 26. 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 the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27. 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 28. The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29. 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 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 30. Irrespective of the notifications made under article 26, 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 26;

(*b*) the date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31. 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 26.

IN FAITH WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Covenant, opened for signature at New York, on the nineteenth day of December, one thousand nine hundred and sixty-six.

For Afghanistan:
Pour l'Afghanistan :
阿富汗：
За Афганистан:
Por el Afganistán:

For Albania:
Pour l'Albanie :
阿爾巴尼亞：
За Албанию:
Por Albania:

For Algeria:
Pour l'Algérie :
阿爾及利亞：
За Алжир:
Por Argelia:

TEWFIK BOUATTOURA
10 December 1968

For Argentina:
Pour l'Argentine :
阿根廷：
За Аргентину:
Por la Argentina:

RUDA
19 Febrero 1968[1]

For Australia:
Pour l'Australie :
澳大利亞：
За Австралию:
Por Australia:

LAURENCE RUPERT MCINTYRE
18 December 1972

[1] 19 February 1968 – 19 février 1968.

For Austria:
Pour l'Autriche :
奥地利：
За Австрию:
Por Austria:

PETER JANKOWITSCH
10 décembre 1973

For Barbados:
Pour la Barbade :
巴貝多：
За Барбадос:
Por Barbados:

For Belgium:
Pour la Belgique :
比利時：
За Бельгию:
Por Bélgica:

C. SHUURMANS
10 décembre 1968

For Bolivia:
Pour la Bolivie :
玻利維亞：
За Боливию:
Por Bolivia:

For Botswana:
Pour le Botswana :
波扎那：
За Ботсвану:
Por Botswana:

For Brazil:
Pour le Brésil :
巴西：
За Бразилию:
Por el Brasil:

For Bulgaria:
Pour la Bulgarie :
保加利亞：
За Болгарию:
Por Bulgaria:

Милко Тарабанов[1]
8 octobre 1968

For Burma:
Pour la Birmanie :
緬甸：
За Бирму:
Por Birmania:

For Burundi:
Pour le Burundi :
布隆提：
За Бурунди:
Por Burundi:

For the Byelorussian Soviet Socialist Republic:[2]
Pour la République socialiste soviétique de Biélorussie[2] :
白俄羅斯蘇維埃社會主義共和國：
За Белорусскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Bielorrusia:

Герадот Гаўрылавіч Чарнушчанко[3]
19 марта 1968[4]

[1] Milko Tarabanov.
[2] See p. 78 of this volume for the texts of the declarations and reservations made upon signature — Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.
[3] Geradot Gavrilovich Chernushchenko — Geradote Gavrilovitch Tchernuchtchenko.
[4] 19 March 1968 — 19 mars 1968.

For Cambodia:
Pour le Cambodge :
柬埔寨：
За Камбоджу:
Por Camboya:

For Cameroon:
Pour le Cameroun :
喀麥隆：
За Камерун:
Por el Camerún:

For Canada:
Pour le Canada :
加拿大：
За Канаду:
Por el Canadá:

For the Central African Republic:
Pour la République centrafricaine :
中非共和國：
За Центральноафриканскую Республику:
Por la República Centroafricana:

For Ceylon:
Pour Ceylan :
錫蘭：
За Цейлон:
Por Ceilán:

For Chad:
Pour le Tchad :
查德：
За Чад:
Por el Chad:

For Chile:
Pour le Chili :
智利：
За Чили:
Por Chile:

JOSÉ PIÑERA CARVALLO
Sept. 16, 1969

For China:
Pour la Chine :
中國：
За Китай:
Por China:

[*Signed — Signé*][1]

For Colombia:
Pour la Colombie :
哥倫比亞：
За Колумбию:
Por Colombia:

EVARISTO SOURDIS
Dic. 21 de 1966[2]

For the Congo (Brazzaville):
Pour le Congo (Brazzaville) :
剛果（布拉薩市）：
За Конго (Браззавиль):
Por el Congo (Brazzaville):

[1] Signature affixed by Liu Chieh on 5 October 1967. See p. 94 for the texts of the declarations relating to the signature on behalf of the Government of the Republic of China — La signature a été apposée par Liu Chieh le 5 octobre 1967. Voir p. 94 pour les textes des déclarations relatives à la signature au nom du Gouvernement de la République de Chine.

[2] 21 December 1966 — 21 décembre 1966.

For the Congo (Democratic Republic of):
Pour le Congo (République démocratique du) :
剛果 (民主共和國):
За Демократическую Республику Конго:
Por el Congo (República Democrática de):

For Costa Rica:
Pour le Costa Rica :
哥斯大黎加:
За Коста-Рику:
Por Costa Rica:

LUIS D. TINOCO

For Cuba:
Pour Cuba :
古巴:
За Кубу:
Por Cuba:

For Cyprus:
Pour Chypre :
賽普勒斯:
За Кипр:
Por Chipre:

ZENON ROSSIDES
9th January 1967

For Czechoslovakia:[1]
Pour la Tchécoslovaquie[1] :
捷克斯拉夫:
За Чехословакию:
Por Checoslovaquia:

VÁCLAV PLESKOT
7.10.1968[2]

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature — Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.
[2] 7 October 1968 — 7 octobre 1968.

For Dahomey:
Pour le Dahomey :
達荷美:
За Дагомею:
Por el Dahomey:

For Denmark:
Pour le Danemark :
丹麥:
За Данию:
Por Dinamarca:

OTTO ROSE BORCH
March 20, 1968

For the Dominican Republic:
Pour la République Dominicaine :
多明尼加共和國:
За Доминиканскую Республику:
Por la República Dominicana:

For Ecuador:
Pour l'Equateur :
厄瓜多:
За Эквадор:
Por el Ecuador:

[*Illegible – Illisible*]
Septiembre 29/1967[1]

For El Salvador:
Pour El Salvador :
薩爾瓦多:
За Сальвадор:
Por El Salvador:

ALFREDO MARTÍNEZ MORENO
Septiembre 21, 1967[2]

[1] 29 September 1967 – 29 septembre 1967.
[2] 21 September 1967 – 21 septembre 1967.

For Ethiopia:
Pour l'Ethiopie :
衣索比亞:
За Эфиопию:
Por Etiopía:

For the Federal Republic of Germany:
Pour la République fédérale d'Allemagne :
德意志聯邦共和國:
За Федеративную Республику Германии:
Por la República Federal de Alemania:

WILLY BRANDT
9/10.1968[1]

For Finland:
Pour la Finlande :
芬蘭:
За Финляндию:
Por Finlandia:

AHTI KARJALAINEN
11/10.67[2]

For France:
Pour la France :
法蘭西:
За Францию:
Por Francia:

For Gabon:
Pour le Gabon :
加彭:
За Габон:
Por el Gabón:

[1] 9 October 1968 – 9 octobre 1968.
[2] 11 October 1967 – 11 octobre 1967.

For Gambia:
Pour la Gambie :
冈比亚:
За Гамбию:
Por Gambia:

For the German Democratic Republic:
Pour la République démocratique allemande :
德意志民主共和国
Германская Демократическая Республика:
Por la República Democrática Alemana:

HORST GRUNERT
27.3.73[1]

For Ghana:
Pour le Ghana :
加纳:
За Гану:
Por Ghana:

For Greece:
Pour la Grèce :
希腊:
За Грецию:
Por Grecia:

For Guatemala:
Pour le Guatemala :
瓜地馬拉:
За Гватемалу:
Por Guatemala:

[1] 27 March 1973 – 27 mars 1973.

For Guinea:
Pour la Guinée :
幾內亞:
За Гвинею:
Por Guinea:

MAROF ACHKAR
Le 28 février 1967

For Guyana:
Pour la Guyane :
蓋亞那:
За Гвиану:
Por Guyana:

ANNE JARDIM
August 22, 1968

For Haiti:
Pour Haïti :
海地:
За Гаити:
Por Haití:

For the Holy See:
Pour le Saint-Siège :
教廷:
За Святейший престол:
Por la Santa Sede:

For Honduras:
Pour le Honduras :
宏都拉斯:
За Гондурас:
Por Honduras:

H. LÓPEZ VILLAMIL

For Hungary:[1]
Pour la Hongrie[1] :
匈牙利:
За Венгрию:
Por Hungría:

KÁROLY CSATORDAY
March 25, 1969

For Iceland:
Pour l'Islande :
冰島:
За Исландию:
Por Islandia:

HANNES KJARTANSSON
30 Dec. 1968

For India:
Pour l'Inde :
印度:
За Индию:
Por la India:

For Indonesia:
Pour l'Indonésie :
印度尼西亞:
За Индонезию:
Por Indonesia:

For Iran:
Pour l'Iran :
伊朗:
За Иран:
Por el Irán:

Subject to ratification[2]
MEHDI VAKIL
4 April 1968

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature—Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.
[2] Sous réserve de ratification.

For Iraq:[1]
Pour l'Irak :
伊拉克：
За Ирак:
Por el Irak:

ADNAN PACHACHI
Feb. 18, 1969

For Ireland:
Pour l'Irlande :
愛爾蘭：
За Ирландию:
Por Irlanda:

For Israel:
Pour Israël :
以色列：
За Израиль:
Por Israel:

MICHAEL COMAY

For Italy:
Pour l'Italie :
義大利：
За Италию:
Por Italia:

PIERO VINCI
18 January 1967

For the Ivory Coast:
Pour la Côte-d'Ivoire :
牙象海岸：
За Берег Слоновой Кости:
Por la Costa de Marfil:

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature—Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.

For Jamaica:
Pour la Jamaïque :
牙買加:
За Ямайку:
Por Jamaica:

E. R. RICHARDSON

For Japan:
Pour le Japon :
日本:
За Японию:
Por el Japón:

For Jordan:
Pour la Jordanie :
約旦:
За Иорданию:
Por Jordania:

SHARIF ABDUL-HAMID SHARAF
June 30, 1972

For Kenya:
Pour le Kenya :
肯亞:
За Кению:
Por Kenia:

For Kuwait:
Pour le Koweït :
科威特:
За Кувейт:
Por Kuwait:

For Laos:
Pour le Laos :
寮國：
За Лаос:
Por Laos:

For Lebanon:
Pour le Liban :
黎巴嫩：
За Ливан:
Por el Líbano:

For Lesotho:
Pour le Lesotho :
賴索托：
За Лесото:
Por Lesotho:

For Liberia:
Pour le Libéria :
賴比瑞亞：
За Либерию:
Por Liberia:

NATHAN BARNES
18th April 1967

For Libya:
Pour la Libye :
利比亞：
За Ливию:
Por Libia:

For Liechtenstein:
Pour le Liechtenstein :
列支敦斯登：
За Лихтенштейн:
Por Liechtenstein:

For Luxembourg:
Pour le Luxembourg :
盧森堡：
За Люксембург:
Por Luxemburgo:

JEAN RETTEL
Le 26 novembre 1974

For Madagascar:
Pour Madagascar :
馬達加斯加：
За Мадагаскар:
Por Madagascar:

BLAISE RABETAFIKA
Le 14 avril 1970

For Malawi:
Pour le Malawi :
馬拉威：
За Малави:
Por Malawi:

For Malaysia:
Pour la Malaisie :
馬來亞聯邦：
За Малайскую Федерацию:
Por Malasia:

For the Maldive Islands:
Pour les îles Maldives :
馬爾代夫羣島:
За Мальдивские острова:
Por las Islas Maldivas:

For Mali:
Pour le Mali :
馬利:
За Мали:
Por Malí:

For Malta:[1]
Pour Malte[1] :
馬耳他:
За Мальту:
Por Malta:

ARVID PARDO
22 October 1968

For Mauritania:
Pour la Mauritanie :
茅利塔尼亞:
За Мавританию:
Por Mauritania:

For Mexico:
Pour le Mexique :
墨西哥:
За Мексику:
Por México:

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature — Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.

For Monaco:
Pour Monaco :
摩納哥:
За Монако:
Por Mónaco:

For Mongolia:[1]
Pour la Mongolie[1] :
蒙古:
За Монголию:
Por Mongolia:

JH. BANZAR
1968.VI.5[2]

For Morocco:
Pour le Maroc :
摩洛哥:
За Марокко:
Por Marruecos:

For Nepal:
Pour le Népal :
尼泊爾:
За Непал:
Por Nepal:

For the Netherlands:
Pour les Pays-Bas :
荷蘭:
За Нидерланды:
Por los Países Bajos:

D. G. E. MIDDELBURG
25 June 1969

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature — Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.
[2] 5 June 1968 — 5 juin 1968.

For New Zealand:
Pour la Nouvelle-Zélande :
紐西蘭：
За Новуіо Зеландию:
Por Nueva Zelandia:

FRANK HENRY CORNER
12 November 1968

For Nicaragua:
Pour le Nicaragua :
尼加拉瓜：
За Никарагуа:
Por Nicaragua:

For the Niger:
Pour le Niger :
奈及爾：
За Нигер:
Por el Níger:

For Nigeria:
Pour la Nigéria :
奈及利亞：
За Нигерию:
Por Nigeria:

For Norway:
Pour la Norvège :
挪威：
За Норвегию:
Por Noruega:

EDVARD HAMBRO
March 20, 1968

For Pakistan:
Pour le Pakistan :
巴基斯坦：
За Пакистан:
Por el Pakistán:

For Panama:
Pour le Panama :
巴拿馬:
За Панаму:
Por Panamá:

For Paraguay:
Pour le Paraguay :
巴拉圭:
За Парагвай:
Por el Paraguay:

For Peru:
Pour le Pérou :
祕魯:
За Перу:
Por el Perú:

For the Philippines:
Pour les Philippines :
菲律賓:
За Филиппины:
Por Filipinas:

SALVADOR P. LÓPEZ

For Poland:
Pour la Pologne :
波蘭:
За Польшу:
Por Polonia:

B. TOMOROWICZ
2.III.1967[1]

[1] 2 March 1967 – 2 mars 1967.

For Portugal:
Pour le Portugal :
葡萄牙:
За Португалию:
Por Portugal:

For the Republic of Korea:
Pour la République de Corée :
大韓民國:
За Корейскую Республику:
Por la República de Corea:

For the Republic of Viet-Nam:
Pour la République du Viet-Nam :
越南共和國:
За Республику Вьетнам:
Por la República de Viet-Nam:

For Romania:[1]
Pour la Roumanie[1] :
羅馬尼亞:
За Румынию:
Por Rumania:

GHEORGHE DIACONESCU
27 June 1968

For Rwanda:
Pour le Rwanda :
盧安達:
За Руанду:
Por Rwanda:

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature — Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.

For San Marino:
Pour Saint-Marin :
聖馬利諾：
За Сан-Марино:
Por San Marino:

For Saudi Arabia:
Pour l'Arabie Saoudite :
沙烏地阿拉伯：
За Саудовскую Аравию:
Por Arabia Saudita:

For Senegal:
Pour le Sénégal :
塞內加爾：
За Сенегал:
Por el Senegal:

IBRAHIMA BOYE
Ambassadeur du Sénégal à l'ONU
New York, 16 juillet 1970

For Sierra Leone:
Pour le Sierra Leone :
獅子山：
За Сьерра-Леоне:
Por Sierra Leona:

For Singapore:
Pour Singapour :
新加坡：
За Сингапур:
For Singapur:

For Somalia:
Pour la Somalie :
索馬利亞:
За Сомали:
Por Somalia:

For South Africa:
Pour l'Afrique du Sud :
南非:
За Южную Африку:
Por Sudáfrica:

For Spain:
Pour l'Espagne :
西班牙:
За Испанию:
Por España:

For the Sudan:
Pour le Soudan :
蘇丹:
За Судан:
Por el Sudán:

For Sweden:
Pour la Suède :
瑞典:
За Швецию:
Por Suecia:

TORSTEN NILSSON
29 September 1967

For Switzerland:
Pour la Suisse :
瑞士:
За Швейцарию:
Por Suiza:

For Syria:
Pour la Syrie :
叙利亚：
За Сирию:
Por Siria:

For Thailand:
Pour la Thaïlande :
泰國：
За Таиланд:
Por Tailandia:

For Togo:
Pour le Togo :
多哥：
За Того:
Por el Togo:

For Trinidad and Tobago:
Pour la Trinité et Tobago :
千里達及托貝哥：
За Тринидад и Тобаго:
Por Trinidad y Tabago:

For Tunisia:
Pour la Tunisie :
突尼西亚：
За Тунис:
Por Túnez:

MAHMOUD MESTIRI
Le 30 avril 1968

For Turkey:
Pour la Turquie :
土耳其：
За Турцию:
Por Turquía:

For Uganda:
Pour l'Ouganda :
烏干達:
За Уганду:
Por Uganda:

For the Ukrainian Soviet Socialist Republic:[1]
Pour la République socialiste soviétique d'Ukraine[1] :
烏克蘭蘇維埃社會主義共和國:
За Украинскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Ucrania:

СЕРГИЙ ТИМОФІЙОВИЧ ШЕВЧЕНКО[2]
20.III.68[3]

For the Union of Soviet Socialist Republics:[1]
Pour l'Union des Républiques socialistes soviétiques[1] :
蘇維埃社會主義共和國聯邦:
За Союз Советских Социалистических Республик:
Por la Unión de Repúblicas Socialistas Soviéticas:

ЯКОВ АЛЕКСАНДРОВИЧ МАЛИК[4]
18.3.68[5]

For the United Arab Republic:
Pour la République arabe unie :
阿拉伯聯合共和國:
За Объединенную Арабскую Республику:
Por la República Arabe Unida:

[*Illegible — Illisible*]
4th August 1967

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature — Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.
[2] Sergei Timofeyevich Shevchenko — Serguei Timofeyevitch Chevtchenko.
[3] 20 March 1968 — 20 mars 1968.
[4] Yakov Aleksandrovich Malik — Yakov Aleksandrovitch Malik.
[5] 18 March 1968 — 18 mars 1968.

For the United Kingdom of Great Britain and Northern Ireland:[1]
Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord[1] :
大不列顛及北愛爾蘭聯合王國：
За Соединенное Королевство Великобритании и Северной Ирландии:
Por el Reino Unido de Gran Bretaña e Irlanda del Norte:

CAREDON
16th September 1968

For the United Republic of Tanzania:
Pour la République-Unie de Tanzanie :
坦尚尼亞聯合共和國：
За Объединенную Республику Танзания:
Por la República Unida de Tanzania:

For the United States of America:
Pour les Etats-Unis d'Amérique :
美利堅合衆國：
За Соединенные Штаты Америки:
Por los Estados Unidos de América:

For the Upper Volta:
Pour la Haute-Volta :
上伏塔：
За Верхнюю Вольту:
Por el Alto Volta:

For Uruguay:
Pour l'Uruguay :
烏拉圭：
За Уругвай:
Por el Uruguay:

PEDRO P. BERRO
Febrero 21/1967[2]

[1] See p. 78 of this volume for the texts of the declarations and reservations made upon signature — Voir p. 78 du présent volume pour les textes des déclarations et réserves faites lors de la signature.
[2] 21 February 1967 — 21 février 1967.

For Venezuela:
Pour le Venezuela :
委內瑞拉:
За Венесуэлу:
Por Venezuela:

GERMÁN NAVA CARRILLO
24 Junio 1969[1]

For Western Samoa:
Pour le Samoa-Occidental :
西薩摩亞:
За Западное Самоа:
Por Samoa Occidental:

For Yemen:
Pour le Yémen :
也門:
За Йемен:
Por el Yemen:

For Yugoslavia:
Pour la Yougoslavie :
南斯拉夫:
За Югославию:
Por Yugoslavia:

ANTON VRATUŠA
Aug. 8, 1967

For Zambia:
Pour la Zambie :
尚比亞:
За Замбию:
Por Zambia:

[1] 24 June 1969 – 24 juin 1969.

DECLARATIONS AND RESERVATIONS MADE UPON SIGNATURE

DÉCLARATIONS ET RÉSERVES FAITES LORS DE LA SIGNATURE

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[BYELORUSSIAN TEXT — TEXTE BIÉLORUSSE]

«Беларуская Савецкая Сацыялістычная Рэспубліка заяўляе, што палажэнні пункта 1 артыкула 26 Пакта аб эканамічных, сацыяльных і культурных правах і пункта 1 артыкула 48 Пакта аб грамадзянскіх і палітычных правах, згодна з якімі рад дзяржаў не можа стаць удзельнікамі гэтых Пактаў, носяць дыскрымінацыйны характар, і лічыць, што Пакты ў адпаведнасці з прынцыпам суверэннай роўнасці дзяржаў павінны быць адкрыты для ўдзелу ўсіх зацікаўленых дзяржаў без якой-небудзь дыскрымінацыі і абмежавання».

[RUSSIAN TEXT — TEXTE RUSSE]

«Белорусская Советская Социалистическая Республика заявляет, что положения пункта 1 статьи 26 Пакта об экономических, социальных и культурных правах и пункта 1 статьи 48 Пакта о гражданских и политических правах, согласно которым ряд государств не может стать участниками этих Пактов, носят дискриминационный характер, и считает, что Пакты в соответствии с принципом суверенного равенства государств должны быть открыты для участия всех заинтересованных государств без какой-либо дискриминации и ограничения».

[TRANSLATION]

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

[TRADUCTION]

La République socialiste soviétique de Biélorussie déclare que les dispositions du paragraphe 1 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels et celles du paragraphe 1 de l'article 48 du Pacte international relatif aux droits civils et politiques, aux termes desquelles un certain nombre d'Etats ne peuvent pas devenir parties auxdits Pactes, ont un caractère discriminatoire et considère que, conformément au principe de l'égalité souveraine des Etats, les Pactes devraient être ouverts à la participation de tous les Etats intéressés sans aucune discrimination ou limitation.

CZECHOSLOVAKIA

[CZECH TEXT — TEXTE TCHÈQUE]

"Československá socialistická republika prohlašuje, že ustanovení článku 26, odstavec 1 Mezinárodního paktu o hospodářských, sociálních a kulturních právech je v rozporu se zásadou, že všechny státy mají právo stát se smluvními stranemi mnohostranných smluv, jež upravují otázky obecného zájmu."

[TRANSLATION[1] — TRADUCTION[2]]

The Czechoslovak Socialist Republic declares that the provisions of article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights are in contradiction with the principle that all States have the right to become parties to multilateral treaties governing matters of general interest.

TCHÉCOSLOVAQUIE

[TRADUCTION — TRANSLATION]

Le Gouvernement de la République socialiste tchécoslovaque déclare que les dispositions de l'article 26, paragraphe 1, du Pacte international relatif aux droits économiques, sociaux et culturels ne sont pas en concordance avec le principe selon lequel tous les Etats ont le droit de devenir parties aux traités multilatéraux réglementant les questions d'intérêt général.

HUNGARY

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

HONGRIE

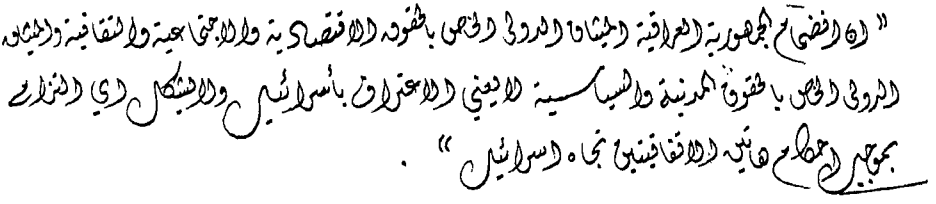
[TRADUCTION — TRANSLATION]

Le Gouvernement de la République populaire hongroise déclare que le paragraphe 1 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels et le paragraphe 1 de l'article 48 du Pacte international relatif aux droits civils et politiques, aux termes desquels certains Etats ne peuvent pas devenir parties auxdits Pactes, ont un caractère discriminatoire et sont contraires au principe fondamental du droit international selon lequel tous les Etats ont le droit de devenir parties aux traités multilatéraux généraux. Ces dispositions discriminatoires sont incompatibles avec les buts des Pactes.

[1] Translation supplied by the Government of Czechoslovakia.
[2] Traduction fournie par le Gouvernement tchécoslovaque.

IRAQ *IRAK*

[ARABIC TEXT — TEXTE ARABE]



[TRANSLATION[1] — TRADUCTION[2]]

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

[TRADUCTION — TRANSLATION]

Le fait que la République d'Irak devienne partie au Pacte international relatif aux droits économiques, sociaux et culturels et au Pacte international relatif aux droits civils et politiques ne signifie en rien qu'elle reconnaît Israël ni qu'elle assume des obligations à l'égard d'Israël en vertu desdits Pactes.

MALTA *MALTE*

[TRADUCTION — TRANSLATION]

"The Government of Malta recognises and endorses the principles laid down in paragraph 2 of article 10 of the Covenant. However, the present circumstances obtaining in Malta do not render necessary and do not render expedient the imposition of those principles by legislation."

Le Gouvernement maltais accepte et appuie les principes énoncés au paragraphe 2 de l'article 10 du Pacte. Toutefois, en raison de la situation présente à Malte, il n'est pas nécessaire ni opportun que ces principes soient sanctionnés par la législation.

MONGOLIA *MONGOLIE*

[TRADUCTION — TRANSLATION]

"The People's Republic of Mongolia declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil

La République populaire mongole déclare que les dispositions du paragraphe 1 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels et celles du paragraphe 1 de l'article 48 du Pacte interna-

[1] Translation supplied by the Government of Iraq.
[2] Traduction fournie par le Gouvernement iraquien.

and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation."

tional relatif aux droits civils et politiques, aux termes desquelles un certain nombre d'Etats ne peuvent pas devenir parties auxdits Pactes, ont un caractère discriminatoire et considère que, conformément au principe de l'égalité souveraine des Etats, les Pactes devraient être ouverts à la participation de tous les Etats intéressés sans aucune discrimination ou limitation.

ROMANIA

[TRANSLATION — TRADUCTION]

The Government of the Socialist Republic of Romania declares that the provisions of article 26, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights are at variance with the principle that all States have the right to become parties to multilateral treaties governing matters of general interest.

ROUMANIE

«Le Gouvernement de la République socialiste de Roumanie déclare que les dispositions de l'article 26, paragraphe 1, du Pacte international relatif aux droits économiques, sociaux et culturels ne sont pas en concordance avec le principe selon lequel tous les Etats ont le droit de devenir parties aux traités multilatéraux réglementant les questions d'intérêt général.»

UKRAINIAN SOVIET SOCIALIST REPUBLIC

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[UKRAINIAN TEXT — TEXTE UKRAINIEN]

«Українська Радянська Соціалістічна Республіка заявляє, що положення пункту 1 статті 26 Міжнародного пакту про економічні, соціальні і культурні права та пункту 1 статті 48 Міжнародного пакту про громадянські і політичні права, згідно з якими ряд держав не може стати учасниками цих пактів, мають дискримінаційний характер, і вважає, що пакти відповідно до принципу суверенної рівності держав повинні бути відкриті для участі всіх заінтересованих держав без будь-якої дискримінації та обмеження».

[RUSSIAN TEXT — TEXTE RUSSE]

«Украинская Советская Социалистическая Республика заявляет, что положения пункта 1 статьи 26 Международного пакта об экономических, социальных и культурных правах и пункта 1 статьи 48 Международного пакта о гражданских и политических правах, в соответствии с которыми ряд государств не может стать участниками этих пактов, имеют дискриминационный характер, и считает, что пакты в соответствии с принципом суверенного равенства государств должны быть открыты для участия всех заинтересованных государств без какой-либо дискриминации и ограничения».

[TRANSLATION]

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

[TRADUCTION]

La République socialiste soviétique d'Ukraine déclare que les dispositions du paragraphe 1 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels et celles du paragraphe 1 de l'article 48 du Pacte international relatif aux droits civils et politiques, aux termes desquelles un certain nombre d'Etats ne peuvent pas devenir parties auxdits Pactes, ont un caractère discriminatoire et considère que, conformément au principe de l'égalité souveraine des Etats, les Pactes devraient être ouverts à la participation de tous les Etats intéressés sans aucune discrimination ou limitation.

UNION OF SOVIET SOCIALIST REPUBLICS

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[RUSSIAN TEXT — TEXTE RUSSE]

«Союз Советских Социалистических Республик заявляет, что положения пункта 1 статьи 26 Пакта об экономических, социальных и культурных правах и пункта 1 статьи 48 Пакта о гражданских и политических правах, согласно которым ряд государств не может стать участниками этих Пактов, носят дискриминационный характер, и считает, что Пакты в соответствии с принципом суверенного равенства государств должны быть открыты для участия всех заинтересованных государств без какой-либо дискриминации и ограничения».

[TRANSLATION]

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

[TRADUCTION]

L'Union des Républiques socialistes soviétiques déclare que les dispositions du paragraphe 1 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels et celles du paragraphe 1 de l'article 48 du Pacte international relatif aux droits civils et politiques, aux termes desquelles un certain nombre d'Etats ne peuvent pas devenir parties auxdits Pactes, ont un caractère discriminatoire et considère que, conformément au principe de l'égalité souveraine des Etats, les Pactes devraient être ouverts à la participation de tous les Etats intéressés sans aucune discrimination ou limitation.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

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

"Secondly, the Government of the United Kingdom declare that they must reserve the right to postpone the application of sub-paragraph (*a*) (i) of article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work, since, while they fully accept this principle and are pledged to work towards its complete application at the earliest possible time, the problems of implementation are such that complete application cannot be guaranteed at present.

"Thirdly, the Government of the United Kingdom declare that, in relation to article 8 of the Covenant, they must reserve the right not to apply sub-paragraph (*b*) of paragraph 1 in Hong Kong, in so far as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations.

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

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

Premièrement, le Gouvernement du Royaume-Uni déclare qu'il considère qu'en vertu de l'Article 103 de la Charte des Nations Unies, en cas de conflit entre ses obligations aux termes de l'article premier du Pacte et ses obligations aux termes de la Charte (aux termes notamment de l'Article premier et des Articles 2 et 73 de ladite Charte), ses obligations aux termes de la Charte prévaudront.

Deuxièmement, le Gouvernement du Royaume-Uni déclare qu'il doit se réserver le droit de différer l'application de l'alinéa i du paragraphe *a* de l'article 7 du Pacte, dans la mesure où cette disposition concerne le paiement aux femmes et aux hommes d'une rémunération égale pour un travail de valeur égale, car, si le Gouvernement du Royaume-Uni accepte pleinement ce principe et s'est engagé à faire le nécessaire pour en assurer l'application intégrale à une date aussi rapprochée que possible, les difficultés de mise en œuvre sont telles que l'application intégrale dudit principe ne peut être garantie à l'heure actuelle.

Troisièmement, le Gouvernement du Royaume-Uni déclare qu'en ce qui concerne l'article 8 du Pacte, il doit se réserver le droit de ne pas appliquer l'alinéa *b* du paragraphe premier à Hongkong, dans la mesure où cet alinéa peut impliquer pour des syndicats n'appartenant pas à la même profession ou à la même industrie le droit de constituer des fédérations ou des confédérations.

Enfin, le Gouvernement du Royaume-Uni déclare que les dispositions du Pacte ne s'appliqueront pas à la Rhodésie du Sud tant qu'il n'aura pas fait savoir au Secrétaire général de l'Organisation des Nations Unies qu'il était à même de garantir que les obligations que lui imposait le Pacte quant à ce territoire pourraient être intégralement remplies.

DECLARATIONS AND RESERVATIONS MADE UPON RATIFICATION OR ACCESSION (*a*)

BARBADOS (a)

"The Government of Barbados states that it reserves the right to postpone:

"(*a*) the application of sub-paragraph (*a*) (1) of article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work;

"(*b*) the application of article 10(2) in so far as it relates to the special protection to be accorded mothers during a reasonable period during and after childbirth; and

"(*c*) the application of article 13(2) (*a*) of the Covenant, in so far as it relates to primary education;

"since, while the Barbados Government fully accepts the principles embodied in the same articles and undertakes to take the necessary steps to apply them in their entirety, the problems of implementation are such that full application of the principles in question cannot be guaranteed at this stage."

DÉCLARATIONS ET RÉSERVES FAITES LORS DE LA RATIFICATION OU DE L'ADHÉSION (*a*)

BARBADE (a)

[TRADUCTION — TRANSLATION]

Le Gouvernement de la Barbade déclare qu'il se réserve le droit de différer l'application des dispositions ci-après :

a) L'alinéa *a*, sous-alinéa i, de l'article 7, en ce qui concerne l'égalité de rémunération des hommes et des femmes pour un même travail;

b) Le paragraphe 2 de l'article 10, en ce qui concerne la protection spéciale à accorder aux mères pendant une période de temps raisonnable avant et après la naissance des enfants;

c) L'alinéa *a* du paragraphe 2 de l'article 13, en ce qui concerne l'enseignement primaire.

En effet, le Gouvernement de la Barbade, qui souscrit pleinement aux principes énoncés dans lesdites dispositions et s'engage à prendre les mesures voulues pour les appliquer intégralement, ne peut, étant donné l'ampleur des difficultés d'application, garantir actuellement la mise en œuvre intégrale des principes en question.

BULGARIA

BULGARIE

[BULGARIAN TEXT — TEXTE BULGARE]

"Народна република България смята за необходимо да подчертае, че член 48 точки 1 и 3 от Международния пакт за граждански и политически права и член 26 точки 1 и 3 от Международния пакт за икономически, социални и културни права, като изключват известен брой държави от възможността да участвуват в пактовете, имат дискриминационен характер. Тези разпоредби са несъвместими със самото естество на пактовете, които имат универсален характер и трябва да бъдат открити за присъединяване на всички държави. По силата на принципа на суверенното равенство никоя държава няма право да възпрепятствува други държави да участвуват в такива пактове."

[TRANSLATION[1] — TRADUCTION[2]]

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

[TRADUCTION — TRANSLATION]

La République populaire de Bulgarie estime nécessaire de souligner que les dispositions des paragraphes 1 et 3 de l'article 48 du Pacte international relatif aux droits civils et politiques et des paragraphes 1 et 3 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels, aux termes desquelles un certain nombre d'Etats ne peuvent pas devenir parties auxdits Pactes, ont un caractère discriminatoire. Ces dispositions ne sont pas en concordance avec la nature même de ces Pactes, dont le caractère est universel et qui devraient être ouverts à la participation de tous les Etats. Conformément au principe de l'égalité souveraine des Etats, aucun Etat n'a le droit d'interdire à d'autres Etats de devenir parties à un Pacte de ce type.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[TRANSLATION]

[*Confirming the declaration made upon signature. For the text, see p. 78 of this volume.*]

[TRADUCTION]

[*Avec confirmation de la déclaration faite lors de la signature. Pour le texte, voir p. 78 du présent volume.*]

CZECHOSLOVAKIA

TCHÉCOSLOVAQUIE

[CZECH TEXT — TEXTE TCHÈQUE]

"Přijímajíce tento Pakt prohlašujeme, že ustanovení článku 26 odstavce 1 Paktu je v rozporu se zásadou, že všechny státy mají právo stát se stranou mnohostranných smluv upravujících záležitosti obecného zájmu."

[1] Translation supplied by the Government of Bulgaria.
[2] Traduction fournie par le Gouvernement bulgare.

[TRANSLATION][1]

. . . The provision of article 26, paragraph 1, of the Covenant is in contradiction with the principle that all States have the right to become parties to multilateral treaties regulating matters of general interest.

DENMARK

"The Government of Denmark cannot, for the time being, undertake to comply entirely with the provisions of article 7 (*a*) (i) on equal pay for equal work and article 7 (*d*) on remuneration for public holidays."

FEDERAL REPUBLIC OF GERMANY

" . . . The said Covenant shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany except as far as Allied rights and responsibilities are affected."

GERMAN DEMOCRATIC REPUBLIC

[GERMAN TEXT — TEXTE ALLEMAND]

„Die Deutsche Demokratische Republik ist der Auffassung, daß Artikel 26 Absatz 1 der Konvention im Widerspruch zu dem Prinzip steht, wonach alle Staaten, die sich in ihrer Politik von den Zielen und Grundsätzen der Charta der Vereinten Nationen leiten lassen, das Recht haben, Mitglied von Konventionen zu werden, die die Interessen aller Staaten berühren."

[1] Translation supplied by the Government of Czechoslovakia.

[TRADUCTION][1]

Les dispositions du paragraphe 1 de l'article 26 du Pacte sont en contradiction avec le principe selon lequel tous les Etats ont le droit de devenir parties aux traités multilatéraux régissant les questions d'intérêt général.

DANEMARK

[TRADUCTION — TRANSLATION]

Le Gouvernement danois ne peut, pour le moment, s'engager à observer entièrement les dispositions de l'alinéa i, paragraphe *a*, de l'article 7 concernant le paiement d'une rémunération égale pour un travail de valeur égale, et celles de l'alinéa *d* de l'article 7 concernant la rémunération des jours fériés.

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE

[TRADUCTION — TRANSLATION]

. . . Ledit Pacte s'appliquera également à Berlin-Ouest avec effet à partir de la date à laquelle il entrera en vigueur pour la République fédérale d'Allemagne, sauf dans la mesure où les droits et responsabilités des Alliés sont en cause.

RÉPUBLIQUE DÉMOCRATIQUE ALLEMANDE

[1] Traduction fournie par le Gouvernement tchécoslovaque.

[TRANSLATION]

The German Democratic Republic considers that article 26, paragraph 1, of the Covenant runs counter to the principle that all States which are guided in their policies by the purposes and principles of the United Nations Charter have the right to become parties to conventions which affect the interests of all States.

[TRADUCTION]

La République démocratique allemande estime que le paragraphe 1 de l'article 26 du Pacte est en contradiction avec le principe selon lequel tous les Etats dont la politique est guidée par les buts et principes de la Charte des Nations Unies ont le droit de devenir parties aux pactes qui touchent les intérêts de tous les Etats.

[TRADUCTION — TRANSLATION]

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

La République démocratique allemande a ratifié les deux Pactes conformément à la politique qu'elle a menée jusqu'ici en vue de sauvegarder les droits de l'homme. Elle est convaincue que ces Pactes favorisent la lutte menée à l'échelle mondiale pour assurer la réalisation des droits de l'homme, lutte qui s'inscrit elle-même dans le cadre de celle engagée en vue du maintien et du renforcement de la paix. A l'occasion du vingt-cinquième anniversaire de la Déclaration universelle des droits de l'homme, la République démocratique allemande participe ainsi à la coopération pacifique entre les Etats, à la promotion des droits de l'homme et à la lutte commune contre la violation de ces droits par des politiques agressives, le colonialisme et l'*apartheid*, le racisme et tous autres types d'atteintes au droit des peuples à disposer d'eux-mêmes.

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

La Constitution de la République démocratique allemande garantit les droits politiques, économiques, sociaux et culturels de tout citoyen sans distinction de race, de sexe et de religion. La démocratie socialiste a créé les conditions voulues pour que tout citoyen non seulement jouisse de ses droits mais s'attache activement à les exercer et à les faire respecter.

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

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

Les droits fondamentaux de l'homme, tels que le droit à la paix, le droit au travail et à la sécurité sociale, l'égalité des femmes et le droit à l'éducation, sont pleinement exercés en République démocratique allemande. Le Gouvernement de la République démocratique allemande a toujours accordé beaucoup d'attention aux conditions matérielles qu'il faut créer au préalable pour garantir essentiellement les droits sociaux et économiques. La nécessité d'assurer et d'améliorer continuellement le bien-être des travailleurs a toujours été l'élément de base de l'ensemble de la politique du Gouvernement de la République démocratique allemande.

Le Gouvernement de la République démocratique allemande estime que la signature et la ratification des deux Pactes relatifs aux droits de l'homme par d'autres Etats Membres de l'Organisation des Nations Unies représenteraient un pas important vers la réalisation des objectifs que sont le respect et la promotion des droits de l'homme et qui sont énoncés dans la Charte des Nations Unies.

HUNGARY

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

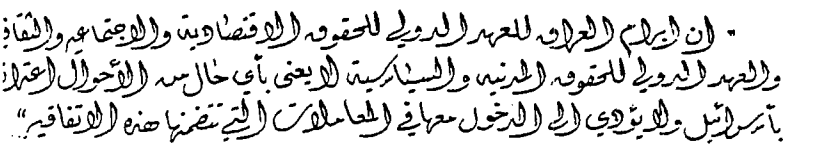
HONGRIE

[TRADUCTION — TRANSLATION]

Le Conseil presidentiel de la République populaire de Hongrie déclare que les dispositions des paragraphes 1 et 3 de l'article 48 du Pacte international relatif aux droits civils et politiques et celles des paragraphes 1 et 3 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels sont incompatibles avec le caractère universel des Pactes. Selon le principe d'égalité souveraine des Etats, les Pactes devraient être ouverts à la participation de tous les Etats sans aucune discrimination ni limitation.

IRAQ *IRAK*

[ARABIC TEXT — TEXTE ARABE]



[TRANSLATION]

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

[TRADUCTION]

La ratification pour l'Irak . . . ne signifie nullement que l'Irak reconnaît Israël ni qu'il établira avec Israël les relations [que régit ledit Pacte].

KENYA (a)

"While the Kenya Government recognizes and endorses the principles laid down in paragraph 2 of article 10 of the Covenant, the present circumstances obtaining in Kenya do not render necessary or expedient the imposition of those principles by legislation",

KENYA (a)

[TRADUCTION — TRANSLATION]

Le Gouvernement kényen reconnaît et approuve les principes énoncés au paragraphe 2 de l'article 10 du Pacte, mais, étant donné la situation actuelle au Kenya, il n'est pas nécessaire ou opportun d'en imposer l'application par une législation correspondante.

LIBYAN ARAB REPUBLIC (a)

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

RÉPUBLIQUE ARABE LIBYENNE (a)

[TRADUCTION — TRANSLATION]

L'approbation et l'adhésion de la République arabe libyenne touchant le Pacte dont il s'agit ne signifient nullement que la République arabe libyenne reconnaît Israël ni qu'elle établira avec Israël les relations que régissent lesdits Pactes.

MADAGASCAR

[TRANSLATION — TRADUCTION]

The Government of Madagascar states that it reserves the right to postpone the application of article 13, paragraph 2, of the Covenant, more particularly in so far as it relates to primary education, since, while the Malagasy Government fully accepts the principles embodied in the said paragraph and undertakes to take the necessary steps to apply them in their entirety at the earliest possible date, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.

MADAGASCAR

«Le Gouvernement malgache déclare qu'il se réserve le droit de différer l'application du paragraphe 2 de l'article 13 du Pacte, notamment en ce qui concerne l'enseignement primaire, car si le Gouvernement malgache accepte pleinement les principes édictés par ledit paragraphe 2 de l'article 13, et s'engage à faire le nécessaire pour en assurer l'application intégrale à une date aussi rapprochée que possible, les difficultés de mise en œuvre, et notamment les incidences financières, sont telles que l'application intégrale desdits principes ne peut être présentement garantie.»

MONGOLIA

[MONGOLIAN TEXT — TEXTE MONGOL]

"Эдийн засаг, Нийгэм, Соёлын эрхийн тухай олон улсын Пакт"—ын 26 дугаар зүйл(1) Иргэний ба Улс төрийн эрхийн тухай олон улсын Пакт"—ын 48 дугаар зүйл(1) нь уг Пактуудад оролцогч улсуудын хүрээг тодорхой заалтаар хязгаарласнаар зарим улсыг ялгаварлан гадуурхаж байна гэж БНМАУ-ын Засгийн газар үзэхийн хамт улс бүр тэгш эрхтэй байх зарчмын үндсэн дээр сонирхож байгаа бүх улс эдгээр Пактад ямар нэгэн ялгаваргүй—гээр оролцох эрх эдлэх ёстой гэж мэдэгдэж байна."

MONGOLIE

[TRADUCTION — TRANSLATION]

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

La République populaire mongole déclare que les dispositions du paragraphe 1 de l'article 26 du Pacte international relatif aux droits économiques, sociaux et culturels et celles du paragraphe 1 de l'article 48 du Pacte international relatif aux droits civils et politiques, aux termes desquelles un certain nombre d'Etats ne peuvent pas devenir parties auxdits Pactes, ont un caractère discriminatoire et considère que, conformément au principe de l'égalité souveraine des Etats, les Pactes devraient être ouverts à la participation de tous les Etats intéressés sans aucune discrimination ou limitation.

NORWAY

"Norway enters a reservation to article 8, paragraph 1 (*d*), to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict shall not be considered incompatible with the right to strike, this right being fully recognised in Norway."

NORVÈGE

[TRADUCTION — TRANSLATION]

La Norvège formule une réserve à l'article 8, paragraphe 1, *d*, stipulant que la pratique norvégienne actuelle qui consiste à renvoyer, par Acte du Parlement, les conflits du travail devant la Commission nationale des salaires (commission arbitrale tripartite permanente s'occupant des questions de salaires) ne sera pas considérée comme incompatible avec le droit de grève, droit pleinement reconnu en Norvège.

ROMANIA

[TRANSLATION — TRADUCTION]

(*a*) The State Council of the Socialist Republic of Romania considers that the provisions of article 26 (1) of the International Covenant on Economic, Social and Cultural Rights are inconsistent with the principle that multilateral international treaties whose purposes concern the international community as a whole must be open to universal participation.

(*b*) The State Council of the Socialist Republic of Romania considers that the maintenance in a state of dependence of certain territories referred to in articles 1 (3) and 14 of the International Covenant on Economic, Social and Cultural Rights is inconsistent with the Charter of the United Nations and the instruments adopted by the Organization on the granting of independence to colonial countries and peoples, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted unanimously by the United Nations General Assembly

[1] United Nations, *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 28* (A/8028), p. 121.

ROUMANIE

«*a*) Le Conseil d'Etat de la République socialiste de Roumanie considère que les provisions de l'article 26, point 1er, du Pacte international relatif aux droits économiques, sociaux et culturels ne sont pas en concordance avec le principe selon lequel les traités internationaux multilatéraux dont l'objet et le but intéressent la communauté internationale dans son ensemble doivent être ouverts à la participation universelle.

«*b*) Le Conseil d'Etat de la République socialiste de Roumanie considère que le maintien de l'état de dépendance de certains territoires auxquels se réfèrent l'article 1er, point 3, et l'article 14 du Pacte international relatif aux droits économiques, sociaux et culturels ne sont pas en concordance avec la Charte des Nations Unies et les documents adoptés par cette organisation sur l'octroi de l'indépendance aux pays et aux peuples coloniaux, y compris la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats conformément à la Charte des Nations Unies, adoptée à l'unanimité par la

[1] Nations Unies, *Documents officiels de l'Assemblée générale, vingt-cinquième session, Supplément no 28* (A/8028), p. 131.

in its resolution 2625 (XXV) of 1970[1] which solemnly proclaims the duty of States to promote the realization of the principle of equal rights and self-determination of peoples in order to bring a speedy end to colonialism.

résolution de l'Assemblée générale de l'Organisation des Nations Unies, n° 2625 (XXV) de 1970[1], qui proclame solennellement le devoir des Etats de favoriser la réalisation du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes, dans le but de mettre rapidement fin au colonialisme.»

RWANDA (a)

RWANDA (a)

[TRANSLATION — TRADUCTION]

The Rwandese Republic [is] bound, however, in respect of education, only by the provisions of its Constitution.

«. . . La République rwandaise ne [s'engage] toutefois, en ce qui concerne l'enseignement, qu'aux stipulations de sa Constitution.»

SWEDEN

SUÈDE

[SWEDISH TEXT — TEXTE SUÉDOIS]

"Sverige gör förbehåll mot konventionens artikel 7 mom. *d*) såvitt avser rätten till lön på allmänna helgdagar."

[TRANSLATION]

Sweden enters a reservation in connexion with article 7 (*d*) of the Covenant in the matter of the right to remuneration for public holidays.

[TRADUCTION]

. . . La Suède se réserve sur le paragraphe *d* de l'article 7 du Pacte en ce qui concerne le droit à la rémunération des jours fériés.

SYRIAN ARAB REPUBLIC (a)

RÉPUBLIQUE ARABE SYRIENNE (a)

[ARABIC TEXT — TEXTE ARABE]

"ان قبول الجمهورية العربية السورية هذين العهدين وابرام حكومتها لهما لايحوى بأية حال معنى الاعتراف باسرائيل ولا يؤدى الى دخولها معها في معاملات مما تنظمه احكامهما .

"ان الجمهورية العربية السورية تعتبر ان الفقرة الاولى من المادة ٢٦ للعهد الخاص بالحقوق الاقتصادية والاجتماعية والثقافية ، وكذلك الفقرة الاولى من المادة ٤٨ للعهد الخاص بالحقوق المدنية والسياسية ، لاتتفقان واهداف العهدين وغايتهما اذ ان احكام هاتين الفقرتين لاتمكن جميع الدول ، بدون تفرقة او تمييز ، من ان تصبح اطرافا فيهما " .

[TRANSLATION]

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

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

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[*Confirming the declaration made upon signature. For the text, see p. 81 of this volume.*]

UNION OF SOVIET SOCIALIST REPUBLICS

[*Confirming the declaration made upon signature. For the text, see p. 82 of this volume.*]

[TRADUCTION]

1. Il est entendu que l'adhésion de la République arabe syrienne à ces deux Pactes ne signifie en aucune façon la reconnaissance d'Israël ou l'entrée avec lui en relation au sujet d'aucune matière que ces deux Pactes règlementent.

2. La République arabe syrienne considère que le paragraphe 1 de l'article 26 du Pacte relatif aux droits économiques, sociaux et culturels ainsi que le paragraphe 1 de l'article 48 du Pacte relatif aux droits civils et politiques ne sont pas conformes aux buts et objectifs des dits Pactes puisqu'ils ne permettent pas à tous les Etats, sans distinction et discrimination, la possibilité de devenir parties à ces Pactes.

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[*Avec confirmation de la déclaration faite lors de la signature. Pour le texte, voir p. 81 du présent volume.*]

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[*Avec confirmation de la déclaration faite lors de la signature. Pour le texte, voir p. 82 du présent volume.*]

DECLARATIONS RELATING TO THE SIGNATURE ON BEHALF OF THE GOVERNMENT OF THE REPUBLIC OF CHINA

BULGARIA

[TRANSLATION — TRADUCTION]

The Government of the People's Republic of Bulgaria considers null the signature and ratification by the so-called Government of China, representing the regime of Chiang Kai-shek, of the Vienna Convention on Diplomatic Relations of 18 June 1961[1] and of the International Covenant on Civil and Political Rights and the Optional Protocol annexed thereto, opened for signature at New York on 19 December 1966[2]. The only legitimate Government entitled to speak on behalf of and to represent China in international affairs is the Government of the People's Republic of China.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[RUSSIAN TEXT — TEXTE RUSSE]

«. . . Правительство Белорусской ССР рассматривает неправомерным участие так называемого правительства Китая (Тайвань) в Международном пакте об экономических, социальных и культурных правах, Международном пакте о гражданских и политических правах и факультативном протоколе и Международном пакте о гражданских и политических правах, поскольку оно не представляет Китай и не имеет права представлять его. Только Правительство Китайской Народной Республики является единственным законным представителем Китая.»

[TRANSLATION]

. . . The Government of the Byelorussian Soviet Socialist Republic regards as illegal the participation of the so-called

[1] United Nations, *Treaty Series*, vol. 500, p. 95.
[2] *Ibid.*, vol. 999, No. I-14668.

DÉCLARATIONS RELATIVES À LA SIGNATURE AU NOM DU GOUVERNEMENT DE LA REPÚBLIQUE DE CHINE

BULGARIE

«Le Gouvernement de la République populaire de Bulgarie considère nulles la signature et la ratification, par le prétendu Gouvernement chinois, représentant le régime de Tchang Kaï-chek, de la Convention de Vienne sur les relations diplomatiques du 18.VI.1961[1] et du Pacte international des droits civils [et politiques] et du Protocole facultatif y annexé, ouverts à la signature à New York le 19. XII. 1966[2]. Le seul Gouvernement légitime habilité à parler au nom de la Chine et de la représenter dans les affaires internationales est le Gouvernement de la République populaire de Chine.»

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[TRADUCTION]

. . . Le Gouvernement de la République socialiste soviétique de Biélorussie considère que l'adhésion du prétendu

[1] Nations Unies, *Recueil des Traités*, vol. 500, p. 95.
[2] *Ibid.*, vol. 999, no I-14668.

Government of China (Taiwan) in the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights, since it does not represent China and has no right to represent it. The Government of the People's Republic of China is the only lawful representative of China.

CZECHOSLOVAKIA

"The Government of the Czechoslovak Socialist Republic considers the signature of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, adopted by the General Assembly's resolution 2200/XX on 16 December 1966, by the authorities of Taiwan, null and void.

"The Czechoslovak Government states that only the Government of the People's Republic of China has the right to represent China in international organizations."

MONGOLIA

"The Government of the Mongolian People's Republic considers null and void the signature and ratification by the Chiang Kai-shek regime of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other instruments approved by the United Nations General Assembly, and [the] Vienna Convention on Diplomatic Relations.

Gouvernement de la Chine (Taïwan) au Pacte international relatif aux droits économiques, sociaux et culturels, au Pacte international relatif aux droits civils et politiques et au Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques est illégale, puisque ce Gouvernement ne représente pas la Chine et n'a pas le droit de la représenter. Seul le Gouvernement de la République populaire de Chine est le représentant légal de la Chine.

TCHÉCOSLOVAQUIE

[TRADUCTION — TRANSLATION]

Le Gouvernement de la République socialiste tchécoslovaque considère comme nulle et non avenue la signature par les autorités de Taiwan du Pacte international relatif aux droits économiques, sociaux et culturels et du Pacte international relatif aux droits civils et politiques, adoptés par l'Assemblée générale dans sa résolution 2200/XX du 16 décembre 1966.

Le Gouvernement de la République socialiste tchécoslovaque considère que seul le Gouvernement de la République populaire de Chine est habilité à représenter la Chine dans des organisations internationales.

MONGOLIE

[TRADUCTION — TRANSLATION]

Le Gouvernement de la République populaire de Mongolie considère nulles et non avenues les signature et ratification par le régime de Tchang Kaï-chek du Pacte international relatif aux droits économiques, sociaux et culturels, du Pacte international relatif aux droits civils et politiques et autres instruments approuvés par l'Assemblée générale des Nations Unies et de la Convention de Vienne sur les relations diplomatiques.

"As is well known the Chiang Kai-shek clique has no right whatsoever to speak on behalf of the Chinese people and that there is only one China—the People's Republic of China."

ROMANIA

". . . The Government of the Socialist Republic of Romania does not recognize to the Chiang Kai-shek's representatives any right to represent China, as the only legal government entitled to represent it is the Government of the People's Republic of China."

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[RUSSIAN TEXT — TEXTE RUSSE]

« . . Правительство Украинской Советской Социалистической Республики рассматривает участие так называемого «правительства Китая», о котором говорится в письме Секретариата ООН, в Международном пакте об экономических, социальных и культурных правах и Международном пакте о гражданских и политических правах, неправомерным, поскольку оно не представляет китайский народ и не имеет права выступать от имени Китая.

«Правительство Украинской Советской Социалистической Республики исходит из того, что в мире имеется только одно китайское государство—Китайская Народная Республика.»

[TRANSLATION]

. . . The Government of the Ukrainian Soviet Socialist Republic considers that the participation of the so-called "Government of China" in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights is illegal, because that Government does not represent the Chinese people and has no right to speak for China.

The Government of the Ukrainian Soviet Socialist Republic takes the position that there is only one Chinese State in the world—the People's Republic of China.

Nul n'ignore que la clique de Tchang Kaï-chek n'est pas habilitée à prendre la parole au nom de la Chine et qu'il n'existe qu'une Chine, à savoir la République populaire de Chine.

ROUMANIE

[TRADUCTION — TRANSLATION]

. . . Le Gouvernement de la République socialiste de Roumanie ne reconnaît pas les représentants de Tchang Kaï-chek comme représentants de la Chine, le seul Gouvernement habilité à la représenter étant le Gouvernement de la République populaire de Chine.

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[TRADUCTION]

. . . Le Gouvernement de la République socialiste soviétique d'Ukraine considère comme irrégulière la participation au Pacte international relatif aux droits économiques, sociaux et culturels et au Pacte international relatif aux droits civils et politiques du prétendu «Gouvernement chinois» car celui-ci ne représente pas le peuple chinois et n'a pas le droit de parler au nom de la Chine.

Le Gouvernement de la République socialiste soviétique d'Ukraine considère qu'il n'existe qu'un seul Etat chinois, à savoir la République populaire de Chine.

UNION OF SOVIET SOCIALIST REPUBLICS

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[RUSSIAN TEXT — TEXTE RUSSE]

«Представительство СССР при ООН заявляет, что Советский Союз не признает имеющим законную силу подписание чанкайшистом Международного пакта об экономических, социальных и культурных правах, Международного пакта о гражданских и политических правах и других актов, одобренных Генеральной Ассамблеей ООН и открытых для подписания в Нью-Йорке 19 декабря 1966 года.

«Хорошо известно, что чанкайшистская клика никого не представляет и не имеет права выступать от имени Китая, и что представляет Китай только Правительство Китайской Народной Республики.»

[TRANSLATION]

. . . The Soviet Union does not recognize the signature by the Chiang Kai-shek representative of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the other instruments approved by the United Nations General Assembly and opened for signature at New York on 19 December 1966 as having legal force.

It is well known that the Chiang Kai-shek clique represents no one and has no right to speak on behalf of China, and that only the Government of the People's Republic of China represents China.

[TRADUCTION]

. . . L'Union soviétique ne reconnaît aucune force légale à la signature, par un représentant de la clique de Tchang Kaï-chek, du Pacte international relatif aux droits économiques, sociaux et culturels, du Pacte international relatif aux droits civils et politiques et des autres instruments adoptés par l'Assemblée générale de l'ONU et ouverts à la signature à New York le 19 décembre 1966.

Nul n'ignore que la clique de Tchang Kaï-chek ne représente personne et n'est pas habilitée à prendre la parole au nom de la Chine et que seul le Gouvernement de la République populaire de Chine représente la Chine.

YUGOSLAVIA

YOUGOSLAVIE

[TRADUCTION — TRANSLATION]

". . . The Government of the Socialist Federal Republic of Yugoslavia considers the signature by the authorities of Taiwan of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, opened for signature at New York on 19 December 1966, null and void.

. . . Le Gouvernement de la République fédérative socialiste de Yougoslavie considère comme nulle et non avenue la signature par les autorités de Taïwan du Pacte international relatif aux droits économiques, sociaux et culturels et du Pacte international relatif aux droits civils et politiques, ouverts à la signature, à New York, le 19 décembre 1966.

"The Government of the Socialist Federal Republic of Yugoslavia considers that only the Government of the People's Republic of China is authorised to assume obligations on behalf of China and to represent her in international organisations."

Le Gouvernement de la République fédérative socialiste de Yougoslavie considère que seul le Gouvernement de la République populaire de Chine est habilité à assumer des obligations au nom de la Chine et à la représenter dans des organisations internationales.

DECLARATIONS relating to the declaration made upon ratification by the Federal Republic of Germany[1] concerning application to Berlin (West)

DÉCLARATIONS relatives à la déclaration formulée lors de la ratification par la République fédérale d'Allemagne[1] concernant l'application à Berlin-Ouest

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UNION OF SOVIET SOCIALIST REPUBLICS

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[RUSSIAN TEXT — TEXTE RUSSE]

«Международный пакт о гражданских и политических правах и Международный пакт об экономических, социальных и культурных правах от 19 декабря 1966 года по своему материальному содержанию непосредственно затрагивают вопросы безопасности и статуса. Учитывая это, Советская сторона рассматривает сделанное Федеративной Республикой Германии заявление о распространении действия этих пактов на Берлин (Западный) как неправомерное и не имеющее никакой юридической силы, поскольку в соответствии с Четырехсторонним соглашением от 3 сентября 1971 г. договорные обязательства ФРГ, затрагивающие вопросы безопасности и статуса, не могут распространяться на Западные секторы Берлина.»

[TRANSLATION]

By reason of their material content, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 directly affect matters of security and status. With this in mind, the Soviet Union considers the statement made by the Federal Republic of Germany concerning the extension of the operation of these Covenants to Berlin (West) to be

[TRADUCTION]

Le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels du 19 décembre 1966 touchent directement, par leur contenu matériel, aux questions de sécurité et de statut. C'est pourquoi l'Union soviétique considère la déclaration de la République fédérale d'Allemagne étendant le champ d'application de ces Pactes à Berlin-Ouest comme illégale et dénuée de toute

[1] See p. 86 of this volume.

[1] Voir p. 86 du présent volume.

illegal and to have no force in law, since, under the Quadripartite Agreement of 3 September 1971,[1] the treaty obligations of the Federal Republic of Germany affecting matters of security and status may not be extended to the Western Sectors of Berlin.

12 August 1974

GERMAN DEMOCRATIC REPUBLIC

force juridique puisque, conformément à l'Accord quadripartite du 3 septembre 1971[1], les obligations contractées par la République fédérale d'Allemagne en vertu de traités ne peuvent s'étendre en ce qui concerne les questions de sécurité et de statut aux secteurs occidentaux de Berlin.

12 août 1974

RÉPUBLIQUE DÉMOCRATIQUE ALLEMANDE

[GERMAN TEXT — TEXTE ALLEMAND]

„Hinsichtlich der Anwendung der Konventionen auf Berlin (West) stellt die Regierung der Deutschen Demokratischen Republik in Übereinstimmung mit dem Vierseitigen Abkommen zwischen den Regierungen der Union der Sozialistischen Sowjetrepubliken, des Vereinigten Königreiches von Großbritannien und Nordirland, der Vereinigten Staaten von Amerika und der Französischen Republik vom 3. September 1971 fest, daß Berlin (West) kein Bestandteil der Bundesrepublik Deutschland ist und nicht von ihr regiert werden darf. Die Erklärungen der Regierung der Bundesrepublik Deutschland, wonach diese Konventionen auch auf Berlin (West) ausgedehnt werden sollen, stehen im Widerspruch zum Vierseitigen Abkommen, in dem festgelegt ist, daß Verträge, die Angelegenheiten der Sicherheit und des Status von Berlin (West) betreffen, durch die Bundesrepublik Deutschland nicht auf Berlin (West) ausgedehnt werden dürfen. Demzufolge können die Erklärungen der Regierung der Bundesrepublik Deutschland keine Rechtswirkungen zeitigen."

[RUSSIAN TEXT — TEXTE RUSSE]

«В отношении распространения конвенций на Берлин (Западный) правительство Германской Демократической Республики в соответствии с Четырехсторонним соглашением между правительствами Союза Советских Социалистических Республик, Соединенного Королевства Великобритании и Северной Ирландии, Соединенных Штатов Америки и Французской Республики от 3 сентября 1971 года констатирует, что Берлин (Западный) не является составной частью Федеративной Республики Германии и не может управляться ею. Заявления правительства Федеративной Республики Германии, согласно которым эти пакты должны распространяться также на Берлин (Западный), находятся в противоречии с Четырехсторонним соглашением, в котором закреплено, что соглашения, касающиеся вопросов безопасности и статуса Берлина (Западного) не могут быть распространены Федеративной Республикой Германии на Берлин (Западный). В соответствии с этим заявления правительства Федеративной Республики Германии не могут иметь правовых последствий.»

[1] United Nations, *Treaty Series*, vol. 880, p. 115.

[1] Nations Unies, *Recueil des Traités*, vol. 880, p. 115.

[TRANSLATION]

As regards the application of the Covenants to Berlin (West), the Government of the German Democratic Republic notes, in accordance with the Quadripartite Agreement between the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and the French Republic of 3 September 1971,[1] that Berlin (West) continues not to be a constituent part of the Federal Republic of Germany and not to be governed by it. The declarations of the Government of the Federal Republic of Germany to the effect that these Covenants shall be extended also to Berlin (West) are in contradiction with the Quadripartite Agreement, which establishes that agreements affecting matters of security and status of Berlin (West) may not be extended to Berlin (West) by the Federal Republic of Germany. Accordingly, the declarations of the Government of the Federal Republic of Germany can have no legal effect.

16 August 1974

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[TRADUCTION]

En ce qui concerne l'application des Pactes à Berlin-Ouest, le Gouvernement de la République démocratique allemande note, conformément à l'Accord quadripartite conclu le 3 septembre 1971[1] entre les Gouvernements de l'Union des Républiques socialistes soviétiques, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, des Etats-Unis d'Amérique et de la République française, que Berlin-Ouest ne fait pas partie de la République fédérale d'Allemagne et ne doit pas être gouvernée par elle. Les déclarations du Gouvernement de la République fédérale d'Allemagne selon lesquelles ces pactes doivent également s'étendre à Berlin-Ouest sont en contradiction avec l'Accord quadripartite, selon lequel les accords concernant les questions afférentes à la sécurité et au statut de Berlin-Ouest ne peuvent pas être étendus à Berlin-Ouest par la République fédérale d'Allemagne. En conséquence, les déclarations du Gouvernement de la République fédérale d'Allemagne sont sans effet en droit.

16 août 1974

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[RUSSIAN TEXT — TEXTE RUSSE]

«Международный пакт о гражданских и политических правах и Международный пакт об экономических, социальных и культурных правах от 19 декабря 1966 года по своему материальному содержанию непосредственно затрагивает вопросы безопасности и статуса. Учитывая это, Украинская ССР рассматривает сделанное Федеративной Республикой Германии заявление о распространении действия этих пактов на Берлин (Западный) как неправомерное и не имеющее никакой юридической силы, поскольку в соответствии с Четырехсторонним соглашением от 3 сентября 1971 года договорные обязательства ФРГ, затрагивающие вопросы безопасности и статуса, не могут распространяться на Западные сектора Берлина.»

[1] United Nations, *Treaty Series*, vol. 880, p. 115.

[1] Nations Unies, *Recueil des Traités*, vol. 880, p. 115.

[TRANSLATION]

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 19 December 1966, by their material content, directly affect questions of security and status. In view of this, the Ukrainian Soviet Socialist Republic considers the statement by the Federal Republic of Germany concerning the extension of the applicability of these Covenants to Berlin (West) to be illegal and to have no legal force, since in accordance with the Quadripartite Agreement of 3 September 1971 the treaty obligations of the Federal Republic of Germany affecting questions of security and status cannot be extended to the Western sector of Berlin.

DECLARATIONS relating to the declaration made by the Union of Soviet Socialist Republics, on 5 July 1974,[1] concerning application to Berlin (West)

Received on:

5 November 1974

FRANCE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
UNITED STATES OF AMERICA

"The Governments of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America wish to bring to the attention of the States Parties to the Covenants that the extension of the Covenants to the Western Sectors of Berlin received the prior authorization, under established procedures, of the authorities of France, the United Kingdom and the United States on the basis of their supreme authority in those Sectors.

[1] See p. 98 of this volume.

[TRADUCTION]

Le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels du 19 décembre 1966 touchent directement, de par leur teneur, aux questions de sécurité et de statut. Dans ces conditions, la République socialiste soviétique d'Ukraine considère la déclaration de la République fédérale d'Allemagne sur l'extension de ces Pactes à Berlin (Ouest) comme illégale et dénuée de toute force juridique étant donné que, conformément à l'Accord quadripartite du 3 septembre 1971, les obligations conventionnelles de la République fédérale d'Allemagne quant aux questions de sécurité et de statut ne peuvent s'étendre aux secteurs occidentaux de Berlin.

DÉCLARATIONS relatives à la déclaration formulée par l'Union des Républiques socialistes soviétiques, le 5 juillet 1974[1], concernant l'application à Berlin-Ouest

Reçue le :

5 novembre 1974

ÉTATS-UNIS D'AMÉRIQUE
FRANCE
ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

«Les Gouvernements de la France, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et des Etats-Unis d'Amérique souhaitent porter à l'attention des Etats parties à ces Pactes que l'extension de ceux-ci aux secteurs occidentaux de Berlin a été au préalable approuvée, conformément aux procédures établies, par les autorités de la France, du Royaume-Uni et des Etats-Unis agissant sur la base de leur autorité suprême dans ces secteurs.

[1] Voir p. 98 du présent volume.

"The Governments of France, the United Kingdom and the United States wish to point out that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the primary purpose of both of which is the protection of the rights of the individual, are not treaties which 'by reason of their material content, directly affect matters of security and status'.

"As for the references to the Quadripartite Agreement of 3 September 1971[1] which are contained in the communication made by the Government of the Union of Soviet Socialist Republics referred to in the Legal Counsel's Note, the Governments of France, the United Kingdom and the United States wish to point out that, in a communication to the Government of the Union of Soviet Socialist Republics which is an integral part (annex IV, A) of the Quadripartite Agreement, they reaffirmed that, provided that matters of security and status are not affected, international agreements and arrangements entered into by the Federal Republic of Germany may be extended to the Western Sectors of Berlin. For its part the Government of the Union of Soviet Socialist Republics, in a communication to the Governments of France, the United Kingdom and the United States which is similarly an integral part (annex IV, B) of the Quadripartite Agreement, affirmed that it would raise no objection to such extension.

"In authorizing the extension of the Covenants to the Western Sectors of Berlin, as mentioned above, the authorities of France, the United Kingdom and the United States took all necessary measures to ensure that the Covenants cannot be applied in the Western Sectors of Berlin in such a way as to affect matters of security and

[1] United Nations, *Treaty Series*, vol. 880, p. 115.

«Les Gouvernements de la France, du Royaume-Uni et des Etats-Unis souhaitent faire remarquer que le Pacte international sur les droits économiques, sociaux et culturels et le Pacte international sur les droits civils et politiques, dont l'objet est, au premier chef, de protéger les droits de l'homme en tant qu'individu, ne sont pas des traités qui, «du fait de leur contenu matériel, affectent directement les questions de sécurité et de statut».

«En ce qui concerne les références faites à l'Accord quadripartite du 3 septembre 1971[1], dans la communication du Gouvernement de l'Union des Républiques socialistes soviétiques à laquelle il est fait référence dans la note du Conseiller juridique, les Gouvernements de la France, du Royaume-Uni et des Etats-Unis souhaitent faire remarquer que, dans une communication au Gouvernement de l'Union soviétique, communication qui fait partie intégrante (annexe IV, A) de l'Accord quadripartite, ils ont à nouveau affirmé que, à condition que les questions de sécurité et de statut ne soient pas affectées, les accords et arrangements internationaux conclus par la République fédérale d'Allemagne pourraient être étendus aux secteurs occidentaux de Berlin. Le Gouvernement de l'Union soviétique, pour sa part, dans une communication aux Gouvernements de la France, du Royaume-Uni et des Etats-Unis qui fait, de même, partie intégrante (annexe IV, B) de l'Accord quadripartite, a déclaré qu'il ne soulèverait pas d'objections à une telle extension.

«En autorisant, ainsi qu'il est indiqué ci-dessus, l'extension de ces Pactes aux secteurs occidentaux de Berlin, les autorités de la France, du Royaume-Uni et des Etats-Unis ont pris toutes les dispositions nécessaires pour garantir que ces Pactes seraient appliqués dans les secteurs occidentaux de Berlin de telle manière qu'ils n'affecteront pas les ques-

[1] Nations Unies, *Recueil des Traités*, vol. 880, p. 115.

status. Accordingly, the application of the Covenants to the Western Sectors of Berlin continues in full force and effect."

6 December 1974

FEDERAL REPUBLIC OF GERMANY

"By their note of 4 November 1974, circulated to all States Parties to either of the Covenants by C.N.306.1974.-TREATIES-7 of 19 November 1974,[1] the Governments of France, the United Kingdom and the United States answered the assertions made in the communication of the Government of the Union of Soviet Socialist Republics referred to above. The Government of the Federal Republic of Germany shares the position set out in the note of the Three Powers. The extension of the Covenants to Berlin (West) continues in full force and effect."

DECLARATION relating to the declarations made by France, the United Kingdom of Great Britain and Northern Ireland and the United States of America, on 5 November 1974,[1] and by the Federal Republic of Germany, on 6 December 1974,[2] concerning application to Berlin (West)

Received on:

13 February 1975

UNION OF SOVIET SOCIALIST REPUBLICS

[RUSSIAN TEXT — TEXTE RUSSE]

«Советская сторона считает необходимым подтвердить свою точку зрения о неправомерности распространения ФРГ действия Международного

[1] See p. 101 of this volume.
[2] See above.

tions de sécurité et de statut. En conséquence, l'application de ces Pactes aux secteurs occidentaux de Berlin demeure en pleine vigueur et effet.»

6 décembre 1974

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE

[TRADUCTION — TRANSLATION]

Dans leur note en date du 4 novembre 1974, qui a été distribuée à tous les Etats parties au Pacte C.N.306.1974.-TREATIES-7 le 19 novembre 1974[1], les Gouvernements de la France, du Royaume-Uni et des Etats-Unis d'Amérique ont répondu aux assertions contenues dans la communication du Gouvernement de l'Union des Républiques socialistes soviétiques mentionnée ci-dessus. Le Gouvernement de la République fédérale d'Allemagne partage les vues formulées dans la note de ces trois puissances. L'extension des Pactes à Berlin-Ouest demeure en pleine vigueur et effet.

DÉCLARATION relative aux déclarations formulées par les Etats-Unis d'Amérique, la France et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, le 5 novembre 1974[1], et par la République fédérale d'Allemagne, le 6 décembre 1974[2], concernant l'application à Berlin-Ouest

Reçue le :

13 février 1975

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[1] Voir p. 101 du présent volume.
[2] Voir ci-dessus.

пакта о гражданских и политических правах и Международного пакта об экономических, социальных и культурных правах от 19 декабря 1966 года на Берлин (Западный), изложенную в ноте Генеральному Секретарю от 4 июля 1974 года (C.N.145.1974.TREATIES-3 от 5 августа 1974 года).»

[TRANSLATION]

The Soviet Union deems it essential to reassert its view that the extension by the Federal Republic of Germany of the operation of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 to Berlin (West) is illegal, as stated in the note dated 4 July 1974 addressed to the Secretary-General (C.N.145.1974.TREATIES-3) of 5 August 1974.[1]

DECLARATIONS relating to the declarations made by the German Democratic Republic, on 12 August 1974,[2] and the Ukrainian Soviet Socialist Republic, on 16 August 1974,[2] concerning application to Berlin (West)

Received on:

8 July 1975

FRANCE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
UNITED STATES OF AMERICA

[TRADUCTION]

L'Union soviétique tient à réitérer qu'à son point de vue l'extension à Berlin-Ouest, par la République fédérale d'Allemagne, de l'application du Pacte international relatif aux droits civils et politiques et du Pacte international relatif aux droits économiques, sociaux et culturels, du 19 décembre 1966 est illégale, pour les motifs qu'elle a exposés dans sa note du 4 juillet 1974 au Secrétaire général (C.N.145.1974.TREATIES-3) du 5 août 1974[1].

DÉCLARATIONS relatives aux déclarations formulées par la République démocratique allemande, le 12 août 1974[2], et la République socialiste soviétique d'Ukraine, le 16 août 1974[2], concernant l'application à Berlin-Ouest

Reçue le :

8 juillet 1975

ÉTATS-UNIS D'AMÉRIQUE
FRANCE
ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[1] See p. 98 of this volume.
[2] See pp. 99 and 100 of this volume.

[1] Voir p. 98 du présent volume.
[2] Voir p. 99 et 100 du présent volume.

"The [above-mentioned declarations[1]] refer to the Quadripartite Agreement of 3 September 1971.[2] This Agreement was concluded in Berlin between the Governments of the French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Governments sending these communications are not parties to the Quadripartite Agreement and are therefore not competent to make authoritative comments on its provisions.

"The Governments of France, the United Kingdom and the United States wish to bring the following to the attention of the States Parties to the instruments referred to in the abovementioned communications. When authorising the extension of these instruments to the Western Sectors of Berlin, the authorities of the Three Powers, acting in the exercise of their supreme authority, ensured in accordance with established procedures that those instruments are applied in the Western Sectors of Berlin in such a way as not to affect matters of security and status.

"Accordingly, the application of these instruments to the Western Sectors of Berlin continues in full force and effect.

«Les [déclarations susmentionnées[1]] se réfèrent à l'Accord quadripartite du 3 septembre 1971[2]. Cet Accord a été conclu à Berlin par les Gouvernements de la République française, de l'Union des Républiques socialistes soviétiques, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et des Etats-Unis d'Amérique. Les Gouvernements qui ont adressé ces communications ne sont pas parties à l'Accord quadripartite et n'ont donc pas compétence pour interpréter de manière autorisée ses dispositions.

«Les Gouvernements de la France, du Royaume-Uni et des Etats-Unis souhaitent appeler l'attention des Etats parties aux instruments diplomatiques auxquels il est fait référence dans les communications ci-dessus sur ce qui suit. Lorsqu'elles ont autorisé l'extension de ces instruments aux secteurs occidentaux de Berlin, les autorités des trois Puissances, agissant dans l'exercice de leur autorité suprême, ont pris, conformément aux procédures établies, les dispositions nécessaires pour garantir que ces instruments seraient appliqués dans les secteurs occidentaux de Berlin de telle manière qu'ils n'affecteraient pas les questions de sécurité et de statut.

«En conséquence, l'application de ces instruments aux secteurs occidentaux de Berlin demeure en pleine vigueur.

[1] See "Declaration by the German Democratic Republic relating to the declaration made upon ratification by the Federal Republic of Germany concerning application to Berlin (West)" on p. 99 of this volume; and "Declaration by the Ukrainian Soviet Socialist Republic relating to the declaration made upon ratification by the Federal Republic of Germany concerning application to Berlin (West)" on p. 100 of this volume.

[2] United Nations, *Treaty Series*, vol. 880, p. 115.

[1] Voir «Déclaration par la République démocratique allemande relative à la déclaration formulée lors de la ratification par la République fédérale d'Allemagne concernant l'application à Berlin-Ouest» à la page 99 du présent volume; et «Déclaration par la République socialiste soviétique d'Ukraine relative à la déclaration formulée lors de la ratification par la République fédérale d'Allemagne concernant l'application à Berlin-Ouest» à la page 100 du présent volume.

[2] Nations Unies, *Recueil des Traités*, vol. 880, p. 115.

"The Governments of France, the United Kingdom and the United States do not consider it necessary to respond to any further communications of a similar nature by States which are not signatories to the Quadripartite Agreement. This should not be taken to imply any change in the position of those Governments in this matter."

19 September 1975

FEDERAL REPUBLIC OF GERMANY

"By their Note of 8 July 1975,[1] . . . the Governments of France, the United Kingdom and the United States answered the assertions made in the communications referred to above. The Government of the Federal Republic of Germany, on the basis of the legal situation set out in the Note of the Three Powers, wishes to confirm that the application in Berlin (West) of the above-mentioned instruments extended by it under the established procedures continues in full force and effect.

"The Government of the Federal Republic of Germany wishes to point out that the absence of a response to further communications of a similar nature should not be taken to imply any change of its position in this matter."

[1] See p. 104 of this volume.

«Les Gouvernements de la France, du Royaume-Uni et des Etats-Unis n'estiment pas nécessaire de répondre à d'autres communications d'une semblable nature émanant d'Etats qui ne sont pas signataires de l'Accord quadripartite. Ceci n'implique pas que la position des Gouvernements de la France, du Royaume-Uni et des Etats-Unis ait changé en quoi que ce soit.»

19 septembre 1975

RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE

[TRADUCTION — TRANSLATION]

Par leur note du 8 juillet 1975[1], . . . les Gouvernements de la France, du Royaume-Uni et des Etats-Unis ont répondu aux affirmations contenues dans les communications mentionnées plus haut. Le Gouvernement de la République fédérale d'Allemagne, sur la base de la situation juridique décrite dans la note des trois Puissances, tient à confirmer que [l'instrument susmentionné], dont il a étendu l'application à Berlin (Ouest) conformément aux procédures établies, continue d'y être pleinement en vigueur.

Le Gouvernement de la République fédérale d'Allemagne tient à signaler que l'absence de réponse de sa part à de nouvelles communications de même nature ne devra pas être interprétée comme signifiant un changement de position en la matière.

[1] Voir p. 104 du présent volume.

EXHIBIT D

No. 24841

MULTILATERAL

Convention against torture and other cruel, inhuman or degrading treatment or punishment. Adopted by the General Assembly of the United Nations on 10 December 1984

Authentic texts: Arabic, Chinese, English, French, Russian and Spanish.
Registered ex officio *on 26 June 1987.*

MULTILATÉRAL

Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants. Adoptée par l'Assemblée générale des Nations Unies le 10 décembre 1984

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol.
Enregistrée d'office le 26 juin 1987.

CONVENTION[1] AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition 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 those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to artlcle 5 of the Universal Declaration of Human Rights[2] and article 7 of the International Covenant on Civil and Political Rights,[3] both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,[4]

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1. 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person informa-

[1] Came into force on 26 June 1987, i.e., the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, in accordance with article 27 (1), including the provisions of articles 21 and 22 concerning the competence of the Committee against Torture, more than five States* having declared that they recognize the competence of the Committee, in accordance with articles 21 and 22:

State	Date of deposit of the instrument of ratification or accession (a)	State	Date of deposit of the instrument of ratification or accession (a)
Afghanistan**	1 April 1987	Norway*	9 July 1986
Argentina*	24 September 1986	Philippines	18 June 1986 *a*
Belize	17 March 1986 *a*	Senegal	21 August 1986
Bulgaria**	16 December 1986	Sweden*	8 January 1986
Byelorussian Soviet Socialist Republic**	13 March 1987	Switzerland*	2 December 1986
Cameroon	19 December 1986 *a*	Uganda	3 November 1986 *a*
Denmark*	27 May 1987	Ukrainian Soviet Socialist Republic**	24 February 1987
Egypt	25 June 1986 *a*	Union of Soviet Socialist Republics**	3 March 1987
France* **	18 February 1986	Uruguay	24 October 1986
Hungary**	15 April 1987		
Mexico	23 January 1986		

* See p. 204 of this volume for the texts of the declarations recognizing the competence of the Committee against Torture, in accordance with articles 21 and 22.

** See p. 207 of this volume for the texts of the reservations made upon ratification.

[2] United Nations, *Official Records of the General Assembly, Third Session*, Part I, p. 71.

[3] United Nations, *Treaty Series*, vol. 999, p. 171; vol. 1057, p. 407 (rectification of Spanish authentic text); vol. 1059, p. 451 (corrigendum to vol. 999).

[4] United Nations, *Official Records of the General Assembly, Thirtieth Session, Supplement No. 34* (A/10034), p. 91.

tion or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2. 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3. 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4. 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5. 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(*a*) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(*b*) When the alleged offender is a national of that State;

(*c*) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6. 1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7. 1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8. 1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9. 1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10. 1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who

may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11. Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12. Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14. 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15. Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16. 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17. 1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from

among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five 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 five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18. 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*) Six members shall constitute a quorum;

(*b*) Decisions of the Committee shall be made by a majority vote of the members present.

3. 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 this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19. 1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to

give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 20. 1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21. 1. A State Party to this Convention 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 this Convention. Such communications may be received and considered according to the procedures laid down in this article 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 dealt with by the Committee under this article 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 considers that another State Party is not giving effect to the provisions of this Convention, 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 under this article only after it has ascertained that all 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 or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(*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 the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an *ad hoc* conciliation commission;

(*f*) In any matter referred to it under this article, 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 by 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 five States Parties to this Convention 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 under this article 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 22. 1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article 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 this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. 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.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(*a*) The same matter has not been, and 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 or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention 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 or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 23. The members of the Committee and of the *ad hoc* conciliation commissions which may be appointed under article 21, paragraph 1 (*e*), 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.[1]

[1] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1, p. 18).

Article 24. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25. 1. This Convention is open for signature by all States.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26. This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27. 1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28. 1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29. 1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties 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 within four months from the date of such communication 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 by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30. 1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31. 1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32. The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(*a*) Signatures, ratifications and accessions under articles 25 and 26;

(*b*) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(*c*) Denunciations under article 31.

Article 33. 1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

[*For the signature pages, see p. 155 of this volume.*]

باسم أفغانستان :

代表阿富汗：

In the name of Afghanistan:
Au nom de l'Afghanistan :
От имени Афганистана:
En nombre del Afganistán:

MOHAMMAD FARID ZARIF

باسم ألبانيا :

代表阿尔巴尼亚：

In the name of Albania:
Au nom de l'Albanie :
От имени Албании:
En nombre de Albania:

باسم الجزائر :

代表阿尔及利亚：

In the name of Algeria:
Au nom de l'Algérie :
От имени Алжира:
En nombre de Argelia:

HOCINE DJOUDI
Le 25 novembre 1985

باسم أنغولا :

代表安哥拉：

In the name of Angola:
Au nom de l'Angola :
От имени Анголы:
En nombre de Angola:

باسم أنتيغوا وبربودا :

代表安提瓜和巴布达：
In the name of Antigua and Barbuda:
Au nom d'Antigua-et-Barbuda :
От имени Антигуа и Барбуды:
En nombre de Antigua y Barbuda:

باسم الأرجنتين :

代表阿根廷：
In the name of Argentina:
Au nom de l'Argentine :
От имени Аргентины:
En nombre de la Argentina:

CARLOS M. MUÑIZ

باسم استراليا :

代表澳大利亚：
In the name of Australia:
Au nom de l'Australie :
От имени Австралии:
En nombre de Australia:

RICHARD ARTHUR WOOLCOTT
10 Dec. 1985

باسم النمسا :

代表奥地利：
In the name of Austria:
Au nom de l'Autriche :
От имени Австрии:
En nombre de Austria:

KARL FISCHER
14 March 1985

باسم البهاما :

代表巴哈马：

In the name of the Bahamas:
Au nom des Bahamas :
От имени Багамских островов:
En nombre de las Bahamas:

باسم البحرين :

代表巴林：

In the name of Bahrain:
Au nom de Bahreïn :
От имени Бахрейна:
En nombre de Bahrein:

باسم بنغلاديش:

代表孟加拉国：

In the name of Bangladesh:
Au nom du Bangladesh :
От имени Бангладеш:
En nombre de Bangladesh:

باسم بربادوس:

代表巴巴多斯：

In the name of Barbados:
Au nom de la Barbade :
От имени Барбадоса:
En nombre de Barbados:

باسم بلجيكا :

代表比利时：

In the name of Belgium:
Au nom de la Belgique :
От имени Бельгии:
En nombre de Bélgica:

E. DEVER

باسم بليز :

代表伯利兹

In the name of Belize:
Au nom du Belize :
От имени Белиза:
En nombre de Belice:

باسم بنن :

代表贝宁：

In the name of Benin:
Au nom du Bénin :
От имени Бенина:
En nombre de Benin:

باسم بوتان :

代表不丹：

In the name of Bhutan:
Au nom du Bhoutan :
От имени Бутана:
En nombre de Bhután:

باسم بوليفيا :

代表玻利维亚：

In the name of Bolivia:
Au nom de la Bolivie :
От имени Боливии:
En nombre de Bolivia:

JORGE GUMUCIO GRANIER

باسم بوتسوانا :

代表博茨瓦纳：

In the name of Botswana:
Au nom du Botswana :
От имени Ботсваны:
En nombre de Botswana:

باسم البرازيل :

代表巴西：

In the name of Brazil:
Au nom du Brésil :
От имени Бразилии:
En nombre del Brasil:

Nova York, 23 de setembro de 1985[1]
JOSÉ SARNEY

باسم بروني دار السلام :

代表文莱国：

In the name of Brunei Darussalam:
Au nom de Brunei Darussalam :
От имени Брунея Даруссалама:
En nombre de Brunei Darussalam:

[1] New York, 23 September 1985 — New York, le 23 septembre 1985.

باسم بلغاريا :

代表保加利亚：

In the name of Bulgaria:
Au nom de la Bulgarie :
От имени Болгарии:
En nombre de Bulgaria:

BORIS TSVETKOV[1]
10.VI.1986

باسم بوركينا فاسو :

代表布尔基纳法索：

In the name of Burkina Faso:
Au nom du Burkina Faso :
От имени Буркина Фасо:
En nombre de Burkina Faso:

باسم بورما :

代表缅甸：

In the name of Burma:
Au nom de la Birmanie :
От имени Бирмы:
En nombre de Birmania:

باسم بوروندي :

代表布隆迪：

In the name of Burundi:
Au nom du Burundi :
От имени Бурунди:
En nombre de Burundi:

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.

باسم جمهورية بيلوروسيا الاشتراكية السوفياتية:

代表白俄罗斯苏维埃社会主义共和国:
In the name of the Byelorussian Soviet Socialist Republic:
Au nom de la République socialiste soviétique de Biélorussie :
От имени Белорусской Советской Социалистической Республики:
En nombre de la República Socialista Soviética de Bielorrusia:

ANATOLIY MIKITAVITCH SHELDAVA[1]
19 декабря 1985 г.[2]

باسم الكاميرون :

喀麦隆代表:
In the name of Cameroon:
Au nom du Cameroun :
От имени Камеруна:
En nombre del Camerún:

باسم كندا:

代表加拿大:
In the name of Canada:
Au nom du Canada :
От имени Канады:
En nombre del Canadá:

STEPHEN LEWIS
August 23, 1985

باسم الرأس الأخضر:

代表佛得角:
In the name of Cape Verde:
Au nom du Cap-Vert :
От имени Островов Зеленого Мыса:
En nombre de Cabo Verde:

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.
[2] 19 December 1985 — 19 décembre 1985.

باسم جمهورية افريقيا الوسطى :

代表中非共和国：

In the name of the Central African Republic:
Au nom de la République centrafricaine :
От имени Центральноафриканской Республики:
En nombre de la República Centroafricana:

باسم تشاد :

代表乍得：

In the name of Chad:
Au nom du Tchad :
От имени Чада:
En nombre del Chad:

باسم شيلي :

代表智利：

In the name of Chile:
Au nom du Chili :
От имени Чили:
En nombre de Chile:

باسم الصين :

代表中国：

In the name of China:
Au nom de la Chine :
От имени Китая:
En nombre de China:

LI LUYE[1]

一九八六年十二月十二日[2]

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.
[2] 12 December 1986 — 12 décembre 1986.

باسم كولومبيا :

代表哥伦比亚：

In the name of Colombia:
Au nom de la Colombie :
От имени Колумбии:
En nombre de Colombia:

CARLOS ALBAN HOLGUIN
10 de abril de 1985[1]

باسم كومورو :

代表科摩罗：

In the name of the Comoros:
Au nom des Comores :
От имени Коморских островов:
En nombre de las Comoras:

باسم الكونغو :

代表刚果：

In the name of the Congo:
Au nom du Congo :
От имени Конго:
En nombre del Congo:

باسم كوستاريكا :

代表哥斯达黎加：

In the name of Costa Rica:
Au nom du Costa Rica :
От имени Коста-Рики:
En nombre de Costa Rica:

JORGE A. MONTERO

[1] 10 April 1985 — 10 avril 1985.

باسم كوبـــا :

代表古巴:
In the name of Cuba:
Au nom de Cuba :
От имени Кубы:
En nombre de Cuba:

OSCAR ORAMAS-OLIVA
Embajador Extraordinario y Plenipotenciario
de la República de Cuba
27-enero-1986[1]

باسم قبـــرص :

代表塞浦路斯:
In the name of Cyprus:
Au nom de Chypre :
От имени Кипра:
En nombre de Chipre:

CONSTANTINOS MOUSHOUTAS
Ambassador Extraordinary and Plenipotentiary
Permanent Representative to the UN[2]
9 October 1985

باسم تشيكوسلوفاكيـــا :

代表捷克斯洛伐克:
In the name of Czechoslovakia:
Au nom de la Tchécoslovaquie :
От имени Чехословакии:
En nombre de Checoslovaquia:

JAROSLAV CÉSAR
8.9.1986[3]

With the following reservations:

"The Czechoslovak Socialist Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention and it does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention."[4]

[1] Ambassador Extraordinary and Plenipotentiary of the Republic of Cuba, 27 January 1986 — Ambassadeur extraordinaire et plénipotentiaire de la République de Cuba, 27 janvier 1986.
[2] Ambassadeur extraordinaire et plénipotentiaire, Représentant permanent auprès de l'Organisation des Nations Unies.
[3] 8 September 1986 — 8 septembre 1986.
[4] [TRADUCTION — TRANSLATION] Avec la réserve suivante : La République socialiste tchécoslovaque ne reconnaît pas la compétence du Comité contre la torture telle qu'elle est définie à l'article 20 de la Convention et ne se considère pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention.

باسم كمبوتشيا الديمقراطية :

代表民主柬埔寨:

In the name of Democratic Kampuchea:
Au nom du Kampuchea démocratique :
От имени Демократической Кампучии:
En nombre de Kampuchea Democrática:

باسم جمهورية كوريا الشعبية الديمقراطيـــة :

代表朝鲜民主主义人民共和国:

In the name of the Democratic People's Republic of Korea:
Au nom de la République populaire démocratique de Corée :
От имени Корейской Народно-Демократической Республики:
En nombre de la República Popular Democrática de Corea:

باسم اليمن الديمقراطيـــة :

代表民主也门:

In the name of Democratic Yemen:
Au nom du Yémen démocratique :
От имени Демократического Йемена:
En nombre del Yemen Democrático:

باسم الدانمـــرك :

代表丹麦:

In the name of Denmark:
Au nom du Danemark :
От имени Дании:
En nombre de Dinamarca:

OLE BIERRING

باسم جيبوتـــــي :

代表吉布提：
In the name of Djibouti:
Au nom de Djibouti :
От имени Джибути:
En nombre de Djibouti:

باسم د ومينيكـــــا :

代表多米尼加：
In the name of Dominica:
Au nom de la Dominique :
От имени Доминики:
En nombre de Dominica:

باسم الجمهورية الد ومينيكية :

代表多米尼加共和国：
In the name of the Dominican Republic:
Au nom de la République dominicaine :
От имени Доминиканской Республики:
En nombre de la República Dominicana:

ELADIO KNIPPING VICTORIA

باسم اكـــــواد ور :

代表厄瓜多尔：
In the name of Ecuador:
Au nom de l'Equateur :
От имени Эквадора:
En nombre del Ecuador:

MIGUEL ALBORNOZ

باسم مصر:

代表埃及:
In the name of Egypt:
Au nom de l'Egypte :
От имени Египта:
En nombre de Egipto:

باسم السلفادور:

代表萨尔瓦多:
In the name of El Salvador:
Au nom d'El Salvador :
От имени Сальвадора:
En nombre de El Salvador:

باسم غينيا الاستوائية:

代表赤道几内亚:
In the name of Equatorial Guinea:
Au nom de la Guinée équatoriale :
От имени Экваториальной Гвинеи:
En nombre de Guinea Ecuatorial:

باسم اثيوبيا:

代表埃塞俄比亚:
In the name of Ethiopia:
Au nom de l'Ethiopie :
От имени Эфиопии:
En nombre de Etiopía:

باسم فيجي :

代表斐济：
In the name of Fiji:
Au nom de Fidji :
От имени Фиджи:
En nombre de Fiji:

باسم فنلندا :

代表芬兰：
In the name of Finland:
Au nom de la Finlande :
От имени Финляндии:
En nombre de Finlandia:

KEIJO KORHONEN

باسم فرنسا :

代表法国：
In the name of France:
Au nom de la France :
От имени Франции:
En nombre de Francia:

CLAUDE DE KEMOULARIA

باسم غابون :

代表加蓬：
In the name of Gabon:
Au nom du Gabon :
От имени Габона:
En nombre del Gabón:

FELIX OYOUÉ
21 janvier 1986

باسم غامبيـــا :

代表冈比亚：
In the name of the Gambia:
Au nom de la Gambie :
От имени Гамбии:
En nombre de Gambia:

LAMIN KITI JABANG
23/10/85

باسم الجمهورية الديمقراطية الألمانية :

代表德意志民主共和国：
In the name of the German Democratic Republic:
Au nom de la République démocratique allemande :
От имени Германской Демократической Республики:
En nombre de la República Democrática Alemana:

HARRY OTT[1]
7.4.1986[2]

باسم جمهورية المانيا الاتحادية :

代表德意志联邦共和国：
In the name of the Federal Republic of Germany:
Au nom de la République fédérale d'Allemagne :
От имени Федеративной Республики Германии:
En nombre de la República Federal de Alemania:

HANS WERNER LAUTENSCHLAGER[1]
13.10.86

باســـم غانـــا :

代表加纳：
In the name of Ghana:
Au nom du Ghana :
От имени Ганы:
En nombre de Ghana:

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.
[2] 7 April 1986 — 7 avril 1986.

باسم اليونـــــان :

代表希腊：

In the name of Greece:
Au nom de la Grèce :
От имени Греции:
En nombre de Grecia:

MIHALIS DOUNTAS

باسم غرينـــــــادا :

代表格林纳达：

In the name of Grenada:
Au nom de la Grenade :
От имени Гренады:
En nombre de Granada:

باسم غواتيمـــــــالا :

代表危地马拉：

In the name of Guatemala:
Au nom du Guatemala :
От имени Гватемалы:
En nombre de Guatemala:

باسم غينيـــــــا :

代表几内亚：

In the name of Guinea:
Au nom de la Guinée :
От имени Гвинеи:
En nombre de Guinea:

JEAN TRAORE
30 mai 1986

باسم غينيا - بيساو :

代表几内亚比绍：
In the name of Guinea-Bissau:
Au nom de la Guinée-Bissau :
От имени Гвинеи-Бисау:
En nombre de Guinea-Bissau:

باسم غيانـــا :

代表圭亚那：
In the name of Guyana:
Au nom de la Guyane :
От имени Гвианы:
En nombre de Guyana:

باسم هايـــتي :

代表海地：
In the name of Haiti:
Au nom d'Haïti :
От имени Гаити:
En nombre de Haití:

باسم الكرسي الرسولي :

代表教廷：
In the name of the Holy See:
Au nom du Saint-Siège :
От имени Святейшего престола:
En nombre de la Santa Sede:

باسم هنـــد وراس:

代表洪都拉斯:
In the name of Honduras:
Au nom du Honduras :
От имени Гондураса:
En nombre de Honduras:

باسم هنغاريـــا :

代表匈牙利:
In the name of Hungary:
Au nom de la Hongrie :
От имени Венгрии:
En nombre de Hungría:

FERENC ESZTERGALYOS[1]
November 28 1986

باسم ايسلنـــــدا :

代表冰岛:
In the name of Iceland:
Au nom de l'Islande :
От имени Исландии:
En nombre de Islandia:

HÖROUR HELGASON

باسم الهنـــــد :

代表印度:
In the name of India:
Au nom de l'Inde :
От имени Индии:
En nombre de la India:

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.

باسم اندونيسيا :

代表印度尼西亚：
In the name of Indonesia:
Au nom de l'Indonésie :
От имени Индонезии:
En nombre de Indonesia:

ALI ALATAS
23 October 1985

باسم العراق :

代表伊拉克：
In the name of Iraq:
Au nom de l'Iraq :
От имени Ирака:
En nombre del Iraq:

باسم ايرلندا :

代表爱尔兰：
In the name of Ireland:
Au nom de l'Irlande :
От имени Ирландии:
En nombre de Irlanda:

باسم جمهورية ايران الاسلامية :

代表伊朗伊斯兰共和国：
In the name of the Islamic Republic of Iran:
Au nom de la République islamique d'Iran :
От имени Исламской Республики Иран:
En nombre de la República Islámica del Irán:

باسم اسرائيل :

代表以色列：

In the name of Israel:
Au nom d'Israël :
От имени Израиля:
En nombre de Israel:

BENJAMIN NETANYAHU
Oct. 22, 1986

باسم ايطاليـــــا :

代表意大利：

In the name of Italy:
Au nom de l'Italie :
От имени Италии:
En nombre de Italia:

MAURIZIO BUCCI

باسم ساحـــل العـــاج :

代表象牙海岸：

In the name of the Ivory Coast:
Au nom de la Côte d'Ivoire :
От имени Берега Слоновой Кости:
En nombre de la Costa de Marfil:

باسم جامايكـــــا :

代表牙买加：

In the name of Jamaica:
Au nom de la Jamaïque :
От имени Ямайки:
En nombre de Jamaica:

باسم اليابـــــان :

代表日本：
In the name of Japan:
Au nom du Japon :
От имени Японии:
En nombre del Japón:

باسم الأردن :

代表约旦：
In the name of Jordan:
Au nom de la Jordanie :
От имени Иордании:
En nombre de Jordania:

باسم كينيـــــا :

代表肯尼亚：
In the name of Kenya:
Au nom du Kenya :
От имени Кении:
En nombre de Kenya:

باسم كيريباتـــــي :

代表基里巴斯：
In the name of Kiribati:
Au nom de Kiribati :
От имени Кирибати:
En nombre de Kiribati:

باسم الكويـــــت :

代表科威特：
In the name of Kuwait:
Au nom du Koweït :
От имени Кувейта:
En nombre de Kuwait:

باسم جمهورية لاو الديمقراطية الشعبية :

代表老挝人民民主共和国：

In the name of the Lao People's Democratic Republic:
Au nom de la République démocratique populaire lao :
От имени Лаосской Народно-Демократической Республики:
En nombre de la República Democrática Popular Lao:

باسم لبنان :

代表黎巴嫩：

In the name of Lebanon:
Au nom du Liban :
От имени Ливана:
En nombre del Líbano:

باسم ليسوتو :

代表莱索托：

In the name of Lesotho:
Au nom du Lesotho :
От имени Лесото:
En nombre de Lesotho:

باسم ليبريا :

代表利比里亚：

In the name of Liberia:
Au nom du Libéria :
От имени Либерии:
En nombre de Liberia:

باسم الجماهيرية العربية الليبية :

代表阿拉伯利比亚民众国：

In the name of the Libyan Arab Jamahiriya:
Au nom de la Jamahiriya arabe libyenne :
От имени Ливийской Арабской Джамахирии:
En nombre de la Jamahiriya Arabe Libia:

باسم لختنشتاين :

代表列支敦士登：

In the name of Liechtenstein:
Au nom du Liechtenstein :
От имени Лихтенштейна:
En nombre de Liechtenstein:

JEAN MARC BOULGARIS
Le 27 juin 1985

باسم لكسمبرغ :

代表卢森堡：

In the name of Luxembourg:
Au nom du Luxembourg :
От имени Люксембурга:
En nombre de Luxemburgo:

ANDRÉ PHILIPPE
22 février 1985

باسم مدغشقر :

代表马达加斯加：

In the name of Madagascar:
Au nom de Madagascar :
От имени Мадагаскара:
En nombre de Madagascar:

باسم مـــــلاوى :

代表马拉维：

In the name of Malawi:
Au nom du Malawi :
От имени Малави:
En nombre de Malawi:

باسم ماليزيـــــا :

代表马来西亚：

In the name of Malaysia:
Au nom de la Malaisie :
От имени Малайзии:
En nombre de Malasia:

باسم ملديـــف :

代表马尔代夫：

In the name of Maldives:
Au nom des Maldives :
От имени Мальдивов:
En nombre de Maldivas:

باسم مالـــي :

代表马里：

In the name of Mali:
Au nom du Mali :
От имени Мали:
En nombre de Malí:

باسم مالطـــه :

代表马耳他：

In the name of Malta:
Au nom de Malte :
От имени Мальты:
En nombre de Malta:

باسم موريتانيـــا :

代表毛里塔尼亚：

In the name of Mauritania:
Au nom de la Mauritanie :
От имени Мавритании:
En nombre de Mauritania:

باسم موريشيـــوس :

代表毛里求斯：

In the name of Mauritius:
Au nom de Maurice :
От имени Маврикия:
En nombre de Mauricio:

باسم المكسيـــــك :

代表墨西哥：

In the name of Mexico:
Au nom du Mexique :
От имени Мексики:
En nombre de México:

Ad referendum
PORFIRIO MUÑOZ LEDO
18 marzo 1985[1]

[1] 18 March 1985 — 18 mars 1985.

باسم موناكـــو:

代表摩纳哥:
In the name of Monaco:
Au nom de Monaco :
От имени Монако:
En nombre de Mónaco:

باسم منغوليـــا:

代表蒙古:
In the name of Mongolia:
Au nom de la Mongolie :
От имени Монголии:
En nombre de Mongolia:

باسم المغـــرب:

代表摩洛哥:
In the name of Morocco:
Au nom du Maroc :
От имени Марокко:
En nombre de Marruecos:

MEHDI ALAOUI[1]
Le 8 - 1 - 1986[2]

باسم موزامبيـــق:

代表莫桑比克:
In the name of Mozambique:
Au nom du Mozambique :
От имени Мозамбика:
En nombre de Mozambique:

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.
[2] 8 January 1986 — 8 janvier 1986.

باسم نـــاورو:

代表瑙鲁:
In the name of Nauru:
Au nom de Nauru :
От имени Науру:
En nombre de Nauru:

باسم نيبـــــال :

代表尼泊尔:
In the name of Nepal:
Au nom du Népal :
От имени Непала:
En nombre de Nepal:

باسم هولنـــــدا :

代表荷兰:
In the name of the Netherlands:
Au nom des Pays-Bas :
От имени Нидерландов:
En nombre de los Países Bajos:

J. H. MEESMAN

باسم نيوزيلنـــــدا :

代表新西兰:
In the name of New Zealand:
Au nom de la Nouvelle-Zélande :
От имени Новой Зеландии:
En nombre de Nueva Zelandia:

WILLIAM RAMSAY MANSFIELD
14 Jan. 1986

باسم نيكاراغوا :

代表尼加拉瓜：

In the name of Nicaragua:
Au nom du Nicaragua :
От имени Никарагуа:
En nombre de Nicaragua:

JAVIER CHAMORRO MORA
4 - 15 - 85

باسم النيجر :

代表尼日尔：

In the name of Niger:
Au nom du Niger :
От имени Нигера:
En nombre del Níger:

باسم نيجيريا :

代表尼日利亚：

In the name of Nigeria:
Au nom du Nigéria :
От имени Нигерии:
En nombre de Nigeria:

باسم النرويج :

代表挪威：

In the name of Norway:
Au nom de la Norvège :
От имени Норвегии:
En nombre de Noruega:

ERIK TELLMANN

باسم عمان :

代表阿曼：
In the name of Oman:
Au nom de l'Oman :
От имени Омана:
En nombre de Omán:

باسم باكستان :

代表巴基斯坦：
In the name of Pakistan:
Au nom du Pakistan :
От имени Пакистана:
En nombre del Pakistán:

باسم بنما :

代表巴拿马：
In the name of Panama:
Au nom du Panama :
От имени Панамы:
En nombre de Panamá:

LEONARDO A. KAM
22 de febrero de 1985[1]

باسم بابوا غينيا الجديدة :

代表巴布亚新几内亚：
In the name of Papua New Guinea:
Au nom de la Papouasie-Nouvelle-Guinée :
От имени Папуа-Новой Гвинеи:
En nombre de Papua Nueva Guinea:

[1] 22 February 1985 — 22 février 1985.

باسم باراغـــــــواى :

代表巴拉圭：

In the name of Paraguay:
Au nom du Paraguay :
От имени Парагвая:
En nombre del Paraguay:

باسم بيـــــــرو:

代表秘鲁：

In the name of Peru:
Au nom du Pérou :
От имени Перу:
En nombre del Perú:

JAVIER ARIAS STELLA
May 29, 1985

باسم الفلبـــــــين :

代表菲律宾：

In the name of the Philippines:
Au nom des Philippines :
От имени Филиппин:
En nombre de Filipinas:

باسم بولنـــــــدا :

代表波兰：

In the name of Poland:
Au nom de la Pologne :
От имени Польши:
En nombre de Polonia:

EUGENIUSZ NOWORTYA[1]
13.I.1986

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.

باسم البرتغـــــال :

代表葡萄牙：

In the name of Portugal:
Au nom du Portugal :
От имени Португалии:
En nombre de Portugal:

RUI MEDINA

باسم قطـــــر :

代表卡塔尔：

In the name of Qatar:
Au nom du Qatar :
От имени Катара:
En nombre de Qatar:

باسم جمهورية كوريـــــا :

代表大韩民国：

In the name of the Republic of Korea:
Au nom de la République de Corée :
От имени Корейской Республики:
En nombre de la República de Corea:

باسم رومانيـــــا :

代表罗马尼亚：

In the name of Romania:
Au nom de la Roumanie :
От имени Румынии:
En nombre de Rumania:

باسم رواندا :

代表卢旺达：

In the name of Rwanda:
Au nom du Rwanda :
От имени Руанды:
En nombre de Rwanda:

باسم سانت كريستوفر ونيفيس :

代表圣克里斯托弗和尼维斯：

In the name of Saint Christopher and Nevis:
Au nom de Saint-Christophe-et-Nevis :
От имени Сент-Кристофер и Невис:
En nombre de San Cristóbal y Nieves:

باسم سانت لوسيا :

代表圣卢西亚：

In the name of Saint Lucia:
Au nom de Sainte-Lucie :
От имени Сент-Люсии:
En nombre de Santa Lucía:

باسم سانت فنسنت وجزر غرينادين :

代表圣文森特和格林纳丁斯：

In the name of Saint Vincent and the Grenadines:
Au nom de Saint-Vincent-et-Grenadines :
От имени Сент-Винсента и Гренады:
En nombre de San Vicente y las Granadinas:

باسم ساموا :

代表萨摩亚：

In the name of Samoa:
Au nom du Samoa :
От имени Самоа:
En nombre de Samoa:

باسم سان مارينو:

代表圣马力诺：

In the name of San Marino:
Au nom de Saint-Marin :
От имени Сан-Марино:
En nombre de San Marino:

باسم سان تومي وبرينسيبي :

代表圣多美和普林西比：

In the name of Sao Tome and Principe:
Au nom de Sao Tomé-et-Principe :
От имени Сан-Томе и Принсипи:
En nombre de Santo Tomé y Príncipe:

باسم المملكة العربية السعودية :

代表沙特阿拉伯：

In the name of Saudi Arabia:
Au nom de l'Arabie saoudite :
От имени Саудовской Аравии:
En nombre de Arabia Saudita:

باسم السنغال :

代表塞内加尔：
In the name of Senegal:
Au nom du Sénégal :
От имени Сенегала:
En nombre del Senegal:

MASSABA SARRE

باسم سيشيـــل :

代表塞舌尔：
In the name of Seychelles:
Au nom des Seychelles :
От имени Сейшельских островов:
En nombre de Seychelles:

باسم سيراليـــون :

代表塞拉利昂：
In the name of Sierra Leone:
Au nom de la Sierra Leone :
От имени Сьерра-Леоне:
En nombre de Sierra Leona:

ABDUL G. KOROMA
18th March, 1985

باسم سنغافـــوره :

代表新加坡：
In the name of Singapore:
Au nom de Singapour :
От имени Сингапура:
En nombre de Singapur:

باسم جزر سليمـــان :

代表所罗门群岛：

In the name of Solomon Islands:
Au nom des Iles Salomon :
От имени Соломоновых Островов:
En nombre de las Islas Salomón:

باسم الصومـــال :

代表索马里：

In the name of Somalia:
Au nom de la Somalie :
От имени Сомали:
En nombre de Somalia:

باسم افريقيا الجنوبية :

代表南非：

In the name of South Africa:
Au nom de l'Afrique du Sud :
От имени Южной Африки:
En nombre de Sudáfrica:

باسم اسبانيـــا :

代表西班牙：

In the name of Spain:
Au nom de l'Espagne :
От имени Испании:
En nombre de España:

EMILIO ARTACHO CASTELLANO

باسم سري لانكا :

代表斯里兰卡：

In the name of Sri Lanka:
Au nom de Sri Lanka :
От имени Шри Ланки:
En nombre de Sri Lanka:

باسم السودان :

代表苏丹：

In the name of the Sudan:
Au nom du Soudan :
От имени Судана:
En nombre del Sudán:

OMER YOUSIF BIRIDO
٤[1] يونيو ١٩٨٦

باسم سورينام :

代表苏里南：

In the name of Suriname:
Au nom du Suriname :
От имени Суринама:
En nombre de Suriname:

باسم سوازيلند :

代表斯威士兰：

In the name of Swaziland:
Au nom du Swaziland :
От имени Свазиленда:
En nombre de Swazilandia:

[1] 4 June 1986 — 4 juin 1986.

باسم السويد :

代表瑞典：

In the name of Sweden:
Au nom de la Suède :
От имени Швеции:
En nombre de Suecia:

ANDERS FERM

باسم سويسرا :

代表瑞士：

In the name of Switzerland:
Au nom de la Suisse :
От имени Швейцарии:
En nombre de Suiza:

FRANCESCA POMETTA

باسم الجمهورية العربية السورية :

代表阿拉伯叙利亚共和国：

In the name of the Syrian Arab Republic:
Au nom de la République arabe syrienne :
От имени Сирийской Арабской Республики:
En nombre de la República Arabe Siria:

باسم تايلند :

代表泰国：

In the name of Thailand:
Au nom de la Thaïlande :
От имени Таиланда:
En nombre de Tailandia:

باسم توغـــو:

代表多哥:

In the name of Togo:
Au nom du Togo :
От имени Того:
En nombre del Togo:

KWAM KOUASSI[1]
New York, le 25 Mars 1987

باسم تونغـــا:

代表汤加:

In the name of Tonga:
Au nom des Tonga :
От имени Тонга:
En nombre de Tonga:

باسم ترينيداد وتوباغـــو:

代表特立尼达和多巴哥:

In the name of Trinidad and Tobago:
Au nom de la Trinité-et-Tobago :
От имени Тринидада и Тобаго:
En nombre de Trinidad y Tabago:

باسم تونـــس:

代表突尼斯:

In the name of Tunisia:
Au nom de la Tunisie :
От имени Туниса:
En nombre de Túnez:

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.

باسم تركيـــا :

代表土耳其：

In the name of Turkey:
Au nom de la Turquie :
От имени Турции:
En nombre de Turquía:

باسم توفالـــو:

代表图瓦卢：

In the name of Tuvalu:
Au nom de Tuvalu :
От имени Тувалу:
En nombre de Tuvalu:

باســم أوغنــدا :

代表乌干达：

In the name of Uganda:
Au nom de l'Ouganda :
От имени Уганды:
En nombre de Uganda:

باسم جمهورية اوكرانيا الاشتراكية السوفياتية :

代表乌克兰苏维埃社会主义共和国：

In the name of the Ukrainian Soviet Socialist Republic:
Au nom de la République socialiste soviétique d'Ukraine :
От имени Украинской Советской Социалистической Республики:
En nombre de la República Socialista Soviética de Ucrania:

GUENNADI OUDOVENKO[1]
27 лютого 1986 р.[2]

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.
[2] 27 February 1986 — 27 février 1986.

باسم اتحاد الجمهوريات الاشتراكية السوفياتية :

代表苏维埃社会主义共和国联盟：

In the name of the Union of Soviet Socialist Republics:
Au nom de l'Union des Républiques socialistes soviétiques :
От имени Союза Советских Социалистических Республик:
En nombre de la Unión de Repúblicas Socialistas Soviéticas:

OLEG ALEKSANDROVICH TROYANOVSKY[1]
10 декабря 1985 года[2]

باسم الامارات العربية المتحدة :

代表阿拉伯联合酋长国：

In the name of United Arab Emirates:
Au nom des Emirats arabes unis :
От имени Объединенных Арабских Эмиратов:
En nombre de los Emiratos Arabes Unidos:

باسم المملكة المتحدة لبريطانيا العظمى وايرلندا الشمالية :

代表大不列颠及北爱尔兰联合王国：

In the name of the United Kingdom of Great Britain and Northern Ireland:
Au nom du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :
От имени Соединенного Королевства Великобритании и Северной Ирландии:
En nombre del Reino Unido de Gran Bretaña e Irlanda del Norte:

J. A. THOMSON[1]
15th March 1985

باسم جمهورية تنزانيا المتحدة :

代表坦桑尼亚联合共和国：

In the name of the United Republic of Tanzania:
Au nom de la République-Unie de Tanzanie :
От имени Объединенной Республики Танзания:
En nombre de la República Unida de Tanzanía:

[1] See p. 198 of this volume for the text of the declarations and reservations made upon signature — Voir p. 198 du présent volume pour le texte des déclarations et réserves faites lors de la signature.
[2] 10 December 1985 — 10 décembre 1985.

باسم الولايات المتحدة الأمريكية :

代表美利坚合众国：

In the name of the United States of America:
Au nom des Etats-Unis d'Amérique :
От имени Соединенных Штатов Америки:
En nombre de los Estados Unidos de América:

باسم أوروغواي :

代表乌拉圭：

In the name of Uruguay:
Au nom de l'Uruguay :
От имени Уругвая:
En nombre del Uruguay:

JUAN CARLOS BLANCO DELEGADO

باسم فانواتو :

代表瓦努阿图：

In the name of Vanuatu:
Au nom de Vanuatu :
От имени Вануату:
En nombre de Vanuatu:

باسم فنزويلا :

代表委内瑞拉：

In the name of Venezuela:
Au nom du Venezuela :
От имени Венесуэлы:
En nombre de Venezuela:

HÉCTOR GRIFFIN
15 de febrero de 1985[1]

[1] 15 February 1985 — 15 février 1985.

باسم فيت نـــام :

代表越南社会主义共和国：

In the name of Viet Nam:
Au nom du Viet Nam :
От имени Вьетнама:
En nombre de Viet Nam:

باسم اليمـــــن :

代表也门：

In the name of Yemen:
Au nom du Yémen :
От имени Йемена:
En nombre del Yemen:

باسم يوغوسلافيـــا :

代表南斯拉夫：

In the name of Yugoslavia:
Au nom de la Yougoslavie :
От имени Югославии:
En nombre de Yugoslavia:

باسم زائـــير :

代表扎伊尔：

In the name of Zaire:
Au nom du Zaïre :
От имени Заира:
En nombre del Zaire:

باسم زامبيا :

代表赞比亚：

In the name of Zambia:
Au nom de la Zambie :
От имени Замбии:
En nombre de Zambia:

باسم زمبابوي :

代表津巴布韦：

In the name of Zimbabwe:
Au nom du Zimbabwe :
От имени Зимбабве:
En nombre de Zimbabwe:

DECLARATIONS AND RESERVATIONS MADE UPON SIGNATURE

10 June 1986

BULGARIA

[BULGARIAN TEXT — TEXTE BULGARE]

«1. В съответствие с чл. 28 от Конвенцията, Народна република България заявява, че не признава компетенцията на Комитета против изтезанията, предоставена му по силата на чл. 20 от Конвенцията, тъй като счита, че разпоредбата на чл. 20 противоречи на принципа на зачитане суверенитета на държавите-страни по Конвенцията.

2. В съответствие с чл. 30, ал. 2 от Конвенцията, Народна република България заявява, че не се счита обвързана с разпоредбата на чл. 30, ал. 1 от Конвенцията, която установява задължителна юрисдикция на международен арбитраж или на Международния съд при решаването на спорове между държавите-страни по Конвенцията. НР България поддържа своето становище, че споровете между две или повече държави могат да бъдат предавани за разглеждане и решаване от международен арбитраж или от Международния съд само при изрично съгласие на всички страни по спора, за всеки отделен случай.»

[TRANSLATION[1]]

1. Pursuant to Article 28 of the Convention, the People's Republic of Bulgaria states that it does not recognize the competence of the Committee against Torture provided for in Article 20 of the Convention, as it considers that the provisions of Article 20 are not consistent with the principle of respect for sovereignty of the States-parties to the Convention.

2. Pursuant to Article 30, paragraph 2 of the Convention, the People's Republic of Bulgaria states that it does not consider itself bound by the provisions of Article 30, paragraph 1 of the Convention, establishing compulsory jurisdiction of international arbitration or the International Court of Justice in the settlement of disputes between States-parties to the Convention. The People's Republic of Bulgaria maintains its position that disputes between two or more States can be submitted for consideration and settlement by international arbitration or the International Court of

[1] Translation provided by the Government of Bulgaria.

DÉCLARATIONS ET RÉSERVES FAITES LORS DE LA SIGNATURE

10 juin 1986

BULGARIE

[TRADUCTION[2]]

1. En application de l'article 28 de la Convention, la République populaire de Bulgarie déclare qu'elle ne reconnaît pas la compétence accordée au Comité contre la torture aux termes de l'article 20 de la Convention puisqu'elle estime que les dispositions de l'article 20 ne sont pas compatibles avec le principe du respect de la souveraineté des Etats parties à la Convention.

2. En application du paragraphe 2 de l'article 30 de la Convention, la République populaire de Bulgarie déclare qu'elle ne se considère pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention rendant obligatoire le recours à l'arbitrage international ou à la Cour internationale de Justice pour le règlement des différends entre Etats parties à la Convention. Elle maintient que les différends entre deux Etats ou plus ne peuvent être soumis à un arbitrage international ou à la Cour internationale de Justice, pour examen et règlement, que si toutes les parties au diffé-

[2] Traduction fournie par le Gouvernement bulgare.

Justice only provided all parties to the dispute, in each individual case, have explicitly agreed to that.

rend en sont explicitement convenues dans chaque cas particulier.

19 December 1985

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

19 décembre 1985

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[BYELORUSSIAN TEXT — TEXTE BIÉLORUSSE]

«Беларуская Савецкая Сацыялістычная Рэспубліка не прызнае кампетэнцыю Камітэта супраць катаванняў, вызначаную артыкулам 20 Канвенцыі.»

«Беларуская Савецкая Сацыялістычная Рэспубліка не лічыць сябе звязанай палажэннямі пункта I артыкула 30 Канвенцыі.»

[TRANSLATION[1]]

1. The Byelorussian Soviet Socialist Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention.

2. The Byelorussian Soviet Socialist Republic does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention.

[TRADUCTION[2]]

1. La République socialiste soviétique de Biélorussie ne reconnaît pas la compétence du Comité contre la torture, telle qu'elle est définie à l'article 20 de la Convention.

2. La République socialiste soviétique de Biélorussie ne se considère pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention.

12 December 1986

CHINA

12 décembre 1986

CHINE

[TRADUCTION — TRANSLATION]

"(1) The Chinese Government does not recognize the competence of the Committee Against Torture as provided for in Article 20 of the Convention.

(2) The Chinese Government does not consider itself bound by paragraph 1 of Article 30 of the Convention."

1) Le Gouvernement chinois ne reconnaît pas la compétence accordée au Comité contre la torture aux termes de l'article 20 de la Convention.

2) Le Gouvernement chinois ne se considère pas lié par le paragraphe 1 de l'article 30 de la Convention.

8 September 1986

CZECHOSLOVAKIA

[*For the text of the reservations, see p. 164 of this volume.*]

8 septembre 1986

TCHÉCOSLOVAQUIE

[*Pour le texte des réserves, voir p. 164 du présent volume.*]

[1] Translation provided by the Government of the Byelorussian Soviet Socialist Republic.

[2] Traduction fournie par le Gouvernement de la République socialiste soviétique de Biélorussie.

7 April 1986

GERMAN DEMOCRATIC REPUBLIC

7 avril 1986

RÉPUBLIQUE DÉMOCRATIQUE ALLEMANDE

[GERMAN TEXT — TEXTE ALLEMAND]

„Die Deutsche Demokratische Republik erklärt in Übereinstimmung mit Artikel 28 Absatz 1 der Konvention, daß sie die in Artikel 20 vorgesehene Kompetenz des Komitees nicht anerkennt.

Die Deutsche Demokratische Republik erklärt in Übereinstimmung mit Artikel 30 Absatz 2 der Konvention, daß sie sich durch Artikel 30 Absatz 1 nicht als gebunden betrachtet."

[TRANSLATION[1] — TRADUCTION[2]]

The German Democratic Republic declares in accordance with Article 28, paragraph 1 of the Convention that it does not recognize the competence of the Committee provided for in Article 20.

The German Democratic Republic declares in accordance with Article 30, paragraph 2 of the Convention that it does not consider itself bound by paragraph 1 of this Article.

[TRADUCTION — TRANSLATION]

Conformément au paragraphe 1er de l'article 28 de la Convention, le Gouvernement de la République démocratique allemande déclare qu'il ne reconnaît pas la compétence accordée au Comité aux termes de l'article 20.

Conformément au paragraphe 2 de l'article 30 de la Convention, le Gouvernement de la République démocratique allemande déclare qu'il ne se considère pas lié par le paragraphe 1er du même article.

13 October 1986

GERMANY, FEDERAL REPUBLIC OF

13 octobre 1986

ALLEMAGNE, RÉPUBLIQUE FÉDÉRALE D'

[GERMAN TEXT — TEXTE ALLEMAND]

„Die Regierung der Bundesrepublik Deutschland behält sich das Recht vor, bei der Ratifizierung diejenigen Vorbehalte oder Interpretationserklärungen mitzuteilen, die sie insbesondere im Hinblick auf die Anwendbarkeit von Artikel 3 für erforderlich hält."

[TRANSLATION[3] — TRADUCTION[4]]

The Government of the Federal Republic of Germany reserves the right to communicate, upon ratification, such reservations or declarations of interpretation as are deemed necessary especially with respect to the applicability of article 3.

[TRADUCTION — TRANSLATION]

Le Gouvernement de la République fédérale d'Allemagne se réserve le droit, lors de la ratification, de communiquer les réserves ou explications interprétatives qu'il jugera nécessaires, en particulier en ce qui concerne l'application de l'article 3.

[1] Translation provided by the Government of the German Democratic Republic.
[2] Traduction fournie par le Gouvernement de la République démocratique allemande.
[3] Translation provided by the Government of the Federal Republic of Germany.
[4] Traduction fournie par le Gouvernement de la République fédérale d'Allemagne.

28 November 1986

HUNGARY

28 novembre 1986

HONGRIE

[HUNGARIAN TEXT — TEXTE HONGROIS]

"A Magyar Népköztársaság nem ismeri el a Kínzás Elleni Bizottság részére az Egyezmény 20. cikkének szövegében megállapitott illetékességet.

A Magyar Népköztársaság nem tartja magára nézve kötelezőnek az Egyezmény 30. cikk 1. bekezdésében foglalt rendelkezéseket."

[TRANSLATION[1] — TRADUCTION[2]]

The Hungarian People's Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention.

The Hungarian People's Republic does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention.

[TRADUCTION — TRANSLATION]

La République populaire hongroise ne reconnaît pas la compétence du Comité contre la torture, telle qu'elle est définie à l'article 20 de la Convention.

La République populaire hongroise ne se considère pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention.

8 January 1986

MOROCCO

8 janvier 1986

MAROC

[ARABIC TEXT — TEXTE ARABE]

"وفقاً للفقرة الأولى من المادة 28، فإن حكومة المملكة المغربية تعلن أنها لا تعترف باختصاص اللجنة المنصوص عليه في المادة 20،
وفقاً للفقرة الثانية من المادة 30، فإن حكومة المملكة المغربية تعلن كذلك أنها لا تعتبر نفسها ملزمة بالفقرة الأولى من نفس المادة."

[TRANSLATION — TRADUCTION]

In accordance with article 28, paragraph 1, the Government of the Kingdom of Morocco declares that it does not recognize the competence of the Committee provided for in article 20.

In accordance with article 30, paragraph 2, the Government of the Kingdom of Morocco declares further that it does not consider itself bound by paragraph 1 of the same article.

[TRADUCTION[1] — TRANSLATION[2]]

Conformément au paragraphe 1er de l'article 28, le Gouvernement du Royaume du Maroc déclare qu'il ne reconnaît pas la compétence accordée au Comité aux termes de l'article 20.

En outre, conformément au paragraphe 2 de l'article 30, le Gouvernement du Royaume du Maroc déclare qu'il ne se considère pas lié par le paragraphe 1er du même article.

[1] Translation provided by the Government of Hungary.
[2] Traduction fournie par le Gouvernement hongrois.

[1] Traduction fournie par le Gouvernement marocain.
[2] Translation supplied by the Government of Morocco.

13 January 1986

POLAND

[POLISH TEXT — TEXTE POLONAIS]

"Zgodnie z artykułem 28, Polska Rzeczpospolita Ludowa nie uważa się za związaną artykułem 20 Konwencji.

Ponadto Polska Rzeczpospolita Ludowa nie uważa się za związaną artykułem 30 ust.1 Konwencji."

[TRANSLATION[1] — TRADUCTION[2]]

Under article 28 the Polish People's Republic does not consider itself bound by article 20 of the Convention.

Furthermore, the Polish People's Republic does not consider itself bound by article 30, paragraph 1, of the Convention.

13 janvier 1986

POLOGNE

[TRADUCTION — TRANSLATION]

Conformément à l'article 28, la République populaire de Pologne ne se considère pas liée par l'article 20 de la Convention.

En outre, la République populaire de Pologne ne se considère pas liée par le paragraphe 1 de l'article 30 de la Convention.

25 March 1987

TOGO

[TRANSLATION — TRADUCTION]

The Government of the Togolese Republic reserves the right to formulate, upon ratifying the Convention, any reservations or declarations which it might consider necessary.

25 mars 1987

TOGO

« Le Gouvernement de la République togolaise se réserve le droit de formuler, lors de la ratification de la Convention, toutes réserves ou déclarations qu'il jugera nécessaires. »

27 February 1986

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[UKRAINIAN TEXT — TEXTE UKRAINIEN]

«1. Українська Радянська Соціалістична Республіка не визнає компетенцію Комітету проти катування, визначену статтею 20 Конвенції.

2. Українська Радянська Соціалістична Республіка не вважає себе зв'язаною положеннями пункту 1 статті 30 Конвенції.»

27 février 1986

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[1] Translation provided by the Government of Poland.
[2] Traduction fournie par le Gouvernement polonais.

[TRANSLATION[1] — TRADUCTION[2]]

1. The Ukrainian Soviet Socialist Republic does not recognize the competence of the Committee against torture as defined by article 20 of the Convention.

2. The Ukrainian Soviet Socialist Republic does not consider itself bound by the provisions of para. 1 article 30 of the Convention.

[TRADUCTION — TRANSLATION]

1. La République socialiste soviétique d'Ukraine ne reconnaît pas la compétence du Comité telle qu'elle est définie à l'article 20 de la Convention.

2. La République socialiste soviétique d'Ukraine ne s'estime pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention.

10 December 1985

10 décembre 1985

UNION OF SOVIET SOCIALIST REPUBLICS

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[RUSSIAN TEXT — TEXTE RUSSE]

«1. Союз Советских Социалистических Республик не признает компетенцию Комитета против пыток, определенную статьей 20 Конвенции.

2. Союз Советских Социалистических Республик не считает себя связанным положениями пункта 1 статьи 30 Конвенции.»

[TRANSLATION[3]]

1. The Union of Soviet Socialist Republics does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention.

2. The Union of Soviet Socialist Republics does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention.

[TRADUCTION[1]]

1. L'Union des Républiques socialistes soviétiques ne reconnaît pas la compétence du Comité contre la torture, telle qu'elle est définie à l'article 20 de la Convention.

2. L'Union des Républiques socialistes soviétiques ne se considère pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention.

15 March 1985

15 mars 1985

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

"The United Kingdom reserves the right to formulate, upon ratifying the Convention, any reservations or interpretative declarations which it might consider necessary."

[TRADUCTION — TRANSLATION]

Le Royaume-Uni se réserve le droit de formuler, lors de la ratification de la Convention, toutes réserves ou déclarations interprétatives qu'il jugera nécessaires.

[1] Translation provided by the Government of the Ukrainian Soviet Socialist Republic.
[2] Traduction fournie par le Gouvernement de la République socialiste soviétique d'Ukraine.
[3] Translation provided by the Government of the Union of Soviet Socialist Republics.

[1] Traduction fournie par le Gouvernement de l'Union des Républiques socialistes soviétiques.

DECLARATIONS RECOGNIZING THE COMPETENCE OF THE COMMITTEE AGAINST TORTURE

ARGENTINA

[SPANISH TEXT — TEXTE ESPAGNOL]

"Con arreglo a los artículos 21 y 22 de la presente Convención, la República Argentina reconoce la competencia del Comité contra la tortura para recibir y examinar las comunicaciones en que un Estado Parte alegue que otro Estado Parte no cumple las obligaciones que le impone la Convención. Asimismo, reconoce la competencia del Comité para recibir y examinar las comunicaciones enviadas por personas sometidas a su jurisdicción, o en su nombre, que aleguen ser víctimas de una violación por un Estado Parte de las disposiciones de la Convención."

[TRANSLATION]

In accordance with articles 21 and 22 of this Convention, the Argentine Republic recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. It also recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

DENMARK

"The Government of Denmark declares, pursuant to Article 21, paragraph 1 of the Convention that Denmark recognizes the competence of the Committee to receive and consider communications to the effect that the State Party claims that another State Party is not fulfilling its obligations under this convention.

The Government of Denmark also declares, pursuant to Article 22, paragraph 1 of the Convention that Denmark recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

DÉCLARATIONS RECONNAISSANT LA COMPÉTENCE DU COMITÉ CONTRE LA TORTURE

ARGENTINE

[TRADUCTION]

Conformément aux articles 21 et 22 de la présente convention, la République argentine reconnaît la compétence du Comité contre la torture pour recevoir et examiner des communications dans lesquelles un Etat partie prétend qu'un autre Etat partie ne s'acquitte pas de ses obligations au titre de la Convention. De même, elle reconnaît la compétence du Comité pour recevoir et examiner les communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui se disent victimes d'une violation, par un Etat partie, des dispositions de la Convention.

DANEMARK

[TRADUCTION — TRANSLATION]

Le Gouvernement danois déclare, conformément au paragraphe 1 de l'article 21, que le Danemark reconnaît la compétence du Comité contre la torture pour recevoir et examiner les communications dans lesquelles un Etat partie prétend qu'un autre Etat partie ne s'acquitte pas de ses obligations au titre de la Convention.

De même, le Gouvernement danois déclare, conformément au paragraphe 1 de l'article 22, que le Danemark reconnaît la compétence du Comité pour recevoir et examiner les communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui prétendent être victimes d'une violation, par un Etat partie, des dispositions de la Convention.

FRANCE

[TRANSLATION — TRADUCTION]

. . . The Government of the French Republic declares, in accordance with article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention.

. . . The Government of the French Republic declares, in accordance with article 22, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

NORWAY

"The Government of Norway declares, pursuant to Article 21, paragraph 1 of the Convention that Norway 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 this convention.

The Government of Norway also declares, pursuant to Article 22, paragraph 1 of the Convention that Norway recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

FRANCE

« . . . Le Gouvernement de la République française déclare, conformément au paragraphe 1er de l'article 21 de la Convention, qu'il reconnaît la compétence du Comité contre la torture pour recevoir et examiner des communications dans lesquelles un Etat partie prétend qu'un autre Etat partie ne s'acquitte pas de ses obligations au titre de la présente Convention.

. . . Le Gouvernement de la République française déclare, conformément au paragraphe 1er de l'article 22 de la Convention, qu'il reconnaît la compétence du Comité contre la torture pour recevoir et examiner des communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui prétendent être victimes d'une violation, par un Etat partie, des dispositions de la Convention. »

NORVÈGE

[TRADUCTION — TRANSLATION]

Le Gouvernement norvégien déclare, en application de l'article 21, paragraphe 1, de la Convention, que la Norvège reconnaît la compétence du Comité pour recevoir et examiner des communications dans lesquelles un Etat partie prétend qu'un autre Etat partie ne s'acquitte pas de ses obligations au titre de la présente Convention.

Le Gouvernement norvégien déclare également, en application de l'article 22, paragraphe 1, de la Convention, que la Norvège reconnaît la compétence du Comité pour recevoir et examiner des communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui prétendent être victimes d'une violation, par un Etat partie, des dispositions de la Convention.

SWEDEN

". . . Pursuant to Article 21, paragraph 1 of the Convention, . . . Sweden 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 this Convention.

". . . Pursuant to Article 22, paragraph 1 of the Convention, . . . Sweden recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

SUÈDE

[TRADUCTION — TRANSLATION]

. . . Conformément au paragraphe 1 de l'article 21 de la Convention, . . . la Suède reconnaît la compétence du Comité pour recevoir et examiner des communications dans lesquelles un Etat partie prétend qu'un autre Etat partie ne s'acquitte pas de ses obligations au titre de cette convention.

. . . Conformément au paragraphe 1 de l'article 22 de la Convention, . . . la Suède reconnaît la compétence du Comité pour recevoir et examiner des communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui prétendent être victimes d'une violation, par un Etat partie, des dispositions de la Convention.

SWITZERLAND

[TRANSLATION — TRADUCTION]

(*a*) Pursuant to the Federal Decree of 6 October 1986 on the approval of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Federal Council declares, in accordance with article 21, paragraph 1, of the Convention, that Switzerland recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State party claims that Switzerland is not fulfilling its obligations under this Convention.

(*b*) Pursuant to the above-mentioned Federal Decree, the Federal Council declares, in accordance with article 22, paragraph 1, of the Convention, that Switzerland recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by Switzerland of the provisions of the Convention.

SUISSE

«*a*) Le Conseil fédéral en vertu de l'Arrêté fédéral du 6 octobre 1986 relatif à l'approbation de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants déclare, conformément à l'article 21, 1er alinéa de la Convention, que la Suisse reconnaît la compétence du Comité contre la torture pour recevoir et examiner des communications dans lesquelles un Etat partie prétend que la Suisse ne s'acquitte pas de ses obligations au titre de la présente Convention.

b) Le Conseil fédéral en vertu de l'Arrêté fédéral précité déclare, conformément à l'article 22, alinéa premier de la Convention, que la Suisse reconnaît la compétence du Comité pour recevoir et examiner des communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui prétendent être victimes d'une violation, par la Suisse, des dispositions de la Convention.»

RESERVATIONS MADE UPON RATIFICATION

AFGHANISTAN

RÉSERVES FAITES LORS DE LA RATIFICATION

AFGHANISTAN

[DARI TEXT — TEXTE DARI]

جمهوری دموکراتیک افغانستان ضمن تصویب میثاق متذکره
براساس فقره ۱ مادهٔ ۲۸ ، صلاحیت کمیته را که در مادهٔ بیستم میثاق
پیشبینی شده است برسمیت نمی شناسد .

همچنان براساس فقره ۲ مادهٔ ۳۰ ، خود را مکلف به رعایت
فقره اول این ماده نمی داند ، چه طبق فقره اول ، ارجاع اجباری
موضوعات طرف منازعه به حکمیت و یا محکمه بین المللی عدالت در مورد تفسیر
و یا تطبیق مواد میثاق توسط یکی از جوانب ذیدخل امکان پذیر میباشد.
در ارتباط باین امر اعلام میدارد که موضوع طرف منازعه در اثر
تقاضای یکی از طرفین نه ، بلکه به موافقهٔ تمامی جوانب ذیدخل
به حکمیت و یا محکمه بین المللی عدالت رجعت داده شود .

[TRANSLATION[1] — TRADUCTION[2]]

While ratifying the above-mentioned convention, the Democratic Republic of Afghanistan, invoking paragraph 1 of the Article 28, of the Convention, does not recognize the authority of the committee as foreseen in the Article 20 of the Convention.

Also according to paragraph 2 of the Article 30, the Democratic Republic of Afghanistan, will not be bound to honour the provision of paragraph 1 of the same Article since according to that paragraph the compulsory submission of disputes in connection with interpretation or the implementation of the provisions of this convention by one of the parties concerned to the International Court of Justice is deemed possible. Concerning to this matter, it declares that the settlement of disputes between the States Parties, such disputes may be referred to arbitration or to the International Court of Justice with the consent of all the Parties concerned and not by one of the Parties.

[TRADUCTION — TRANSLATION]

La République démocratique d'Afghanistan ratifie la Convention mais, s'autorisant du paragraphe 1 de l'article 28 de cet instrument, ne reconnaît pas la compétence accordée au Comité aux termes de l'article 20.

En outre, comme le permet le paragraphe 2 de l'article 30, la République démocratique d'Afghanistan déclare qu'elle ne se considère pas liée par les dispositions du paragraphe 1 dudit article, qui établissent qu'en cas de différend concernant l'interprétation ou l'application de la Convention, l'une des parties intéressées peut exiger que ce différend soit soumis à la Cour internationale de Justice. La République démocratique d'Afghanistan déclare que les différends entre Etats parties ne peuvent être soumis à l'arbitrage ou à la Cour internationale de Justice qu'avec le consentement de toutes les parties intéressées et non pas seulement par la volonté de l'une d'entre elles.

BULGARIA

[*Confirming the reservations made upon signature. See p. 198 of this volume.*]

BULGARIE

[*Avec confirmation des réserves faites lors de la signature. Voir p. 198 du présent volume.*]

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[*Confirming the reservations made upon signature. See p. 198 of this volume.*]

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[*Avec confirmation des réserves faites lors de la signature. Voir p. 198 du présent volume.*]

FRANCE

[TRANSLATION — TRADUCTION]

The Government of the French Republic declares, in accordance with article 30, paragraph 2, of the Convention, that it shall not be bound by the provisions of paragraph 1 of that article.

FRANCE

« Le Gouvernement de la République française déclare, conformément au paragraphe 2 de l'article 30 de la Convention, qu'il ne sera pas lié par les dispositions du paragraphe 1er de cet article. »

[1] Translation provided by the Government of Afghanistan.
[2] Traduction fournie par le Gouvernement afghan.

HUNGARY

[*Confirming the reservations made upon signature. See p. 198 of this volume.*]

HONGRIE

[*Avec confirmation des réserves faites lors de la signature. Voir p. 198 du présent volume.*]

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[*Confirming the reservations made upon signature. See p. 198 of this volume.*]

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[*Avec confirmation des réserves faites lors de la signature. Voir p. 198 du présent volume.*]

UNION OF SOVIET SOCIALIST REPUBLICS

[*Confirming the reservations made upon signature. See p. 198 of this volume.*]

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[*Avec confirmation des réserves faites lors de la signature. Voir p. 198 du présent volume.*]

EXHIBIT E

U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

I. The Senate's advice and consent is subject to the following reservations:

(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, color, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject of the reasonable requirements of domestic law.

(3) That the United States understands the reference to "exceptional circumstance" in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.

(4) That the United States declares that the right referred to in Article 47 may be exercised only in accordance with international law.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

> Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

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EXHIBIT F

Northwestern Journal of International Human Rights

Volume 3 | Issue 1 Article 7

Spring 2005

U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence

Kristina Ash

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U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence

Kristina Ash*

¶1 Post-September 11, 2001, the United States found itself in a predicament: even though it possessed exceptional global power, the terrorist attacks exposed an extraordinary security vulnerability.[1] In response, the Bush administration instituted "sweeping strategies of domestic security, law enforcement, immigration control, security detention, governmental secrecy. . .[and] forced disarmament of any country that poses a gathering threat."[2] These policies have restricted individual rights in the United States,[3] and have created international hostility towards Western nations.[4]

¶2 Often, if the United States does not involve itself in issues concerning human rights, "nothing happens, or worse yet, as in Rwanda and Bosnia, disasters occur."[5] Thus, it is important that the U.S. have a voice in global leadership so that it may prevent these human rights atrocities. The tragedy of current U.S. foreign policy is that by excepting itself from international standards and policies, the US undermines the its role in global leadership and activism, and allows grave human rights violations to proliferate.[6]

¶3 The United States must reevaluate its foreign policy. A starting point is the International Covenant on Civil and Political Rights ("ICCPR").[7] The ICCPR is an early United Nations treaty which "guarantees a broad spectrum of civil and political rights."[8]

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* Kristina Ash, 2005 J.D. Candidate, Northwestern University School of Law; 1998 B.A., Cum Laude, Arizona State University. I would like to thank my mother for her distinctive viewpoints and Joshua Romero , my editor, for his patience, invaluable comments, and advice.

[1] Harold Hongju Koh, *On American Exceptionalism*, 55 STAN.L.REV 1479, 1497(2003).

[2] *Id*.

[3] *See* Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295-96 (2002)(stating that "[s]upporters and critics alike saw the federal government as 'pushing the envelope' in restricting civil liberties in the name of national security").

[4] *See e.g.* Sark Starr & Nicki Gostin, *Anti-Americanism: Will We Be Booed?*, NEWSWEEK, Feb. 23, 2004, at 14 (discussing the "I'm afraid of Americans" t-shirts worn at Fashion Week in New York, the protests over the American anthem during the Athens Games, and the "hatred of America…so endemic everywhere in Europe").

[5] Koh, *supra* note 1, at 1488 (citing Richard C. Holbrooke, To End A War (1998); Samantha Power, A Problem from Hell: America and the Age of Genocide (2002)).

[6] *Id.* at 1487 (naming its "exceptional global leadership and activism" as "the most important respect in which the United States has been genuinely exceptional").

[7] International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States ratified the treaty Sept. 8, 1992 [hereinafter ICCPR].

[8] Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992), reprinted in 31 I.L.M. 645 (1992) [hereinafter Senate Comm. Report].

In 1992, the United States ratified the ICCPR, twenty-six years after it was unanimously adopted by the United Nations General Assembly and fifteen years after President Carter signed the covenant.[9] With its ratification, the United States attached "an unprecedented number"[10] of reservations, understandings, and declarations ("RUDs"), specifically five reservations, five understandings, four declarations, and one proviso.

¶4 When it was considering the ratification of the ICCPR, the Senate Committee on Foreign Relations articulated two goals. First, it sought to underscore its commitment to the protection of human rights. Criticizing other countries' human rights violations while refusing to sign the international treaty has made the United States appear hypocritical in the view of other states.[11] Second, ratification of the treaty would allow the United States to participate in the Human Rights Committee, a committee established in the ICCPR to "monitor compliance."[12] This would allow the United States to actively participate in the development and enforcement of human rights around the world.

¶5 This article proceeds in three parts: Part I provides a framework with which to evaluate the U.S. reservations to the ICCPR. Part II analyzes the reservations taken by the U.S. to determine whether its goals in ratification are adequately served. Part III offers solutions to maximize U.S. influence on international human rights.

I. BACKGROUND

¶6 The ICCPR has nearly unanimous support around the world, signaling the universality of its provisions.[13] Even so, many countries have elected to make certain reservations, understandings, and declarations ("RUDs"). None of the countries have made more RUDs than the United States. This section provides the background necessary to examine U.S. participation in the ICCPR, including the ICCPR history, its major provisions, and the U.S. RUDs to the convention.

A. History

¶7 When the Allied forces discovered the human rights atrocities committed during World War II, they were appalled. Shortly after the United Nations was formed, member states moved to create a Universal Bill of Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political rights.[14] Given its instrumental role

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[9] *Id.* at 2 (President Carter signed the ICCPR Oct. 5, 1977).
[10] William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOKLYN J. INT'L L. 277, 280 (1995).
[11] Senate Comm. Report, *supra* note 8, at 3. ("In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the covenant is conspicuous and, in the view of many, hypocritical").
[12] *Id.* ("Ratification will enable the United States to participate in the work of the Human Rights Committee established by the Covenant to monitor compliance").
[13] *See* Schabas, *supra* note 10, at 277 (stating that 114 states signed the ICCPR before the U.S. became a party).
[14] Michael H. Posner & Peter J. Spiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*. 42 DEPAUL L. REV. 1209, 1211 (1993).

in creating this Universal Bill of Rights, it is no surprise that the three covenants are primarily consistent with the Bill of Rights in the United States Constitution.[15]

¶8 On December 16, 1966, the United Nations General Assembly unanimously adopted the ICCPR.[16] Less than ten years later, the covenant was entered into force;[17] however, the United States was conspicuously missing from the group of countries which had ratified the covenant.

¶9 Congress was considering ratification of the treaties in the 1950s. During that time, state-sponsored segregation was prevalent in the United States.[18] Senator Bricker was concerned because ratification of the treaties would invalidate thousands of laws which discriminated against minorities.[19] He proposed a constitutional amendment that would severely limit the treaty power given in the Constitution, making all international agreements non-executing.[20]

¶10 While the Bricker amendment did not pass, its shadow still looms over U.S. foreign policy. The United States did not become party to any international human rights treaties until 1988 when it ratified the Convention on the Prevention and Punishment of the Crime of Genocide.[21] Moreover, as Professor Taifa notes, the "current U.S. approach of attaching non-self-executing declarations to such covenants and conventions [effectively] accomplishes the original goal sought by Senator Bricker and others - to render international human rights treaties impotent in U.S. law."[22]

¶11 In 1977, President Carter signed the ICCPR, but according to the Senate Committee Report, "domestic and international events at the end of 1979. . . prevented the Committee from moving to a vote on the Covenant."[23] In 1991, President H.W. Bush urged the Senate to renew its consideration of the ICCPR.[24] In 1992, after attaching a number of RUDs which rendered the treaty powerless under domestic law, the United States Senate finally voted to ratify the ICCPR, twenty-six years after it was unanimously adopted by the U.N.

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[15] *Id*.(noting that the bills of rights share "freedom of thought, conscience, and religion; freedom of opinion and expression; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person, including protection against arbitrary arrest or detention; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and emigration; freedom from slavery and forced labor; and the general right to protection of life, including protection against the arbitrary deprivation of life")

[16] Senate Comm. Report, *supra* note 8, at 2.

[17] *Id.* (entered into force March 23, 1976).

[18] Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641, 651 (1997).

[19] *Id.* at 652.

[20] *Id.*

[21] Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force for the United States Feb. 23, 1989), G.A. Res. 260A, U.N. GAOR, 3d Sess., Supp. No. 1, at 174, U.N. Doc. A/810 (1948); *See* David P. Stewart, *The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1185 (1993).

[22] Nkechi Taifa, *supra* note 9, 40 HOW. L.J. at 652.

[23] Senate Comm. Report, *supra* note 8, at 2.

[24] *Id*.

B. Major Provisions in the ICCPR

¶12 The rights protected in the ICCPR are rights "rooted in basic democratic values and freedoms."[25] The Covenant seeks to promote "the inherent dignity and . . . equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world."[26] To further this goal, the Covenant proffers twenty-seven articles which give individuals around the world various civil and political rights "without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[27]

¶13 Among the enumerated rights are self-determination,[28] right to life,[29] right to liberty and security of person,[30] right to compensation for unlawful detention,[31] freedom of thought, conscience, and religion,[32] freedom of opinion,[33] right to peacefully assemble,[34] right to freedom of association,[35] rights of the family,[36] right to participate in the public process[37], and equal protection under the law.[38]

¶14 The Covenant also prohibits governments from numerous activities including torture or cruel, inhuman or degrading treatment or punishment,[39] slavery or other compulsory labor,[40] propaganda for war,[41] and advocacy of national, racial, or religious hatred.[42]

¶15 In addition, the covenant establishes a Human Rights Committee to oversee compliance of the various articles by the Parties to the covenant. Countries may recognize the committee's competence to consider complaints made by other parties to the treaty.[43]

C. United States Reservations to the ICCPR

¶16 Even though U.S. Congressmen "recognize[d] the importance of adhering to internationally recognized standards of human rights,"[44] they nonetheless excepted the United States from several provisions in the treaty by making an unprecedented number of RUDs.

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[25] *Id.* at 1.
[26] ICCPR, *supra* note 7, at Prmbl.
[27] *Id.* at Art. 2(1).
[28] *Id.* at Art. 1.
[29] *Id.* at Art. 6.
[30] *Id.* at Art. 9-11.
[31] Id.
[32] *Id.* at Art. 18.
[33] *Id.* at Art. 19.
[34] *Id.* at Art. 21.
[35] *Id.* at Art. 22.
[36] *Id.* at Art. 23-24.
[37] *Id.* at Art. 25.
[38] *Id.* at Art. 26.
[39] *Id.* at Art. 7.
[40] *Id.* at Art. 8.
[41] *Id.* at Art. 20.
[42] Id.
[43] *Id.* at Art. 41.
[44] Senate Comm. Report, *supra* note 8, at 5.

¶17 The U.S. made reservations to the ICCPR's provisions on prohibition of war propaganda,[45] capital punishment,[46] cruel, inhuman or degrading treatment,[47] criminal penalties,[48] and juveniles.[49] It made understandings concerning the provisions on equal protection,[50] compensation for illegal arrests,[51] separate treatment of the accused from the convicted,[52] and right to counsel,[53] and the extension of the provisions in the treaty to federal states.[54] Finally, it made declarations with regard to the treaty being non-self-executing,[55] the rights that may be taken away during emergencies,[56] the Human Rights Committee,[57] and the savings clause on natural wealth and resources.[58]

¶18 Eleven countries made objections to the U.S. reservations, understandings, and declarations included in its ratification.[59] It is important to note that while each of these countries objected to certain provisions, none of the countries objected to the majority of the U.S. reservations.[60]

¶19 All eleven countries objected to the second U.S. reservation to Article 6 of the ICCPR. Section 2 of Article 6 requires that the "sentence of death may be imposed only for the most serious crimes."[61] Section 5 states that the death penalty "shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."[62] The United States reservation states:

> [t]hat the United States reserves the right. . . to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment,

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[45] *Id.* at 7. (making a reservation to the prohibition of "propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence" in Art. 20 of the ICCPR).
[46] *Id.* (making a reservation to the limitation concerning the "circumstances in which capital punishment is imposed " in article 6 of the ICCPR).
[47] *Id.* at 8 (limiting the definition of "cruel, inhuman, or degrading treatment or punishment" in article 7 of the ICCPR).
[48] *Id.* (making a reservation to article 15 of the ICCPR).
[49] *Id.* (making a reservation to article 10 of the ICCPR).
[50] *Id.* at 9 (understanding that legal distinctions made in U.S. law are not inconsistent with article 26 or article 2).
[51] *Id.* at 16-17 (understanding that the right to seek compensation satisfies the provision's right to compensation in article 9(b) and article 14(6)).
[52] *Id.* at 17-18 (understanding that consideration of the person's dangerousness and allows the accused to waive his right is allowed under the"exceptional circumstances" in article 10.
[53] *Id.* at 18-19 (understanding that the right to counsel only attaches in criminal cases and does not afford the defendant the right to choose his counsel).
[54] *Id.* at 19-20 (understanding that given the federal system of government, the federal government will implement the treaty to the extent that it is able and remove any impediments to states to fulfill their obligations under the treaty.)
[55] *Id.* at 20 (declaring that the treaty does not create a private cause of action in the U.S.).
[56] *Id.* at 20-21 (declaring that even in times of emergency, the U.S. will adhere to its Constitution).
[57] *Id.* at 21-22 (declaring that it is the intention of the U.S. to accept the competence of the Human Rights Committee).
[58] *Id.* at 22 (declaring that the right in article 47 must comport with international law).
[59] The objecting countries were Belgium, Denmark, Finland, France, Germany, Italy, The Netherlands, Norway, Portugal, Spain, and Sweden.
[60] ICCPR, Objections, United Nations Treaties Collections (Feb. 5, 2002) *available at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm [hereinafter ICCPR Objections].
[61] ICCPR, *supra* note 7, at Art. 6 § 2.
[62] *Id.*, Art 6 § 5.

> including such punishment for crimes committed by persons below the age of eighteen years of age.[63]

¶20 Countries objected to the U.S. reservation because it allegedly went against the object and purpose of the treaty. Article 4 of the ICCPR allows for derogation from the covenant during times of national emergency.[64] However, Article 4 Section 2 prohibits States from derogating from essential articles in the Covenant.[65] These articles include the right to life,[66] the right to be free of torture[67] and slavery[68], right to be free of imprisonment for breach of contractual obligations[69], right to be free of *ex post facto* laws,[70] right to be recognized as a person before the law,[71] and freedom of thought, conscience, and religion.[72] Arguably, the most essential of these articles is the right to life. By reserving the right to sentence persons under the age of eighteen to death, the United States contravened a major object and purpose of the treaty.

¶21 Nine of the eleven countries also objected to the third U.S. reservation regarding article 7 of the ICCPR.[73] Article 7 states, "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."[74] The U.S. reservation states that Article 7 will only apply "to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[75]

¶22 States objected to this reservation on a variety of grounds. First, some objected for the same reason that they objected to the reservation to article 6, namely that the reservation is an essential article in the covenant and thus contravenes the object and purpose of the treaty.[76] Like the previous reservation to the right to life, the right to be free of torture is an essential civil and political right that cannot be modified even in times of national emergency. Second, States objected on the basis that a country cannot

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[63] ICCPR, Declarations and Reservations, *available at* http://www.unhchr.ch/html/menu/b/treaty5_asp.htm (February 5, 2002) [hereinafter ICCPR Reservations].
[64] ICCPR, *supra* note 7, Art. 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 obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin").
[65] *Id*. at Art 4 §2. ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision").
[66] *Id.* at Art. 6.
[67] *Id.* at Art 7.
[68] *Id*. at Art 8.
[69] *Id*. at Art 11.
[70] *Id*. at Art 15.
[71] *Id*. at Art 16.
[72] *Id*. at Art 18.
[73] The nine countries are Denmark, Finland, Germany, Italy, The Netherlands, Norway, Portugal, Spain, and Sweden.
[74] *Id*. at Art 7.
[75] ICCPR Reservations, *supra* note 63.
[76] *Id.* (Denmark, Norway, and Spain gave this reason for their objection.

site domestic law as a reason not to fulfill its obligations under a treaty.[77] Third, a couple of States interpreted the U.S. reservation "as a reference to article 2 of the Covenant, thus not in any way affecting the obligations of the United States."[78]

¶23 Finland and Sweden also objected to the U.S'. first understanding to the ICCPR, considering it to be a reservation in substance. That understanding is as follows:

> That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status – as those terms are used in article 2, paragraph 1 and article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate government objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.[79]

¶24 Like the third reservation, this "understanding" relies on domestic law to alter the U.S'. responsibilities under the ICCPR. Moreover, the "rational basis" standard carries an extremely low burden for the state, so it likely does not meet the standard defined by the ICCPR.

¶25 In order to analyze the various RUDs, the U.S. must consider these objections as well as the implications of all RUDs. To do this, the U.S. should categorize each of the RUDs, and decide whether they are necessary in light of U.S. goals in signing the ICCPR.

II. ANALYSIS

¶26 The Senate Committee on Foreign Relations issued in 1992 a report on the ICCPR, urging Congress to ratify the treaty and naming two goals: (1) to "remove doubts about the seriousness of the U.S. commitment to human rights"; and (2) to "strengthen the impact of U.S. efforts in the human rights field."[80] However, in the same report, the committee recommended a substantial number of RUDs.[81] While U.S. RUDs in and of themselves do not necessarily undermine the first goal expressed by the committee, the excessive number of RUDs submitted by the U.S. could easily raise doubts as to U.S. commitment to the international human rights standards embodied in the ICCPR. Indeed, eleven countries issued objections, mainly on the grounds that the RUDs went against the

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[77] Finland and Portugal.
[78] ICCPR Objections, Objections taken by Germany. *See also* Objections taken by Italy.
[79] ICCPR Reservations, *supra* note 63.
[80] Senate Comm. Report, *supra* note 8, at 3.
[81] *Id.* at 7-11 (suggesting five ICCPR Reservations, five understandings, and four declarations).

object and purpose of the treaty.[82] In objecting to the U.S. reservation to article seven, Portugal explicitly stated its skepticism of U.S. commitment to the covenant.[83]

¶27 This is not to say that all reservations are intolerable.[84] In fact, of the considerable quantity of RUDs taken by the United States, countries only made objections to three of the U.S. reservations and one of the understandings.[85] Therefore, in order to achieve the goals set forth in the Senate Committee Report, it is not necessary for the U.S. to eliminate all of its RUDs. Instead, the U.S. need merely reexamine its RUDs and determine whether they undermine U.S. goals.

¶28 In his article on American exceptionalism, Professor Koh described the world's perception of the United States as "pushy, preachy, insensitive, self-righteous, and usually, anti-French."[86] Professor Koh attributes this image to four types of American exceptionalism: distinctive rights, different labels, the "flying buttress" mentality, and double standards.[87] Under this theory, it is the double standards that are the most dangerous and destructive to Americans.[88] By using this system of categorization, one can evaluate U.S. RUDs to the ICCPR and determine which of those RUDs the U.S. should withdraw.

A. Distinctive Rights

¶29 Distinctive rights refer to those rights that have become more celebrated and protected as a result of American policies and values which developed through America's unique culture and history.[89] Examples of these rights are nondiscrimination based on race or protections of speech and religion.[90] RUDs falling into this category should not give cause for concern because even under European Union law, these differences between nations are allowed.[91]

¶30 The United States made a reservation to Article 20 of the treaty,[92] which bans propaganda for war as well as "national, racial or religious hatred that constitutes

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[82] *See* ICCPR Reservations, *supra* note 63; ICCPR Objections, *supra* note 60 (the eleven countries were Belgium, Denmark, Finland, France, Germany, Italy, The Netherlands, Norway, Portugal, Spain, and Sweden).
[83] *Id.*, at Portugal (October 5, 1993)("The Government of Portugal also considers that the reservation with regard to article 7 in which a State limits its responsibilities under the Covenant by invoking general principles of National Law *may create doubts on the commitments of the Reserving State* to the object and purpose of the Covenant." (emphasis added)).
[84] Koh, *supra* note 1, at 1484 ("not all the ways in which the United States exempts itself from global treaty obligations are equally problematic").
[85] ICCPR Objections, *supra* note 60 (Eleven States objected to the second U.S. reservation; nine objected to the third reservation; one objected to the fourth reservation, and two objected to the first understanding).
[86] Koh, *supra* note 2, at 1480.
[87] *Id.* at 1483.
[88] *Id*.
[89] *Id*.
[90] *Id.* (citing that "the U.S. First Amendment is far more protective than other countries' laws of hate speech, libel, commercial speech, and publication of national security information" (citations omitted)).
[91] *Id.* ("judicial doctrine of 'margin of appreciation,' familiar in European Union law, permits sufficient national variance as to promote tolerance of some measure of this kind of rights distinctiveness"); *See also* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843 ("each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions").
[92] 138 CONG. REC. S4781, S4783 (1992).

incitement to discrimination, hostility or violence."[93] Concerned that this provision would violate freedom of speech protected by the First Amendment, the Senate adopted a reservation "[t]hat Article 20 does not . . . restrict the right of free speech and association protected by the Constitution and laws of the United States."[94] Where U.S. duties under a treaty conflict with rights protected in the U.S. Constitution, rights in the Constitution must prevail.[95] This provision protects a distinctive right (free speech) and has been given more protection in the United States than in some other countries.[96]

¶31 In accordance with Koh's theory, making a reservation to Article 20 did not detract from the United States' commitment to promoting human rights standards. First, Article 20 features two competing rights, both of which are represented in the treaty. Even though the human rights commission did not believe that the two rights need necessarily conflict, by clarifying its commitments under the ICCPR, the U.S. was able to protect its sovereignty without risking violating the article and thus undermining its commitments to human rights standards.[97] Second, many established democracies took exceptions to this article, including Belgium, Denmark, Finland, France, Ireland, the Netherlands, Sweden, and the United Kingdom,[98] so the U.S. is not contravening an internationally established practice.

¶32 The United States also made a declaration regarding Article 19 of the treaty.[99] Article 19 protects freedom of expression subject to certain restrictions regarding "respect of the rights or reputations of others [and] the protection of national security or of public order . . . public health or morals."[100] The declaration states that the United States would "whenever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions are permissible under the Covenant."[101] For this reason, the U.S. declared that it would continue to grant the more expansive protection of free speech under the U.S. Constitution.[102] This is essentially protecting the same distinctive right as the reservation regarding free speech.

¶33 A second U.S. reservation that falls under this category is the reservation to the ICCPR provision which holds that "[i]f, subsequent to the commission of the [criminal] offence, provision is made by law for the imposition of a lighter penalty, the offender

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[93] ICCPR, *supra* note 7, Art. 20.
[94] 138 CONG. REC. at S4783.
[95] *Reid v. Covert*, 354 U.S. 1, 16-17 (1957)(stating "[i]t would be manifestly contrary to the objectives of those who created the Constitution. . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions").
[96] *See e.g.* Thomas Lundmark, *Free Speech Meets Free Enterprise in the United States and Germany*, 11 IND. INT'L & COMP. L. REV. 289, 300 (2001) (comparing the more expansive protection of speech in the United States to Germany's test which balances "the rights of the speaker…against those of the person being injured by his speech"); Tammy Joe Evans, Comment, *Fair Trial vs. Free Speech: Canadian Publication Bans versus the United States Media*, 2 SW. J. OF L. & TRADE AM. 203, 203 (1995) (stating that publication bans frequently used in Canada to ensure a fair trial would be unconstitutional in the United States).
[97] ICCPR, *supra* note 7, gen. cmt. 11, 19th Session, July 7, 1983, *available at* http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+11.En?OpenDocument.
[98] ICCPR Reservations, *supra* note 63.
[99] Senate Comm. Report, *supra* note 8, at 20-21.
[100] ICCPR, *supra* note 7, art. 19(3).
[101] Senate Report, *supra* note 8, at 20-21.
[102] *Id*.

shall benefit thereby."[103] Given that one of the goals of the criminal justice system is to deter crimes, the Senate believed that the sentence that was in place at the time the offense was committed should be imposed.[104] No objections were raised to this reservation.[105] Moreover, Germany also made a similar reservation.[106]

B. Different Labels

¶34 Different labels refers to "America's tendency to use different labels to describe synonymous concepts."[107] "Refusing to accept the internationally accepted human rights standard as the American legal term . . . reflects a quirky, nonintegrationist feature of our cultural distinctiveness."[108] RUDs falling under the "different labels" category include the U.S. reservation regarding torture and the U.S. understandings regarding compensation for unlawful arrests and the right to counsel.

¶35 The reservation regarding torture states that the U.S. only "considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means "cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendment."[109] Essentially, this reservation uses a different label for the same prohibited treatment. What is troubling about this reservation is that it allows some internationally questioned government practices, such as execution by asphyxiation in the gas chamber.[110] However, because the ICCPR does not ban the death penalty and because European Courts have indicated their willingness to expand the meaning of "cruel, inhuman or degrading treatment or punishment" to include the death penalty, it is understandable that the U.S. would make this reservation to protect itself from the evolving definition and allow changes to come about through legislation.[111]

¶36 Articles 9(5) and 14(6) of the ICCPR provide for compensating victims of unlawful arrest or detention.[112] The U.S. Senate Committee expressed concern that "it [was] possible that in some . . . situations a victim of unlawful arrest or detention might not in fact be able to recover compensation, notwithstanding the variety of compensatory schemes which have been adopted."[113] The United States offered its citizens the same rights sought to be protected in the ICCPR, thus they were generally in compliance with the provision.

¶37 The U.S. also made an understanding regarding the right to counsel, because although the U.S. government did guaranteed its citizens the right to counsel, this right did not "entitle a defendant to counsel of his own choice when he [was] either indigent or

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[103] ICCPR, *supra* note 7, at art 15(1).
[104] Senate Report, *supra* note 8, at 14.
[105] ICCPR Objections, *supra* note 60.
[106] ICCPR Reservations, *supra* note 63, at Germany (providing that a greater sentence may be applicable in certain cases).
[107] Koh, *supra* note 1, at 1483.
[108] *Id.* at 1484 (comparing the use of these terms to American's refusal to use the metric system).
[109] Senate Comm. Report, *supra* note 8, at 14.
[110] Schabas, *supra* note 10, at 278 (1995) (citing the practice in California).
[111] *See* Stewart, *supra* note 21, at 1193-94.
[112] ICCPR, *supra* note 7, at art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"); ICCPR at art. 14(6) (providing for compensation when a guilty verdict has been reversed or the person has been pardoned because of a miscarriage of justice).
[113] Senate Comm. Report, *supra* note 8, at 16-17.

financially able to retain counsel in some other form."[114] Additionally, criminal defendants couldn't compel unnecessary witnesses to his defense.[115] These rights are protected in the United States, however, concern over American legal definitions compelled the Senate Committee to include clarifications of the definitions in the form of understandings.

C. The "Flying Buttress" Mentality

¶38 The "flying buttress" mentality refers to the American policy of supporting rights, but not officially subjecting itself to the international standard, similar to the architectural devise which upholds a structure from the outside.[116] The purpose is to comply while still seeming to maintain uninhibited sovereignty.[117] Unfortunately, the practical result of this policy is that the United States is alone with rogue states that do not officially support the various human rights. RUDs which exemplify a "flying buttress" mentality are the reservation regarding the treatment of juveniles and the understanding regarding the separate treatment of the accused.

¶39 The U.S. made a reservation to Articles 10(2)(b) and (3) regarding the treatment of juveniles.[118] The reservation acknowledged that "[t]he policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system."[119] However, the U.S. insisted upon a reservation which would allow it freedom during exceptional circumstances and where the juvenile has volunteered in the military prior to his or her eighteenth birthday.[120] Essentially, this reservation wholly supports the right protected in the covenant while still purporting to maintain freedom to deviate from that standard. Similarly, the U.S. understanding regarding separate treatment of the accused basically adheres to the standard set forth in the covenant while allowing deviation in "exceptional circumstances."[121]

¶40 While this "flying buttress" mentality is not necessarily problematic, it is unnecessary. If the circumstances under which the U.S. deviates from the provisions in the ICCPR are truly exceptional, the U.S. should be able and willing to defend its departure. Therefore, these RUDs are unnecessary and give the appearance of diminishing U.S. commitment to the ICCPR.

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[114] *Id.* at 18.
[115] *Id*.
[116] Koh, *supra* note 1, at 1484-85.
[117] *Id.*
[118] ICCPR, *supra* note 7, art. 10(2)(b) ("Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication"); art 10(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").
[119] Senate Comm. Report, *supra* note 8, at 15.
[120] *Id*.
[121] *Id.* at 17-18.

D. Double Standards

¶41 While the other forms of American exceptionalism are caused by American culture and differences in terms, this policy of double standards actually applies different rules to Americans as to the rest of the world.[122] This creates problems because by excepting itself from international norms, the U.S. is often accompanied by notorious human rights violators such as Iran, Nigeria, and Saudi Arabia.[123] The American practice also "sharply weakens America's claim to lead globally through moral authority" which erodes at the U.S'. "soft power."[124] Finally, because of the U.S'. unique position of power, excepting itself to international rules actually weakens the rules, which prevent the U.S. from using them against other countries in the future.[125]

¶42 Examples of RUDs which exemplify these double standards are the reservation regarding capital punishment of juveniles, the reservation regarding torture and punishment, and the understanding regarding non-discrimination. It is these provisions which the U.S. must remove in order to comport with the international standards and achieve its goal of removing doubts about the U.S. commitment to human rights.

¶43 First, the U.S. reserved the right "to impose capital punishment . . . for crimes committed by persons below eighteen years of age."[126] The U.S. goal of promoting human rights standards is seriously undermined with this reservation. Since 2000, the Democratic Republic of Congo (DRC), Iran, Pakistan, and the United States are the only countries known to have executed juveniles.[127] Moreover, the majority of U.S. states do not allow the execution of minors.[128]

¶44 Article 4 of the ICCPR states that "[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made."[129] If states may not derogate from this provision even in times of national emergency, it follows that those provisions are central to the object and purpose of the treaty. By making a reservation to Article 6, the United States' credibility is severely undermined, thus thwarting its primary goal in signing the treaty.

¶45 Second, the U.S. stated that it understood that distinctions based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status…to be permitted [when] such distinctions are, at minimum, rationally related to a legitimate government objective."[130] Such an understanding is in effect a reservation because it changes the law for the United States.[131] As such, the United States, like Saudi Arabia and other Middle Eastern countries, to make discriminatory

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[122] Koh, *supra* note 1, at 1485-86.
[123] *Id.* at 1486-87.
[124] *Id*. at 1487.
[125] *Id*.
[126] Senate Comm. Report, *supra* note 8, at 13.
[127] *Death Penalty Facts*, Amnesty Int'l USA, *at* http://www.amnestyusa.org/abolish/juveniles.html (November 21, 2003) (noting that only four countries have executed juveniles since 2000; Pakistan has recently abolished the juvenile death penalty, and DRC has imposed a moratorium on it).
[128] Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard – Explanation, Example, and Avenues for Change*, 4 N.Y. City L. Rev. 59, 79-80 (2001) (noting that "[s]eventeen states. . . permit the execution of sixteen-year-olds, and another five states allow seventeen-year-olds to be put to death").
[129] ICCPR, *supra* note 7, Art. 4 § 2.
[130] Senate Comm. Report, *supra* note 8, at 16.
[131] *See* ICCPR Objections, *supra* note 60, at Finland and Sweden.

laws against women. Thus, the international rule against gender discrimination is severely weakened.

III. CONCLUSION

¶46 In order to achieve its goals of removing doubts as to U.S. commitment to international human rights and of influencing the world community, the U.S. must make three changes: (1) the U.S. should withdraw its first reservation concerning the juvenile death penalty; (2) it should withdraw its first understanding concerning discrimination; and (3) the U.S. should modify its domestic laws in order to conform with the international standard. The U.S. should also consider withdrawing those RUDs which merely assert different labels or purport to exclude compliance during times of emergency. However, the U.S. should not be afraid to keep those RUDs which are distinctive rights, especially those which are also recognized under European law.

EXHIBIT G

Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, Initial report of State parties due in 1993, Addendum, United States of America, U.N. Doc. CCPR/C/81/Add.4 (1994)

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24 August 1994
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CONSIDERATION OF REPORTS SUBMITTED BY STATE PARTIES UNDER ARTICLE 40 OF THE COVENANT, INITIAL REPORT OF STATE PARTIES DUE IN 1993, ADDENDUM, UNITED STATES OF AMERICA
[24 August 1994]

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Introduction

1. The U.S. Constitution is the central instrument of American government and the supreme law of the land. For over 200 years it has guided the evolution of governmental institutions and has provided the basis for political stability, individual freedom, economic growth and social progress. It contains specific guarantees of the most important rights and freedoms necessary to a democratic society. These rights are principally found in the Bill of Rights, which consists of the first 10 amendments to the Constitution, adopted in 1791, only 2 years after the Constitution itself was approved. They include, among others, freedom of religion, speech, press, and assembly, the right to trial by jury, and a prohibition on unreasonable searches and seizures. Other significant protections have been added by subsequent amendments. Many of these rights parallel those addressed in the International Covenant on Civil and Political Rights. While originally formulated as limitations on the authority of the federal government, these protections have to a great extent been interpreted over time to apply against all forms of government action, including the governments and officials of the 50 constituent states and subordinate governmental entities. The Constitution thus provides binding and effective standards of human rights protection against actions of all levels of government throughout the nation.

2. The Constitution was designed to protect the people against the abuse of authority by distributing the power of the federal government among three separate but co-equal branches (the executive, the legislative and the judicial). Each branch was given specific responsibilities and prerogatives as well as a certain ability to limit or counter the authority of the other two branches. This system of "checks and balances" serves as a guarantee against potential excesses by any one branch.

3. Moreover, the federal government established by the Constitution is a government of limited authority and responsibility. Those powers not delegated to the federal government were specifically reserved to the states and the people. The resulting division of authority, which characterizes the federal system in the United States means that state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power. The prerogatives of the states in this regard are so well established that even two neighbouring states frequently have widely varying laws and practices on the same subjects. Some areas covered by the Covenant fall into this category.

4. For this reason, and because article 50 expressly extends the provisions of the Covenant to all parts of federal states, the United States included in its instrument of ratification an understanding to the effect that the U.S. will carry out its obligations thereunder in a manner consistent with the federal nature of its form of government. More precisely, the understanding states:

> "That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant."

This provision is not a reservation and does not modify or limit the international obligations of the United States under the Covenant. Rather, it addresses the essentially domestic issue of how the Covenant will be implemented within the U.S. federal system. It serves to emphasize domestically that there was no intent to alter the constitutional balance of authority between the federal government on the one hand and the state and local governments on the other, or to use the provisions of the Covenant to federalize matters now within the competence of the states. It also serves to notify other States Parties that the United States will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.

5. Although there is a growing body of federal criminal law and procedure, criminal law is still largely a matter of state competence, and the precise rules, procedures and punishments vary from state to state. In all states, however, as well as at the federal level, criminal law and procedure must meet the minimum standards provided by the U.S. Constitution, and those standards apply to all individuals regardless of nationality or citizenship.

6. State constitutions and laws also limit the actions of state and local governmental units and officials in order to secure individual rights. State and local officials must always meet the basic federal constitutional standards. In addition, they must comply with the applicable state and local law, which in many instances provides even greater protection to the individual. Because of the large number of such provisions, this report emphasizes the common federal standards with occasional reference to some state and local provisions.

7. The rights protected by the Covenant are, for the most part, guaranteed by the U.S. Constitution and federal statutes. The U.S. Constitution applies to the actions of officials at all levels of government. Some federal laws control only the actions of federal officials and agencies; others apply generally to federal, state and local officials. The differences will be noted where relevant to the discussion of specific articles.

8. In ratifying the Covenant, the United States declared "[T]he provisions of Articles 1 through 27 are not self-executing". This declaration did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts. As indicated throughout this report, however, the fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For this reason it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. In some cases, it was considered necessary to take a substantive reservation to specific provisions of the Covenant, or to clarify the interpretation given to a provision through adoption of an understanding. These reservations and understandings are discussed in the following text under the articles to which they refer.

IMPLEMENTATION OF SPECIFIC PROVISIONS OF THE COVENANT

Article 1 - Self-determination

9. The basic principle of self-determination is at the core of American political life, as the nation was born in a struggle against the colonial regime of the British during the eighteenth century. The right to self-determination, set forth in article 1 of the Covenant, is reflected in Article IV, Section 4 of the U.S. Constitution, which obliges the federal government to guarantee to every State a "Republican Form of Government". Implicitly, this article ensures that every state will be governed by popularly elected officials. Similarly, Articles I and II of the Constitution, as amended by the Twelfth, Seventeenth, Twentieth, Twenty-second, and Twenty-third Amendments to the Constitution, and the second clause of the Fourteenth Amendment, describe in detail the manner by which the national government is to be elected. The right to vote in federal, state, and local elections is also implicit, for it is the "essence of a democratic society". Reynolds v. Sims, 377 U.S. 533, 555 (1964). The states are permitted to set the qualifications for voting, but the states are limited by the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments from restricting the franchise on the basis of race, colour, previous condition of servitude, sex, failure to pay a poll tax, or for being under any age except 18 years. Hence, the people of the United States are free in law and in practice to determine their "political status" within the structure of the Constitution, and to change the Constitution itself through amendment. There have been 27 such amendments since the founding of the Republic, beginning with the Bill of Rights (Amendments I-X) in 1791.

10. The right to pursue economic and cultural development is not mentioned, in such terms, in the U.S. Constitution, yet it is among the most fundamental principles that define American society. The essential civil and political rights guaranteed by the Constitution and the Covenant, and a free market economy, provide the basis for free and liberal pursuit of economic or cultural development, with virtually no restraint save for those necessary to protect public safety and welfare.

11. Property rights are specifically protected by the Fifth and Fourteenth Amendments, which guarantee that neither the states nor the federal government may deprive one of property without due process or take property for public use without fair compensation. The Constitution does not, however, protect persons or corporations from reasonable economic regulation by both the states and the federal government. Cultural life, on the other hand, is generally protected by the First Amendment guarantees of freedom of speech and association which are very broadly construed, as discussed below in connection with Articles 18, 19, 21 and 22.

The Insular Areas

12. The United States includes a number of Insular Areas, each of which is unique and constitutes an integral part of the U.S. political family. Persons born in these areas are U.S. citizens (U.S. nationals in the case of American Samoa). Local residents, including U.S. citizens born elsewhere who have moved to these areas, elect their own local governments and make and are ruled by their own local laws. They are free to move to other parts of the United States and enjoy the protections for individual liberty that the Bill of Rights guarantees to all Americans. Guam, the Virgin Islands, American Samoa and Puerto Rico each are represented in the U.S. House

of Representatives by an elected delegate. Other than the right to vote on the final passage of a bill or resolution, the delegate from each Insular Area enjoys the same privileges and exercises the same powers as a member of Congress from one of the states.

13. The United States considers Guam, the U.S. Virgin Islands, and American Samoa as still "non-self-governing" for purposes of Article 73 of the Charter of the United Nations. Although these areas are in fact self-governing at the local level, as described below, they have not yet completed the process of achieving self-determination. By contrast, the States of Alaska and Hawaii, as well as the Commonwealth of Puerto Rico, all of which used to be "non-self-governing" for purposes of Article 73, have completed acts of self-determination through which they have resolved the terms of their respective relationships with the rest of the United States. Similarly, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia and the Republic of the Marshall Islands, all of which were once part of the Trust Territory of the Pacific Islands, have completed the process of self-determination.

14. **The Commonwealth of Puerto Rico**. The largest and most populous of the U.S. Insular Areas, Puerto Rico was acquired by the United States in 1899 after the Spanish-American War. Between 1900 and 1950, Congress provided for the governance of Puerto Rico through Organic Acts. In 1950, Congress enacted legislation which authorized Puerto Rico to organize its own government and adopt a constitution. Puerto Rico did so, and its constitution became effective on 25 July 1952, at which time Puerto Rico achieved the status of a Commonwealth of the United States. Since then, the question of Puerto Rico's relationship to the United States has continued to be a matter of public debate and discussion. Most recently, the people of Puerto Rico expressed their views in a public referendum in November 1993; continuation of the current commonwealth arrangement received the greatest support, although nearly as many votes were cast in favour of statehood. By contrast, a small minority of some 5 per cent chose independence.

15. **Guam**. Guam was acquired by the United States in 1899 after the Spanish-American War and, with the exception of the period of occupation during the Second World War, was administered by the Navy until 1950. In 1950, Congress enacted the Guam Organic Act, providing for the civil government of Guam. 48 U.S.C. sections 1421-1425. It includes a Bill of Rights that parallels the guarantees of individual liberty in the Constitution and it grants U.S. citizenship to the people of Guam. Since 1968, the executive branch of Guam's Government, consisting of the Governor and the Lieutenant Governor, have been popularly elected. Legislative authority is exercised by a unicameral legislature of 21 members elected every two years. Judicial power is vested in local Guamanian courts and in the U.S. District Court for Guam.

16. **The U.S. Virgin Islands**. The U.S. States Virgin Islands were purchased from Denmark in 1916. They are governed in accordance with an Organic Act that Congress enacted in 1936 and revised in 1954. Both the Organic Act and the revised Organic Act included a Bill of Rights paralleling U.S. constitutional protections for individual rights. The people of the Virgin Islands have been U.S. citizens since 1927. Since 1968, the Governor and the Lieutenant Governor have been popularly elected. Legislative power is vested in a unicameral legislature composed of 15 senators elected every 2 years. Judicial power is vested in a local court system and in the U.S. District Court for the Virgin Islands.

17. **American Samoa**. The United States acquired American Samoa through Deeds of Cession executed by its Chiefs in 1900 and 1904 and ratified by Congress in 1929. Unlike the situation with Guam and the Virgin Islands, Congress has not enacted an Organic Act for American Samoa. Instead, it provided for the delegation of executive authority to the Secretary of the Interior. In 1967, the Secretary approved the constitution of American Samoa, which provides for the functioning of its local government. A subsequent federal statute, 48 U.S.C. section 1662a, prohibits any amendments or modification to the constitution without the consent of Congress. The constitution of American Samoa includes a Bill of Rights that substantially parallels the Bill of Rights in the U.S. Constitution.

18. Residents of American Samoa are U.S. nationals. A "national of the United States" is (1) a citizen of the United States or (2) "a person, who though not a citizen of the United States owes permanent allegiance to the United States". Immigration and Naturalization Act, section 101 (a)(22), 8 U.S.C. section 1101 (a)(22). Only the

inhabitants of American Samoa and Swains Island are non-citizen nationals. A U.S. national is not an alien. "The term 'alien' means any person not a citizen or national of the United States." INA section 101 (a)(3), 8 U.S.C. section 1101 (a)(3). A non-citizen national who becomes a resident of any state and is otherwise eligible may become a citizen. INA section 325, 8 U.S.C. section 1436.

19. The Governor and Lieutenant Governor of American Samoa have been popularly elected since 1978. Legislative powers of the American Samoa are vested in a bicameral body known as the Fono. The judiciary consists of a system of local courts and of the High Court of American Samoa. The Chief Justice and Associate Justice of the High Court are appointed by the Secretary of the Interior. There is no federal court with general jurisdiction over American Samoa. American Samoa has tended to oppose the establishment of a federal court due to concern that it could have a negative impact on certain aspects of traditional Samoan culture, known as Fa'a Samoa, such as communal land ownership patterns.

20. **The Commonwealth of the Northern Mariana Islands**. At one time a component of the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands (CNMI) elected to become part of the United States political family through a Covenant enacted in 1976. In accordance with the Covenant, the CNMI adopted a constitution which became effective in 1978. The Covenant and the constitution incorporate the protections of the U.S. Bill of Rights and guarantee U.S. citizenship for residents of the CNMI.

21. Under its constitution, the CNMI is governed by a popularly elected Governor, Lieutenant Governor, and bicameral legislature. Judicial power is vested in the CNMI's local court system and in the U.S. District Court for the Northern Mariana Islands. The CNMI is represented in Washington, D.C. by a popularly elected Resident Representative to the United States. The Resident Representative serves a four-year term but is not a member of Congress.

22. **The Trust Territory of the Pacific Islands**. In 1947, following the Second World War, the United States entered into a Trusteeship Agreement with the United Nations Security Council under which the United States was designated trustee of more than 2,100 islands in the Western Pacific formerly subject to the Japanese mandate. Over time, the Trust Territory of the Pacific Islands (TTPI) was divided into four geographically distinct areas: the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia, and Palau.

23. As discussed above, the Northern Mariana Islands chose in 1976 to become a Commonwealth of the United States. The Marshall Islands and the Federated States of Micronesia each chose to become independent, sovereign nations in a relationship of free association with the United States. In December 1990, they became States Members of the United Nations. Thus, the sole remaining entity of the Trust Territory is the Republic of Palau.

24. Palau is still subject to the United Nations Trusteeship Agreement, and accordingly, it continues to be governed under the authority of the Secretary of the Interior of the United States. Under the constitution of Palau and pursuant to the Secretary's Order No. 3142 of 15 October 1990, the Secretary has delegated executive, legislative, and judicial authority to the local government of Palau. The United States recognized the constitution and government of Palau in 1980. The government consists of a popularly elected President and Vice President, a bicameral legislature known as the OEK, and a local judicial system. A body known as the Council of Chiefs advises the President on matters concerning traditional law and custom. Palau is composed of 16 states, each of which has its own local government and constitution.

25. In 1986, the government of Palau and the Government of the United States signed a Compact of Free Association, which was enacted into law by the U.S. Congress in the same year. The Compact was ratified by the people of Palau in a plebiscite in November 1993, which should soon lead to the termination of the Trusteeship and independence for Palau.

Native Americans

26. **Introduction**. The United States is home to a wide variety of indigenous people or groups who, despite their

ethnic, cultural and linguistic diversity, are generally referred to as Native Americans. Many are organized as tribes, some of which have obtained official recognition by the federal government while others have not. For purposes of this report, the term also includes special status groups such as Alaska Natives and native Hawaiians. The term "Alaska Natives" includes Inuits (sometimes referred to as Eskimos), Indians, and Aleuts. Native Hawaiians are not a federally recognized Indian tribe or group. The lifestyles of Native Americans vary widely, from those in which traditional culture is still largely practised (over 100,000 Native Americans still speak their native languages) to those who have been largely or completely assimilated into urban modernity.

27. In the 1990 census, 1.9 million individuals, or less than 1 per cent of the population, identified themselves as Native Americans. The largest tribes or ethnic groups among these self-identified Native Americans were the Cherokee, Navajo, native Hawaiians, Chippewa and Sioux. The states with the largest Native American populations include Oklahoma, California, Arizona, Hawaii and New Mexico. The highest proportion of Native Americans to the rest of the population occurs in Alaska (15.6 per cent). Approximately half of the total Native American population lives on or near a reservation. The largest land-holding tribes are the Navajo (whose land is located in Arizona, New Mexico and Utah and covers an area larger than 9 of the 50 states), Tohono O'odham, Pine Ridge, Cheyenne River, and San Carlos. In total, Native American tribes and individuals own between 50 and 60 million acres of land. In addition, Alaskan natives own another 44 million acres of land as a result of the Alaska Native Claims Settlement Act.

28. Of all Native American tribes, 542 are federally recognized, including 223 Alaska villages and regional tribes. The term "tribe" here refers to the political and institutional mechanisms of tribal authorities which exercise jurisdiction over reservation or other tribal lands. The members of a tribe, as individuals, are U.S. citizens with the same rights as other U.S. citizens and may live where they choose. Within the area of tribal jurisdiction, however, the tribe itself generally is the governing authority and not a state or other local government. Tribes enjoy considerable autonomy even with respect to the federal government. Federally recognized tribes are eligible to participate in specified programmes funded and administered by the Bureau of Indian Affairs (BIA) in the Department of the Interior. Since 1978, 150 groups have notified the BIA of the intention to seek federal recognition. As of mid-1994, 73 groups had submitted letters of intent to petition; 26 petitions were incomplete; 9 petitions were under active consideration; 5 were ready for active consideration; 7 required legislation; and 30 had been resolved (9 acknowledged as tribes; 13 denied; 5 legislatively determined; and 3 otherwise addressed).

29. The Alaska Native Claims Settlement Act identified 44 million Alaskan acres as Native controlled and owned, and extinguished Natives' claims to most of the rest of Alaska. Native Hawaiians have sought ownership and control over land and acknowledgement of Native American status for some time but without success.

30. Under U.S. law, Native American tribes are distinct, independent political communities, which retain all aspects of their sovereignty not withdrawn by treaty or statute or by implication as a result of their status. See United States v. Wheeler, 435 U.S. 313 (1978); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). Perhaps the most fundamental principle of the law governing the relationship between the United States and Native American tribes is the principle that the powers vested in Native American tribes are inherent powers of a limited sovereignty which has never been extinguished. They are not, in general, delegated powers granted by acts of Congress.

31. Although Native American tribes are currently accorded a substantial measure of autonomy and self-governance, there are still many areas of difficulty and controversy in their relationships with federal and state governments. Despite some improvements, Native Americans are far more likely to live in poverty and suffer high rates of disease, suicide and homicide than the majority of U.S. citizens. According to the 1990 census, 31 per cent of Native Americans lived below the poverty level. In 1991 the unemployment rate for Native Americans was 45 per cent. Native Americans experience disproportionately high rates of mortality from tuberculosis, alcoholism, accidents, diabetes, homicide, suicide, pneumonia and influenza.

32. **Historical background**. Some scholars have estimated the Native American population of the United States to have been as high as 10 million persons at the time of initial European contact. The basis of indigenous social

and political organization was tribal. Tribes ranged from small semi-nomadic bands to large, highly organized and sophisticated communities. Tribes were self-governing entities with clearly understood socio-political rankings or hierarchies. They had systems of social and political control to perform or regulate subsistence and economic activity (including trading with other tribes), distribute wealth, recognize land boundaries, conduct war and regulate domestic and other aspects of intragroup relations.

33. The organizers of government of the United States recognized the self-governance of Indian groups. The Constitution vests in the federal government the exclusive authority to regulate commerce with Native American tribes. Art. 1, section 8, cl. 3. The First Congress acted promptly to exercise this authority, enacting the Indian Trade and Intercourse Act of 1790, 1 Stat. 137. Further, President Washington and the First Congress reached agreement that the treaty-making power of the federal government extended to treaties with Native American tribes, establishing the precedent that Native American treaties - like those with foreign nations - needed Senate approval before they could take effect.

34. As the largely European immigrant population of the United States increased and moved westward, there was increasing tension and violence between settlers and Native Americans. Opting to resolve the situation by accommodating the settlers, the federal government between 1815 and 1845 sought to remove eastern tribes from their tribal homelands. However, with the continued westward push of immigrant settlement, further removal became impossible. In the 1850s, the federal government adopted a new policy of assignment of tribes to permanent reservations. Reservations were intended to be for the exclusive use of Native Americans, providing a fixed and permanent home under the superintendence of a tribal agent. Comm'r of Indian Affairs Annual Rept., S. Exec. Doc. No. 1, 33d Cong., 2d Sess. 225 (1854). Confinement to reservations was often strenuously opposed by tribes, leading to a series of military conflicts that extended through the 1870s.

35. By 1880, there were serious doubts about the reservation policy. Economically and socially, most reservations were not successful. There was widespread destitution in tribal country and significant corruption in the administration of the federal Native American service. Political reformers came to favour allotment of land to individual Indians as a response to these problems and as the vehicle to assimilate Indians into mainstream society. Economic interests in the western states supported allotment because it promised to open additional land to settlement.

36. In 1887, the General Allotment Act authorized the Secretary of the Interior to allot tracts of reservation land to individual Native Americans - 80 acres (approximately 32.3 hectares) to an individual and 160 acres (64.7 hectares) to a family. The allotted land was to be held in trust by the United States for a period of 25 years; thereafter a fee patent was to be issued. Consistent with the philosophy underlying the allotment policy, legislative and administrative policies accompanying allotment strongly discouraged tribal self-government and traditional cultural and religious practices.

37. The General Allotment Act and subsequent allotment legislation resulted in a significant diminution of Native American land holdings. Of 40 million acres allotted to individuals, some 27 million acres were lost by sale or foreclosure between 1887 and 1934. An additional 60 million acres were sold to non-Native American homesteaders or corporations as "surplus" or were ceded outright. In total, Native American land holdings declined from 138 million acres in 1887 to 48 million acres in 1934.

38. In 1934, the policies of assimilation and allotment were rejected with the enactment by Congress of the Indian Reorganization Act (IRA). See 25 U.S.C. sections 461-479. The overriding purpose of the Act was to establish "machinery whereby Indian tribes would be able to assume greater self-government, both politically and economically". Morton v. Mancari, 417 U.S. 535, 542 (1974). The IRA took a community-based approach to preservation of a tribal land base and reorganization of tribal governments. The Act stopped allotment and contained provisions to stabilize tribal land holdings and for the acquisition in trust of additional trust lands for Native American reservations. It provided that tribes could organize for their common welfare, adopt constitutions and by-laws, and form tribal corporations, with the power to own, hold, manage, and operate property and businesses.

39. However, in the late 1940s, federal policy shifted again, with congressional and executive reports proposing

renewed policies of assimilation. In 1953, House Concurrent Resolution 108 declared as congressional policy the termination of federal control and supervision over Native American tribes and the freeing of tribes and their members "from all disabilities and limitations specially applicable to Indians". The Indian Reorganization Act was not repealed, but individual acts were passed to implement the new policy for individual tribes or groups of tribes. Specific arrangements varied from tribe to tribe, but these acts typically required tribal approval before the sale or encumbrance of tribal land. For most purposes, the federal trust relationship was ended for terminated tribes, and tribes and their individual members were made subject to state jurisdiction. Eligibility for special federal services for tribes and tribal members was ended.

40. The impact of termination on these tribes was devastating. Tribes often went from prosperity to poverty. Many terminated tribes saw their land sold. The termination act stripped tribes of their exemption from taxation, and tribal leaders were forced to begin to sell ancestral tribal land to pay the taxes. By the 1960s, many tribes faced the loss of their land, tribal identity, and culture.

41. By 1970, however, national policy had shifted once again, this time toward a goal of tribal self-determination. The new policy was first articulated in a 1970 message to Congress by President Nixon. The message called for rejection of the extremes of both termination and excessive tribal dependence on the federal government. The message said that the "time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions" and proposed a new policy of self-determination "to strengthen the Indian's sense of autonomy without threatening his sense of community". H.Doc. 91-363, 91st Cong., 2d Sess. 1-3 (1970). This new policy found expression in the Indian Self-Determination Act, discussed below.

42. **Current policy**. Current policy continues and builds upon this policy of tribal "self-determination" as expressed by President Clinton on 29 April 1994, in a meeting with tribal leaders. The President signed two memoranda: one instructing all government agencies to cooperate wherever possible in meeting the need for eagle feathers in the traditional practices of Native Americans, and the other directing federal agencies to ensure that they interact with tribes on a government-to-government basis.

43. In terms of legal status, Native American tribes are recognized as "unique aggregations possessing attributes of sovereignty over both their members and their territory". United States v. Mazurie, 419 U.S. 544, 557 (1974). "The sovereignty that Indian tribes retain is of a unique and limited character ... . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status (i.e., by virtue of their being within and part of the United States)." United States v. Wheeler, 435 U.S. 313, 323 (1977).

44. In recent decisions, the U.S. Supreme Court has recognized the inherent right of tribes to tax non-Native Americans doing business within their territories, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), and the immunity of Native Americans and their property from state taxation, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), and Bryan v. Itasca County, 426 U.S. 373 (1976). The Supreme Court has also upheld the right of tribal courts to make the initial determinations as to the scope of their own jurisdiction. National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985).

45. The Supreme Court has recognized that, as a general rule, states lack authority to exercise their civil, regulatory laws on Native American territory. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). A tribe's authority to regulate land use within the boundaries of its territories has been found to vary depending on the character of the territory. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); South Dakota v. Bourland, 113 S.Ct. 2309 (1993). As a guiding principle for these decisions, the Supreme Court has stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation". Montana v. United States, 450 U.S. 544, 564 (1981).

46. The Supreme Court has held that tribal courts are the proper forum for the adjudication of civil disputes

involving Native Americans and non-Native Americans arising on a reservation. Fisher v. District Court, 424 U.S. 382 (1976). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty", and, as a result, "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute". Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

47. In the area of criminal jurisdiction, Congress during the 1950s gave several of the states authority to exercise concurrent jurisdiction on Indian reservations. 18 U.S.C. section 1162; 28 U.S.C. section 1360. In 1968 Congress limited the tribal exercise of criminal jurisdiction to misdemeanours. 25 U.S.C. section 1302(7). The Supreme Court subsequently concluded that tribes do not have criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). It also concluded that tribes do not have criminal jurisdiction over non-member Indians. Duro v. Reina, 495 U.S. 676 (1990). In 1990, however, Congress effectively reversed the Duro decision, recognizing the unique nature of the Indian communities. See Act of 5 November 1990, 104 Stat. 1893; Act of 9 October 1991, 105 Stat 616; Act of 28 October 1991, 105 Stat. 646.

48. **Indian Self-Determination Act**. In the 1970 message on Indian policy mentioned above, then-President Nixon called for legislation to allow tribes to take over control and operation of federally funded and administered Indian programmes from the Department of the Interior and what is now the Department of Health and Human Services. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEA), 25 U.S.C. sections 450, et seq. The Act declares it to be the policy of the United States to assure "maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities". 25 U.S.C. section 450a(a).

49. The ISDA directs the Secretaries of the Interior and Health and Human Services to enter into contracts or grants with Indian tribes and organizations to plan, conduct, or administer programmes that the Secretaries are authorized to administer for the benefit of Indians. Contracts designated as mature contracts may be for an indefinite term, and reporting requirements are minimal. The Act specifically provides that it neither affects the sovereign immunity of Indian tribes nor requires the termination of any existing trust responsibility of the United States with respect to Indian people. In 1991, the Bureau of Indian Affairs within the Department of the Interior (BIA) distributed $481,228,608 to 414 Indian tribal contractors under the provisions of the ISDA.

50. **Self-Governance Demonstration Project**. In 1988 amendments to the ISDA, Congress established a Self-Governance Research and Demonstration Project involving 20 Indian tribes. Title III, Pub. L. No. 100-472, 102 Stat. 2296 (1988). The purpose of the Self-Governance Project is to allow tribes greater flexibility in administering their own programmes and services with minimal federal governmental involvement. The participant tribes sign a self-governance compact with the government and are allowed to redesign BIA programmes and redistribute funding according to tribal priorities. The tribes in the demonstration programme operate BIA programmes with only limited requirements to adhere to federal regulations and record-keeping requirements. In December 1991, Congress increased to 30 the number of tribes eligible to participate in the Self-Governance Project and extended the demonstration period from 1993 to 1996. Pub. L. No. 102-184, 105 Stat. 1278 (1991). Congress is currently considering legislation to make the project permanent.

51. **Recognition of tribes**. After the abandonment of the termination policy in the 1960s and 1970s, the federal relationship with many of the "terminated" tribes was restored, beginning with the Menominee Tribe in 1973. Menominee Restoration Act, 25 U.S.C. section 903-903f. During the same period, there was a growing awareness of, and interest among, other groups of Indian descendants not formally recognized as tribes by the federal government in asserting their tribal status, tribal treaty rights, or tribal land claims. Many groups of these Indian descendants sought recognition from the federal government.

52. In 1978, the Department of the Interior established a programme within the Bureau of Indian Affairs to standardize the recognition process and provide substantive criteria for determining whether a group of Indian descendants existed as an Indian tribe. Previously, such determinations had been made on an ad hoc basis. The programme included an effort to identify all groups interested in petitioning to establish their tribal status. The

effort ultimately identified 150 groups of Indian descendants with an interest in establishing tribal status.

53. The acknowledgement process requires documentation of specific criteria including that the group has been viewed as Indian since historical times, lives in community, and exercises political authority over its members. Thus far, the status of 30 groups has been resolved either by the Department of the Interior or through special legislation.

54. **Indian natural resources**. Indian tribes retain considerable control over natural resources and wealth, with some added protection by the federal government through the establishment of a trust. The federal trust responsibility to the Indian tribes has its roots in the assertion by the federal government that it has the power to control the sale of Indian land to non-Indians. The policy was first asserted by Great Britain in the Royal Proclamation of 1763, which stated that only the Crown could take lands from the Indians. The policy continued after independence in the Indian Trade and Intercourse Act, passed by the First Congress in 1790 and is now codified in 25 U.S.C. section 177. The courts have held that along with the power to control the disposition of the land comes the responsibility to manage the land for the benefit of the Indian owners and with the same care and skill that a person of ordinary prudence would exercise in dealing with his or her own property. United States v. Mason, 412 U.S. 391, 398 (1973).

55. The United States also has a more general trust relationship with the Indian people, United States v. Mitchell, 463 U.S. 206, 225 (1983) (Mitchell II), and that relationship creates an overriding duty to deal fairly with all Indians. Morton v. Ruiz, 415 U.S. 199, 236 (1974). The trust obligation is a strict fiduciary standard that applies to all departments of the government that deal with Indians, not just the departments specifically charged with responsibility for Indian affairs. If Indians believe the government is not acting in accordance with its trust responsibilities, they may seek injunctive relief from the courts to compel the government to perform its duties or, if damage has already occurred, they may obtain damages through a breach of trust action. Mitchell II, 463 U.S. at 226-28.

56. **Land**. According to a 1990 Bureau of Indian Affairs report, tribes and individual Native Americans own between 50 and 60 million acres of trust or restricted land. This represents 2.34 per cent of the total land base in the United States. Federal law specifically prohibits the alienation of tribal trust lands absent the consent of the federal government. 25 U.S.C. section 177. It is the intent of the statutory restraint on alienation of Native American lands to insulate such lands from the full impact of market forces, preserving the land base for the furtherance of Native American values. Inherent in this federal policy is the view that preservation of a substantial land base is essential to the existence of tribal society and culture.

57. Prior to the 1930s, federal policies had the effect of diminishing the Native American land base. As indicated above, between 1887 and 1934 Native American land holdings declined from 138 million acres to 48 million acres. However, the 1934 Indian Reorganization Act contained provisions to stabilize the Indian land base. More recently, the Congress enacted the Indian Land Consolidation Act of 1983 to assist tribes in addressing the allotment policy. 25 U.S.C. sections 2201-11. The Act authorizes tribes to establish land consolidation areas where tribes are assisted in acquiring and exchanging land in order to consolidate their holdings. The Act also provided that especially small fractionated interests in allotted land owned by individuals do not pass to the owners' heirs, but return to the tribe upon the death of those individuals. This latter provision of the Act was found to violate the constitutional rights of Native American landowners in Hodel v. Irving, 481 U.S. 704 (1987). The Act has been amended to address this decision, but constitutional challenges to the amended Act are currently pending in the courts.

58. **Enforcement of land rights against third parties**. Federal law has attempted to protect tribal possessory rights against intrusion by third parties by restraining and punishing various types of trespass. Ordinary trespass remedies are available to Native American tribes to prevent trespasses upon their land and to recover damages for injuries arising out of such trespasses. Accordingly, actions may be maintained for ejectment, for injunctions against intrusions and to recover damages for trespass on, or injury to, tribal lands. See Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985).

59. Possessory suits or damage actions involving tribal possessory rights may be commenced either by the tribe itself or by the federal government acting on behalf of the tribe. Basically these claims allege that (i) the affected tribe has a superior property interest in the subject land (i.e. aboriginal or recognized title), (ii) the Non-intercourse Act provides that no transfer of tribal lands is valid unless approved by the federal government, (iii) subsequent to the Act certain tribal lands were conveyed to third parties without specific governmental approval, (iv) these conveyances are in violation of the Act and thus, invalid, and (v) the affected tribe is now entitled, despite the passage of time, to return of the land and/or to damages for trespasses committed by those who wrongfully occupied the land. Oneida County, supra.

60. In instances where the federal government has been requested but has been unwilling to take action on behalf of the tribe, the courts have been willing to order the commencement of a possessory action on the theory that the federal trusteeship over Native American lands created by the statutory restraints on alienation imposes an affirmative obligation to protect Indian possessory rights. In tribal possessory actions commenced directly by the tribe, the tribe may assert any and all positions, claims, and defences that would have been available had the suit been commenced by the federal government. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

61. **Indian land rights claims against the United States**. The great bulk of aboriginal Native American land in what is now the United States passed out of indigenous ownership before 1890 by cession pursuant to treaty or taking by the federal government. The right of Native Americans to obtain compensation for or recovery of this land differs from their rights against third parties.

62. Aboriginal Indian interest in land derives from the fact that the various tribes occupied and exercised sovereignty over lands at the time of occupation by white people. This interest does not depend upon formal recognition of the aboriginal title, and gives the tribes the right to occupy and possess the land. Aboriginal title gives a tribe the right to possess land as against third parties until and unless Congress specifically extinguishes the right.

63. Congress may recognize or extinguish aboriginal rights. Once aboriginal rights are recognized by Congress, then the tribe has title that cannot be extinguished without a clear and specific action by Congress in a treaty, statute or executive order, and compensation for the extinguishment of the right. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941). However, by law, Congress is not obligated to pay compensation to the tribes when it extinguishes aboriginal Indian rights that have not been recognized by Congress. See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

64. Despite this legal doctrine, compensation has in fact been paid by the United States for many Indian land cessions at the time they were made, although the compensation often has been less than adequate. In this century, additional provision has been made for cases in which no or inadequate compensation was paid. In the first half of the twentieth century, special jurisdictional statutes gave some tribes the right to sue in the Court of Claims for compensation for land taking. In 1946, Congress adopted the Indian Claims Commission Act, 25 U.S.C. sections 70, et seq., which provided for a quasi-judicial body, the Indian Claims Commission (ICC), to open up unresolved Indian claims against the United States, a large portion of which involved claims for taken lands. The Act authorized claims "arising from the taking by the United States, whether as a result of a Treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant", as well as claims "not recognized by any existing rule of law or equity" based on general principles of fair and honourable dealings. 25 U.S.C. section 70a.

65. The ICC provided a forum for suits against the United States Government that would otherwise have been barred by time and sovereign immunity, and in some respects provided Indians with special benefits that would not ordinarily have been available under regular court rules and procedures. Recovery of compensation did not depend on proof of recognized title; compensation was available even if a tribe's property interest was aboriginal only. Further, compensation was available if a tribe's interest in land was found to have been taken for less than adequate compensation. However, the wording of the Act and its legislative history made clear that only

financial compensation was contemplated by Congress; the ICC had no authority to restore land rights that had been extinguished. Osage Nation v. United States, 1 Indian Claims Commission 54 (1948), reversed on other grounds, 119 Ct.Cl. 592, cert. denied, 342 U.S. 896 (1951).

66. **Water**. Generally, Indian water rights are based on the federal or Indian reserved rights legal doctrine first enunciated by the U.S. Supreme Court in Winters v. United States, 207 U.S. 564 (1908). Winters held that the establishment of an Indian reservation includes an implicit reservation of water necessary to provide a permanent home for Indians. The holding followed the recognized rule that treaties are not grants of rights to Indians, but grants of rights from them and a reservation of those rights not granted. United States v. Winans, 198 U.S. 371, 381 (1905). In Winters, the Supreme Court recognized that in establishing reservations, not only did the United States reserve water for Indians, but the Indians themselves also reserved their aboriginal right to "command of the lands and water". 207 U.S. at 576.

67. Indian reserved water rights differ from water rights held by non-Indians under state law in a number of key respects. For example, Indian water rights are not based on the amount of water a tribe has historically put to use or "appropriated". Rather, the quantity of water that a tribe is entitled to is an amount sufficient to carry out the purpose of making the reservation a permanent home base for Indian people. Included within this measure is water for domestic, commercial, industrial, recreational, hunting and fishing, and agricultural purposes. The water right is broad enough "to satisfy the future as well as the present needs of the Indian[s]". Arizona v. California, 373 U.S. 546, 600 (1963). Another unique aspect of an Indian reserved water right is that it is not forfeited through non-use, so that a tribe's water rights are protected from usurpation by its non-Indian neighbours during those periods of time when the tribe is unable, because of economic or other constraints, to use its water.

68. **Hunting and fishing rights**. Through international treaties and domestic legislation, Congress and the executive branch have sought to ensure conservation of wildlife yet recognize the essential rights of Indians to hunt and fish to maintain their culture. In the contiguous 48 states where Indian tribes had reserved hunting and fishing rights in treaties, litigation in federal court provided the primary means of protecting Indian hunting and fishing rights. In the early 1970s, the United States initiated litigation against the states of Washington, Oregon, and Michigan to define and protect from state regulation the treaty fishing rights of many tribes. The cases have recognized legitimate conservation needs but, at the same time, by protecting the tribes' right to regulate the fishery free of state controls, the litigation has done a great deal to preserve and enhance fundamental tribal rights.

69. In addition to U.S. Government participation in hunting and fishing rights litigation on behalf of the tribes, the BIA has provided tribes with funding to support the tribes' own litigation and funding to develop their own fish and game management capabilities and resources. Congress has enacted legislation to make the income derived from treaty fishing tax exempt thereby providing some measure of economic protection to preserve the cultural activity of treaty fishing.

70. In Alaska, although aboriginal hunting and fishing rights were extinguished, certain statutory provisions exempt Alaska Natives from many wildlife management statutes and mandate a subsistence priority for rural Alaskans.

71. **Minerals**. Decisions of the U.S. Supreme Court in the 1930s established that the minerals in, on, or under Indian-owned land were constituent elements of the land and thus owned by the Indians who own the land. United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); British-American Oil Prod. Co. v. Board of Equalization, 299 U.S. 159, 164-65 (1936). Minerals currently being produced are primarily oil, gas, and coal. Other minerals known to exist on Indian lands include shale, gilsonite, uranium, gypsum, helium, copper, iron, zinc, lead, phosphate, asbestos, and bentonite. Mineral resources in, on, or under lands owned by any individual Indian or Alaska Native or any Indian tribe, the title to which is held in trust by the United States or subject to a restraint on alienation imposed by the United States, are subject to development and disposition under statutes and regulations of the United States. These statutes and regulations provide that while the individual Indian or Indian tribe is the lessor, the Secretary of the Interior must approve the lease or other minerals agreement before

it is effective. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 372 (1968); Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1459 (9th Cir. 1986). The regulations are detailed and cover items such as durational requirements, rental and royalty rates, acreage restrictions, environmental requirements, and operating requirements. See 25 C.F.R. Part 211 (Leasing of Tribal Lands for Mining); 25 C.F.R. Part 212 (Leasing of Allotted Lands for Mining). Under this comprehensive system of statutes and regulations applicable to Indian mineral resources, the United States has a fiduciary obligation toward Indians with respect to management of Indian mineral resources. Pawnee v. United States, 830 F.2d 187, 190 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1987); Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986).

72. Indian mineral resources can be developed under two different statutory schemes. The first is a leasing system where the individual Indian or Indian tribe may lease its mineral resource to a developer. 25 U.S.C. sections 396-396g. The second statutory scheme was established in 1982 with the enactment of the Indian Mineral Development Act, codified at 25 U.S.C. sections 2101-08. The purpose of that Act was to allow Indian tribes to enter into various kinds of agreements for the development of their mineral resources. Tribes wishing to have greater responsibility, oversight, and flexibility in the control and development of their own mineral resources can negotiate innovative, flexible business arrangements under the Act. The tribes are not limited to the leases and the restrictions on leasing that are present under the 1938 leasing statute.

73. Under either statutory scheme, Indian lands are not treated as federal public lands for purposes of mineral regulation. The principal goal of the Department of the Interior in Indian mineral resource management is not to further federal energy policies, but rather to assist Indian landowners in deriving maximum economic benefit from their resources consistent with sound conservation, environmental, and cultural practices.

74. **Timber**. Indian tribes have full equitable ownership in timber located on tribal reservation lands. United States v. Algoma Lumber Co., 305 U.S. 415, 420 (1939). The question of tribal ownership of timber resources was unresolved until the 1938 decision of the U.S. Supreme Court in United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938), which held that timber was a constituent element of the land and owned by the tribe unless the treaty with the tribe specified otherwise.

75. Individual Indians and Indian tribes generally may not sell the timber on their land without the approval of the Secretary of the Interior. The U.S. Congress authorized the sale of standing timber in 1910. 25 U.S.C. sections 406, 407. Under these statutes, timber may be sold in accordance with regulations promulgated by the Secretary of the Interior found at 25 C.F.R. Part 163. The regulations state that the objectives with respect to management of Indian forest lands are to preserve commercial forest lands in a perpetually productive state, develop a sales programme supported by written tribal objectives and a long-range multiple use plan, develop resources for jobs and income, regulate water runoff and soil erosion, and preserve wildlife, recreational, cultural, aesthetic, and traditional values. 25 C.F.R. section 163.3. In Mitchell v. United States, 463 U.S. 206 (1983), these statutes and regulations were held to create a fiduciary relationship between the government and Indian timber owners.

76. In 1990, the U.S. Congress declared that the United States has a trust responsibility toward Indian forest lands when it passed the National Indian Forest Resources Management Act. 25 U.S.C. section 3101-20. The Act reaffirmed the existing Native American forest land management objectives and established some new programme directions. The purposes of the Act are to allow both the Department of the Interior and the Native Americans to participate in the management of Indian forest lands in a manner consistent with the Secretary's trust responsibility and with the objectives of the Indian owners; to provide educational and training opportunities to increase the number of Indians working in forestry programmes on Indian lands; and to authorize the necessary appropriations to carry out the protection, conservation, utilization, management, and enhancement of Indian forest lands objectives of the Act.

Article 2 - Equal protection of rights in the Covenant

77. As a general principle, all individuals within the United States are afforded the enjoyment of the rights enumerated in the International Covenant on Civil and Political Rights as a matter of law without regard to race,

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Judicial interpretation of the guarantees in the U.S. Constitution has led to the development of an extensive body of decisional law covering a broad spectrum of governmental activity according to a number of well-accepted canons. The right of individuals to challenge governmental actions in court, and the power of the judiciary to invalidate those actions that fail to meet the constitutional standards, provides an effective method for ensuring equal protection of the law in practice. In addition, a number of significant anti-discrimination statutes provide additional protection for the civil and political rights of persons within the United States. While the remainder of this section of the report addresses domestic law regarding the principle of equal protection, the United States is none the less committed to the international principle of equal protection and is actively moving toward ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

78. **Equal protection**. Most of the substantive rights enumerated in the Covenant have exact or nearly exact analogues in the U.S. Constitution, as is discussed more fully in those portions of this report dealing with each of the 26 articles. In addition, and of particular relevance to article 2, the Constitution guarantees "equal protection" to all. This principle derives from the Fourteenth Amendment's guarantee that no state may "deny to any person within its jurisdiction the equal protection of the laws", and the Fifth Amendment's guarantee that "no person shall be deprived of life, liberty, or property, without due process of law", which has been read to incorporate an "equal protection" component. Bolling v. Sharpe, 347 U.S. 497 (1954). These constitutional provisions limit the power of government with respect to all persons subject to U.S. jurisdiction. As interpreted and applied by the U.S. Supreme Court, the doctrine of equal protection applies not only with respect to the rights protected by the Covenant, but also to the provision of government services and benefits such as education, employment and housing.

79. The substantive guarantees of the Constitution are often implemented without reference to equal protection. For example, the Supreme Court recently held that a local government could not constitutionally prohibit animal sacrifices that are part of a religious ritual, although the government could pass neutral laws to protect animals from torture, or to protect public health. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1993). While the group that practises the sacrifices may be identifiable racially and ethnically, the case was decided squarely under the First Amendment protection of religious freedom. The Court did not discuss the issues in terms of ethnic non-discrimination and equal protection.

80. **Classifications**. Under the doctrine of equal protection, it has long been recognized that the government must treat persons who are "similarly situated" on an equal basis, but can treat persons in different situations or classes in different ways with respect to a permissible state purpose. The general rule is that legislative classifications are presumed valid if they bear some reasonable relation to a legitimate governmental purpose. McGowan v. Maryland, 366 U.S. 420, 425-36 (1961). The most obvious example is economic regulation. Both state and federal governments are able to apply different rules to different types of economic activities, and the courts will review such regulation under a very deferential standard. See, e.g. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Similarly, the way in which a state government chooses to allocate its financial resources among categories of needy people will be reviewed under a very deferential standard. Dandridge v. Williams, 397 U.S. 471 (1970).

81. **Suspect classifications**. On the other hand, certain distinctions or classifications have been recognized as inherently invidious and therefore have been subjected to more exacting scrutiny and judged against more stringent requirements. For example, classification on the basis of racial distinctions is automatically "suspect" and must be justified as necessary to a compelling governmental purpose. Korematsu v. United States, 323 U.S. 214 (1944); Brown v. Board of Education, 347 U.S. 483 (1954); McLaughlin v. Florida, 379 U.S. 184 (1961); Loving v. Virginia, 388 U.S. 1 (1967). Laws which purposely discriminate against racial minorities, whether in the fields of housing, voting, employment, education or other areas, have rarely been upheld under this higher standard. When intentional discrimination on the basis of race or national origin can be inferred from a legislative scheme or discerned in legislative history, it is as forbidden as overt use of a racial classification. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948). Unlawful intentional discrimination has sometimes been inferred simply

from the impact of a law. For example, in Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Supreme Court found impermissible discrimination where all of some 200 Chinese applicants were denied permits to operate laundries while virtually all non-Chinese applicants were granted permits under the same statute.

82. In addition to distinctions based on race, colour and national origin, distinctions based on gender, illegitimacy and alienage have all been accorded special status under the Equal Protection clauses, though legislative classifications of the last three types are typically less difficult to justify than classifications by race, colour, or national origin. For example, in Craig v. Boren, 429 U.S. 190 (1976), the Court stated that classifications by gender must "substantially further important government objectives", and struck down a state statute setting a higher drinking age for men than women. In Levy v. Louisiana, 391 U.S. 68 (1968), the Court held that a state statute that did not permit illegitimate children to sue for wrongful death was "invidiously" discriminatory because there was no link between the children's illegitimacy and the alleged wrong to their mother. And in Graham v. Richardson, 403 U.S. 365 (1971), the Court struck down state statutes denying welfare benefits to resident aliens and to aliens who had not resided in the state for 15 years.

83. By contrast, the courts have not read the Constitution's Equal Protection clauses to require compelling justifications for classifications based on property or economic status, San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); age, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); or disability, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). Thus, distinctions based on such characteristics will be assessed against less stringent standards but may still be found to violate the equal protection doctrine when not rationally related to a legitimate governmental purpose. Disability and age discrimination have also been addressed by statute, as discussed below.

84. **Fundamental interest**. Where a so-called "fundamental interest" is at stake, the Supreme Court has subjected legislative classifications to "strict scrutiny" despite the absence of a suspect classification. This explains why, in the cases involving the right to vote (including fair apportionment) and the due process cases (right to counsel, etc.), the Court has found invidious discrimination even though the basis for that discrimination is not race, national origin, sex, or any other suspect class. What makes a right "fundamental" is not always clear. The fundamental rights are not necessarily those found in other provisions of the Constitution; indeed, those other rights can be protected without reference to equal protection. More likely, the rights are the ones not found in the Constitution except by inference, such as the right to procreation. See Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of persons convicted of grand larceny but not embezzlers).

85. **Corrective or affirmative action**. In recent years, the question has frequently arisen whether legislation may classify by race for purposes of compensating for past racial discrimination. The general rule that has evolved is that because race is a "suspect classification", in this context as in all others, it will be subject to "strict scrutiny" by the courts. City of Richmond v. Croson, 488 U.S. 469 (1989). However, where an employer or other entity has engaged in racial discrimination in the past, it will generally be permitted (and may sometimes be required) to accord narrowly tailored racial preferences for a limited period of time, to correct the effects of its past conduct. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). Greater latitude for racially based remedies has been permitted when Congress has acted under the enabling clause of the Fourteenth Amendment than when states or political subdivisions have given a racial preference. See, e.g. Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding congressionally mandated set-aside of percentage of federal grant to be spent through minority contractors).

86. **Specific issues**. Although, as noted above, issues of discrimination involving rights protected by the Covenant are often addressed through suits to vindicate a constitutional right other than equal protection, equal protection has sometimes been invoked directly in connection with certain guarantees specified in the Covenant, such as the following:

> (a) Poverty and due process. The Fifth and Fourteenth Amendments assure "due process of law" as well as "equal protection of the law". Obviously, economic status can affect the right to a fair trial and a reasonably effective appeal. In this area, courts have weighed the essentiality of certain elements of the justice system and, on occasion, found it a denial of equal protection for the state to

fail to pay for the necessary assistance - e.g., to provide counsel, Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); and transcripts Griffin v. Illinois, 351 U.S. 12 (1956). Similarly, the Supreme Court has held that a person's probation cannot be revoked merely because he is unable to pay restitution, Bearden v. Georgia, 461 U.S. 660 (1983). All states and the federal government have mechanisms for providing legal counsel to indigent defendants in the criminal process;

(b) Race and due process. Even in the nineteenth century it was clear that racial discrimination in jury selection affected the due process rights of African Americans, Strauder v. West Virginia, 100 U.S. 303 (1879). Reading the Equal Protection clauses in conjunction with the constitutional guarantee of Due Process, the Supreme Court has repeatedly held that it is a violation to discriminate in preparation of jury lists on the basis of race or national origin, Neal v. Delaware, 103 U.S. 370 (1880); Hernandez v. Texas, 347 U.S. 475 (1954). That prohibition has been extended to the exercise of peremptory challenges in petit jury selection, Batson v. Kentucky, 476 U.S. 79 (1986), and, most recently, to peremptory challenges on the basis of sex, J.E.B. v. Alabama Ex Rel. T.B., 62 U.S.L.W. 4219 (April 19, 1994). While that prohibition has not been extended to encompass other statuses (e.g. low-income), a separate line of cases has interpreted the Sixth Amendment right to a fair trial and a jury of one's peers to encompass a right to be tried by a jury drawn from a venire from which no "identifiable group" has been systematically excluded. Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968). Moreover, the Court has recognized that the potential jurors also have a cognizable right not to be discriminated against. Carter v. Jury Comm'n of Greene County, 39 U.S. 320 (1970); Georgia v. McCollum, 112 S.Ct. 2348 (1992);

(c) Race and the death penalty. Legal attacks on the death penalty have generally been based on the Eighth Amendment's prohibition of cruel and unusual punishment. In recent years, however, there have been efforts to demonstrate that in operation, the death penalty is unequally applied on the basis of race. Numerous defendants have attempted, so far without success, to show that the discretionary elements in the process of sentencing a defendant to death have had the effect of discrimination by race of defendant or race of victim. See McCleskey v. Kemp, 481 U.S. 279 (1987) (where petitioner could not demonstrate that he personally had been discriminated against, statistics suggesting systemic inequities could not be used to overturn death sentence). This issue is also the subject of considerable public debate and political consideration and is currently under study in the U.S. Congress;

(d) Race and the right to form families. The Supreme Court has relied upon the Equal Protection Clause to invalidate state bans on intermarriage, Loving v. Virginia, 388 U.S. 1 (1967), and to prevent courts dealing in child custody from implementing societal prejudices, Palmore v. Sidoti, 466 U.S. 429 (1984).

87. **State action**. Operating alone, the constitutional Equal Protection clauses protect one only against discriminatory treatment by a government entity, or by persons acting "under colour of law". Thus, the doctrine does not reach purely private conduct in which there is no governmental involvement. Whether or not in any particular situation there is sufficient "state action" to bring a discriminatory practice under the constitutional Equal Protection clauses represents a complicated jurisprudence in its own right. See, e.g. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

88. **Federal statutes**. Congress has supplemented the constitutional guarantees of equal protection to encompass certain private actions by exercising its powers under the "commerce clause" and under the "enabling" clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments. After the Civil War, Congress implemented the Thirteenth Amendment by passing laws prohibiting private racial discrimination in property and contractual relationships. 42 U.S.C. sections 1981 and 1982. Most of the federal civil rights laws were passed in and after 1964 on the basis of the commerce clause as well as the post-Civil War amendments. These statutes prohibit

discrimination in areas beyond those covered by the Covenant, including privately owned public accommodations, private and federal, state or local governmental employment, federally assisted programmes, and private and public housing. Where the statutes cover ground already protected by the Constitution, they add remedies that did not exist before. Moreover, these statutes prohibit discrimination on the basis of statuses other than, and in addition to, the ones protected under the Equal Protection clauses of the Constitution. Thus, in addition to race, colour, national origin, and sex (in most instances), these statutes include religion (but not in federally assisted programmes), age, familial status (housing only) and disability.

89. Virtually every federal agency is involved in promoting or enforcing equal protection guarantees. Although the federal civil rights statutes and implementing regulations are too numerous to provide an exhaustive list, some of the principal statutes are described below. Because these statutes were passed at different times to address different problems, no two cover precisely the same ground. For example, Title II of the Civil Rights Act of 1964, prohibiting discrimination in places of public accommodation and amusement (hotels, restaurants, cinemas) does not mention "sex" as a protected category. Title II, moreover, does not protect against discrimination by race in ordinary retail stores. On the other hand, the Americans with Disabilities Act, passed in 1990, requires that retail stores as well as places of public amusement be accessible to persons with disabilities. Some of the gaps in coverage are filled in by state and local constitutions, laws, and ordinances.

90. Title VI of the Civil Rights Act of 1964, 42 U.S.C. sections 2000d et seq., prohibits discrimination on the basis of race, colour, or national origin in programmes or activities receiving federal financial assistance. Title IX of the Education Amendments of 1972, 20 U.S.C. sections 1681 et seq., and implementing regulations at 34 C.F.R. Part 106, prohibits discrimination on the basis of sex in federally funded education programmes or activities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, prohibits discrimination on the basis of disability in programmes or activities receiving federal financial assistance. The Age Discrimination Act of 1975, 42 U.S.C. sections 6101-7, prohibits discrimination on the basis of age in programmes or activities receiving federal financial assistance.

91. Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e et seq., prohibits public and private employers (with certain exceptions including the federal government and small private businesses) from discriminating on the basis of race, colour, religion, sex or national origin in their employment practices. The Age Discrimination in Employment Act of 1967, 29 U.S.C. sections 621 et seq., similarly bars discrimination in employment on the basis of age.

92. Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. section 793, requires employers with federal contracts or subcontracts of more than $10,000 to take affirmative action to employ and advance in employment qualified individuals with disabilities. Executive Order 11246, as amended, prohibits most federal contractors and subcontractors and federally assisted contractors and subcontractors from discriminating in employment decisions on the basis of race, colour, sex, religion or national origin. The Vietnam-Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. section 4212, requires that employers with federal contracts or subcontracts of $10,000 or more provide equal opportunity and affirmative action for Vietnam-era veterans and certain disabled veterans of all wars. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. sections 12101 et seq., bars discrimination in employment practices by employers (with exceptions similar to those under Title VII, supra) against qualified individuals with disabilities. The ADA also requires that steps be taken to make "public entities" such as public transit, and "public accommodations", which includes many private commercial establishments, accessible to disabled individuals.

93. The Fair Housing Act, 42 U.S.C. section 3601 et seq., and implementing regulations at 24 C.F.R. Parts 100-125, prohibits discrimination based on race, colour, religion, sex, national origin, handicap and familial status in activities relating to the sale, rental, financing and advertising of housing and in the provision of services and facilities in connection with housing. The Act applies both to public and private housing and defines "familial status" to include one or more persons under the age of 18 being domiciled with a parent or other person having legal custody of such individual or individuals.

94. Additionally, many federal agencies administer programmes designed to enhance opportunities for women,

minorities, and other groups. For example, the U.S. Department of Education administers grant programmes designed to encourage and assist the participation of minorities and women in elementary, secondary and higher education programmes. These include bilingual education programmes, magnet schools, desegregation assistance centres, women's educational equity programmes, financial aid for students who are minorities or women, and grants to strengthen historically African-American colleges and universities. The U.S. Department of Labor monitors and enforces compliance with the non-discrimination provisions applicable to federal contractors and apprenticeship programmes, including affirmative action programmes for women and minorities, and promotes the placement of Native Americans with federal contractors.

95. **Aliens**. Under U.S. immigration law, an alien is "any person not a citizen or national of the United States". See 8 U.S.C. section 1101(a)(3). Aliens living in the United States, even though not U.S. citizens, generally enjoy the constitutional and Covenant rights and protections of citizens, including the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery; the right to liberty and security of person; the right to humane treatment for persons deprived of their liberty; freedom from imprisonment for breach of contractual obligation; freedom of movement; the right to fair trial; prohibition of ex post facto laws; recognition as a person under the law; freedom from arbitrary interference with privacy, family and home in the United States; freedom of thought, conscience and religion; freedom of opinion and expression; freedom of assembly; and freedom of association. "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments", Plyer v. Doe, 457 U.S. 202, 210 (1982); see also Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (resident aliens are persons within the protection of the Fifth Amendment and may not be deprived of life, liberty or property without due process); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (aliens accused of a crime are entitled to Fifth and Sixth Amendment rights).

96. Aliens enjoy equal protection rights as well, but distinctions between illegal aliens and others do not require as strong justifications as distinctions between citizens and aliens lawfully in the United States. Distinctions between resident aliens and citizens require more justification, but not the compelling state interests required for distinctions based on race. The longer an alien has been in the United States and the more legitimate the alien's immigration status, the more equivalent the alien's equal protection rights are to those of a U.S. citizen. Consistent with article 25 of the Covenant, aliens are generally precluded from voting or holding federal elective office. A number of federal statutes, some of which are discussed above, prohibit national origin discrimination in various contexts.

97. **State Constitutions**. Roughly 27 states currently have "equal protection clauses" in their constitutions. Unlike the Fourteenth Amendment to the United States Constitution, the state equal protection guarantees often incorporate other rights by reference. For example, the Connecticut clause (constitution, art. I, sect. 20) provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, colour, ancestry, national origin, or sex". Whether the "civil or political rights" are restricted, under this kind of clause, to rights enumerated elsewhere in the state constitution, depends upon the state judiciary's interpretation. As a practical matter, the Fourteenth Amendment provides a minimum below which no state can go in according equal protection. The states can extend but not contract what the federal Constitution demands.

98. **Remedies**. U.S. law provides extensive remedies and avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights, including:

> (a) A person claiming to have been denied a constitutional or, in some instances, a statutory right, may bring a civil action in federal court under 42 U.S.C. section 1983, which states:
>
> > "Every person who, under colour of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

Only "state actions" or actions "under colour of state law" are subject to section 1983. These include actions by federal, state and local officials. Some officials, however, are subject to absolute or qualified immunity. Judges, for example, enjoy absolute immunity. Bradley v. Fisher, 80 U.S. 335 (1872). Other officials enjoy qualified immunity, which is designed to protect the discretion of officials in the exercise of their official functions. Qualified immunity will not be afforded, however, if the officials violated clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). While prosecutors enjoy absolute immunity from suit for their involvement in the judicial phase of the criminal process, they are afforded only qualified immunity for law enforcement functions. Burns v. Reed, 500 U.S. 478 (1991). The Fourteenth Amendment's Due Process and Equal Protection clauses, as well as other constitutional rights, are enforced under section 1983 in hundreds of federal suits every year. The most common relief under section 1983 is damages, subject only to rules about official immunity. Injunctive relief is also available and widely used as relief under this provision. All states have judicial procedures by which official action may be challenged, though the procedure may go by various names (such as "petition for review");

(b) Federal officials may be sued directly under provisions of the Constitution, subject only to doctrines of immunity. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979);

(c) Conspiracies to deny civil rights, apart from being subject to criminal prosecution, may be attacked civilly under 42 U.S.C. section 1985. However, where the right is one enumerated in the Constitution as being secured only from "state action", there must be official actors in the conspiracy, or it cannot be reached under that statute. Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825 (1983);

(d) Section 2 of the Voting Rights Act of 1965, as amended, may be enforced by a private suit to vindicate denials of Fifteenth Amendment rights, i.e. intentional denials or limitations on the right to vote or to exercise an effective vote. (See the discussion under art. 25.);

(e) Where Congress has so provided, the federal government, through the Attorney General, may bring civil actions to enjoin acts or patterns of conduct that violate some constitutional rights. Thus, as indicated below, the Attorney General can sue under the Civil Rights of Institutionalized Persons Act to vindicate the rights of persons involuntarily committed to prisons, jails, hospitals, and institutions for the mentally retarded. Similarly, section 2 of the Voting Rights Act of 1965, as amended, authorizes the Attorney General to bring suit to vindicate the right to vote without discrimination based on race;

(f) A person whose alleged injury resembles one actionable at common law (such as the deprivation of life addressed by art. 6) may sue the United States for damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. section 1346(b), 2671 et seq., or sue the states under analogous state statutes. The FTCA waives the sovereign immunity of the United States with respect to certain torts. "Discretionary" acts, and many "intentional" torts are not included, but the Act does waive the sovereign immunity of the United States with respect to claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution based on the acts or omissions of "investigative or law enforcement officers" of the U.S. Government. The Act defines "investigative or law enforcement officer" as an officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law; this definition may include Department of Defense personnel being used in a law enforcement capacity;

(g) Any person prosecuted under a statute or in conjunction with a governmental scheme (such as jury selection) which he or she believes to be unconstitutional may challenge that statute as part of the defence. This may be done in the context of federal or state prosecutions. Even in civil actions, the defendant may pose a constitutional challenge to the statute that forms the basis of the suit. Any court, from the lowest to the United States Supreme Court, may consider such a claim of unconstitutionality, though normally it must be raised at the earliest opportunity to be considered at all. The United States Supreme Court has the discretion to review nearly all cases coming from the lower federal courts or from the states' highest courts;

(h) Detention pursuant to a statute believed to be unconstitutional or as a result of a procedure that allegedly violated a constitutional right may be challenged by a writ of habeas corpus in state and/or federal court. To a limited degree, post-conviction relief is also available by state and federal writs of habeas corpus or, in the case of federal convictions, by a motion for relief from a sentence (see 28 U.S.C. section 2241-55). All states have similar remedies as part of their criminal procedure;

(i) The federal government may prosecute criminally the violations of some civil rights. Section 241 of Title 18, U.S. Code, prohibits conspiracies to interfere with rights secured to all inhabitants of the United States by the Constitution, by federal laws, and by federal court decisions interpreting both of them. Section 242 of Title 18 prohibits any act "under colour of law" that interferes with a protected right. Abuse of police power, denying rights guaranteed by the Bill of Rights but most often denials of due process, can be reached under these statutes, subject to doctrines of immunity. The government may also bring criminal prosecutions for use of force or threat of force to violate a person's rights under the 1964 Civil Rights Act. 18 U.S.C. section 245;

(j) In addition to the remedies discussed above, federal, state and local officials, as well as private persons, who violate the rights of others may be subject to prosecution under a host of generic federal and state criminal statutes (see, for example, the discussion under art. 6). U.S. Department of Defense personnel may also be subject to criminal prosecution under the Uniform Code of Military Justice (10 U.S.C. section 801-946) of the U.S. Code.

99. **Publicity and education**. People in the United States are very aware of their rights. As discussed in Part I, the text of the Covenant, as well as its legislative history in the United States and numerous commentaries, are available to any interested person through libraries, congressional and other publications and computer databases. Throughout the United States, students at all levels receive extensive instruction in fundamental civil and political rights. The federal government has sent copies of the Covenant to the attorneys general of each state and constituent unit in the United States, with the request that they be further distributed to all relevant officials, and U.S. government officials have participated in a number of public presentations highlighting the significance of U.S. ratification. This report will be widely distributed by the U.S. Government, bar associations, and human rights organizations.

100. **U.S. understandings**. Despite the strength and breadth of the equal protection guarantees afforded all individuals under the Constitution and the various federal and state statutory schemes, the prohibitions against non-discrimination in U.S. law are not open-ended. Discrimination is prohibited only for specific statuses, and there are exceptions which allow for distinctions. For example, even under the generally protective Age Discrimination Act of 1975, 42 U.S.C. section 6101-07, age may be taken into account in certain circumstances. In addition, U.S. law permits additional distinctions, such as between citizens and non-citizens and between different categories of non-citizens, especially in the context of the immigration laws. Noting that the Human Rights Committee itself has acknowledged, in General Comment 18, that not all differentiation of treatment constitutes discrimination, the United States felt it appropriate to state clearly, through an understanding included in its instrument of ratification:

"That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands

distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective."

In addition, the United States stated its understanding that the prohibition in paragraph 1 of article 4 upon discrimination in time of emergency based "solely" on status of race, colour, sex, language, religion or social origin does not prohibit distinctions that may have a disproportionate effect upon persons of a particular status.

Article 3 - Equal rights of men and women

101. **Constitutional protections**. The rights enumerated in the Covenant and provided by U.S. law are guaranteed equally to men and women in the United States. With the adoption in 1920 of the Nineteenth Amendment, which guaranteed women the right to vote, the principal constitutional impediment to the equality of men and women was eliminated. Over the past 30 years, women in the United States have made significant strides at gaining social and economic equality with men, although further progress needs to be made.

102. As discussed under article 2, the U.S. Constitution explicitly guarantees men and women equality before the law through the Equal Protection and Due Process clauses of the Fourteenth and Fifth Amendments. As interpreted by the U.S. Supreme Court, these provisions prohibit both the federal government and the states from arbitrarily or irrationally discriminating on the basis of gender. For example, the Supreme Court has declared unconstitutional a state law giving preference to males over females in the appointment of administrators for the estates of individuals who have died intestate. Reed v. Reed, 404 U.S. 71 (1971). The Court found that the preference constituted the "very kind of arbitrary choice forbidden in the Equal Protection Clause". Id. at 76.

103. The legal standard by which the U.S. Supreme Court has judged gender distinctions has evolved over time. One year after the Reed decision, the court ruled that denying benefits for the husbands of women in the military, while providing them to the wives of similarly situated men in the military, violated the Fifth Amendment. Frontiero v. Richardson, 411 U.S. 677 (1973). The following year, however, the Court upheld a sex-based distinction in a law that provided a benefit - a property tax exemption - for widows but not for similarly situated widowers. Kahn v. Shevin, 416 U.S. 351 (1974). The Court found that the distinction was permissible because it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden". Id. at 355.

104. In Craig v. Boren, 429 U.S. 190 (1976), the Court articulated the standard which has governed the field of gender distinctions ever since: "To withstand constitutional challenge ... classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives". 429 U.S. at 197. See also, Taylor v. Louisiana, 419 U.S. 522 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

105. It is virtually certain that the Supreme Court would strike down any significant distinction between men and women in the enjoyment of the civil and political rights secured by the Covenant, either under the substantive right involved or as a matter of equal protection.

106. **Equal Rights Amendment (ERA)**. An amendment to the U.S. Constitution to introduce a separate Equal Protection clause specifically addressing gender equality was first proposed in 1923 and thereafter in subsequent Congresses. In 1972, the Equal Rights Amendment (ERA) passed the U.S. Congress. However, in the succeeding 10 years, an insufficient number of states ratified the measure, and it accordingly expired in 1982. None the less, to date 16 states have adopted the ERA as part of their state constitutions. Most of the state ERA's provide simply that "[e]quality of rights under the law shall not be denied or abridged by the state on account of sex". See, e.g. Colorado, article II, section 29; Hawaii, article I, section 3; Illinois, article I, section 18; Maryland, DR 46; New Mexico, article II, section 18. Other states have added the ERA provision to their broader constitutional equal protection clauses. For example, the Alaska Constitution provides that "[n]o person is to be denied the enjoyment of any civil or political right because of race, colour, creed, sex, or national

origin". Alaska article I, section 3. See also, Connecticut, article I, section 20 and Massachusetts, article LVI.

107. **Federal statutes and programmes**. Many federal civil rights statutes and programmes including those discussed under article 2 address discrimination on the basis of sex.

108. **Justice Department review**. Beginning in 1976, the U.S. Department of Justice conducted a review of federal statutes and regulations and of the policies, practices and procedures of federal agencies in order to identify provisions that discriminated on the basis of gender. See Final Report of the Attorney General to the President and Domestic Policy Council Pursuant to E.O. 12336 (April 1986). Most of the statutory provisions identified were not substantively discriminatory, and the majority of the others had little practical impact. For example, 14 U.S.C. sections 371-73 provided that only "male citizens" could be designated as aviation cadets in the U.S. Coast Guard. Although the statute was technically in effect, the aviation cadet programme to which it applied was no longer operated. The few statutes that did have significant sex-based distinctions were subject to challenge on constitutional grounds as discussed above. See, e.g. Califano v. Goldfarb, 430 U.S. 199 (1977).

109. **Family law**. Family law, discussed in detail with respect to articles 23 and 24, is an area which currently invites substantial debate over gender equality. In that field, women have historically been discriminated against in terms of the inequity which has persisted in the marital relationship and in divorce and custody settlements. Women still bear the majority of responsibility for child-rearing both within and outside of the marriage setting, and often are unable to enforce child-support orders or alimony awards, resulting in poverty or extreme hardship. However, the 1970s ushered in a movement of sweeping reforms, resulting in far more equitable marital property, alimony, and child custody laws. These reforms are further discussed under articles 23 and 24.

Article 4 - States of emergency

110. Unlike many countries, the United States does not have a constitutional or legal regime either for declaring "states of emergency" or otherwise for imposing emergency rule by the executive branch. The U.S. military does not exercise criminal jurisdiction over civilian persons within the United States.

111. **Federal level**. The U.S. Constitution and implementing federal statutes do authorize the President in limited and clearly defined circumstances to use federal troops to control domestic violence, suppress insurrections and enforce federal law. These laws do not, however, authorize the executive branch to suspend or interfere with the normal operations of the other branches of the national government (the Congress and the judiciary) or to permit derogations from fundamental rights. Indeed, with only one limited exception (the right of habeas corpus, which Congress may temporarily suspend when public safety so requires), constitutional rights remain in effect at all times.

112. Article IV, section 4 of the Constitution imposes on the federal government the obligation to protect a state "on Application of the [State] Legislature, or of the [State] Executive (when the Legislature cannot be convened) against domestic Violence". Article I, section 8 authorizes the Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasion". This is the basis for intervention by federal troops or marshals in civil disorders occurring within the states.

113. The Constitution also provides, in article II, section 3, that the President "shall take Care that the Laws be faithfully executed". This provision has been interpreted to grant the President authority to enforce federal laws through extraordinary means if the President determines that unlawful obstructions or rebellion make it impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings.

114. Chapter 15 of Title 10, U.S. Code, defines the scope of the constitutional grants of emergency powers. Pursuant to the President's authority under article IV, section 4 of the Constitution, section 331 of Title 10 provides authority to the President to dispatch troops on request of the state's governor or legislature. The sending of troops is not, however, automatically triggered by the request of a state pursuant to this section. The President must use his own judgement as to whether the situation warrants the use of armed forces. Traditionally, three conditions have existed before troops have been sent: (i) the actual existence of domestic violence, (ii) a

statement that the violence is beyond the control of the state authorities, and (iii) a proper request from the state governor or legislature.

115. Sections 332 and 333 of Title 10 provide authority for the President to dispatch troops without state request in order to enforce federal law, prevent obstruction of the execution of federal law, carry out federal court orders or protect civil rights. These provisions overlap to some extent, but both are aimed at violence or insurrection obstructing or interfering with the enforcement of federal laws within a state. Section 332 is aimed generally at resistance to the carrying out of federal laws; section 333 is concerned with the forcible interference with the civil rights of individuals and with violence aimed at preventing the enforcement of court orders. These provisions were invoked by the President to enforce racial desegregation orders in certain states during the 1950s and 1960s.

116. Section 334 of Title 10 requires that, in all cases in which the President deems it necessary to use armed forces pursuant to his authority under Title 10, the President must issue a proclamation ordering the insurgents to disperse. Such proclamations are followed by an executive order directing the appropriate use of the armed forces to suppress the violence. They are also subject to Congressional oversight.

117. In addition to the President's Title 10 authority, there are further statutory grants of emergency powers to the President. The National Emergencies Act, 50 U.S.C. sections 1601 et seq., confers upon the President the authority to declare national emergencies and establishes procedures to be followed by the President in exercising emergency power. 50 U.S.C. sections 1601 et seq. Most importantly, the Act requires the President to report to Congress on actions taken and funds expended pursuant to a declaration of national emergency. The Act further allows Congress to terminate such states of emergency by enacting into law a joint resolution. This Act has typically been used in conjunction with the International Emergency Economic Powers Act (IEEPA, described in the next paragraph) to impose economic sanctions against other nations, rather than to deal with domestic or national security emergencies.

118. IEEPA, 50 U.S.C. sections 1701 et seq., allows the President, upon determination that an unusual and extraordinary threat exists, to issue executive orders investigating, regulating or prohibiting certain international transactions. In addition, the President may issue executive orders investigating, regulating, and otherwise affecting a wide variety of transactions in which foreign interests are implicated. In practice, the use of IEEPA has been primarily limited to the implementation of economic sanctions (often mandated by the United Nations) on the territory of the United States. IEEPA also imposes congressional reporting requirements upon the President. The Congress may terminate an IEEPA emergency power granted to the President by passing a joint resolution pursuant to certain provisions of the National Emergencies Act.

119. Most of the President's other congressionally mandated emergency powers, particularly in the case of natural disasters, are delegated to the Federal Emergency Management Agency (FEMA). These powers include, among others, his authority under the Disaster Relief and Emergency Assistance Act, 42 U.S.C. sections 5121 et seq.; the Fire Prevention and Control Act, 15 U.S.C. sections 2201 et seq.; the Flood Disaster Protection Act, 50 U.S.C. sections 4001 et seq.; the Federal Civil Defense Act, 50 U.S.C. sections 2251 et seq.; and the Earthquake Hazards Reduction Act, 42 U.S.C. sections 7701 et seq. FEMA acts as the focal point for all planning, preparedness, mitigation, response and recovery actions for such catastrophic domestic emergencies. FEMA has no authority to suspend or infringe constitutional rights in the exercise of its duties. The Agency's purpose is to coordinate emergency activities at the national, state, and local levels, fund emergency programmes and provide technical guidance and training.

120. The Posse Comitatus Act, 18 U.S.C. section 1385, forbids the President to use the armed forces to "execute" the laws except where authorized by the Constitution or by another act of Congress. 18 U.S.C. section 1385. Under the Act, prohibited actions include interdiction of vehicles, vessels, and aircraft; searches and seizures; arrests and "stop and frisk" actions; surveillance or pursuit of individuals; investigation; and interrogation. Thus, in a disaster relief situation, absent any other legislation, federal troops must avoid a direct law enforcement role. They may, however, render humanitarian assistance, including the provision of emergency medical care to civilians and the destruction of explosives found in civilian communities.

121. State and local levels**.** At the state and local levels, a wide variety of emergency authorities permit the state executive branches (state governors, city mayors, county executives) to take emergency actions. These authorities are based on the general police power that is reserved to the states under the U.S. Constitution. In an emergency situation, a state may take reasonable actions necessary to preserve public health, safety and welfare, even if those actions incidentally infringe on otherwise protected rights. For example, states may impose curfews in situations of civil unrest or to prevent sabotage and espionage in times of war, establish quarantines during an epidemic, restrict water usage during a severe drought, and even regulate interest rates during times of economic emergency. These various state-imposed regimes may not, however, limit constitutional rights or infringe on the non-derogable rights specified in article 4 of the Covenant.

122. Judicial review. The federal courts have the power to review the exercise of emergency powers by the federal or state authorities, and have exercised considerable judicial scrutiny in this area. Judicial review has included examination of both substantive authority and procedural issues. As a general rule, cases in which the exercise of emergency power has resulted in the restriction of individual rights have been subjected to careful judicial review. See, e.g. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1886) (voiding a presidential order suspending habeas corpus); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (invalidating the seizure of steel mills pursuant to Presidential order during the Korean War); Dames & Moore v. Regan, 453 U.S. 654 (1981) (judicial review of constitutionality of President's orders regarding disposition of blocked Iranian assets under IEEPA).

123. **Emergency powers in practice**. Two recent examples of the use of federal emergency powers include the 1992 Los Angeles riots and the aftermath of Hurricane Andrew in 1992. In response to the riots and after receiving a request from the Governor of California, the President, pursuant to the authority vested in him by the Constitution and laws of the United States, including 10 U.S.C., chapter 15, issued a proclamation ordering all persons engaged in acts of violence to cease and desist. Immediately following the proclamation, the President issued an executive order directing federal law enforcement officers and the armed forces, including elements of the National Guard, to suppress the violence.

124. Throughout the emergency, the Department of Justice remained the lead federal agency, coordinating the response of all other federal agencies involved, including the Department of Defense (DOD). Although military forces had the authority to engage in direct law enforcement activities, for the most part they did not do so. Because the worst rioting had ended prior to the arrival of federal troops and because military commanders preferred not to involve soldiers in searches, arrests, pursuits, and other direct law enforcement activities, the military's principal role was to increase the security of the area, thereby deterring further rioting. Civilian agencies continued to perform the majority of law enforcement activities.

125. In response to the devastation of Hurricane Andrew in August 1992, the President declared a major disaster under the Stafford Disaster Relief Act (42 U.S.C. sections 5121-5203) for certain counties in southern Florida. When it became apparent that significant federal assistance would be needed in the disaster area and following a request from the Governor of Florida, the President authorized DOD to deploy a significant force to the disaster area to provide humanitarian relief.

126. Pursuant to the Stafford Act and the Federal Response Plan, the Federal Emergency Management Agency (FEMA) was the lead federal agency and had the authority to coordinate the activities of all federal agencies, including DOD. FEMA tasked DOD to provide assistance requested by state officials, and the joint task force had no authority to engage in relief activities other than as directed by FEMA. Unlike the Los Angeles deployment, the federal troops in Florida were not authorized to engage in law enforcement activities.

127. **U.S. understanding**. In keeping with its general understanding of the requirements of equal protection, as discussed in connection with article 2, the United States submitted the following understanding with respect to paragraph 1 of article 4 of the Covenant:

> "The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status."

In other words, distinctions having a "disproportionate effect" upon persons of a particular status, but not in fact based on that status at all, are not necessarily prohibited. Thus, for example, a curfew could be imposed as appropriate in view of safety requirements even if, due to patterns of residence, this affected certain groups more than others.

Article 5 - Non-derogable nature of fundamental rights

128. The United States was founded on basic principles of human rights from which it cannot deviate. In particular, the rights guaranteed in the U.S. Constitution, which substantially reflect the principles embodied in the Covenant, are the supreme law of the land. These guarantees represent a foundation that can never be broken. Congress and the states may protect rights to a greater extent, but never to a lesser extent than the Constitution provides. In some instances, that foundation already provides greater protection than the Covenant. Therefore, the United States could never restrict fundamental human rights on the pretext that the Covenant does not recognize such rights or recognizes them to a lesser extent.

129. Furthermore, as the Covenant has been declared non-self-executing for purposes of U.S. laws, it could never be invoked in any judicial context to limit existing rights. More specifically, with respect to actions taken by the executive branch and the Congress, the United States declared in ratifying the Covenant:

> "It is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations."

130. The United States conditioned its ratification on this declaration to emphasize that it will continue to adhere to the constraints of its Constitution in respect to all restrictions and limitations of civil and political rights. Furthermore, the United States also made this declaration to indicate as clearly as possible its belief that as a general rule States Party should resort to such restrictions only under the most unusual and compelling circumstances.

Article 6 - Right to life

131. **Right to life, freedom from arbitrary deprivation**. This right is protected by the federal and state constitutions and law. The Fifth Amendment to the U.S. Constitution provides that "no person shall ... be deprived of life, liberty, or property, without due process of law". The Fourteenth Amendment provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law". These provisions incorporate the constitutional recognition of every human's inherent right to life and the doctrine that this right shall be protected by law. The Fifth and Fourteenth Amendments also make unconstitutional the state-engineered disappearance of individuals.

132. The value of human life is further protected by the criminal codes of the U.S. Government, the 50 states, the several U.S. territories, and other constituent jurisdictions which all criminalize the arbitrary and unjustified

deprivation of life. Each jurisdiction has statutes that penalize murder and impose the most severe criminal penalties for homicide that is accompanied by specific aggravating factors.

133. The federal statutes protecting life and penalizing the deprivation of life with sentences of either capital punishment or life imprisonment include the following:

First degree murder (18 U.S.C. section 1111);

Killing a witness (18 U.S.C. section 1512(a));

Assassination of the President, President-elect, Vice-President, or one of a limited group of other persons under the statute (18 U.S.C. section 1751);

Murder by any person engaged in a continuing criminal drug enterprise or the murder of a law enforcement official during the commission of a drug felony (21 U.S.C. section 848(e));

Wilful destruction of an aircraft or motor vehicle with the intent to endanger the safety of any person on board, which has resulted in the death of any person (18 U.S.C. section 34);

Wilfully derailing, disabling, exploding, or causing a train wreck, that results in death (18 U.S.C. section 1992);

Offences involving the transportation of explosive material with the knowledge that it will be used to kill, injure or intimidate (18 U.S.C. section 844(d));

Destruction of U.S. Government property by fire or through the use of explosives that results in death (18 U.S.C. section 844(f));

The mailing of injurious articles with intent to kill or injure and that results in death (18 U.S.C. section 1716);

Genocide (18 U.S.C. section 1091(b)), which includes killing, seriously wounding, or inflicting other specified types of destruction upon members of a national, ethnic, racial, or religious group with the specific intent to destroy that group completely or in substantial part;

Terrorism (18 U.S.C. section 2331), which consists of killing a U.S. national outside the United States, or while outside the United States, attempting to kill or engaging in a conspiracy to kill a U.S. national; the statute requires a written certification by a high-ranking official of the Department of Justice "that, in the judgment of the certifying official, such offence was intended to coerce, intimidate, or retaliate against a government or a civilian population" (18 U.S.C. section 2332(d));

Conspiracy to cause the death of another (18 U.S.C. section 1117);

Killing or attempting to kill an "internationally protected person" (18 U.S.C. section 1116), including but not limited to heads of state and foreign ministers and accompanying members of their families if in a country other than their own; and representatives, officers, agents, and employees of the United States or a foreign government, or international organization, entitled under international law to protection. The alleged offender must be present within the United States. His or her nationality is irrelevant;

Treason, under a statute that provides that "[w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere" (18 U.S.C. section 2381);

Espionage (18 U.S.C. section 794); and

Air piracy where death results (49 U.S.C. section 1472(i), (n)).

The Uniform Code of Military Justice also proscribes capital punishment for certain offences. 10 U.S.C. sections 801 et seq.

134. The U.S. Code also proscribes attempted murder, which is punishable by a term of 20 years' imprisonment (18 U.S.C. section 1113), and manslaughter, defined as the unlawful killing of a human being without malice (18 U.S.C. section 1112). Voluntary manslaughter is a killing that occurs during a sudden quarrel or in the heat of passion; involuntary manslaughter occurs during the commission of an unlawful act not amounting to a felony, a lawful act in an unlawful manner, or a lawful act that, without due caution and circumspection, might produce death.

135. Other crimes, such as arson and kidnapping, carry severe penalties that are augmented when they jeopardize human life and even more severe penalties when a death results. For example, arson carries a federal penalty of five years' imprisonment, but an arson that places a life in jeopardy is punishable by 20 years' imprisonment. See 18 U.S.C. section 81. Similarly, the penalties for assaults are increased from 3 years' to 10 years' imprisonment when the assault is committed by the use of a deadly or dangerous weapon. The punishment for certain serious drug offences also is enhanced when the offender uses a firearm. 18 U.S.C. section 924(c)(1).

136. Every state also criminalizes deliberate acts that result in death or serious threat to life. However, offences may vary in detail from state to state. State criminal laws concerning murder, manslaughter, and conspiracy are essentially similar to the federal law; the most severe punishments are allocated to the acts committed with the most particular intent to cause death. At present, the statutes of 37 states provide the death penalty for murder and, in a few of these states, for other offences, almost all for offences resulting in death.

137. The issue of race and the death penalty is discussed under article 2; death-row conditions are discussed under article 7.

138. **Official use of force**. The protection of the right to life is also implicated in statutes regulating the official use of force. Prison guards, sheriffs, police, and other state officials who abuse their power through excessive use of force may be punished under 18 U.S.C. sections 241 and 242, discussed under article 2. Where law enforcement officials are involved in using excessive force, individually or in a conspiracy, victims are protected with respect to the rights secured by the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. Which amendment is involved depends upon the status of the victim as an arrestee (Fourth Amendment), a pretrial detainee (Fourteenth Amendment), or a convicted prisoner (Eighth Amendment). Graham v. Connor, 490 U.S. 386 (1989).

139. **Death penalty**. The sanction of capital punishment continues to be the subject of strongly held and publicly debated views in the United States. The majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country. In addition, federal law provides for capital punishment for certain very serious federal crimes. Capital punishment is only carried out under laws in effect at the time of the offence and after exhaustive appeals. The U.S. Supreme Court has held that the Eighth Amendment to the U.S. Constitution (which proscribes cruel and unusual punishment) does not prohibit capital punishment. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). However, the death penalty is available for only the most egregious crimes and, because of its severity, warrants unique treatment that other criminal sentences do not require.

140. First, it cannot be imposed even for serious crimes - such as rape, kidnapping, or robbery - unless they result in the death of the victim. Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782, 797 (1982); Eberheart v. Georgia, 433 U.S. 917 (1977); Hooks v. Georgia, 433 U.S. 917 (1977). Moreover, it is not enough for imposition of capital punishment that the crime resulted in death; the crime must also have attendant aggravating circumstances. In other words, restrictions on imposition of the death penalty are tied to a constitutional requirement that the punishment not be disproportionate to the personal culpability of the wrongdoer, Tison v. Arizona, 481 U.S. 137, 149 (1987), and the severity of the offence, Coker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty is disproportionate punishment for crime of rape).

141. Thus, offences set forth in several federal statutes (e.g., first degree murder) that were enacted before 1968, the date of the decision in United States v. Jackson, 390 U.S. 570, in theory carry a death penalty, but because the crimes are not narrowed sufficiently by statutorily required aggravating circumstances, the death penalty in fact may not be imposed for those crimes.

142. As noted elsewhere, the ex post facto clause of the Constitution bars the retroactive increase in penalties available in criminal cases. In operation, it thus forbids the Government from imposing a death penalty on an offender for a crime that, at the time of its commission, was not subject to capital punishment.

143. The death penalty cannot be carried out unless imposed in a judgement issued by a competent court and subject to appellate review. Of the 36 states with capital punishment statutes at the end of 1991, 34 provided for an automatic review of each death sentence and 31 provided also for automatic review of the conviction. Those that do not mandate automatic review authorize review when the defendant wishes to appeal. The fact that a state appellate court reviews each death sentence to determine whether it is proportionate to other sentences imposed for similar crimes reduces the likelihood that the death penalty will be inflicted arbitrarily and capriciously so as to constitute cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153 (1976). Typically the review is undertaken regardless of the defendant's wishes and is conducted by the state's highest appellate court. In the states not providing automatic review, the defendant can appeal the sentence, the conviction, or both. If an appellate court vacates either the sentence or the conviction, it may remand the case to the trial court for additional proceedings or for retrial. As a result of resentencing or retrial, it is possible for the death sentence to be reimposed.

144. Finally, the U.S. Supreme Court has found that where a sentencing jury may impose capital punishment, the jury must be informed if the defendant is parole ineligible, in other words where a life prison sentence could not result in parole. Simmons v. South Carolina, 114 S.Ct. 2187 (1994) (plurality).

145. **Right to seek pardon or commutation**. Under the U.S. system, no state may prohibit acts of executive clemency, including amnesty, pardon, and commutation of sentence. Gregg v. Georgia, 428 U.S. 153, 199 (1976). Indeed, in a recent Supreme Court decision, Herrera v. Collins, 113 S.Ct. 853 (1993), the Court recognized the availability of executive clemency for persons facing the death penalty whose convictions have been affirmed, whose collateral appeal rights have been exercised and exhausted, and who thereafter present a newly articulated claim of factual innocence.

146. **Genocide**. The United States is a party to the Convention on the Prevention and Punishment of the Crime of Genocide, and has fully implemented its obligations under that Convention. The United States Code makes genocide a federal criminal offence punishable by life imprisonment. The implementing statute, 18 U.S.C. section 1091(b), defines genocide to include killing, seriously wounding, or inflicting other specified types of destruction upon members of a national, ethnic, racial, or religious group with the specific intent to destroy that group completely or in substantial part.

147. **U.S. reservation**. The application of the death penalty to those who commit capital offences at ages 16 and 17 continues to be subject to an open debate in the United States. In the United States the death penalty may be imposed on wrongdoers who were 16 or 17 years of age at the time of the offence. The Supreme Court ruled that it is unconstitutional to impose a death penalty upon a person who was 15 years of age when he committed the offence (Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion)), but it has approved under the Eighth Amendment the imposition of a death penalty on a wrongdoer who was 16 years of age at the time of the murder (Stanford v. Kentucky, 492 U.S. 361 (1989)). Four of the nine Justices dissented in the latter case, contending that execution of an offender under 18 years of age is disproportionate and unconstitutional. Id. at 403. A more recent Supreme Court decision addressing the issue noted that of 36 states whose laws permitted capital punishment at the time of the decision, 12 declined to impose it on persons 17 years of age or younger, and 15 declined to impose it on 16-year-olds. Stanford v. Kentucky, 492 U.S. 361 (1989).

148. Because approximately half the states have adopted legislation permitting juveniles aged 16 and older to be

prosecuted as adults when they commit the most egregious offences, and because the Supreme Court has upheld the constitutionality of such laws, the United States took the following reservation to the Covenant:

"The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

Article 7 - Freedom from torture, or cruel, inhuman or degrading treatment or punishment

149. **Torture**. U.S. law prohibits torture at both the federal and state levels. As this report is being prepared, the U.S. is completing the process of ratifying the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Torture has always been prohibited by the Eighth Amendment to the U.S. Constitution. As a consequence, torture is unlawful in every jurisdiction of the United States, and "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". U.S. Constitution, Amendment VIII.

150. **Cruel, inhuman or degrading treatment or punishment**. The Eighth Amendment to the U.S. Constitution (applicable to actions of the federal government) and the Fourteenth Amendment (making the Eighth Amendment applicable to the states) prohibit cruel and unusual punishment. Cruel and unusual punishments include uncivilized and inhuman punishments, punishments that fail to comport with human dignity, and punishments that include physical suffering. Furman v. Georgia, 408 U.S. 238 (1972). Since the prohibition of cruel, inhuman or degrading treatment or punishment and the promotion of humane treatment consistent with human dignity are intertwined, the discussion in this section relates also to paragraph 1 of article 10. Because the scope of the constitutional protections differs from the provisions of article 7, the U.S. conditioned its ratification upon a reservation discussed below.

151. **Basic rights of prisoners**. The U.S. Supreme Court has applied the constitutional prohibition against cruel and unusual punishment not only to the punishments provided for by statute or imposed by a court after a criminal conviction, but also to prison conditions and treatment to which a prisoner is subjected during the prisoner's period of incarceration. See Estelle v. Gamble, 429 U.S. 97 (1976). Prisoners may not be denied an "identifiable human need such as food, warmth, or exercise". Rhodes v. Chapman, 452 U.S. 337 (1981). Accordingly, prisoners must be provided "nutritionally adequate food, prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it". Ramos v. Lane, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Prisoners must also be provided medical care, although an inadvertent failure to provide medical care does not rise to the level of a constitutional violation. Rather, it is prison officials' "deliberate indifference to a prisoner's serious illness or injury" that constitutes cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97 (1976). Prison officials have a duty to protect prisoners from violence inflicted by fellow prisoners. Hudson v. Palmer, 468 U.S. 517 (1984). Because prisons are by definition dangerous places, prison administrators are responsible to victims only if they had prior knowledge of imminent harm. Finally, prisoners must not be subject to excessive use of force. Force may be applied "in a good faith effort to maintain or restore discipline", but may not be used "maliciously and sadistically to cause harm". Whitley v. Abers, 475 U.S. 312, 320-21 (1986). It does not matter whether the force results in serious injury. Hudson v. McMillan, 112 S.Ct. 995 (1992).

152. The Department of Justice can criminally prosecute any prison official who wilfully causes a convicted prisoner to be subjected to cruel and unusual punishment under 18 U.S.C. section 241 and/or section 242. In addition, certain federal and state statutes call for affirmative protection of the interests of prisoners. For example, 18 U.S.C. section 4042 imposes a duty upon the Attorney General to provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offences against the United States, and to provide for the protection, instruction, and discipline of such persons.

153. The Attorney General may also initiate civil actions under the Civil Rights of Institutionalized Persons Act when there is reason to believe that a person, acting on behalf of a state or locality, has subjected

institutionalized persons (including persons in facilities for nursing or custodial care, for juvenile and pretrial detainees, and for the mentally or physically ill, disabled, or handicapped, as well as correctional facilities) to "egregious or flagrant conditions which deprive such persons of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm". 42 U.S.C. section 1997a.

154. Prisoners who have been subjected to cruel and unusual punishment may file a civil suit to recover damages from the individuals who inflicted such punishment. Where the perpetrators are agents of the federal government, these suits are based on the legal precedent established by the case of Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971), in which the Supreme Court held that officials of the federal government may be held personally liable for actions undertaken in their official capacity. Prisoners also may sue the federal government under the Federal Tort Claims Act, 28 U.S.C. sections 2671, et seq. Where the perpetrators are agents of state or local governments, the victim may sue under 42 U.S.C. section 1983.

155. **Solitary confinement and special security measures**. Convicted prisoners may be subjected to special security measures and segregation (i.e., physical separation from the general prison population) only in unusual circumstances. Such measures may be employed for punitive reasons or as a means of maintaining the safety and security of inmates and staff in the institution. No conditions of confinement, including segregation, may violate the proscription of the Eighth Amendment, nor may they violate the prisoners' rights to due process and access to the courts under the Fifth and Fourteenth Amendments.

156. All correctional systems in the U.S. have codes of conduct that govern inmate behaviour, and all have systems for imposing sanctions when inmates violate this code. These disciplinary systems are essential to ensuring the security and good order of correctional institutions. Inmates are provided a copy of the code of conduct immediately upon their arrival at a correctional institution, and additional copies are maintained in the inmate law libraries. The prison disciplinary process is administered internally, but there are important constitutional requirements that provide guidance.

157. Segregation is one of the sanctions that may be imposed upon an inmate who, it has been determined, has violated the code of conduct. Before this sanction may be imposed, the inmate is entitled to due process protection emanating from the Fifth and Fourteenth Amendments of the Constitution and recognized by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Specifically, an inmate must be provided written notice of the claimed violation and a written statement of the evidence relied upon in the disciplinary action taken; inmates must be permitted at least 24 hours to prepare for his or her appearance before the disciplinary officer or committee; inmates must be permitted to call witnesses at the hearing or at the least introduce written statements from witnesses; and must be permitted to seek assistance from a fellow inmate or from staff if he or she is illiterate or does not understand the proceedings. In addition, an impartial decision maker must preside over the hearing. If, after the preceding procedures have been followed, the disciplinary officer concludes that the inmate is deserving of punishment, segregation is one of many possible sanctions. The prisoner is given a specific term to remain in segregation (generally no more than 60 days), and this sentence may be appealed to higher level officials within the department of corrections. As with every other aspect of his or her imprisonment, the inmate has the opportunity to file suit in court.

158. Inmates may also be separated from the general prisoner population as the result of a classification decision. Prison administrators may determine that, based on a host of factors, an inmate's presence in general population would pose a substantial threat of harm to him/herself or others and the inmate therefore must be removed. This decision must be documented. Because this removal is an administrative rather than a punitive measure, it is usually not necessary to comply with the requirements of Wolff v. McDonnell delineated above. As a general matter, prison administrators may transfer prisoners to any correctional institution at any time for any reason. See Olim v. Wakinekona, 461 U.S. 238 (1983). But, if the prisoner's conditions of confinement are dramatically altered as a result of the classification decision, he or she may be entitled to some due process protection. See Vitek v. Jones, 445 U.S. 480 (1980) (requiring due process procedures for prisoners being transferred from a prison to a mental hospital).

159. Prisoners may also be segregated for medical reasons. This frequently occurs when inmates have communicable diseases. In such cases, the fact and duration of the segregation is determined by medical staff.

160. Segregation is not solitary confinement. The segregation unit in a prison separates, or segregates, certain prisoners from those who are in general population. Inmates in segregation are not permitted to eat in the dining hall; rather, they are served in their cells. They are not permitted to report to their work assignments, nor are they permitted to attend school. They are permitted to exercise (though they may not be permitted to do so out of doors) and they are permitted to read and to correspond. Depending upon the reason for their segregation, they may be permitted to listen to the radio and watch television if available. Some rights and privileges may not be abridged by virtue of an inmate's placement in segregation, whatever the reason for such placement. First, they must be permitted to correspond with persons outside the prison in the same fashion as prisoners in general population. Second, they must be allowed visits with friends or relatives, and to make telephone calls. Inmates must also be permitted access to the law library, their legal papers, and their attorney. Finally, they must be given appropriate medical care, food, clothing, and other basic necessities.

161. Inmates held in segregation have limited contact with other inmates and with staff, but under no circumstances will they be denied all human contact. For the duration of their stay in segregation, inmates are carefully monitored by medical and mental health personnel to ensure they do not suffer detrimental effects.

162. **Visitation**. Prison administrators are afforded great deference in assessing what type of restrictions are necessary to maintain order and control in a correctional institution. Prison administrators could, within the strictures of the Constitution, prohibit prisoners from visiting with friends or family members. See Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989); Meachum v. Fano, 427 U.S. 215 (1976). As the Supreme Court observed in Price v. Johnson, 334 U.S. 266 (1948), "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our prison system". Neither the prisoners nor the members of the public have a constitutional right to visit persons in prison. Nevertheless, prison administrators everywhere in the United States permit visitation, and most even encourage family members and friends to visit. The Federal Bureau of Prisons encourages visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community. 28 C.F.R. section 540.40. The number of visits prisoners are allowed each month, the duration of each visit, and the number of visitors allowed at any given time are all established by department of corrections' regulations which are made available to the inmates. In addition to visits with friends and family members, prisoners are permitted to meet with their attorneys, members of the clergy, and sometimes members of the media.

163. Prisoners may be restricted from visiting for a limited period of time as a sanction for violating prison rules of conduct. In many prison systems, however, including the Federal Bureau of Prisons, visits will be suspended only for violation of regulations specifically concerned with visitation guidelines or orderliness and security in the visiting room. See 28 C.F.R. section 540.50(c).

164. Restrictions are imposed on the visitors as well as on the prisoners; such restrictions vary depending upon the security level of the correctional institution and the classification status of the inmate. For example, inmates in maximum security prisons may be permitted only non-contact visits where the visitor and the prisoner are separated by a pane of glass and must speak to one another using a telephone. Prisoners in medium or minimum security institutions can often sit side-by-side in the visiting room and the prisoners can hold their children. In some prisons visits are held outside, weather permitting. Inmates in segregation may be required to wear restraints, such as handcuffs, during the visits. All prisoners are required to submit to a strip search prior to and immediately after a visit. This procedure prevents the admission of contraband into the prison. Visitors are generally required to pass through a metal detector; sometimes they are required to submit to a pat search of their person and their belongings. In rare circumstances visitors may be subjected to a strip search. Of course, visitors may opt not to visit rather than undergo these procedures.

165. In most correctional systems in the country, visitors are prohibited from bringing items to prisoners, such as food, papers, clothes, etc. Procedures exist for processing incoming items, but in order to maintain security the

items may not be passed directly to the prisoner. There are other restrictions on what may transpire during visits. For example, sexual contact is usually not permitted, though in some prisons the inmates are permitted to kiss the visitor once upon first seeing them and once more prior to the end of the visit. On the other hand, many systems allow conjugal visits.

166. **Death row**. As discussed under article 6, the U.S. Supreme Court has ruled that the death penalty is not in and of itself cruel and unusual punishment. For many years, the Court set aside sentences of death that were imposed under a procedure that allowed prejudice and discrimination to be factors in determining the sentence. Furman v. Georgia, 408 U.S. 238 (1972). Since that decision, many states and the federal government have created new death penalty laws that have withstood Supreme Court scrutiny. As of 20 April 1994, there were approximately 2,848 prisoners on death row, all of whom had been convicted of murder. In 1993, 38 prisoners were executed, bringing to 240 the total of all prisoners executed since 1976, the year the Supreme Court reinstated the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976).

167. In the states that have prisoners under sentence of death, various protection are afforded to ensure that their treatment is neither cruel, unusual, or inhumane. The living conditions and treatment of such prisoners are guided by department of corrections' regulations unique to each state, but there are some general principles that apply universally. Most departments of corrections house death penalty prisoners in a separate wing of a maximum security prison to ensure that these prisoners do not mingle with prisoners in the general population. Death row inmates spend a great majority of time in their cells. In some states they are permitted to work and to attend programmes and activities, and in all states they are given time for recreation. Most death row inmates have access to educational programmes though in many cases they are self-study programmes. All death row inmates are given access to library books, legal resources and other resources. They are also permitted to make purchases from the commissary. Inmates under sentence of death spend a great deal of time pursuing hobbies such as arts and crafts, drawing, and bible study. They are permitted to visit with family members and friends as well as attorneys. In some states the visits are non-contact, and in many states the visits take place in an area removed from the general population visits. Finally, death row inmates are permitted to correspond with persons outside the institution and to make telephone calls.

168. Currently, in nearly every state death row inmates live in single-person cells, though population pressures may cause this to change. There is always concern regarding the mental health and psychological state of death row inmates. Accordingly, in many states these inmates are reviewed by a psychologist or psychiatrist on a regular basis, and in all states inmates have access to such professionals upon request. Death row inmates have access to religious services and activities, though generally such activities take place in the individual's cell or in an area separated from the general population. Staff selected to work with death row inmates are generally very experienced; a 1991 study by the American Corrections Association and the National Institute of Justice revealed that staff working these positions had, on average, seven years' experience. Only a few states provide specialized training for staff who work with death-sentenced inmates, though most correctional administrators specially select staff who are particularly professional and mature.

169. Death row inmates have access to the same types of recourse available to other inmates to redress grievances. They can file a formal grievance through the internal administrative remedy process, they can file suit in court, and they can write to the news media and legislators.

170. **Pretrial detention**. Persons detained pretrial or otherwise have not been convicted of a crime and therefore, under the Fifth and Fourteenth Amendments, they have a right to remain free from "punishment" of any type. Id. The mere fact of detention, however, does not in and of itself constitute "punishment", nor do the "[l]oss of freedom of choice and privacy [that] are inherent incidents of confinement". Bell v. Wolfish, 441 U.S. 520 (1979). Pretrial detainees may be subject to restrictions and conditions accompanying such confinement that are necessary to maintain order and security at the institution, but they may not be subjected to any restrictions that are imposed for the purpose of punishment. Pretrial and other detainees are thus treated differently than convicted inmates, and correctional workers are informed of these differences through training and institution policies. In addition, although the Eighth Amendment does not apply directly to detainees, courts have determined that detainees enjoy equivalent protection with regard to conditions of detention.

171. Persons detained by the federal government may be housed in local jails, federal detention centres, or special units within federal correctional institutions. The staff at a local jail may be state or local police officers, or they may be correctional officers. At federal facilities the staff are always federal correctional officers. The latter group are trained correctional officers who are instructed regarding appropriate treatment. Federal pretrial detainees are, to the extent practicable, housed separately from convicted persons. 18 U.S.C. section 3142 (i). Standards promulgated by the American Correctional Association require that facilities provide for "the separate management" of detainees (witnesses, civil inmates, etc.) from the general offender population.

172. **Psychiatric hospitals**. As discussed under article 9, individuals with mental illness may be committed to psychiatric hospitals through either involuntary or voluntary commitment procedures for the purpose of receiving mental health services. Patients are afforded Fourteenth Amendment substantive due process protection designed to ensure that conditions of confinement do not violate their constitutional rights. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court held that all institutionalized persons, including mental patients, are entitled to adequate food, clothing, shelter, medical care, reasonable safety, and freedom from undue bodily restraint.

173. Complaints tend to focus on inadequate conditions of confinement, i.e. lack of adequate staff and staff supervision of patients, inadequate medical and psychiatric care, overuse and misuse of medication, lack of adequate services for geriatric patients, and unsanitary conditions. In addition to private remedies which are available to mental patients, federal statutes require each state to establish a "protection and advocacy" system to monitor state psychiatric hospitals and to make appropriate arrangements for individual patients with various problems and difficulties. See 42 U.S.C. sections 10801 et seq. (Protection and Advocacy Systems for individuals with Mental Illness). Moreover, pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. sections 1997, et seq., the Attorney General has authority to investigate, and file civil lawsuits as necessary, based on the belief that conditions in a state-operated psychiatric hospital are subjecting patients to a pattern or practice of deprivations of their constitutional rights. Since the enactment of the statute in 1980, some 62 facilities holding mentally disabled persons have been investigated and relief sought, as appropriate.

174. **Corporal punishment in public schools**. While corporal punishment is rare in the U.S. educational system, the U.S. Supreme Court decided, in Ingraham v. Wright, 430 U.S. 651 (1977), that teachers may impose reasonable but not excessive force to discipline a child. Therefore, it is not cruel and unusual punishment for schools to use corporal punishment. However, students may sue for assault and battery if the punishment is excessive. By 1993, 25 states in the United States had banned corporal punishment. Additionally, hundreds of cities and school boards in those states that do allow corporal punishment have banned it. The federal government's role in this area is limited to protection from discrimination on the basis of race, sex, national origin, disability, or age in the imposition of corporal punishment.

175. **Military justice system**. Article 55 of the Uniform Code of Military Justice specifically prohibits punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment. The article also prohibits the use of irons, single or double, except for the purpose of safe custody. If a commanding officer were to subject a service member to such punishment, the commanding officer (as well as the individuals who actually carried out the punishment) would be subject to court-martial for maltreatment (art. 92) and assault (art. 128), at the very least. A service member might also pursue a civil tort action, for money damages, against the perpetrator. A commanding officer who orders the illegal punishment would be acting outside the scope of his position and would be individually liable for the intentional infliction of bodily and emotional harm.

176. **U.S. reservation**. The extent of the constitutional provisions discussed above is arguably narrower in some respects than the scope of article 7. For example, the Human Rights Committee adopted the view that prolonged judicial proceedings in cases involving capital punishment might constitute cruel, inhuman or degrading treatment or punishment in contravention of this standard. The Committee has also indicated that the prohibition may extend to such other practices as corporal punishment and solitary confinement.

177. As such proceedings and practices have repeatedly withstood judicial review of their constitutionality in the United States, it was determined to be appropriate for the United States to condition its acceptance of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on a formal reservation to the effect that the United States considers itself bound to the extent that "cruel, inhuman treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. For the same reasons, and to ensure uniformity of interpretation as to the obligations of the United States under the Covenant and the Torture Convention on this point, the United States took the following reservation to the Covenant:

> "The United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

178. **Medical or scientific experimentation**. Non-consensual experimentation is illegal in the U.S. Specifically, it would violate the Fourth Amendment's proscription against unreasonable searches and seizures (including seizing a person's body), the Fifth Amendment's proscription against depriving one of life, liberty or property without due process, and the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.

179. Comprehensive control of unapproved drugs is vested by statute in the federal Food and Drug Administration (FDA). The general use of such drugs is prohibited, see 21 U.S.C. section 355(a), but the FDA permits their use in experimental research under certain conditions. 21 U.S.C. sections 355(i), 357(d); 21 C.F.R. section Part 50. The involvement of human beings in such research is prohibited unless the subject or the subject's legally authorized representative has provided informed consent, with the limited exceptions described below. The FDA regulations state in detail the elements of informed consent. 21 C.F.R. sections 50.41-50.48.

180. An exception is made where the human subject is confronted by a life-threatening situation requiring use of the test article, legally effective consent cannot be obtained from the subject, time precludes consent from the subject's legal representative, and there is no comparable alternative therapy available. The Commissioner of the FDA may also determine that obtaining consent is not necessary if the appropriate Department of Defense official certifies that informed consent is not feasible in a specific military operation involving combat or the immediate threat of combat. This regulatory exception has been challenged in litigation and upheld as consistent with the governing statutes and the U.S. Constitution. Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991).

181. The United States has also undertaken substantial efforts to diagnose and redress injuries that may have been caused by past exposure to potentially dangerous military agents. Thus, it continues to fund epidemiological studies in an attempt to resolve lingering scientific and medical uncertainty surrounding the long-term health effects of exposure to herbicides containing dioxin and to ionizing radiation. It has also provided military veterans with an expeditious means of obtaining compensation for claims based on exposure to such herbicides during service in the Republic of Viet Nam, or exposure to ionizing radiation during atmospheric nuclear tests or the American occupation of Hiroshima and Nagasaki, and has established guidelines for evaluating and applying the latest scientific evidence. The Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2727 (1984). Civilian residents of the relevant areas put at risk by nuclear testing or employed in uranium mining can also recover sizeable compensation if they have developed any of a number of specified diseases. Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990).

182. In December 1993, it became widely known that between 1944 and 1974 the United States Government conducted and sponsored a number of experiments involving exposure of humans to radiation. While certain experiments resulted in valuable medical advances including radiation treatment for cancer and the use of isotopes to diagnose illnesses, a number of the experiments may not have been conducted according to modern-day ethical guidelines. Moreover, the majority of the records of the experiments were kept secret for years. The United States Government has taken a number of steps to investigate the propriety of the experiments. For

instance, the Department of Energy established a centralized information centre in Washington, D.C., that holds 270,000 records on nuclear testing and 7,000 records on all types of human experiments, and identified approximately 2,500 records of human radiation experiments and placed them in public reading rooms around the country. By executive order in January 1994, the President established the Advisory Committee on Human Radiation Experiments, which is charged with investigating the propriety and ethics of all human radiation experiments conducted by the Government, and determining whether researchers obtained informed consent from their subjects. Currently, the U.S. Congress and the Executive Branch are considering to what extent compensation may be appropriate in various cases.

183. Experimentation on prisoners is restricted by the Fourth, Fifth, and Eighth Amendments to the United States Constitution, by statutes, and by agency rules and regulations promulgated in response to such provisions. As a general matter, in the United States, "[e]very human being of adult years or sound mind has a right to determine what shall be done with his own body ...". Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 105 N.E. 92, 93 (1914). Accordingly, prisoners are almost always free to consent to any regular medical or surgical procedure for treatment of their medical conditions. Consent must be "informed": the inmate must be informed of the risks of the treatment; must be made aware of alternatives to the treatment; and must be mentally competent to make the decision. But due to possible "coercive factors, some blatant and some subtle, in the prison milieu", (James J. Gobert and Neil P. Cohen, Rights of Prisoners, New York: McGraw Hill, Inc., 1981, pp. 350-51) prison regulations generally do not permit inmates to participate in medical and scientific research.

184. The Federal Bureau of Prisons prohibits medical experimentation or pharmaceutical testing of any type on all inmates in the custody of the Attorney General who are assigned to the Bureau of Prisons. 28 C.F.R. section 512.11(c).

185. Moreover, the federal government strictly regulates itself when conducting, funding, or regulating research in prison settings. An Institutional Review Board, which approves and oversees all research done in connection with the federal government, must have at least one prisoner or prisoner representative if prisoners are to be used as subjects in the study. Research involving prisoners must present no more than a minimal risk to the subject, and those risks must be similar to risks accepted by non-prisoner volunteers. See 28 C.F.R. Part 46. Furthermore, guidelines established by the Department of Health and Human Services provide that the research proposed must fall into one of four categories:

> "(1) Study of the possible causes, effects, and processes of incarceration, and of criminal behaviour, provided that the study presents no more than a minimal risk and no more than inconvenience to the subject;
>
> (2) Study of prisons as institutional structures or of prisoners as incarcerated persons, provided that the study presents no more than minimal risk and no more than inconvenience to the subject;
>
> (3) Research on conditions particularly affecting prisoners as a class;
>
> (4) Research on practices, both innovative and accepted, which have the intent and reasonable probability of improving the health and well-being of the subject."

45 C.F.R. section 46.306(a)(2).

186. Similar standards have been developed within the broader correctional community that strictly limit the types of research conducted in prisons, even with an inmate's consent. For example, in its mandatory requirements for institutional accreditation, the American Correctional Association (ACA) stipulates that:

> "Written policy and practice prohibit the use of inmates for medical, pharmaceutical, or cosmetic experiments. This policy does not preclude individual treatment of an inmate based on his or her need for a specific medical procedure that is not generally available (emphasis added)."

Mandatory Standard 3-4373, Section E, "Health Care", in Standards for Adult Correctional Institutions, 3rd ed., Laurel, Maryland: American Correctional Association, January 1990, p. 126.
The commentary accompanying this mandatory regulation reads:

"Experimental programmes include aversive conditioning, psychosurgery, and the application of cosmetic substances being tested prior to sale to the general public. An individual's treatment with a new medical procedure by his or her physician should be undertaken only after the inmate has received full explanation of the positive and negative features of the treatment."

(Id.)

187. Non-medical, academic research on inmates is normally allowable in federal and state prisons with the inmate's express consent. This type of research normally consists of inmate interviews and surveys. Inmates are not required to participate in any research activities other than those conducted by correctional officials for purposes of inmate classification, designation, or ascertaining inmate programme needs (e.g., employment preparation, educational development, and substance abuse and family counselling).

Article 8 - Prohibition of slavery

188. **Slavery and involuntary servitude**. Abolition of the institution of slavery in the United States dates from President Lincoln's Emancipation Proclamation, effective in 1863, and the Thirteenth Amendment to the U.S. Constitution adopted in 1865. The Thirteenth Amendment also prohibits the holding of a person in involuntary servitude. The U.S. Department of Justice prosecutes involuntary servitude cases under three statutes designed to implement the Thirteenth Amendment, 18 U.S.C. sections 1581, 1583, and 1584, and under 18 U.S.C. section 241, which criminalizes conspiracies to interfere with the exercise of constitutional rights. In this context, 18 U.S.C. section 241 criminalizes conspiracies to interfere with a person's Thirteenth Amendment right to be free from involuntary servitude. The other involuntary servitude statutes make unlawful: (i) holding or returning a person to a condition of peonage (section 1581); (ii) carrying a person away to or enticing a person to involuntary servitude (section 1583); and (iii) holding a person to a condition of involuntary servitude (section 1584). Peonage is a form of involuntary servitude based on real or alleged indebtedness.

189. In 1988, the U.S. Supreme Court defined involuntary servitude to mean a condition of servitude in which the victim is forced to do labour for another individual through the use or threatened use of physical or legal coercion. United States v. Kozminski, 487 U.S. 931 (1988). Thus, Department of Justice prosecutions of involuntary servitude require evidence showing the use or threatened use of physical or legal coercion by the defendant as a sufficient means of holding the victim to a condition of forced labour. Psychological coercion alone used to hold a person to forced labour does not constitute involuntary servitude. Id. at 948-49. Evidence of coercive measures such as withholding a victim's mail or isolating the victim from members of his family in an effort to dissuade the victim from leaving his place of labour is not by itself sufficient for an involuntary servitude conviction. However, the age, mental competency, or other specific characteristics of a victim may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that victim to involuntary servitude. Id. at 948. For example, a child who is told he can go home through a strange area at night may be subject to physical coercion where an adult would not be, and an illegal immigrant threatened with deportation may be subject to legal coercion where a citizen of the United States would not be.

190. Unfortunately, cases of involuntary servitude continue to arise under these statutes. The Department of Justice's enforcement efforts in recent years have principally involved two categories of prosecutions: (1) migrant worker cases; and (2) cases involving persons with particular vulnerabilities.

191. The migrant worker cases typically involve the recruitment of workers through deceit or force to perform agricultural work at a labour camp. The workers are generally informed after a few days that they are being charged for meals, shelter, and other necessities and that they may not leave until they have worked off their debts. The operators of the camp often employ threats and acts of violence to create a climate of fear and

intimidation that prevents the workers from leaving the camp.

192. In United States v. Warren, a 1983 prosecution in the Middle District of Florida, four defendants were convicted of holding persons to involuntary servitude by picking up individuals under false pretences, delivering them to labour camps in North Carolina and Florida, requiring them to work long hours for little or no pay, and keeping them in the camps through poverty, threats and acts of violence. The government introduced evidence at trial to show that disobedient workers were beaten, threatened with a gun or a smouldering piece of rubber hose, and denied food or medicine as punishment for failure to work as expected by the camp operators. Several workers were able to leave the camp only after a nun arranged for them to obtain money from family members whom the workers had been unable to contact on their own. The Eleventh Circuit Court of Appeals upheld the convictions. United States v. Warren, 772 F.2d 827 (11th Cir. 1985).

193. The "vulnerable person" cases typically involve victims whom the defendants are able to hold in a condition of involuntary servitude based in part on some specific characteristic of the victim. Persons with particular vulnerabilities include illegal immigrants, elderly or very young persons and mentally retarded persons.

194. In United States v. Vargas, a 1991 prosecution in the Southern District of California, three defendants were convicted on one count of holding a person to involuntary servitude. Claudia Vargas recruited 17-year-old Juanita Hernandez-Ortiz, in Mexico City, Mexico, in 1989 to work as a maid for her family, first in Mexico and then in the United States. The defendants originally agreed to send money to Ms. Hernandez' family, to give her room and board, and, eventually, to send her to school. Instead, the Vargases forced Ms. Hernandez to enter the country illegally, then took all of her identification documents and threatened to turn her over to immigration officials. Throughout 1990 and 1991, the defendants' physical abuse of Ms. Hernandez escalated. Raul Vargas on one occasion used a broom handle to beat Ms. Hernandez, and his mother tore clumps of hair from Ms. Hernandez' head. By April 1990, the defendants were forcing Ms. Hernandez to live in the garage, locking her in with little or no food when they would be gone for days at a time. A county child protective services worker eventually took Ms. Hernandez from the Vargas home.

195. Migrant worker and vulnerable person cases are not the only involuntary servitude prosecutions pursued by the Department of Justice. In United States v. Lewis, the Department prosecuted eight leaders of a religious sect known as the House of Judah for their activities in forming and monitoring work details among the male children who lived on the sect's compound in rural western Michigan. The sect leaders, including prophet William Lewis (also known as My Lord Prophet) and members of his leadership council prohibited members from leaving the compound, assigned persons to patrol the perimeter of the compound with weapons, and publicly beat members who refused to obey commands, attempted to leave or otherwise displeased sect leaders. The young male children were assigned to work details and were beaten when they did not work or performed their work poorly. Twelve-year-old John Yarbough died five days after one of the beatings he received for failing to report for assigned work. All seven defendants who went to trial were convicted on charges of conspiring to hold John Yarbough to involuntary servitude and of holding John Yarbough and others to involuntary servitude; the eighth defendant pleaded guilty prior to trial. United States v. Lewis, 644 F. Supp. 1391 (W.D. Mich. 1986).

196. One of the major issues in the Lewis case was how the presence of the children's parents, also members of the sect, at the compound affected the defendants' culpability. In affirming the convictions in Lewis, the Sixth Circuit Court of Appeals held that the defendants did not share the immunity of the children's parents based on the parents' right to discipline their children. United States v. King, 840 F.2d 1276, 1280 (6th Cir. 1988).

197. In another case involving the holding of children in involuntary servitude, United States v. Van Brunt, the Department of Justice successfully prosecuted eight defendants who were leaders of a pseudo-religious/athletic cult based in Los Angeles, California, and Clackamas County, Oregon. These defendants were indicted in Oregon on charges involving the systematic physical abuse of over 50 children. The children were coerced into performing arduous athletic accomplishments to attract corporate financial support and sponsorship for the cult. All the children of cult members were allegedly abused, including the daughter of Eldridge Broussard, the group's founder and leader, who died as a result of a severe beating. A few months later, following the indictment, Eldridge Broussard died of natural causes. All seven of the remaining defendants pleaded guilty a

month before trial was scheduled and were sentenced to serve prison terms of 2_ years to over 8 years.

198. Since 1977, the Department of Justice has prosecuted 28 involuntary servitude cases involving 100 defendants. The cases have resulted in 36 convictions and 46 guilty pleas.

199. **Hard labour**. Hard labour is no longer available as a criminal sanction under federal criminal law, though it remains a possible punishment under the Uniform Code of Military Justice and some state laws. In these jurisdictions, a judge may sentence a person to "a term of imprisonment with hard labour". There is no specific constitutional or statutory prohibition against hard labour. The Eighth Amendment, as discussed above, prohibits the infliction of any punishment that is "cruel and unusual". While hard labour does not necessarily constitute cruel and unusual punishment, prison work requirements which compel inmates to perform physical labour which is beyond their strength, endangers their lives, or causes undue pain constitute cruel and unusual punishment. Ray v. Mabry, 556 F.2d 881 (8th Cir. 1977). The Supreme Court has, on more than one occasion, found hard labour to be an excessive punishment grossly disproportionate to the crime for which it was imposed. Weems v. United States, 217 U.S. 349 (1910).

200. Several states possess the statutory authority to place offenders in programmes that employ "hard labour". While the term "hard labour" has remained unaltered in a few states, the U.S. military services, and some U.S. territories, "hard labour ... [is] not correspondent to work in the stocks or other eighteenth century punishments which were then considered reasonable". Justiniano Matos v. Gaspar Rodriguez, 440 F. Supp. 673, 675 (D. Puerto Rico 1976). In theory, "hard labour" refers to a form of punishment and suggests more than mere institution work assignments. In practice, however, the jobs assigned to prisoners sentenced to "hard labour" are often the very same as those assigned to prisoners sentenced to a term of imprisonment. In the majority of states and territories where the "hard labour" terminology has survived, courts and corrections agencies have translated the sanction into modern community corrections programmes (halfway house placement, work release, boot camps, etc.). There are typically four placement alternatives for offenders sentenced under hard labour statutes: (i) correctional institution work crew, (ii) work release programme with a local building contractor, public agency, sanitation crew, etc., (iii) apprenticeship programme with a mentor skilled in a particular trade, or (iv) vocational training.

201. An example of a work programme where an offender could be placed is provided by the Home Builders Institute (HBI), the educational arm of the National Association of Homebuilders. HBI provides a "Project Trade" programme for adult offenders in prison and a "Job Corps" programme for juveniles in trouble. Offenders typically receive remedial education, vocational training, counselling, and health care. These programmes are designed "to turn America's hardest-to-employ" into productive, independent citizens through classroom and work assignments in 11 separate construction trade training programmes. See HBI "Project Trade Abstract", Washington, D.C., Home Builders Institute.

202. **Forced labour**. The United States does not engage in practices of forced labour. On 7 June 1991, the United States ratified International Labour Organisation Convention No. 105 concerning the abolition of forced labour. The Convention, which entered into force for the U.S. on 25 September 1992, requires ratifying states to undertake to suppress and not make use of forced labour in five specific cases: as a means of political coercion or education, or as punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a method of mobilizing and using labour for purposes of economic development; as a means of labour discipline; as punishment for having participated in strikes; and as a means of racial, social, national or religious discrimination.

Article 9 - Liberty and security of person

203. **Arrest and detention: general**. Both the U.S. Constitution and a number of statutes and rules of criminal procedure protect individuals against arbitrary arrest and detention. The Constitution greatly restricts the ability of the government at all levels to infringe on the liberty of its citizens; several provisions bear directly on the power to arrest and detain. The Fifth Amendment provides that no person shall be "deprived of ... liberty ... without due process of law". Similarly, the Fourteenth Amendment provides that no state shall "deprive any

person of ... liberty ... without due process of law". The Fourth Amendment provides that all persons shall be free from unreasonable searches and seizures, and "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". Finally, the Sixth Amendment provides that in all criminal prosecutions, the accused shall be given a "speedy and public trial, by an impartial jury of the state", and persons shall be "informed of the nature and cause of the accusation" brought against them. These constitutional protections apply (with one exception not relevant to this inquiry) to the states under the Due Process clause of the Fourteenth Amendment. See Wolf v. Colorado, 338 U.S. 25, 27-28, 33 (1949); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (Fifth Amendment privilege against self-incrimination); Benton v. Maryland, 395 U.S. 784, 793-96 (1969) (Fifth Amendment double jeopardy clause); Hurtado v. California, 110 U.S. 516, 535 (1884) (Fifth Amendment due process clause); Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967) (Sixth Amendment speedy trial clause); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (Sixth Amendment right to counsel).

204. The constitutional provisions described above form the bases for strict rules regarding the arrest and detention of suspects in the United States; these rules are applied and enforced at all levels of government. First, persons may be detained upon a finding that there is probable cause to believe they have committed a crime. A judicial officer must authorize such detention either by issuing a warrant for the person's arrest, or by approving such arrest shortly after it occurs. Subsequently, the judicial officer must authorize the continued detention of the person following a hearing wherein it is determined whether there is reason to believe the suspect will flee from justice or will pose a threat to the public if released. There is usually a presumption that the person shall be released pending trial with or without executing an appearance bond although exceptions may exist where the crime is particularly heinous. See, e.g., 18 U.S.C. sections 3142 et seq.

205. Additionally, states through their separate laws guarantee that individuals will not be arbitrarily arrested and detained by state authorities and also require prompt notification of charges and a speedy trial. States are obligated at a minimum to adhere to the requirements of the U.S. Constitution, but they may adopt greater protections in their own statutes or state constitutions.

206. **Arrest**. In the United States, a person ordinarily may be deprived of liberty for only a brief period unless such person (i) has been formally arrested and charged, by complaint or indictment, with a crime, or (ii) refuses to obey a lawful court order (but only for as long as he refuses to obey). The primary protection against the government's unwarranted deprivation of a person's liberty is in the Fourth Amendment to the Constitution. It provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

207. The Fourth Amendment requires two things: (i) the arrest must be "reasonable" and (ii) an arrest effected by a warrant must be backed by a showing, under oath, of probable cause and a particular description of the person to be arrested. The "seizure" of a person under the Fourth Amendment can include a formal arrest or a detention by government officials where, under the totality of the circumstances, the person reasonably believes that he or she is not free to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

208. The Fourth Amendment does not require that an arrest be effected by a judicially authorized warrant. Whether the arrest is made with or without a warrant, the Amendment requires that there be probable cause. Probable cause exists when the police have knowledge or information of facts and circumstances sufficient to allow a person of reasonable caution to believe that an offence has been or is being committed by the person to be arrested. Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar v. United States, 338 U.S. 160, 175-76 (1949). In this respect, U.S. law and practice does not permit "preventive detention".

209. A police officer may arrest a person without first securing a warrant or a complaint if, for example, he

observes the person engaged in the commission of a crime. However, the officer must then promptly swear out a complaint before a judge or magistrate. Fed. R. Crim. P. 3 describes a complaint as "a written statement of the essential facts constituting the offence charged". In addition, a person who has been arrested or otherwise subject to significant restraints on his liberty is entitled to a hearing before a judge or magistrate; the judicial officer determines whether a prudent person would conclude that there is probable cause to believe that the accused committed the offence. Gerstein v. Pugh, 420 U.S. 103 (1975).

210. If the police officer seeks a warrant prior to arrest, a judicial officer will issue a warrant or summons if he finds (in the complaint or affidavits appended to the complaint) probable cause to believe that the defendant committed the alleged crime. Under Fed. R. Crim. P. 4(c), the warrant must describe with particularity the person to be arrested and the offence, and it must direct that the person then be brought before the nearest available magistrate.

211. The requirement that arrests not be effected absent probable cause and that an independent and neutral judicial officer make the probable cause determination goes far to protecting against arbitrary detention in criminal cases. Nor may a person be arrested, whether or not he is to be detained in custody, without being promptly informed of the basis for the arrest and detention.

212. **Reasons for arrest and detention**. Federal law requires that the arrestee must be given a copy, immediately upon arrest, of the arrest warrant (if the arresting officer has a copy) or, at a minimum, must be informed of the offence charged and given an opportunity to see the warrant as soon as practicable. Fed. R. Crim. P. 4(d)(3). In the case of warrantless arrest, the arresting authority generally must inform the arrestee of the cause of his arrest. State practice is similar. There may be exceptions for state arrests, however, in the limited circumstances where the arrest is for an offence committed in the actual presence of the arresting officer or person, or the officer arrests the person after an immediate and hot pursuit or after an escape. See, e.g. People v. Beard, 46 Cal.2d 278, 294 P.2d 29 (1956).

213. **Right to counsel**. In addition, the requirement that the accused be provided assistance of counsel promptly in a criminal case protects against arbitrary detention. First, under the Fifth Amendment and the rule imposed by the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 444, 478-79 (1966), before questioning a person in "custody", police officers - state and federal - must inform the person that he or she has a right to remain silent, that any statements he or she makes can be used against him or her at a criminal trial, that he or she has the right to the presence of a lawyer, and that if he or she cannot afford a lawyer one will be appointed. "Custody" for purposes of Miranda does not necessarily require that the person be formally arrested and charged; it is sufficient if his or her freedom of action has been deprived in any significant way. Miranda, 384 U.S. at 444. Nor does it matter whether the custodial interrogation is focusing on a major crime or a minor violation. Some types of detention, however, may be so insignificant, such as a routine traffic stop, that Miranda warnings are not required because the defendant is not deemed in custody. Berkemer v. McCarthy, 468 U.S. 420, 441-2 (1984).

214. By operation of Miranda, once a person requests the assistance of a lawyer during questioning the interrogation must stop until counsel is provided. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). While there is no requirement that counsel be promptly provided, there can be no continued custodial interrogation without counsel. In the event the person in custody wishes to speak with an attorney and is denied the opportunity to do so, any evidence the police obtain - either directly or as a "fruit" of the initial statement - as a consequence of the denial of counsel will be excluded at trial.

215. In addition to the requirement under Miranda that persons in custodial interrogation situations be informed of their right not to answer questions and their right to the presence of an attorney, the Sixth Amendment requires that "in all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence". The Supreme Court has ruled that the Sixth Amendment right to counsel is triggered by the initiation of adversarial judicial proceedings against the accused, either by formal charge, preliminary hearing, indictment, information, or arraignment. Kirby v. Illinois, 406 U.S. 682, 689 (1972). This provision applies to the states as well. Gideon v. Wainwright, 372 U.S. 335 (1963).

216. The protections of Miranda v. Arizona as well as Gideon v. Wainwright and other Sixth Amendment cases generally are invoked to guarantee that persons who are not already represented will receive the assistance of counsel. Should a detainee already have an attorney and wish to contact that attorney, no statute or rule prohibits him from doing so, even though that person's constitutional right to counsel may not yet have attached. If for some reason the request to contact his attorney is not immediately honoured, the government will be barred from using as evidence any statements the detainee made to officers in response to questioning after the attempt to contact the lawyer; the government also cannot use information derived from those statements.

217. **Initial appearance**. At both the federal and state levels, all persons who have been arrested or detained must be brought before a judicial officer promptly even when the arrest has been made pursuant to a warrant issued upon a finding of probable cause. Officers who arrest a person without a warrant must bring that person before a magistrate for a judicial finding of probable cause within a reasonable time. Gerstein v. Pugh, 420 U.S. 103 (1975). Though "reasonable time" is undefined, the Supreme Court has held that it generally cannot be more than 48 hours, see County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991). Some states may apply more stringent statutory or constitutional requirements to bar detention for even that length of time. If there is "unreasonable delay" in bringing the arrested person before a magistrate or judge for this initial appearance, confessions or statements obtained during this delay period may be excluded from evidence at trial.

218. Not all delay over 48 hours will be deemed unreasonable. For example, the Supreme Court suggested in one case that a delay of three days over a three-day holiday weekend was not violative of the person's due process rights. Baker v. McCollan, 443 U.S. 137, 145 (1979). In other instances, for example when the police seek to check the defendant's story, delay greater than 48 hours may also be found to be reasonable. Mallory v. United States, 354 U.S. 449, 455 (1957).

219. In arrests for violations of federal law, Fed. R. Crim. P. 5 requires that an arresting officer bring the accused before the nearest available magistrate without unnecessary delay. If a federal magistrate or judge is not available, the person must be brought before a state or local official. See 18 U.S.C. section 3041; Fed. R. Crim. P. 5(a). At this proceeding, called an "initial appearance", the judge or magistrate informs the accused of the charges against him, informs the suspect of his right to remain silent and the consequences if he chooses to make a statement, his right to request an attorney or retain counsel of his choice, and of the general circumstances under which he may obtain pretrial release. Fed. R. Crim. P. 5(c). The magistrate will also inform the accused of his right to a preliminary hearing, assuming that the person has not yet been indicted by a grand jury, and allow reasonable time to consult with his attorney. Fed. R. Crim. P. 5(c).

220. **Pretrial release**. In the federal system and the various states, the general rule is that persons awaiting trial will not be detained in custody unless the judicial officer cannot be assured that there are conditions of release that will reasonably guarantee the safety of the public and the appearance of the person at the criminal trial. Since the amount of bail is not the only factor in determining the risk that a charged person would flee before trial, his financial status may not be the overriding concern. Courts frequently take into account such other factors as the seriousness of the crime (and the severity of the penalty the person is likely to face if convicted), the strength of the evidence, and the individual's ties to the community in assessing the likelihood that he will appear at his trial.

221. A person lacking the financial means to secure release by a cash bond or by arranging for a bail bondsman to act as a surety may be released on other conditions which might reasonably guarantee appearance at trial. Such conditions may include requirements to report regularly to a designated law enforcement or pretrial services agency, to limit his travels or remain under house arrest, to comply with a curfew, and the like. The court may also impose conditions of release that are designed to protect the public safety, such as prohibitions against contacting or associating with certain individuals.

222. If release on bail is ordered, the amount of bail should be set at a figure sufficient to guarantee the person's availability at trial. Stack v. Boyle, 342 U.S. 1, 4 (1951). A person with fewer assets would, theoretically, be as unwilling to forfeit all his property as a person with substantial assets. Under that analysis, bail could be set at a much lower figure for the detainee of lesser wealth. However, as a practical matter courts may have less

confidence in ordering low bail or alternatives to the pledging of property for persons who pose a risk of flight for other reasons, such as the aforementioned severity of the crime and lack of community ties, and who also lack substantial financial assets that would be risked by pretrial flight.

223. In federal courts, the Bail Reform Act, 18 U.S.C. sections 3141 et seq., provides that, except for the categories of particularly dangerous persons or persons likely to flee if not detained, defendants awaiting trial can be released on personal recognizance, upon the execution of an unsecured appearance bond, or upon other conditions. The other conditions may include a requirement that the defendant remain in the custody of a designated custodian or that the defendant's movements be subject to electronic monitoring, that the defendant restrict his travel outside the jurisdiction, that the defendant post a cash bond or pledge property as security for his promise to appear at trial, or that the defendant execute a bail bond with a solvent surety.

224. The Bail Reform Act also provides that when a judicial officer "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial". 18 U.S.C. section 3141(e). In certain circumstances the statute allows a rebuttable presumption against release pending trial. 18 U.S.C. section 3142(e),(f)(1). The rebuttable presumption arises if (i) within the past five years the defendant while released pending trial on another matter, had committed a crime of violence, a crime for which the maximum sentence was life imprisonment or the death penalty, a serious drug felony, or (in conjunction with other circumstances) any other felony, or (ii) the judge finds probable cause to believe that the defendant committed a serious drug or firearms felony. Subject to rebuttal by the defendant, the court shall find that no condition or combination of conditions will reasonably assure the appearance of the person if released before trial or the safety of any other person and the community. The court may also deny release pending trial if it finds a serious risk of flight or that the defendant will obstruct or attempt to obstruct justice, or threaten or attempt to threaten, injure, or intimidate a prospective witness or juror. 18 U.S.C. section 3142(f)(2).

225. At a detention hearing under the statute, the arrested person has the right to counsel, to cross-examine witnesses called by the government, and to testify and present witnesses and evidence on his behalf. If after the hearing the judicial officer finds that no conditions of pretrial release can reasonably ensure the safety of other persons and the community, he must state his findings of fact in writing and support his conclusions with "clear and convincing evidence". 18 U.S.C. section 3142(f), (i). The statute further spells out the factors that the judicial officer must consider: the nature and seriousness of the charge, the strength of the government's evidence, the detained person's background and characteristics, and the nature and seriousness of the danger that would be posed if the detained person was released. 18 U.S.C. section 3142(g).

226. A person subject to pretrial detention - either because the individual cannot "make" the bail which has been set or because the court has declined to release him under any circumstances - may appeal to a higher court. Stack v. Boyle, supra. Under federal law, if the person is ordered detained by a magistrate, he may file a motion with the district court for revocation or amendment of the order. The statute requires that the motion shall be determined "promptly". 18 U.S.C. section 3145(b). If the district court denies the motion, he may appeal the order to the court of appeals. That appeal too shall be determined "promptly". 18 U.S.C. section 3145(c). The remedy of appeal is guaranteed to persons regardless of their ability to pay for an attorney; an indigent defendant who wishes to appeal the decision will be assisted by court-provided counsel, and the indigent appellant will not have to pay any court costs or filing fees in order to perfect his appeal.

227. Approximately 62 per cent of federal offenders were released prior to disposition of their cases in 1990. Of those who were not released, two thirds were denied bail and were detained after a hearing at which it was determined that they posed a danger to the community. Defendants denied pretrial release because of their potential danger were held an average of 88 days before disposition of their cases.

228. State procedures for setting and making bail are relatively similar to the federal process, although there are significant variations in law and practice among the 50 jurisdictions. States take into account different factors in setting bail, and some have no statutory factors for setting bail. None the less, certain factors are usually considered, including the seriousness of the offence, the strength of the case against the suspect, and the

suspect's prior criminal record. Bail is usually arranged through a cash payment, an agreement with a bail bondsman, or on the suspect's personal recognizance.

229. In 1990, an estimated 65 per cent of defendants facing felony charges in the nation's 75 most populous counties were released prior to the disposition of their cases. More than half were released within a day of arrest, and 80 per cent were released within a week of their arrest. Of the 35 per cent who remained in custody pending disposition of their criminal cases, approximately one in six defendants was denied release on bail; the other five in six were unable to post the required bail amount. Felony defendants detained prior to disposition were held in custody for an average of 37 days.

230. Right to speedy trial**.** In addition to providing the protection of the right to counsel, the Sixth Amendment also guarantees that "[in] all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...". This speedy trial protection applies to state as well as federal prosecutions. In federal courts, the right is implemented by the Speedy Trial Act, 18 U.S.C. sections 3161 et seq. Many states have adopted similar statutes. The right to speedy trial is discussed in greater detail under article 14.

231. **The military justice system**. In military jurisprudence, the apprehension and restraint of individuals are addressed in the Uniform Code of Military Justice, articles 7 through 14, 10 U.S.C. sections 807-14. The civilian term "arrest" is equivalent to the military term "apprehension". Under the Uniform Code of Military Justice (UCMJ), article 7, 10 U.S.C. section 807, an individual may be apprehended only upon reasonable belief that an offence has been committed and that the person apprehended committed it.

232. This matter is expounded in Rule for Court-Martial 302, Manual for Courts-Martial (1984). This rule details that warrants are not required for apprehension (except in certain cases involving private dwellings) and that reasonable force may be used to effect the apprehension.

233. The imposition of restraint is effected pursuant to UCMJ, article 9, 10 U.S.C. section 809, and is more particularly described in Rule for Court-Martial 304, Manual for Courts-Martial. Pretrial restraint is moral or physical restraint on a person's liberty and may consist of, in order of increasing severity: conditions on liberty (orders directing a person to do or refrain from doing specified acts), restriction in lieu of arrest (orders directing the person to remain within specified limits, while still performing full military duties), arrest (orders directing the person to remain within specified limits, while not performing full military duties), and confinement (physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges).

234. Rule for Court-Martial 305 discusses pretrial confinement in great detail. Only a commanding officer, to whose authority a civilian or officer is subject, may order pretrial restraint of that civilian (subject to trial by court-martial) or officer. Any commissioned officer may order the pretrial confinement of an enlisted member. An individual may be ordered into pretrial confinement only if there is probable cause to believe that an offence triable by court-martial has been committed, the person confined committed it, and confinement is required by the circumstances.

235. The person confined must be notified immediately of the nature of the offence charged; the right to remain silent and that any statement made may be used against such person; the right to retain civilian counsel at no expense to the government; the right to military counsel at no cost; and procedures for review of the pretrial confinement.

236. Within 72 hours of ordering an individual placed into pretrial confinement or being notified that a member of the unit is in pretrial confinement, the commander must decide whether or not the confinement will continue. The commander must order the prisoner's release unless the commander believes upon probable cause that a court-martial offence has been committed; the prisoner committed it; confinement is necessary because it is foreseeable that the prisoner will not appear at trial proceedings; the prisoner will engage in serious criminal misconduct; and less severe forms of restraint are inadequate.

237. Within seven days of the imposition of the restraint, a review must be conducted of the adequacy of probable cause to believe the prisoner has committed an offence and of the necessity of continued pretrial confinement. The review is conducted by a neutral and detached officer, who must consider the confining commander's decision, written matters, and any presentation made by the prisoner and the prisoner's counsel, who are allowed to appear at the review.

238. Once the charges for which the prisoner is being held are referred to trial by court-martial, the pretrial confinement is subject to review by the military judge. Should the judge determine the pretrial confinement resulted from an abuse of discretion, the military judge shall order administrative credit for any pretrial confinement served as a result of the abuse. There is no avenue for compensation to a prisoner who is determined to have been wrongly confined.

239. Under Rule for Court-Martial 707, the prisoner must be brought to trial within 120 days of the imposition of restraint. Pretrial confinees and post-trial confinees may be quartered in the same facility and may use common areas (such as dayrooms), but their actual quarters must be separate. Habeas corpus procedures are available to an accused through Federal District Court.

240. Recently, Congress enacted a "bill of rights" for military members who are required to submit to a mental health examination (National Defense Authorization Act, Pub L. No. 102-484, 106 Stat 2315, 1506 (1992)). The commander must consult a mental health professional prior to referring a member for a mental health evaluation. The commander must provide the member with a written notice that includes an explanation for the referral, the name of the mental health professional consulted by the commander, and how to contact an attorney or inspector general for assistance in challenging the referral. The member may have an attorney to assist in redress; have the assistance of the inspector general to review referral; and be evaluated by a mental health professional of the member's own choosing. The Act prohibits using mental health referrals against members for whistle blower activities. It also includes special procedures for emergency or inpatient evaluations. The Act requires the Secretary of Defense to revise applicable regulations to incorporate these requirements. These requirements do not become effective until the regulation revision is completed.

241. **Detention to secure the presence of a witness**. A person may also be held in custody to secure his presence as a material witness at an upcoming trial. The Supreme Court has stated that the "duty to disclose knowledge of crime ... is so vital that one known to be innocent may be detained in the absence of bail, as a material witness". Stein v. New York, 346 U.S. 156, 184 (1953). Federal law accordingly has a material witness statute, 18 U.S.C. section 3144, that provides:

> "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of [the Bail Reform Act]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."

242. Custody of the witness may be obtained by means of an arrest warrant secured from a judge upon a showing of probable cause to believe that the testimony of the witness is material and that it may be impracticable to secure the witness's presence by subpoena. Bacon v. United States, 449 F.2d 933, 937-39 (9th Cir. 1971); United States v. Coldwell, 496 F. Supp. 305, 307 (E.D. Okl. 1979); United States v. Feingold, 416 F. Supp. 627, 628 (E.D.N.Y. 1976). Where a material witness is held in custody under that provision, the prosecutor is obligated to make a bi-weekly report to the court explaining why it is necessary that the witness continue in detention in lieu of giving a deposition under the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 46(g). In addition, the witness held in custody must be given appointed counsel if the witness is financially unable to afford a lawyer. In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses

in Western Dist. of Texas, 612 F. Supp. 940, 943 (W.D.Tex. 1985).

243. Detention for contempt of court**.** A person may also be held in custody as a means of ensuring compliance with a court order. The decision to take a contemner into custody is reserved for the judge, and is subject to appeal to a higher court. Courts have the inherent power to enforce compliance with their lawful orders through civil contempt. Shillitani v. United States, 384 U.S. 364, 370 (1966). A finding of civil contempt and the remand of the individual into custody solely for the purpose of coercing obedience to lawful orders is not viewed as criminal punishment. Id. Court-ordered detention under its civil contempt powers may continue indefinitely but not forever. United States ex rel. Thom v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985). The continued incarceration must be subject to court review at reasonable intervals or when requested by either party. Moreover, the decision to maintain a person in custody in order to compel his compliance is appealable to a higher court; the standard of review of a trial court civil contempt sanction is the abuse of discretion standard: if there is clear and convincing evidence of the contemner's violation of a court's prior lawful order, the trial court would have broad discretion in finding civil contempt and imposing sanctions, and the finding and the sanction would be reversed only for abuse of discretion. Peppers v. Barry, 873 F.2d 967, 968 (6th Cir. 1989); Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989); United States v. Hefti, 879 F.2d 311, 315 (8th Cir. 1989), cert. denied, 110 S.Ct. 1125 (1990).

244. **Commitment for mental disease**. Persons suffering from a mental disease or defect may be detained and treated based upon a judicial finding that the release of such persons would be dangerous to themselves or others. "Involuntary civil commitment" is the process by which individuals alleged to have a mental illness or other mental impairment are deprived of their liberty and confined to an in-patient hospital setting for treatment.

245. The U.S. Supreme Court has held that persons who have not been convicted or suspected of any criminal conduct may be detained if it can be determined that, by reason of a mental disease or defect, they are likely to cause harm to themselves, or to others. United States v. Addington, 441 U.S. 418 (1978). All states have civil commitment statutes that allow a person to be committed to a mental health facility for treatment and care. Because such statutes permit the state to deprive citizens of their liberty, the state is required to satisfy an exceptionally high standard of proof, illustrating both the mental state of the individual and the imminent danger posed by the person. As the Supreme Court noted in 1978, "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence". United States v. Addington, supra, at 427. Most states require "clear and convincing" evidence to be presented, others possess a "clear, cogent, and convincing" standard, and a few states require an even higher standard of "clear, unequivocal and convincing" proof.

246. While the states and the federal government retain the power to commit individuals in the various circumstances noted above, the U.S. Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection". United States v. Addington, supra, at 425; see also Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); In re Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967). Recognizing the unique, non-criminal status of individuals detained in this manner, the Supreme Court has affirmatively noted that "in a civil commitment state power is not exercised in a punitive sense". United States v. Addington, supra, at 428.

247. The same rules apply to the states. State law usually requires, as a prerequisite to involuntary confinement, proof that patients have a mental disability that renders them dangerous to themselves or others, or, less commonly, gravely disabled and unable to care for basic needs. The process is initiated when a third party petitions a local court asking the court to commit an individual. Following receipt of the petition, the court holds a hearing to determine whether the individual whose commitment is sought meets the jurisdiction's commitment standard. An emergency commitment can be ordered without a hearing for a period of time which is usually 72 hours. Allegedly mentally ill individuals are represented by counsel in these proceedings, but other procedural requirements vary from state to state. In addition, the Miranda rule described above applies to state custodial interrogations. See, e.g., Etelle v. Smith, 451 U.S. 454 (1981).

248. Voluntary commitment includes procedures where individuals sign themselves into a facility for treatment as well as actual third-party- initiated commitments or admissions to hospitals. State statutes typically permit the superintendent of a facility to admit an individual if the superintendent believes the person to be "suitable for admission", and parents may commit their dependent children through various procedures without a court hearing. The U.S. Supreme Court has held, however, that the deprivation of liberty involved in so-called voluntary commitment requires that a neutral fact-finder determine the child's suitability for commitment. Parham v. J.R., 442 U.S. 584 (1979).

249. A person who is acquitted on a criminal charge by reason of insanity may continue to be confined after acquittal only after a determination that the individual is both mentally ill and dangerous. Foucha v. Louisiana. 112 S.Ct. 1780 (1992).

250. All states provide patients with the right to habeas corpus to contest the legality of their commitments. Moreover, state statutes afford patients a right to have the need for their confinement reviewed periodically. These statutes are an outgrowth of the Supreme Court's holding in Donaldson v. O'Connor, 422 U.S. 563 (1975), that even where an individual's initial commitment may have been founded on a legally adequate basis, confinement cannot continue after the basis no longer exists.

251. **Detention of illegal immigrants**. Non-citizens who are apprehended attempting to enter the United States illegally (excludable aliens) or who are apprehended following entry into the United States (deportable aliens) may be detained pending exclusion or deportation hearings or returned to their home countries. Detention is generally based on the conclusion that a particular alien poses a danger to the community or is likely to abscond.

252. In the case of some excludable aliens who have committed serious crimes in the U.S. and have served their criminal sentences, or who have serious mental illnesses, immigration detention has lasted for considerable periods due to concerns that the particular aliens involved pose a danger to the community and the refusal of their home country to accept them back. Their detention, which is currently authorized under section 236(b) of the Immigration and Nationality Act, has repeatedly been challenged as unauthorized by law, unconstitutional or arbitrary and in violation of international law, with limited success to date. See Alvarez-Mendez v. Stock, 746 F. Supp. 1006, aff'd 941 F.2d 956 (1992), cert. denied, 113 S.Ct. 127 (1992) (general principles of international law allegedly forbidding arbitrary detention were not applicable to detention of Cuban national found excludable and deportable; detention to protect society is not punishment); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), cert. denied, Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986) (the Attorney General has implied authority to detain excludable aliens indefinitely); but see Barrera-Echavarria v. Rison, 21 F.3d 314 (9th Cir. 1994), pet. reh'g. filed (16 May 1994) (granting habeas corpus to a Mariel Cuban).

253. Both excludable and deportable aliens in the United States have a right to apply for habeas corpus (see below), as well as political asylum and withholding of exclusion/deportation. The application of U.S. immigration law to illegal aliens, and their rights in immigration proceedings, are discussed in detail under article 13.

254. **Habeas corpus relief**. The procedures set out above guarantee that throughout the U.S. a neutral judge will promptly and repeatedly be available to make judgements about the lawfulness of detention. In addition, habeas corpus is an historic remedy available to persons subject to restraint of their liberty. Hensley v. Municipal Court, 411 U.S. 345, 351 (1973). Art. I, section 9, cl. 2 provides that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it". Through habeas corpus a person may obtain an immediate judicial hearing on the legality of the detention and an order directing the official who holds him in custody to release him, if appropriate. Wales v. Whitney, 114 U.S. 564, 574 (1885). In particular, a person in custody who has not been formally arrested and provided a preliminary hearing, as is required by law, may seek immediate release through an application for a writ of habeas corpus that he may file in either federal or state court. See United States ex rel. Davis v. Camden County Jail, 413 F. Supp. 1265, 1268 n.3 (D.N.J. 1976).

255. The process for obtaining habeas corpus relief is less onerous than other remedies; the Supreme Court has

emphasized that the "very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected". Harris v. Nelson, 394 U.S. 286, 291 (1969); Hensley v. Municipal Court, 411 U.S. at 350.

256. The right of a person to habeas corpus relief generally depends on the legality or illegality of his detention, i.e. whether the fundamental requirements of law have been complied with, and not on the underlying issues of guilt or innocence. However, the fundamental requirements of the law require that a person cannot be subject to detention unless a neutral and detached magistrate makes an independent finding that there is sufficient probable cause to believe that person committed an offence. Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

257. Because there are other constitutional and statutory guarantees, the writ of habeas corpus is little used in practice as a remedy for protecting detainees in criminal cases. The writ can also be used to review a final conviction - in addition to the statutory right to appeal one's conviction - as well as to challenge execution of a sentence or to challenge confinement that does not result from a criminal conviction, such as the commitment into custody for mental incompetency or detention for immigration reasons.

258. **Right to compensation**. U.S. law at the federal and state levels provides ample remedies to victims of unlawful arrests and other miscarriages of justice. As described under article 2, victims of unlawful arrest or detention may collect damages from federal law enforcement officials for violations of their constitutional rights, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Congress has by statute provided for similar relief against state officials, 42 U.S.C. section 1983. Victims also have rights to compensation against state officials under provisions of state law. In both contexts, the defendants to such actions may raise the defence of qualified immunity, which is designed to protect the discretion of law enforcement officials in the exercise of their official functions. In some instances, immunity has been waived by statute, such as the Federal Tort Claims Act. In other cases, compensation may be available through insurance, or by special act of the legislature. There is, however, no constitutional or statutory requirement of compensation for all persons who have been arrested unlawfully. For this reason, and because the U.S. Government believes that few, if any, states actually provide an absolute right of compensation to all victims of unlawful arrest regardless of the circumstances, the U.S. conditioned its acceptance on the following understanding:

> "The United States understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law."

Article 10 - Treatment of persons deprived of their liberty

259. **Humane treatment and respect**. As discussed in connection with article 7, the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution, as well as federal and state statutes, regulate the treatment and conditions of detention of persons deprived of their liberty by state action. In addition, as discussed below, at both the federal and state levels a number of mechanisms exist to ensure that, through enforcement of their constitutional and statutory rights, prisoners are treated with humanity and respect for their dignity, commensurate with their status.

260. In all criminal correctional systems, the policies and practices of prison staff are governed by official regulations. These regulations are based on U.S. and state constitutional requirements, and, with the exception of rules dealing exclusively with staff or security issues, are generally available to inmates through inmate libraries. Few if any systems' regulations comply with every provision of the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials, but most do substantially comply. For example, most U.S. department of corrections' regulations do not incorporate the United Nations standard that no male staff shall enter a women's institution unless accompanied by a woman. None the less, the important underlying issue of sexual abuse is addressed through staff training and through criminal statutes

prohibiting such activity. For example, federal correctional officers are given training regarding appropriate behaviour towards inmates of the opposite sex, and 18 U.S.C. section 2243 provides that anyone who engages in a sexual act with a person in a federal prison may be subject to a fine and/or a term of imprisonment.

261. As evidenced by the many successful suits that have been brought to enforce detainees' rights, the actual practice of detention in the United States frequently does not meet constitutional standards. Overcrowding in country jails is a perpetual problem, especially as the federal government often must rely upon those jails for pretrial detention. When prison policies are, on their face, inconsistent with constitutional provisions, or when the conduct of staff does not comport with policy, prisoners generally can bring their complaints to the attention of prison administrators through internal grievance procedures. A prisoner can also file suit in the appropriate federal or state court. Additionally, there are less formal mechanisms of complaint, such as writing letters to government representatives or to private activists apprising them of inmate concerns. Inmates are also afforded liberal access to the media through both written correspondence (28 C.F.R. section 540.20 (C)) and in-person interviews. In many instances these informal mechanisms give rise to internal and outside investigations of prison conditions and procedures.

262. With regard to civil commitments, current statutes and judicial decrees typically involve a host of procedural safeguards, including notice to relevant individuals, judicial hearings, representation of counsel, and presentation of evidence and cross-examination of adverse witnesses. Multiple opinions from mental health professionals are almost always required. Individuals detained as a result of their mental state are given appropriate mental health treatment and are regularly evaluated for possible release.

263. **Correctional systems: federal government**. Individuals convicted of federal crimes are sentenced by U.S. District Courts to the custody of the United States Attorney General. The Attorney General is appointed by the President and confirmed by the U.S. Senate, and manages the U.S. Department of Justice (DOJ). The Attorney General delegates custody responsibilities to the Federal Bureau of Prisons (BOP). The Director of the Bureau of Prisons retains full administrative responsibility for offenders designated to the Attorney General's custody.

264. The BOP operates nearly 80 correctional facilities across the United States. Offenders are placed in institutions based upon a host of factors, including the severity level of their offences, their criminal history, and any special needs or requirements. Persons being detained prior to their trial, or while waiting for their immigration hearings, are normally designated to special "detention" facilities or housing units within correctional institutions. These inmates are, to the extent practicable, managed separately from convicted offenders. See 18 U.S.C. 3142 (i)(2).

265. Federal offenders may be sentenced directly to privately owned community corrections centres (CCCs), also known as "halfway houses". These facilities are usually owned and administered by private, non-profit service organizations (the Salvation Army, religious associations, etc.). Offenders serving part or all of their federal sentences in CCCs are still under the custody of the Attorney General and the BOP, although the daily management of these offenders is administered by the CCC professional staff. Private halfway houses are monitored regularly by BOP staff who provide training to CCC staff and who inspect the facilities to ensure that the CCC is in compliance with federal regulations regarding offender programme needs and facility safety requirements.

266. The operation of federal correctional institutions is directly supervised by the Director of the Bureau of Prisons, who reports to the Attorney General. When problems arise or allegations are raised regarding misconduct, the Attorney General may initiate an investigation. The Office of Inspector General within the Department of Justice conducts such investigations at the Attorney General's request. In addition, the BOP investigates allegations of staff misconduct internally through its Office of Internal Affairs. A separate branch of the Department of Justice may become involved if there is reason to believe the prisoners' rights are being violated. The legislative branch, the U.S. Congress, may initiate an investigation of the BOP's operations where problems are brought to their attention. Finally, federal courts may be called upon to resolve problems.

267. **State and local systems**. State prisons are normally operated by state corrections agencies. These agencies

are normally located within the state's executive department, reporting to the governor or the state attorney general, though some are part of the health and human services or law enforcement division. State departments of corrections are structured in a fashion similar to the federal government. Persons are committed to the custody of the state department of corrections for service of a term of imprisonment. Where there are allegations of problems or improper behaviour, an investigation may be undertaken by the state's attorney general or by another branch of the government. An investigation may also be undertaken by federal authorities (such as the Civil Rights Division of the Department of Justice), particularly if the prisoner claims his constitutional rights have been violated. The matter also may be resolved in state or federal court.

268. County and local jails are supervised by the county or local government in which they are located. County jails, as well as county governments, are ultimately responsible to their respective state governments. In some large metropolitan areas, municipal or city governments may also exercise correctional authority, subject to state and federal law. Many states have systems of jail inspections to ensure that these local facilities are operated in conformity with state and local standards.

269. **Staff training**. All correctional staff in the United States are required to complete orientation programmes.

270. All Bureau of Prisons employees receive basic training during an intensive three-week "Introduction to Correctional Techniques" course at the Bureau of Prisons Staff Training Academy at the Federal Law Enforcement Training Center in Glynco, Georgia. This training programme provides professional instruction in three categories: academics, firearms, and self-defence. Prior to working in correctional facilities, staff members must successfully complete this programme and also participate in "institutional familiarization" courses within the correctional institutions at which they will work. Bureau of Prisons staff members are required to participate in "annual refresher training" programmes conducted at the beginning of every year for the duration of their employment with the agency.

271. State and local criminal justice systems have independent systems of training corrections officers. Prison staff are generally trained by spending several weeks at a training academy. The majority of such training programmes consist of familiarizing new employees with department of corrections policies regarding inmate treatment, taking into account appropriate state and federal law. Such policies address issues such as proper search techniques, correspondence and telephone guidelines, use of force, etc. These policies dictate permissible and appropriate staff (and inmate) behaviour with respect to most aspects of prison life. Accordingly, it is essential that staff are aware of the substance of such rules.

272. In addition to subjects addressed by department of corrections regulations, subjects of instruction include race relations, mental health issues, introduction to correctional law, prisoner-staff relations, communication skills, self-defence and firearms training. Following the training at the academy, most correctional workers spend several weeks in on-the-job-training where they become more familiar with the workings of the particular institution to which they are assigned and gain some experience in dealing with inmates. Yearly refresher training is required of most correctional workers.

273. The American Corrections Association, a private, non-profit organization, has as its purpose to promote improvement in the management of American correctional agencies through the administration of a voluntary accreditation programme and the ongoing development of relevant, useful standards. The accreditation process began in 1978 and currently involves about 80 per cent of all state departments of corrections and youth services as active participants, as well as facilities operated by the District of Columbia and the U.S. Department of Justice.

274. ACA standards require that "a written body of policy and procedure establishes the institution's training and staff development programmes, including training requirements for all categories of personnel". They also require that all new full-time employees receive 40 hours of orientation training before undertaking their assignments. Orientation training includes at a minimum the following: orientation to the purpose, goals, policies, and procedures of the institution and parent agency; working conditions and regulations; employees' rights and responsibilities; and an overview of the correctional field. Depending on the employee(s) and the

particular job requirements, orientation training may include preparatory instruction related to the particular job. ACA Standards, 1990. Facilities must provide specific training programmes for administrative staff, specialist employees, professional workers, support staff, clerical workers, part-time and contract individuals. Training needs and programmes must be reviewed and updated annually.

275. Many correctional training and staff development programmes are supplemented by the resources of public and private agencies, local police academies, private industry, colleges, universities, and libraries. Outside guidance and assistance for the institution's training programme can take the form of materials, equipment, course development, and evaluation techniques. Training opportunities are also available for state and local agencies at the national level. The National Institute of Corrections, the National Academy of Corrections, the National Institute of Justice, the Federal Bureau of Investigation, large corporations, and various professional groups all provide managerial, specialized, and advanced training opportunities for state and local corrections officials in addition to the basic training provided in the institutions.

276. Complaints. The Department of Justice receives and acts on complaints sent directly from both federal and state prisoners. Such letters are received regularly both by the Civil Rights Division and by the Federal Bureau of Investigation (FBI). All letters from prisoners are carefully reviewed to determine if they state a basis for a criminal investigation. Those which complain about conditions of confinement are referred to the Civil Rights Division's Special Litigation Section to determine if any civil action may be warranted pursuant to the Civil Rights of Institutionalized Persons Act.

277. The Civil Rights Division's Criminal Section also receives referrals from the Federal Bureau of Prisons. When a federal prisoner complains to the federal prison about the conduct of a prison official - typically a correctional officer - and the substance of that complaint indicates a possible criminal violation, the Bureau of Prisons immediately transmits the complaint to the Civil Rights Division for review.

278. If a letter from a prisoner, or the prisoner's complaint forwarded by the Bureau of Prisons, indicates that a prosecutable civil rights offence may have occurred, the FBI conducts a preliminary investigation. Typically, these complaints will allege the use of excessive force by a prison guard. In its investigation the FBI will interview the victim and any witnesses, and will obtain any relevant written records, such as incident reports or medical records. The results of this investigation are analysed by an attorney in the Criminal Section to determine what facts can be proven and whether these facts indicate that a criminal civil rights violation has occurred. If so, the attorney may recommend that a grand jury investigation be instituted. The grand jury investigation may lead to indictment and criminal prosecution of the prison official.

279. Many complaints involve individual grievances, including alleged wrongful conviction of a criminal offence, problems involving parole, grievances against the convict's counsel, request for transfer to a different facility, and other requests for personal assistance. For the most part, the Department of Justice is without authority to address these individual problems, but other remedies may be available.

280. Other complaints allege systemic deficiencies, e.g. lack of adequate medical care, violence, abuse and neglect of a significant number of individuals, lack of adequate staff to afford necessary services and supervision, lack of safety for individuals confined, insufficient treatment or training for mentally disabled individuals, inadequate sanitation, and the like. Pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. section 1997e, the Attorney General has authority to investigate various public facilities where she believes that conditions are subjecting confined individuals to a pattern or practice of deprivations of their constitutional rights. Since the passage of the statute in 1980, some 150 institutions have been investigated.

281. Prosecutions. Abuses do sometimes occur in jails and prisons in the United States. The states can and do prosecute their abusive prison officials. In addition, the Department of Justice has conducted prosecutions in a variety of cases involving federal and state prison officials. The following are illustrative examples of such prosecutions:

(a) In 1990 three correction officers of the Adult Correctional Facility at Cranston, Rhode Island, were sentenced to prison terms ranging from six months to a year for beating an inmate who had been convicted of child molestation. Upon his arrival at the prison, the inmate was beaten about the head and kicked in the ribs by a group of guards;

(b) In 1991, five prison guards at Cross City Correction Institute in Florida were convicted and sentenced to terms ranging from nine months to nearly six years. The guards had roamed the prison shortly after a riot and beaten prisoners in retaliation. Some of the prisoners beaten had not even participated in the riot. Several of the prisoners suffered severe injuries, including one inmate who lost an eye when he was kicked in the face while down on his hands and knees;

(c) In 1993, the Chief Correctional Officer of the Washington County Jail in West Virginia was sentenced to 37 months' incarceration and ordered to pay $14,933 in restitution after he pleaded guilty to coercing women inmates into having sexual encounters with him. The defendant exchanged drugs and prison privileges for sex and threatened inmates that if they did not cooperate with him, they would be transferred or not released from jail.

282. Since October 1988, the Department of Justice has filed charges in approximately 126 cases of official misconduct. These cases involved approximately 180 police officers. About 15 of the cases involved officials violating the civil rights of a prisoner or person in jail; approximately 55 officials were involved in such cases.

283. Segregation of the accused from the convicted. A suspect detained pending trial is entitled to greater rights and privileges than convicted persons and may not be punished. To ensure these rights and privileges are provided, accused persons are, to the extent practicable, segregated from convicted persons. United States v. Lovett, 328 U.S. 303 (1946). Such separation is required by federal law, 18 U.S.C. section 3142, and many state laws contain similar provisions. Separation of federal detainees is accomplished by housing pretrial detainees in separate units within Metropolitan Correctional or Detention Centres, or in local jails, or in federal correctional institutions. See 28 C.F.R. section 551.104. When consistent with the security and good order of the correctional facility, and where it appears to present no danger to the detainee, a pretrial detainee, at the detainee's request, may be intermingled with convicted prisoners in order to participate in programmes. Most state and county corrections policies require separation of individuals based upon their conviction status, whenever practicable. When possible, pretrial detainees are separated from convicted offenders. Due to overcrowding in most correctional systems, the separation of pretrial and convicted offenders is not always possible due to space constraints. Moreover, in the military justice system, segregation of the accused from the convicted cannot always be guaranteed in light of military exigencies.

284. U.S. understanding. Because of the above and related concerns, the United States included in its instrument of ratification the following statement of understanding:

"The United States understands the reference to 'exceptional circumstances' in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons."

285. Treatment of juveniles. U.S. law, policy, and practice are generally in compliance with the Covenant's requirements regarding separate treatment of juveniles in the criminal justice system. In general, children deprived of their liberty in the U.S. are constitutionally entitled to treatment appropriate to their age and status. Courts have developed a substantial body of case law in this area, requiring, inter alia, that incarcerated children be accorded decent accommodations, education and support services. See e.g. Inmates of Boys' Training School v. Afflack, 346 F. Supp. 1354 (D.R.I. 1972). Federal law requires that juvenile offenders be completely segregated from adult inmates. See 18 U.S.C. section 5039. Most state and local correctional facilities never place juvenile offenders with adult prisoners, regardless of overcrowded conditions. Separate facilities, or units

within facilities, are often utilized to ensure that these groups remain apart. In the vast majority of jurisdictions, children who are deprived of their liberty are housed in facilities or homes devoted solely to juveniles. In those cases in which juveniles and adults are housed in the same facility, they are completely segregated. The only exception to this practice occurs when an older juvenile's case has been transferred to the adult criminal court and he or she is subsequently imprisoned as an adult.

286. U.S. reservation. None the less, close consideration of the Covenant's provisions in this regard indicated that it would be prudent to retain a measure of flexibility to address exceptional circumstances in which trial or incarceration of juveniles as adults might be appropriate, for example, prosecution of juveniles as adults based on their criminal histories or the especially serious nature of their offences, and incarceration of particularly dangerous juveniles as adults in order to protect other juveniles in custody. Moreover, there is no separate system for juveniles within the United States armed services. Individuals are permitted to enlist in the military at age 17. They are subject to the Uniform Code of Military Justice as fully as other members of the military. Cadets of the service academies also are subject to the Code. Accordingly, the United States included the following reservation in its instrument of ratification:

> "[T]he policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18."

287. Reform and rehabilitation. While there is no right under the U.S. Constitution to rehabilitation, Coakley v. Murphy, 884 F.2d 1218 (9th Cir. 1989), all prison systems have as one of their goals the improvement of prisoners to facilitate their successful reintegration into society. For example, the Federal Bureau of Prisons' mission is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, and appropriately secure, and which provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. Moreover, Bureau of Prisons regulations require virtually all BOP institutions to provide a range of academic, occupational, and leisure-time activities to allow inmates to improve their knowledge and skills. 28 C.F.R. section 544.80-544.83.

288. While the extent of educational, vocational, and treatment programmes varies among prison systems, such programmes are an integral part of every correctional institution. In nearly all prison systems able-bodied sentenced prisoners are required to work, although exceptions are made for inmates who are enrolled in educational and vocational training programmes. Pretrial detainees, persons committed for mental health studies, material witnesses and other non-convicted detainees may not be forced to work other than to maintain their personal living space. In many cases these prisoners agree to work; many do so to alleviate boredom and to earn spending money or to assist their families. While not required by the Constitution, prisoners are usually compensated for their services, though the pay is modest. Correctional institutions employ prisoners in industry (manufacturing furniture and many other items), data processing, and maintenance and repair. Inmates with a low security classification may be released during the day to work on community projects such as maintaining state and federal parks and public roads. Some federal correctional institutions are located on the grounds of military bases and the inmates provide support services to the military such as lawn maintenance. Some correctional institutions allow private businesses to employ prisoners, but such arrangements are complicated as to appropriate compensation for the prisoners. See Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Cir. 1991).

289. In addition to providing necessary services to the correctional institution, jobs enable the inmates to earn money to help support their families, and to receive training for employment after release. Many prisons offer vocational training programmes such as auto mechanics and metal work that allow prisoners to become certified to pursue a trade upon release.

290. Some prisoners incarcerated in correctional institutions operated by the Federal Bureau of Prisons have the opportunity to work in Federal Prison Industries (tradename UNICOR). UNICOR operates factories, printing plants, and data-processing centres to produce a vast array of goods and services sold to components of the federal government. Inmates who work in UNICOR earn up to $1.40 per hour, substantially more than inmates employed in institution maintenance positions. Moreover, they learn skills applicable to many private sector jobs.

291. All prisons have education programmes and inmates are strongly encouraged to participate. Federal law requires the Bureau of Prisons to operate a mandatory functional literacy programme for inmates to ensure that inmates possess reading and mathematical skills equivalent to the eighth grade level. Further, non-English-speaking federal inmates must participate in an English as a second language programme until they also meet the literacy requirements. 18 U.S.C. section 3624(f). In addition to basic educational programmes including the preparation for the Federal Education Development certificate, many prisons offer university courses by correspondence or by bringing college instructors to the prison. Staff encourage inmates to enrol in such programmes, and they assist inmates in exploring sources of funding. See e.g. 28 C.F.R. section 544.20-21.

292. Federal prisoners are also given the opportunity to participate in social education programmes designed to "improve their interpersonal relationships, communication, self-motivation, realistic goal setting, and positive self-concept". 28 C.F.R. section 544.90.

293. A significant number of prisoners suffer from chemical and alcohol dependency; specifically, 47 per cent of federal inmates manifest such problems. Accordingly, correctional institutions have drug and alcohol treatment programmes designed to help the prisoners overcome their dependencies. Some programmes offer inmates individual or group counselling sessions, and other, more intensive programmes, involve full-time treatment. These programmes extend into an intensive community supervision phase to help offenders remain drug-free upon release.

294. In furtherance of the programmes described above and in order to protect the safety of prisoners and staff alike, prison administrators have found it useful to classify prisoners and house prisoners with others who share some important characteristics. For example, it would be dangerous to house young, inexperienced, non-violent offenders with older men who have spent a great deal of their lives in prison for the commission of violent, predatory crimes. Accordingly, prisoners are classified at a particular security level prior to their admission into a correctional institution. Classification decisions are based on age, prior criminal history, offence giving rise to the imprisonment, history of escape or violence, history of prison misconduct, as well as the prisoner's needs regarding treatment, education, and release planning.

295. **The military justice system**. The Department of Defense has established uniform policies among the military services in the treatment of prisoners, the operation and administration of correctional facilities and programmes, and the consideration of prisoners for return to duty, clemency, or parole. DoD Directive (DoDD) 1325.4, 19 May 1988. Consistent with this policy, members of the military deprived of their liberty because they have committed criminal offences are treated humanely, with respect for their dignity and in a structured behavioural treatment system the fundamental goals of which are reformation and rehabilitation.

296. The objective of the confinement and correction programme in the military is to provide quality confinement and rehabilitative services to commanders. Use of positive measures and rehabilitation is intended to prepare the maximum number of prisoners for return to military duty with improved attitudes and behaviour, and to return those judged unfit for further military duty to the civilian community as more productive and responsible citizens. The goals of the confinement and correction programme are to help individuals solve their problems, correct their behaviour, and improve their attitudes toward self, military, and society.

297. On confinement, the confinement officer or appointee determines a custody grade for the prisoner. As a rule, medium is the initial custody grade unless there is a specific reason to assign the prisoners to maximum or minimum custody. Prisoners are assigned to maximum custody if they are a danger to themselves or others, present a high escape risk, or are sentenced to death. Maximum custody prisoners are confined separately in a

single cell. Medium custody prisoners require continuous supervision. They are eligible for normal work assignments outside the confinement or correction facility. Minimum custody prisoners require little supervision due to trustworthiness, attitude, and dependability. With approval from the installation commander, minimum custody prisoners may go to and from work or appointments without escort.

298. Military prisoners are employed in maintenance and support activities that provide useful and constructive work. Work assignments must be consistent with the prisoner's grade, custody level, physical and mental condition, behaviour, sentence status, and previous training. Assignments should contribute toward the prisoner's correctional treatment and the needs of the confinement or correction facility. Prisoners not in training for return to duty will normally be assigned to work projects in preparation for return to civilian life.

299. **U.S. understanding**. While acknowledging that reformation and social reform of prisoners are fundamental objectives, the United States included the following interpretive statement in its instrument of ratification:

> "The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence and incapacitation as additional legitimate purposes for a penitentiary system."

Article 11 - Freedom from imprisonment for breach of contractual obligation

300. In the United States, imprisonment is never a sanction for the inability to fulfil a private contractual obligation. Contract law generally provides remedies for the promisee rather than punishment for the promisor. Breach of contract is a civil matter and imprisonment is never a civil remedy. The historical remedies for failure to fulfil a contractual obligation include assessment of damages to be paid by the non-fulfilling party to compensate the other party to the contract for his losses. Where damages cannot remedy the situation, the court can enter an order directing the party to specifically perform. The purpose of remedies in contract law is to correct the problem or ameliorate the adverse consequences, not to punish the non-performing party.

Article 12 - Freedom of movement

301. In the United States, the right to travel - both domestically and internationally - is constitutionally protected. The U.S. Supreme Court has held that it is "a part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment". Zemel v. Rusk, 381 U.S. 1 (1965). As a consequence, governmental actions affecting travel are subject to the mechanisms for judicial review of constitutional questions described elsewhere in this report. Moreover, the United States Supreme Court has emphasized that it "will construe narrowly all delegated powers that curtail or dilute citizens' ability to travel". Kent v. Dulles, 357 U.S. 116, 129 (1958).

302. Within the United States, there are no restrictions on movement or change of residence from state to state or city to city, save in exceptional situations, in which such restrictions would be warranted under paragraph 3 of this article (restriction of movement for persons under investigation, subpoena, or arrest warrant in a criminal matter, or restriction as a condition of probation or parole), or by a state of emergency under article 4 or to protect national security under paragraph 3 of article 12. Nor is there a registration requirement for citizens. Under the Alien Registration Act, 8 U.S.C. section 1302, non-resident aliens over the age of 14 who remain in the United States over 30 days, and who were not registered and fingerprinted in their visa application process, must register and be fingerprinted. This registration requirement does not, however, restrict movement.

303. **Citizen travel: passports**. Section 215(b) of the Immigration and Nationality Act, 8 U.S.C. section 1185(b), establishes a general requirement that U.S. citizens use a passport to depart from or enter the United States. No civil or criminal penalty is provided, however, for failure to comply with this statute. A passport is not required for travel within the United States or between the United States and any part of either North or South America, except Cuba. Exceptions to the general rule requiring passports for foreign travel are also made for U.S. citizens travelling in their official capacity as merchant mariners or air crewmen, or on active military duty.

An exception also exists for citizens under 21 whose parents are employees of a foreign Government, and who either hold or are included in a foreign passport. There are also limited circumstances in which a citizen can obtain a special pass from a consular officer or specific authorization from the Secretary of State to have the passport requirement waived.

304. **Mandatory denial**. Passports are issued to applicants as a matter of course in all but a few rare situations. Except for direct return to the U.S., the law provides that a passport shall not be issued to an applicant subject to a federal arrest warrant or subpoena for any matter involving a felony. Furthermore, a passport shall not be issued where the applicant is subject to a court order or condition of parole or probation which forbids departure from the U.S. Passports will also be refused if the applicant has not repaid loans received from the United States for certain expenses incurred while the applicant was a prisoner abroad. Nor will a passport be issued if the applicant is under imprisonment or supervised release for any conviction, at either the state or federal level, for a felony involving a controlled substance.

305. In any case, including for direct return to the United States, a passport may be refused where the applicant has not repaid a loan received from the United States to effectuate his return from a foreign country, where the applicant has been declared incompetent, or where a minor applicant does not have the necessary consent of legal guardians. Moreover, a passport may be refused if the Secretary of State determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States. Finally, a passport may be refused when the applicant is subject to imprisonment or supervised release for a misdemeanour drug conviction, other than a first offence for possession, if the individual used a U.S. passport or otherwise crossed an international border in committing the offence.

306. A passport may be revoked, restricted, or limited where the national would not be entitled to a passport as described above, or where the passport was obtained by fraud, or fraudulently altered or misused. Unless specifically validated therefore, a U.S. passport shall cease to be valid for travel into or through any country or area at war with the United States. U.S. passports may also be invalidated for travel through areas in which armed hostilities are in progress, or where there is imminent danger to the public health or physical safety of U.S. travellers. Such determinations are made by the Secretary of State and are published in the Federal Register.

307. When a passport has been denied or revoked, the person affected receives notice in writing, and may go through a review process. The adversely affected person has 60 days to require the Department of State or the appropriate Foreign Service post to establish the basis for its action in a proceeding before a hearing officer. At the private hearing, the adversely affected person may appear and testify, present witnesses and other evidence, and make arguments. If the person wishes, he or she may be represented or assisted by an attorney. The adversely affected person is entitled to be informed of all evidence before the hearing officer and of the source of such evidence, and may confront and cross-examine adverse witnesses. In the event of an adverse decision, the adversely affected person has 60 days to appeal to the Board of Appellate Review of the Department of State. In either the original complaint and the subsequent appeal, if the adversely affected person fails to take advantage of the 60-day window, the matter is closed and not subject to further administrative review.

308. U.S. law provides generally that "a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers". 22 U.S.C. section 211a. Controls are currently in effect under this statute for Lebanon, the Libyan Arab Jamahiriya, and Iraq; passports are validated for travel to these countries on a case-by-case basis. Apart from the above restrictions, there does not exist any legal authority that would permit the United States Government directly to prevent the peacetime travel of U.S. citizens abroad, except pursuant to United Nations Security Council mandatory sanctions. In extraordinary circumstances, limitations may be imposed, e.g. on travel-related transactions with a foreign government or country, on the grounds of national or international security (e.g. pursuant to United Nations Security Council sanctions, the International Emergency Economic Powers Act, 50 U.S.C. section 1701, or the Trading with the Enemy Act, 50 U.S.C. App. 5(b), Regan v. Wald, 468 U.S. 222 (1984)) which, while not regulating travel directly, may have the indirect effect of limiting travel. Recent legislation has prohibited the imposition of new controls on travel-related transactions under IEEPA after

30 April 1994. This does not affect existing controls or new controls mandated by the United Nations Security Council.

309. A citizen of the United States who can prove his or her citizenship cannot be deprived of the right to return to the United States under any circumstances. However, if a person comes to the United States and has no acceptable documentation relating to citizenship or nationality, such as a passport or birth certificate, then the immigration officer at the port of entry may detain that person and conduct an investigation to determine citizenship. 8 C.F.R. 235.1.

310. Non-U.S. citizens are free to leave the United States and to return to their country of origin, or to travel to third countries, except in rare instances. Departure may be denied, for example, to aliens who are fugitives from justice on account of an offence punishable in the United States. If departure is restricted pursuant to a departure control order, the alien will be given written notice of that restriction, and will be entitled to an administrative hearing. See generally 8 C.F.R. Part 215.

311. As noted above, travel within the United States is generally unregulated and unrestricted. In exceptional circumstances, however, aliens are subject to certain conditions regarding their travel. In most cases, such persons are diplomatic personnel or governmental representatives to international organizations. Travel of diplomatic personnel may be restricted on the basis of reciprocity where travel of U.S. personnel is restricted in the foreign state; travel of aliens in either category may be restricted where they are considered to present a security risk to the United States. Rarely, other individuals who might otherwise be denied entry to the United States are permitted entry subject to restrictive travel conditions on national security grounds, e.g. where the individual has a past association with terrorist activity.

Article 13 - Expulsion of aliens

312. The United States has a strong tradition of supporting immigration and has adopted immigration policies reflective of the view that immigrants make invaluable contributions to the fabric of American society. At present, the United States provides annually for the legal immigration of over 700,000 aliens each year, with special preferences granted for family reunification and employment skills purposes. In addition, the United States grants admission to some 120,000 refugees from abroad annually, and accords political asylum to many others within the United States. Notwithstanding these large programmes for legal immigration to the United States, illegal immigration to the United States continues in substantial numbers. The total number of aliens illegally in the United States is currently estimated to be over 3 million. Due to the ease of travel and relative lack of residence controls within the United States, as well as the extensive procedural guarantees accompanying deportation, aliens who enter the continental United States illegally, or who stay on illegally after an initial lawful entry, are often able to remain for many years.

313. Aliens who have entered the United States, whether legally or illegally, may be expelled only pursuant to deportation proceedings, as described below. (Different procedures apply to diplomatic representatives, who may be declared persona non grata.) The legal protection for such persons includes the extensive procedural safeguards provided by the Immigration and Nationality Act (INA), U.S.C. section 1101 et seq., and rests fundamentally on the constitutional rights of due process afforded to all. As the Supreme Court has stated:

> "Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Shaughnessy v. United States, 206 U.S. 206, 212 (1953).
>
> "Whatever his status under the immigration laws, an alien is surely a 'person' [for purposes of certain constitutional guarantees] in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210 (1981).

314. The term "entry" is generally defined under INA section 101(a)(13) as "any coming of an alien into the United States from a foreign port or place". Aliens within the United States who were inspected and admitted as well as those who evaded inspection and came into the United States illegally are considered to have effected an "entry". Persons who attempt illegal entry but are detected at the border prior to entry are occasionally allowed into the United States for further processing of their entry claims (in lieu of return to their home country or detention at the border), or under the Attorney General's discretionary parole authority. Such excludable aliens, whose presence in the United States results solely from the limited, conditional permission of the United States Government, are not considered to have entered the United States for immigration purposes. They generally are subject to exclusion proceedings, as described below, which provide some due process protections, although not as extensive as those provided in deportation proceedings.

Deportation

315. Aliens who have entered the United States and who violate U.S. immigration laws are subject to deportation proceedings. Grounds for deportation include: (i) excludability at time of entry or adjustment of status; (ii) entry without inspection; (iii) alien smuggling; (iv) marriage fraud; (v) criminal offences; (vi) falsification of documents; (vii) security grounds; (viii) public charge grounds.

316. Deportation hearing. In general, a proceeding to determine the deportability of an alien in the United States is initiated with the filing of an Order to Show Cause (OSC), which describes the grounds for deportation, with the Office of the Immigration Judge. 8 C.F.R. sections 242.1(a), 3.14(a). INS may either take the alien into custody under the authority of a warrant, or release the alien on bond or on conditional parole. INA section 242 (a)(1); 8 C.F.R. section 242.2 (c)(1), (2).

317. Generally, an alien "is not and should not be detained or required to post bond except on a finding that he is a threat to the national security ... or that he is a poor bail risk". Matter of Patel, 15 I&N Dec. 666 (BIA 1976). The Attorney General is, however, obligated to take into custody any alien convicted of an aggravated felony, but may release the alien, if the alien demonstrates that the alien "is not a threat to the community and that the alien is likely to appear before any scheduled hearings". INA section 242(a)(2)(B); 8 C.F.R. section 3.19(h). Custody and bond determinations made by the Immigration and Naturalization Service (INS) may be reviewed by an immigration judge and may be appealed to the Board of Immigration Appeals (BIA). An alien's release on bond or parole may be revoked at any time in the discretion of the Attorney General. INA section 242(a).

318. Deportation hearings are open to the public, except that the immigration judge may, for the purpose of protecting witnesses, parties, or the public interest, limit attendance or hold a closed hearing in any specific case. 8 C.F.R. sections 242.16(a), 3.27(b); 3.27(c). Furthermore, an applicant for asylum or withholding of deportation may expressly request that the evidentiary hearing be closed to the public. 8 C.F.R. section 242.17(c)(4)(i).

319. During deportation proceedings, the immigration judge has the authority to determine deportability, to grant discretionary relief, and to determine the country to which an alien's deportation will be directed. The immigration judge must also: (i) advise the alien of the alien's right to representation, at no expense to the government, by qualified counsel of his choice; (ii) advise the alien of the availability of local free legal services programmes; (iii) ascertain that the alien has received a list of such programmes and a copy of INS Form I-618, Written Notice of Appeal Rights; (iv) advise the alien that the alien will have a reasonable opportunity to examine and object to adverse evidence, to present evidence, and to cross-examine witnesses presented by the government; (v) place the alien under oath; (vi) read the factual allegations and the charges in the order to show cause to the alien and explain them in non-technical language, and enter the order to show cause as an exhibit in the record. 8 C.F.R. section 242.16(a).

320. The INA mandates that the "alien shall have a reasonable opportunity to be present" at the deportation proceeding. INA section 242(b). The BIA has held that aliens "must be given a reasonable opportunity to present evidence on their own behalf, including their testimony". Matter of Tomas, 19 I&N Dec. 464, 465 (BIA 1987). The BIA has further noted that in most cases, "all that need be translated are the immigration judge's statements

to the alien, the examination of the alien by his counsel, the attorney for the Service, and the immigration judge, and the alien's responses to their questions". Matter of Exilus, 18 I&N 276, 281 (BIA 1982). However, "the immigration judge may determine ... that the alien's understanding of other dialogue is essential to his ability to assist in the presentation of his case". Id.

321. In a proceeding before an immigration judge "in which the [alien] fails to appear, the immigration judge shall conduct an in absentia hearing if the immigration judge is satisfied that notice of the time and place of the proceeding was provided to the [alien] at a prior hearing or by written notice to the [alien] or to [the alien's] counsel of record, if any, at the most recent address contained in the Record of Proceeding". 8 C.F.R. section 3.26.

322. If the alien concedes deportability and the alien has not applied for discretionary relief other than voluntary departure (discussed below), the immigration judge may enter a summary decision ordering deportation or granting voluntary departure with an alternate order of deportation. 8 C.F.R. section 242.18(b). The immigration judge may not accept an admission of deportability "from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which [an alien] is an inmate or patient". 8 C.F.R. section 242.16(b).

323. In cases where deportability is at issue and/or where the alien has applied for discretionary relief, the immigration judge receives evidence on the issues. The government must establish an alien's deportability by clear, convincing, and unequivocal evidence and must establish that the person is an alien. 8 C.F.R. section 242.14(a). If deportability is based on an entry violation, such as entry without inspection, however, after the INS establishes identity and alienage of the person, the burden shifts to the alien to show the time, place, and manner of his entry into the United States. If this burden of proof "is not sustained, such person shall be presumed to be in the United States in violation of law". INA section 291.

324. **Relief from deportation**. The immigration judge determines applications under INA sections 208(a) (asylum) (discussed under U.S. Asylum and Refugee Policy, below), 212 (waivers of excludability), 243(h) (withholding of deportation) (also discussed below), 244(a) (suspension of deportation), 244(e) (voluntary departure), 245(a) (adjustment of status), and 249 (registry).

(a) Waivers. Waivers are available for some of the grounds of deportation;

(b) Suspensions of deportation. Under INA section 244(a), the Attorney General may "suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien ... who applies for suspension of deportation" and (i) is deportable; (ii) subject to certain exceptions, has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application; (iii) proves that during all of such period he was and is a person of good moral character; and (iv) is a person whose deportation would in the opinion of the Attorney General result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. INA section 244(a)(1);

(c) Voluntary departure. The Attorney General may permit an alien to "depart voluntarily from the United States at his own expense in lieu of deportation" if such alien (i) is not deportable for criminal offences, falsification of documents or on security grounds; (ii) is not an aggravated felon; and (iii) establishes "to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure". INA section 244(e)(1);

(d) Registry. INA section 249 generally provides that the Attorney General may create a record if lawful admission for permanent residence for an alien, as of the date of the approval of his application, if (i) such alien is not excludable as participant in Nazi persecutions or genocide and not excludable under INA section 212(a) "as it relates to criminals, procurers, and other immoral

persons, subversives, violators of the narcotic laws or smugglers of aliens"; and (ii) the alien establishes that he entered the United States prior to 1 January 1972; has had residence in the United States continuously since such entry; is a person of good moral character; and is not ineligible for citizenship. INA section 249; see also 8 C.F.R. section 249.1 (discussing waivers of inadmissibility for certain exclusion grounds in conjunction with registry applications).

325. **Decisions and appeals**. A decision of an immigration judge in a deportation hearing may be written or oral. Appeal from the decision lies with the BIA. 8 C.F.R. section 242.21. A final order of deportation may be reviewed by federal courts, but will not be reviewed "if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order". INA section 106 (c). The immigration judge may upon the judge's own motion, or upon motion of the trial attorney, or the alien, reopen any case which the judge decided, "unless jurisdiction in the case is vested in the Board of Immigration Appeals". 8 C.F.R. section 242.22. A motion to reopen "will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing". Id.

Exclusion

326. An alien has the burden of satisfying the INS officer at the border point of entry that the alien is entitled to enter the United States and not subject to exclusion. If the officer concludes the alien is not clearly entitled to enter, the officer must detain the alien for further inspection. INA section 235(b). The alien may be released on bond or parole; the standards for release are essentially the same as they are in deportation proceedings.

327. Exclusion proceedings are held before immigration judges. See 8 C.F.R. section 236. They are not public, unless the alien requests that they be. 8 C.F.R. section 236.2(a). Unlike deportation cases, the authority to make detention decisions rests with the INS, rather than the immigration judge.

328. The immigration judge must inform the alien of the nature and purpose of the hearing; advise the alien that the alien has a statutory right to have an attorney at no cost to the government, and of the availability of free legal services programmes; ascertain that the applicant has received a list of such programmes; request the alien to determine then and there whether the alien desires representation; and advise the alien that the alien will have a reasonable opportunity to present evidence, to examine and object to adverse evidence, and to cross-examine witnesses presented by the government.

329. Except for aliens previously admitted to the United States for lawful permanent residence, aliens have the burden of proving their admissibility in exclusion proceedings. The immigration judge can grant various forms of relief, including waivers, adjustment of status under certain conditions, and political asylum and withholding of exclusion. Suspension of deportation and voluntary departure are not available.

330. The immigration judge's decision may be oral or written. The alien may appeal to the BIA. 8 C.F.R. sections 3.1(h), 236.7. Attorney General review of the BIA's decision is available only upon request by the INS Commissioner, the BIA Chairman, or a majority of the BIA, or in the discretion of the Attorney General.

331. Following a final determination of exclusion, an alien may surrender himself to the custody of the INS, or may be notified to surrender to custody. An alien taken into custody either upon notice to surrender or by arrest may not be deported less than 72 hours thereafter unless the alien consents in writing. 8 C.F.R. section 237.2.

332. An alien detained pending or during exclusion proceedings may seek further review in federal court under a writ of habeas corpus.

United States refugee and asylum policy

333. The refugee and asylum policy of the United States, set forth primarily in the Refugee Act of 1980 and the

Immigration and Nationality Act (the INA), was created in accordance with the strong, historical commitment of the United States to the protection of refugees and in compliance with the 1967 United Nations Protocol relating to the Status of Refugees. The Protocol, to which the United States has acceded, adopted the operative provisions of the 1951 United Nations Convention relating to the Status of Refugees.

334. Under the INA, persons within the United States may seek refugee protection through a grant of asylum or withholding of deportation. The standard for such determinations is that provided in the Protocol, defining a refugee as: "any person who is outside of any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion". INA section 101(a)(42)(A); 8 U.S.C. section 1101(a)(42)(A). Refugee status is not available to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion", or for aliens who have been convicted of an aggravated felony. INA sections 101(a)(42)(B) and 208(d); 8 U.S.C. sections 1101(a)(42)(B) and 1158(d).

335. At present, there are some 300,000 asylum claims pending in various stages of adjudication; over 100,000 new claims were filed in fiscal year 1992. A related form of protection, temporary protected status, is available to persons already within the United States when the Attorney General determines that certain extreme and temporary conditions in their country of nationality (such as ongoing armed conflict or an environmental disaster) generally do not permit the United States to return them to that country in safety.

336. In addition, the United States maintains a substantial programme for providing assistance to refugees overseas. The United States overseas refugee admissions programme, which also uses the Protocol definition of refugee, provides for the admission and resettlement in the United States of over 120,000 refugees of special humanitarian concern to the United States each year from throughout the world. In addition, the United States provides on-site assistance, primarily through relevant international organizations such as the United Nations High Commissioner for Refugees, the International Committee of the Red Cross, and the International Organization for Migration, in the amount of over $300 million each year, not only to "Protocol refugees" but also to others who are suffering from the disruptive effects of conflict or other forms of dislocation. In the last three years alone, the United States has contributed over $1 billion in assistance to refugees throughout the world.

337. **Refugee admissions**. The INA provides for the admission of refugees outside the United States. Each year the President, after appropriate consultation with Congress, determines an authorized admission level for refugees. For example, the admission ceiling for refugees in 1994 was 121,000. This annual ceiling represents the maximum number of refugees allowed to enter the United States each year, allocated by world geographical region. INA section 207(a). The President may accommodate an emergency refugee situation by increasing the refugee admissions ceiling for a 12-month period. INA section 207(b); 8 U.S.C. section 1157(b).

338. Persons applying in overseas offices for refugee protection in the United States must satisfy four criteria. They must: (i) fall within the definition of a refugee set forth in the INA; (ii) be among the types of refugees determined to be of special humanitarian concern to the United States; (iii) be admissible under the Immigration and Nationality Act; and (iv) not be firmly resettled in any foreign country.

339. The refugee application process originates either at a United States embassy or at a designated consular office, if distance makes direct filing at an embassy impracticable. 8 C.F.R. section 207.1(a). Interviews are then conducted by employees of the Immigration and Naturalization Service. There exists no formal procedure for either administrative appeal or judicial review of adverse decisions. The applicant has the burden of showing entitlement to refugee status. 8 C.F.R. section 208.8(d).

340. **Asylum**. Asylum applications may be submitted by persons who are physically present in the United States. Asylum may be granted without regard to the applicant's immigration status or country of origin. There are two

paths for an alien present in the United States seeking asylum. First, the alien may come forward to the INS to apply "affirmatively". Second, the alien may seek asylum as a defence to exclusion or deportation proceedings, even after a denial of asylum through the affirmative process. Grants of asylum are within the discretion of the Attorney General under either process, but the affirmative asylum process is executed under the auspices of the INS, while the exclusion and deportation procedures fall within the jurisdiction of the Executive Office for Immigration Review within the Department of Justice.

341. **Affirmative asylum**. Affirmative asylum claims are heard and decided by a corps of INS asylum officers located in seven regional offices. The Asylum Officer conducts an interview with the applicant "in a non-adversarial manner ... to elicit all relevant and useful information bearing on the applicant's eligibility". 8 C.F.R. section 208.9(b). The applicant may have counsel present at the interview and may submit the affidavits of witnesses. In addition, the applicant may supplement the record within 30 days of the interview. 8 C.F.R. section 208.9.

342. Upon completion of the interview, the asylum officer must forward a copy of the asylum application to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) (recently renamed the Bureau of Democracy Rights and Labor) of the Department of State. The BHRHA may comment on the application within 45 days. The asylum officer may make a final decision if no response from the BHRHA arrives within 60 days. 8 C.F.R. section 208.11.

343. The asylum officer's decision must be in writing and, if asylum is denied, the decision must include a credibility assessment. 8 C.F.R. section 208.17. The alien has the right to specific reasons for denial and the right to both factually and legally rebut the denial. 8 C.F.R. sections 103.3(a) and 103.2(b)(2). The decision of the asylum officer is reviewed by the INS's Office of Refugees, Asylum, and Parole (CORAP), but the applicant has no right to appeal. 8 C.F.R. section 208.18(a).

344. Asylum claims must be denied when: (i) the alien has been convicted of a particularly serious crime in the United States and constitutes a danger to the community; (ii) the alien has been firmly resettled in a third country; or (iii) there are reasonable grounds for regarding the alien as a threat to the security of the United States. 8 C.F.R. section 208.14(c). In addition, asylum officers may use discretion in asylum denials.

345. Asylum officers also have limited power to revoke asylum and relief under the "withholding of deportation" provision of the INA (section 243(h)). This power may be exercised when: (i) the alien no longer has a well-founded fear of persecution or is no longer entitled to relief under section 243(h) because of changed country conditions; (ii) there existed fraud in the application such that the alien was not eligible for asylum at the time it was granted; or (iii) the alien has committed any act that would have been grounds for denial. 8 C.F.R. section 208.24(a)(b).

346. Once an affirmative asylum application is denied, the asylum officer is empowered, if appropriate, to initiate the alien's exclusion or deportation proceedings.

347. **Asylum and withholding of exclusion/deportation in exclusion or deportation proceedings**. If an alien has been served with an Order to Show Cause to appear at a deportation hearing or a notice to appear at an exclusion hearing, he must appear before an immigration judge, with whom he may file an asylum application. The filing of an asylum application is also considered a request for withholding of deportation or exclusion under INA section 243(h).
348. Relief under INA section 243(h) differs from a request for asylum in three ways. First, section 243(h) provides relief from deportation or exclusion to a specific country where the applicant's "life or freedom would be threatened", while asylum protects the alien from deportation generally and only requires a well-founded fear of persecution. Second, relief under section 243(h) cannot result in permanent residence, while asylees are eligible for permanent residence after one year. Third, relief under section 243(h) is mandatory while asylum is a discretionary grant.

349. An immigration judge must consider a section 243(h) claim "de novo regardless of whether or not a

previous application was filed and adjudicated by an Asylum Officer". 8 C.F.R. section 208.2(b). Like an asylum officer, the Immigration Judge must request an advisory opinion from the BHRHA and wait 60 days before rendering a final decision.

350. The alien will be denied section 243(h) relief and will remain subject to exclusion or deportation if the alien: (i) engaged in persecution of others; (ii) has been convicted of a particularly serious crime that constitutes a danger to the community of the United States; (iii) has committed a serious non-political crime outside of the United States; or (iv) may represent a danger to the security of the United States. INA section 243(h)(2).

351. Denial of asylum and withholding of deportation by an Immigration Judge can result in a final order of deportation or exclusion. The alien may appeal to the Board of Immigration Appeals within ten days of the Immigration Judge's order. Appeal to federal courts is possible within ninety days of the Board's decision. INA section 106(a)(1); 8 U.S.C. section 1105(a)(1).

352. **Parole under INA section 212(d)(5)(B)**. A refugee may be paroled into the United States by the Attorney General only if there exist "compelling reasons in the public interest with respect to that particular alien" to parole rather than admit the person as a refugee under INA section 207. INA section 212(d)(5)(B). Parole allows an alien to remain in the United States temporarily until a final status decision is made. Parole is not equivalent to an "admission", and thus leaves the alien subject to exclusion.

353. The Attorney General has created a "special interest parole" process "on an exceptional basis only for an unspecified but limited period of time" pursuant to the Lautenberg Amendment of the Foreign Operations Appropriations Act. Pub. L. No. 101-167. Under this provision, certain persons from Cambodia, the Lao People's Democratic Republic, Viet Nam, and the former Soviet Union (specifically Jews, Evangelical Christians, Ukrainian Catholics, and Ukrainian Orthodox Christians) who were inspected and paroled into the United States between 15 August 1988 and 30 September 1994 after being denied refugee status are eligible for adjustment of status.

354. **Temporary protected status**. Under INA section 244A, the Attorney General has the authority to grant temporary protected status to aliens in the United States, temporarily allowing foreign nationals to live and work in the United States without fear of being sent back to unstable or dangerous conditions. The United States thus may become, at the Attorney General's discretion, a temporary safe haven for foreign nationals already in the country if one of three conditions exist: (i) there is an ongoing conflict within the state which would pose a serious threat to the personal safety of returned nationals; (ii) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial but temporary disruption of living conditions; the state is temporarily unable to accept the return of nationals; and the state officially asks the Attorney General for a designation of temporary protected status; or (iii) there exist extraordinary and temporary conditions in the state that prevent nationals from returning in safety, as long as the grant of temporary protected status is not contrary to the national interest of the United States. INA section 244A(b)(1). Designation of temporary protected status may last for 6 to 18 months, with the possibility of extension.

355. An alien is ineligible for temporary protected status if he has been convicted of at least one felony or two or more misdemeanours. 8 C.F.R. section 240.4. Ineligibility is also based upon the grounds for denial of relief under INA section 243(h)(2), as stated above. Temporary protected status may be terminated if: (i) the Attorney General finds that the alien was not eligible for such status; (ii) the alien was not continuously physically present, except for brief, casual, and innocent departures or travel with advance permission; (iii) the alien failed to register annually; or (iv) the Attorney General terminates the programme. INA section 244A(c)(3).

356. An alien granted temporary protected status cannot be deported during the designated period and shall be granted employment authorization. The alien may also travel abroad with advance permission. Temporary protected status also allows the alien to adjust or change status.

357. At present, nationals from four states are eligible for temporary protected status: Bosnia-Herzegovina, until August 1994; Liberia, until March 1995; Somalia, until September 1994; and Rwanda, until June 1995.

Nationals of El Salvador are eligible for a comparable form of temporary protection through December 1994.

358. **Rights of refugees and asylees**. Certain benefits are available to an alien applying for asylum. First, as long as the asylum claim appears non-frivolous, the applicant may be granted employment authorization while the asylum application is pending. Second, the applicant may be granted advance parole to travel abroad to a third country for humanitarian reasons.

359. In April 1992, the INS created a "pre-screening" procedure to identify genuine asylum seekers whose parole from detention might be appropriate while their asylum claims are pending. Specially trained asylum pre-screening officers interview applicants in detention and evaluate asylum claims. If the claimant is deemed to have a "credible fear of persecution", then the alien may be released pending the asylum claim. The alien must, however, agree to check in periodically with the INS and appear at all relevant hearings.

360. The immediate family (spouse and children) of the person granted admission as a refugee or political asylum can accompany or follow such person without having to apply for protection independently. INA section 207(c)(2) and section 208(c).

361. Finally, one who entered the United States as a refugee is eligible for permanent resident status after one year of continuous physical presence in the United States. The number of refugees adjusting to permanent resident status is not subject to the annual limitation on immigrants into the United States. INA section 209. An asylee may also apply for permanent resident status after being continuously present in the United States for at least one year after being granted asylum. There are 10,000 visas set aside each year for asylees applying for residency.

Article 14 - Right to fair trial

362. The court systems in the United States grant both citizens and nationals of other countries the fair trial rights embodied in article 14 of the Covenant. The principles and practices of the justice system in the federal government, in the 50 states, and in the various territories and dependencies trace their roots to the federal Bill of Rights adopted two centuries ago and outlined in more detail in Part I of this report. The federal and state constitutions and statutory law provide for fair and public hearings. An independent judiciary, as well as an independent and active bar, are dedicated to the ideal and reality of fair trials and elaborate appellate procedures.

363. While not perfect, the American court systems do not remain static but constantly adapt to evolving notions of fairness and due process. Over the past 40 years, for example, problems of racism in jury selection and discrimination in the administration of justice were addressed head on. Constitutional rights of defendants were expanded markedly in several controversial rulings by the Supreme Court of the United States.

364. As the Republic enters its third century, the changing nature of crime will no doubt lead to further changes in the administration of justice. However, our federal and state systems are all bound by the mandatory and minimum guarantees of the federal Constitution. The Constitution is the base beneath which no state or federal court may depart, though greater protections than the minimum can be found in various state or federal laws.

Fair and public hearing

365. **Criminal cases**. The Due Process clause of the Fifth Amendment to the U.S. Constitution provides that, "No person shall ... be deprived of life, liberty, or property, without due process of law". That provision, applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to a fundamentally fair trial at all levels of government. As the Supreme Court has explained, however, the Fifth and Fourteenth Amendments guarantee the right to a fair trial, but not to a perfect trial. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Thus, although mistakes may occur at trial, a reviewing court will none the less affirm a criminal conviction if it determines that the mistakes were harmless. To affirm a criminal conviction in the case of an error involving constitutional rights, the reviewing court must determine beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 23 (1967). For trial error that is

not of constitutional dimensions, the reviewing court must determine with "fair assurance ... that the judgment was not substantially swayed by the error". Kotteakos v. United States, 328 U.S. 750, 765 (1946).

366. The Sixth Amendment guarantees federal defendants "in all criminal prosecutions ... a speedy and public trial". This right has been extended to defendants in state criminal proceedings through the due process clause of the Fourteenth Amendment. In re Oliver, 333 U.S. 257 (1948). The constitutional guarantee of a public trial does more than ensure fairness to defendants. It ensures public confidence in the fairness of the criminal justice system and responsible performance by judges and prosecutors. It also provides an outlet for community reaction to crime, and encourages witnesses to come forward and to testify truthfully. Waller v. Georgia, 467 U.S. 39 (1984). Because of these public interests, the right to a public trial is not merely a right of the criminal defendant under the Sixth Amendment. For example, the First Amendment provision that "Congress shall make no law ... abridging the freedom of speech, or of the press" has been deemed to protect the right of the public and the press to have access to a criminal trial. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (granting access to press and public to criminal trial). See also Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (state cannot prevent press and public access to criminal trials without a compelling governmental interest, narrowly tailored). The Supreme Court has also granted press access to preliminary hearings and jury voir dire. Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986) (preliminary hearings); Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) (voir dire). But see Gannett Co. v. DePasqucle, 443 U.S. 368 (1979) (denying access to pretrial suppression hearing where publicity could taint jury pool).

367. Thus, even though a defendant may offer to waive his right to a public trial and request a closed proceeding, the public and press have a constitutionally protected right of access to the trial under the First Amendment. Singer v. United States, 380 U.S. 24 (1965). The law must balance a defendant's desire for closure (motivated, for example, by a desire to protect his privacy or to reduce the possibility of adverse publicity that could deny him an impartial verdict) or the prosecution's similar desire (for example, to protect the secrecy of ongoing criminal investigations or the privacy rights of particular witnesses or victims) against the constitutionally protected public interest in open proceedings.

368. To restrict public access to a criminal trial or to a discrete portion of one, the trial judge must find that closure is essential to preserve higher values - such as the defendant's right to a fair trial - and the closure order must be narrowly tailored to serve those values. Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501 (1984). When a court closes a trial in whole or in part, it must make specific factual findings so that a reviewing court may evaluate the propriety of the order. Moreover, the media or an individual party may make an immediate and expedited appeal to a higher court from an order closing part of the criminal proceeding.

369. Notwithstanding the right of public access to court proceedings, the decision-making process in a criminal trial, as well as in other proceedings, is not open to the public. Jurors deliberate entirely in secret so that their views can be candidly expressed without reservation. Discussions between judges or between a judge and the judge's clerk are also privileged against public disclosure.

370. Competent, independent and impartial tribunal. The Due Process clauses of the Fifth Amendment and the Fourteenth Amendment guarantee criminal defendants certain fundamental rights deemed essential to a fair trial. For example, a criminal defendant has the right to an unbiased judge, an impartial jury free from unfair influences, and a trial free of outside distractions and disruption. Due process is violated if the trial is conducted in a manner or atmosphere that likely rendered the jury unable to give the evidence reasonable consideration. The competence of the lay jury is augmented by the fact that the judge instructs the jury on applicable legal principles. Where the instructions are incorrect on critical legal points the conviction is subject to reversal. Sullivan v. Louisiana, 113 S.Ct. 373 (1993); United States v. Diaz, 891 F.2d 1057, 1062-63 (2d Cir. 1989).

371. Federal criminal trials (except trials for certain petty offences) are overseen by district court judges who are nominated by the President, and must be confirmed by the U.S. Senate, according to article III of the U.S. Constitution. Unlike the executive and legislative branches of the federal government, the judicial branch is non-political. Baker v. Carr, 369 U.S. 186 (1962). Once nominated and confirmed, article III judges serve lifetime

tenure "during good behaviour". Thus, after their appointment through a political process, the judges are independent of the political branches and serve life tenure unless removed by impeachment. Art. I, section 3 cl. 6. Not only are article III judges not easily removed from office, but Congress also cannot reduce their salaries in an effort to induce their resignation. This provision protects against Congressional efforts to punish judges for past decisions or to indirectly influence future judicial decisions. Art. III, section 1.

372. Among the reasons for which article III judges may be impeached is conviction of a felony. In the history of the United States only 11 federal judges have been removed from their position by impeachment. Within the past few years, two judges have been impeached based upon criminal convictions, and another federal judge was impeached even after having been acquitted of criminal charges.

373. Because the constitutional provision of lifetime tenure may protect judges whose competency or conduct is open to question, a federal statute provides a detailed mechanism whereby other article III judges may investigate whether a judge should be removed for misconduct or is otherwise unable to discharge all the duties of his office by reason of mental or physical incapacity. Should the investigating panel determine that the judge is not competent, they can take certain remedial action short of removing the judge from office. 28 U.S.C. section 372.

374. Another guarantee of judicial independence is the provision of absolute immunity from civil liability. Litigants unhappy with anything that occurs in the course of an investigation into their conduct or with the result of their trials cannot sue the judges. The remedy for an incorrect ruling is reversal by a higher court, not a lawsuit against the judge personally. Bradley v. Fisher, 80 U.S. 335 (1872).

375. The U.S. Constitution does not require that federal judges have legal training. However, as a practical matter, present-day federal judges are selected from among lawyers. In the confirmation process, the Senate examines, among other factors, the competence and legal experience of the judicial nominee. Once appointed, federal judges receive continuing legal and judicial education, as well as other technical and administrative support, from the Federal Judicial Center; that entity, too, is under the control of the judicial branch. 28 U.S.C. sections 620 et seq.

376. Petty offences (for which the maximum term of imprisonment is less than six months) may be prosecuted before federal magistrates, who are appointed by the judges of the district court and serve for eight years. Federal law defines the minimum qualifications for appointment to be a federal magistrate. One such requirement is that the magistrate be an attorney admitted to the practice of law for at least five years. 28 U.S.C. section 631.

377. The methods of selection and the roles of judges within the state systems vary widely. States have the power to prescribe the ways judges are selected, Sugarmann v. Dougall, 413 U.S. 634, 647 (1974); Lefkovitz v. State Board of Elections, 400 F. Supp. 1005, 1015 (N.D. Ill. 1975), aff'd, 424 U.S. 901 (1976), as well as their eligibility and qualifications, Gruenburg v. Kavanagh, 413 F. Supp. 1132 (E.D. Mich. 1976).

378. States may also set appropriate standards of conduct for their judges. Gruenburg v. Kavanagh, 413 F. Supp. at 1135. An American Bar Association Code of Judicial Conduct has been adopted by a majority of the jurisdictions in the United States, and is of hortatory if not mandatory force in others. Canon 1 of the Code of Judicial Conduct requires that "[a] judge shall uphold the integrity and independence of the judiciary". Canon 2 requires that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities". Canon 3 requires that "[a] judge shall perform the duties of judicial office impartially and diligently". This canon dictates, for example, that a judge disqualify himself or herself whenever the judge's impartiality might reasonably be questioned. Canon 4 requires that "[a] judge shall so conduct the judge's extrajudicial activities as to minimize the risk of conflict with judicial obligations". Canon 5 requires that "a judge or judicial candidate shall refrain from inappropriate political activity".

379. To ensure that the legislative or executive power of any state is not invoked to weaken the independence of the judiciary, the constitutions of many states prescribe certain fundamental conditions under which the judicial

branch operates. State court judges may be popularly elected or appointed, and may serve any length of term, as prescribed by the constitutions and statutes of individual states. Some states elect judges by popular vote. The fairness of judicial elections is governed by the Voting Rights Act of 1965, as amended in 1982. See 42 U.S.C. sections 1971 et seq. The Supreme Court has determined that for purposes of the Voting Rights Act, a judge who wins an election in the district in which the judge runs is a "representative" of that district. Chisom v. Roemer, 501 U.S. 380 (1991). This determination has resulted in the resolution and settlement of a number of lawsuits which challenged the fairness of state judicial elections.

380. Most of the states require their judges to be lawyers, or at least learned or well informed of the law. Most also provide for the removal of judges on the ground of incompetency. Finally, most states select judges by appointment, which may be made by the governor, the highest court of the state, or the state legislature.

381. Many states are beginning to adopt some type of merit selection system out of concern that the election and political appointment systems compromise judicial independence. The merit system attempts to weed out the political element at the initial stage by restricting the power of nomination to a specialized commission, usually consisting of lawyers, legal scholars, and citizens. The appointing authority, whether it is the governor, court, or legislature, can appoint judges only from the list submitted by the nomination commission. Several cases challenging the fairness of some states' merit selection systems are currently pending.

382. Due process requirements prohibit a judge from presiding over a criminal trial where the judge's impartiality may reasonably be questioned. In re Murchison, 349 U.S. 133, 138-39 (1955) (due process violated when judge charged defendants with contempt because judge could not free himself of influence of own personal knowledge of what occurred in secret grand jury session); United States v. Diaz, 797 F.2d 99, 100 (2d Cir. 1986) (per curiam) (due process violated when sentencing judge wrote letter to senator four days after trial complaining of leniency of sentences required by statutes because judge's impartiality may reasonably be questioned), cert. denied, 488 U.S. 818 (1988). In federal courts, statutes require recusal if a party to the proceeding files an affidavit showing the judge is biased or prejudiced either against such party or in favour of an adverse party, 28 U.S.C. section 144, or whenever the judge's impartiality reasonably may be questioned, 28 U.S.C. section 455(a). Recusal also would be required if the judge, the judge's spouse or other family member is a party to the proceeding, is acting as a lawyer for one of the parties, is likely to be a material witness, or has financial interests in the proceeding. Even though the judge may not be the fact-finder at the trial, bias on the part of the trial judge can require reversal of the criminal conviction on appeal.

383. Trial by jury. The Sixth Amendment also provides that "in all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury of the State and district wherein the crime shall have been committed". This right to a jury trial applies to any federal or state offence for which imprisonment for more than six months is authorized. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). However, the right does not apply in juvenile court proceedings or military trials.

384. The right to trial by jury reflects "a profound judgment about the way in which law should be enforced and justice administered". Duncan v. Louisiana, 391 U.S. at 155. In the U.S. system, the jury is the fact-finder. Therefore, a judge may not direct the jury to return a verdict of guilty, no matter how strong the proof of guilt may be. Sparf and Hansen v. United States, 156 U.S. 51, 105-6, (1895).

385. The right to an impartial jury requires that the jury be selected from a representative cross-section of the community in which the crime was committed. The jurors must, however, be competent. In federal criminal trials there are minimum statutory standards of competency, including that the juror be at least 18 years of age, literate in English, have been a resident of the district for at least one year, otherwise physically and mentally able to sit as a juror, and not have been convicted of a felony or be currently facing a criminal felony charge. 28 U.S.C. section 1865(b).

386. To ensure the impartiality of the jury, the trial court must conduct a voir dire examination of prospective jurors to discover any potential bias. In cases of high publicity, the court must be extra cautious to ensure that jurors have not been influenced by the publicity. The trial court may exclude for cause any prospective juror who

will be unable to impartially render a verdict based on the evidence. The voir dire is also designed to examine juror competency, and the trial court may excuse jurors for lack of competency (i.e. mental or physical impairment, or lack of language proficiency).

387. In addition to removal for cause, as the act of striking jurors by the judge is called, statutes provide that the parties may remove jurors through the use of peremptory challenges. Peremptory challenges permit the parties to exclude a certain number of jurors without any explanation to the court, except in limited instances. In federal criminal trials, Federal Rule of Criminal Procedure 24(b) provides that in cases punishable by death each side may exercise 20 peremptory challenges; for felonies (crimes punishable by more than one year in prison) the prosecution may use 6 peremptory challenges and the defendant or defendants jointly may exercise 10 challenges. Where there are multiple defendants the trial court may allow additional peremptory challenges to be used. While removal of jurors for cause is constitutionally based, the use of peremptory challenges to remove jurors is not a constitutional right.

388. However, where peremptory challenges are permitted, the parties may not use them deliberately to exclude members of a racial or ethnic group, or of a particular sex. Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 499 U.S. 400 (1991); J.E.B. v. Alabama Ex Rel. T.B., 62 U.S.L.W. 4219 (19 April 1994). At the same time, the defendant also is not entitled to deliberately exclude members of a racial or ethnic group from the jury. Georgia v. McCollum, 112 S.Ct. 2348 (1992).

389. Where the jury is the fact-finding tribunal, the historic number of jurors is 12. The Supreme Court has held that the Sixth Amendment allows state juries to be composed of fewer than 12 (but more than 5) members. Williams v. Florida, 399 U.S. 78, 102-3 (1970). In federal criminal proceedings, the rules provide for a 12-member jury, but the parties may stipulate, in writing and with the approval of the court, to waive a 12-member jury. Fed. R. Crim. P. 23(b). Rule 23(b) also allows the trial judge to proceed with fewer than 12 jurors even without stipulation if the court finds it necessary to excuse a juror for just cause during deliberation. Each state may set the size of its jury so long as it is constitutionally permissible. Juries in state criminal trials usually have between 6 and 12 jurors.

390. In federal jury trials, the jury must be unanimous in returning its verdict for conviction or acquittal. Andres v. United States, 333 U.S. 740, 748-49 (1948); Fed. R. Crim. P. 31(a). If the jurors cannot agree, the judge declares a mis-trial and the government is free to prosecute the defendant again before a different jury.

391. In state jury trials, a conviction by a non-unanimous verdict of a 12-member jury satisfies the Sixth Amendment. Apodaca v. Oregon, 406 U.S. 404, 411-12 (1972) (upheld conviction by 10 votes of 12-member jury); Johnson v. Louisiana, 406 U.S. 356, 359-63 (1972) (upheld conviction by 9 votes of 12-member jury). However, if the state has a 6-member jury system, the verdict must be unanimous. Burch v. Louisiana, 441 U.S. 130, 134 (1979). The Supreme Court has not addressed the question of unanimity where the juries are composed of more than 6 but fewer than 12 members. Id. at 138 n.11.

392. Public access to judgements and records. The public and the press have the right, under the First Amendment, to records of criminal cases ending in acquittal, dismissal, or finding no probable cause, unless the state or the defendant demonstrates a compelling interest in non-disclosure, as well as to those ending in conviction. Furthermore, at common law, the public has the right to inspect and copy public records, including judicial records. Nixon v. Warner Communication, 435 U.S. 589, 598 (1978).

393. This right may be restricted in certain limited circumstances. An important exception to the rule favouring public dissemination applies to grand jury material. Information secured by the grand jury in the course of its investigation is also protected from public disclosure, both traditionally and by operation of the Federal Rules of Criminal Procedure. See Butterworth v. Smith, 494 U.S. 624, 629-30 (1990); Fed. R. Crim. Pro. 6(e). In particular, Rule 6(e)(2) provides:

> "A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is

made under ... this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court."

394. Grand jury secrecy is critical to the judicial system; the Supreme Court has spoken repeatedly about "'the indispensable secrecy of grand jury proceedings'". United States v. R. Enterprises, 498 U.S. 292, 299 (1991), quoting United States v. Johnson, 319 U.S. 503, 513 (1943). Grand jury secrecy serves several distinct and compelling public interests: it encourages witnesses to come forward and testify freely and honestly; it minimizes risks that prospective defendants will flee or use corrupt means to thwart investigations; it safeguards the grand jurors themselves from extraneous pressures and influences; and it protects accused persons who are ultimately exonerated from unfavourable publicity. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). To the extent that information is secured by the grand jury in its investigation, it is presumptively non-public unless and until the judge enters an order permitting its disclosure upon a showing of specialized need. Fed. R. Crim. P. 6(e).

395. There are other instances in which the rule of public disclosure is not followed. Juvenile records may be sealed or expunged, and the public would not have access to such records outside very limited circumstances. For example, federal laws permit the disclosure of juvenile records only for certain specified purposes, such as the preparation of a pre-sentence report for another court or an ongoing investigation. 18 U.S.C. section 5038. Many states also forbid the publication of the names of rape victims or of children who are victims in criminal cases. See e.g. Florida Stat. Ann section 119.07(2)(h); Wyo. Stat. section 6-2-310. Other state's laws may strongly urge the media to exercise self-restraint but do not subject publication to some form of sanction. See e.g. Wis. Stat. section 950.055. However, such laws could be unconstitutional, as a violation of the First Amendment, if applied to journalists who receive the information from public authorities. See The Florida Star v. B.J.F., 491 U.S. 524 (1989) (civil damages on newspaper for printing rape victim's name violated freedom of the press); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam) (state court's pretrial order preventing press from publishing name/photo of juvenile charged with murder violated freedom of the press).

396. Federal law also regulates and restricts the disclosure of other sensitive information. The Classified Information Procedures Act (CIPA), 18 U.S.C. Appendix III (1980), is triggered in cases involving classified national security information. CIPA requires the trial court to conduct a hearing, upon motion of the government, to examine the use, relevance, or admissibility of the classified information. If the court authorizes the disclosure of such information, the government may, in lieu of disclosing the information, submit a statement admitting relevant facts that the information would tend to prove, or submit a summary of the information. The trial court should allow these alternative methods of disclosure "if the statement or summary will provide the defendant with substantially the same ability to make his defence as would disclosure of the specific classified information". Id. section 6. If, however, the court decides that the classified information at issue may not be disclosed, the records of the hearing would be sealed and preserved for appeal. Id. section 6.

397. **Civil cases**. Guarantees of fairness and openness also are ensured in the civil context, with federal and state constitutions providing basic and essential protections. While protections in civil disputes might not match those that exist in criminal proceedings, the fundamental features of the United States judicial system - an independent judiciary and bar, due process and equal protection of the law - are common to both.

398. Most importantly, the Due Process and Equal Protection clauses of the Constitution - applicable to the states through the Fourteenth Amendment - mandate that judicial decision-making be fair, impartial, and devoid of discrimination. Neutrality, of course, is the core value. As members of the Supreme Court repeatedly have emphasized, "the right to an impartial decision maker is required by due process" in every case. Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part). Indeed, because the "appearance of evenhanded justice ... is at the core of due process", Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring), the Court has held that even decision makers who in fact "have no actual

bias" must be disqualified if there might be an appearance of bias. Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972). See also Goldberg v. Kelly, 397 U.S. 254, 271 (1971). Specifically, this means that a judge possessing a personal interest in a case should be precluded from taking part in it, Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (a person "with substantial pecuniary interest in legal proceedings should not adjudicate these disputes"); a judge may not "give vent to personal spleen or respond to a personal grievance" in reaching a decision, Offut v. United States, 348 U.S. 11, 14 (1954), and a hearing must be "conducted by some person other than one initially dealing with the case". Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972). In short, impartiality and fairness are guaranteed by the Due Process clause.

399. Neutrality also means the absence of discrimination. As is the case with criminal trials, the Equal Protection clause bars the use of discriminatory stereotypes in the selection of the jury in civil cases. As the Supreme Court held in Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 628 (1991): "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."

400. Fairness of civil proceedings also is ensured by the requirement that where they might result in serious "hardship" to a party adversary hearings must be provided. For instance, where a dispute between a creditor and debtor runs the risk of resulting in repossession, the Supreme Court has concluded that debtors should be afforded a fair adversarial hearing. See Fuentes v. Shevin, 407 U.S. 67 (1972). See also Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

401. This is particularly true in civil cases involving governmental action, where the Supreme Court, since the 1970s and the landmark case of Goldberg v. Kelly, supra, has recognized the importance of granting procedural rights to individuals. Depending on the seriousness of the private interests at stake, the U.S. Constitution mandates different types of guarantees in civil proceedings involving the government: an unbiased tribunal; notice to the private party of the proposed action; an opportunity to be heard and/or the right to present evidence; and the right to know the government's evidence, to cross-examine and present witnesses, and to receive written findings from the decision maker. Applying these principles, the Court has thus held that persons have had a right to notice of the detrimental action, and a right to be heard by the decision maker. Grannis v. Ordean, 234 U.S. 385, 394 (1918) ("The fundamental requisite of due process of law is the opportunity to be heard"); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare entitlements cannot be interrupted without a prior evidentiary hearing). When action is taken by a government agency, statutory law embodied in the Administrative Procedures Act also imposes requirements on the government, such as the impartiality of the decision maker and the party's right to judicial review of adverse action. As Justice Frankfurter once wrote, the

> "validity and moral authority of a conclusion largely depend on the mode by which it was reached ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done."

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J. concurring).

402. Although inequalities in wealth distribution certainly have an impact on individuals' access to the courts and to representation, the equal protection components of state and federal constitutions have helped smooth these differences. In particular, the Supreme Court has held that access to judicial proceedings cannot depend on one's ability to pay where such proceedings are "the only effective means of resolving the dispute at hand". Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971) (holding unconstitutional a state law conditioning a judicial decree of divorce upon the claimant's ability to pay court fees and costs).

403. Inequalities remain, though, in part because neither the Constitution nor federal statutes provide a right to appointed counsel in civil cases. None the less, the Supreme Court has made it easier for indigent parties to afford legal representation by invalidating prohibitions against concerted legal action. The Court has thus recognized a right for groups to "unite to assert their legal rights as effectively and economically as practicable".

United Trans. Union v. State Bar of Michigan, 401 U.S. 576, 580 (1971).

Presumption of innocence in criminal trials

404. In both federal and state prosecutions, the presumption of innocence is an essential aspect of the constitutional requirement of due process.

405. The presumption of innocence means that the government bears the burden of proving every element of the charged crime beyond a reasonable doubt. Sullivan v. Louisiana, 113 S.Ct. 2078, 2080 (1993); In re Winship, 397 U.S. 358, 364 (1970). The defendant bears no burden at trial of calling witnesses or introducing any tangible evidence, nor is the defendant obliged to testify. The U.S. Supreme Court has explained that "[t]he principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law". Coffin v. United States, 156 U.S. 432, 453-54 (1895) (reversing convictions and remanding for a new trial where trial judge had refused to instruct jury that the defendants were entitled to the presumption of innocence). The Court went on to define the presumption of innocence as "a conclusion drawn by the law in favour of the citizen ... an instrument of proof created by the law in favour of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." Id. at 458-59.

406. In a subsequent decision, the Court explained that the "presumption of innocence is a doctrine that allocates the burden of proof in criminal trials. It also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial". Bell v. Wolfish, 441 U.S. 520, 534 (1979).

407. But, the Court explained, the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun". Id. at 534. Thus, the presumption of innocence does not limit the right of the government to arrest a person charged with a crime, to detain the person pending trial, or to govern conditions of pretrial detention. In accordance with this view, the Supreme Court has also upheld the constitutionality of pretrial detention of indicted persons if no conditions of release will reasonably assure his or her appearance at trial and the safety of any other person and the community. United States v. Salerno, 481 U.S. 739 (1987). The federal statute that governs decisions regarding pretrial detention or release explicitly provides that "[n]othing ... shall be construed as modifying or limiting the presumption of innocence". 18 U.S.C. section 3142(j).

Rights of the accused

408. **Right to be informed promptly and in detail of the charges**. As discussed in the context of article 9, the Sixth Amendment guarantees that criminal defendants have the right "to be informed of the nature and cause of the accusation". This guarantee applies in both state and federal courts.

409. The Federal Rules of Criminal Procedure require that an arrested person must be taken "without unnecessary delay before the nearest available federal magistrate". Fed. R. Crim. P. 5. If the arrest was made without a warrant, a complaint must be filed "forthwith" in compliance with the probable cause requirement of Fed. R. Crim. P. 4. The purpose of the initial appearance is to inform the defendant of the charges and advise the defendant of the right to remain silent, right to counsel, the right to a preliminary hearing and the fact that any statement made by the defendant can be used against the defendant. The magistrate is also required to inform the defendant of the "general circumstances under which the defendant may secure pretrial release". The initial appearance and procedure for pretrial release are discussed under article 9.

410. The Federal Rules do not impose a time-frame for informing the defendant of the charges. However, the U.S. Supreme Court recently enunciated a rule that a probable cause determination must be made within 48 hours of a warrantless arrest. County of Riverside v. McLaughlin, 500 U.S. 44 (1991). That decision clarified a 1975 decision in which the Supreme Court held that an individual detained as a result of a warrantless arrest is

entitled to a "prompt" judicial determination of probable cause. Gerstein v. Pugh, 420 U.S. 103 (1975). Gerstein permitted States to have flexibility in adopting procedures for determining probable cause; in County of Riverside, the Court created a presumption that delays of more than 48 hours in determining probable cause following warrantless arrests are unconstitutional.

411. The right of the accused to be informed of the charges in a language the accused understands is also linked to the Fifth Amendment right to due process of law. The use of interpreters in the federal court system is discussed in more detail in the context of article 14(3)(f), below.

412. **Right to prepare defence and to communicate with counsel**. Defendants retained in custody acquire their Sixth Amendment right to counsel when formal adversarial judicial proceedings are initiated against them. Brewer v. Williams, 430 U.S. 387, 398 (1977). In contrast, the right to the presence of an attorney during custodial interrogation, which is grounded on the Fifth and Fourteenth Amendments, protects against self-incrimination, and can be waived by the defendant. Edwards v. Arizona, 451 U.S. 477, 481-82 (1981). In the defendant's first appearance before the magistrate or judge, at the point that the defendant is informed of the charges and his rights, the magistrate must also allow reasonable time for the defendant to consult with the defendant's attorney. Fed. R. Crim. P. 5(c). If the defendant is detained pending trial, this right of consultation continues for the duration of the detention. In Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989), the court stated:

> "[p]re-trial detainees have a substantial due process interest in effective communication with their counsel and in access to legal materials. When this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised."

413. The right to consult with counsel includes the right of private consultation. United States ex rel. Darcy v. Handy, 203 F.2d 407 (3rd Cir. 1953). If a defendant is in custody the police or prison authorities cannot place undue restrictions on access to counsel. See e.g. Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973) (prison officials enjoined from requiring the use of phones and partitioned visiting rooms for attorney-client conferences); Lewis v. State, 695 P.2d 528 (Okl. Crim. App. 1984) (police must maintain procedures to ensure a person in custody can exercise the right to consult with counsel).

414. Under the Federal Rules of Criminal Procedure, the defendant is accorded the time and opportunity to begin preparation of a defence almost immediately after the arrest. Federal Rule of Criminal Procedure 5 requires the magistrate, at the initial appearance of the defendant, to "allow the defendant reasonable time and opportunity to consult counsel". The right to counsel, as noted elsewhere, attaches at the formal initiation of criminal proceedings and continues through the appellate stage.

415. A criminal defendant must sometimes strike a balance between the need to have adequate time to prepare a defence and the desire for a speedy trial. The Sixth Amendment guarantees a criminal defendant the right to a speedy trial. To help ensure compliance in federal courts with this constitutional requirement, Congress enacted the Speedy Trial Act of 1974, 18 U.S.C. sections 3161 et seq. That statute imposes specific time limits on the government for completion of various stages of the prosecution (e.g. filing the indictment or information within 30 days of the arrest or service of summons, commencement of trial within 70 days of the filing of the indictment or date of the initial appearance, whichever is later.) However, Congress has also recognized the need to permit a defendant to have adequate time to prepare for trial. Therefore, the Speedy Trial Act was amended to prevent the government from beginning a trial sooner than 30 days after the defendant's initial appearance before the court, unless the defendant consents to an early trial. 18 U.S.C. section 3161(c)(2).

416. The Sixth Amendment also guarantees a defendant the right to counsel. This right has been interpreted to embrace the right to counsel of the defendant's own choice. For an indigent defendant, the right requires that the court appoint competent counsel if the defendant cannot afford to retain an attorney. Gideon v. Wainwright, 372 U.S. 335 (1963). However, while the right to counsel is absolute, the right to counsel of choice is a qualified one, to be balanced against state interests in judicial efficiency and in the integrity of the process. Morris v. Slappy,

461 U.S. 1 (1982). For example, the court has the discretion to disqualify a defendant's chosen lawyer for actual or even potential conflict of interest. Wheat v. United States, 486 U.S. 153 (1988). Additionally, the court can balance the need for expeditious proceedings against the request of a defendant to discharge the attorney and substitute a new one, where the choice of counsel will result in delay of the trial. United States v. Richardson, 894 F.2d 492 (1st Cir. 1990).

417. U.S. understanding. In its instrument of ratification, the United States noted its understanding with respect to the right to counsel as follows:

> "[S]ubparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed."

418. Right to trial without undue delay**.** The Sixth Amendment guarantees that "[in] all criminal prosecutions, the accused shall enjoy the right to a [speedy and public trial] ....". The speedy trial protection applies to state as well as federal prosecutions. In re Oliver, 333 U.S. 257 (1948). In federal courts, the right is implemented by the Speedy Trial Act, 18 U.S.C. sections 3161 et seq., discussed below.

419. The right to a speedy trial under the Sixth Amendment is triggered by the filing of formal charges. Delay occurring before charges are filed is not a Sixth Amendment issue; the statutes of limitation, which begin to run from the time the offence is committed, serve as the primary protection against undue preindictment delay. But there may be undue delay even when the charges are brought within the appropriate statute of limitations. When that occurs, the Due Process clause of the Fifth Amendment (the protections of which also apply to persons charged in state courts by virtue of the Fourteenth Amendment) may protect the accused. To prevail on a constitutional claim of preindictment delay, the accused must show that the delay resulted in actual and substantial prejudice and was improperly motivated in order to disadvantage the accused.

420. The Sixth Amendment, which protects a defendant's right to a speedy trial after arrest or indictment, is designed to minimize pretrial incarceration or impairment of liberty pending trial and the disruption of life while criminal charges are outstanding; it also is designed to limit the possibility that the defence will be impaired by the passage of time. If the delay constitutes an impairment of the defendant's constitutional speedy trial right, the court will dismiss the criminal charges with prejudice - thereby barring the government from reinstituting the same charges in a new indictment.

421. Where an accused raises a claim of post-indictment delay under the Sixth Amendment, the courts apply a four-part test originally fashioned by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). The factors include the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice that the defendant may have suffered on account of the delay.

422. The first factor, length of delay, is the "triggering mechanism". Unless the court finds the delay excessive on its face, it will not examine the remaining factors. The second factor is the reason for the delay. Where the government acts deliberately and causes the delay, the factor is weighted more heavily against it; where the reasons for the delay are neutral, they are not weighted heavily against the government; and where the delay is occasioned by the defendant, that factor is weighted against the defendant. Courts will also consider whether the defendant has asserted the right to a speedy trial; where the defendant has not done so, the failure to assert the right will make it difficult for the defendant to later argue that he was denied a speedy trial. The final factor is prejudice to the defendant. When determining prejudice the courts consider whether the defendant has been in custody or suffered restrictions on liberty pending trial, whether the defendant faced anxiety and public opprobrium while the criminal charges are pending, and whether the delay has impaired the defendant's ability to defend himself.

423. The federal Speedy Trial Act. The right to a speedy trial is implemented in federal courts by the Speedy

Trial Act, 18 U.S.C. sections 3161 et seq., and by the requirement that the federal district courts implement local plans for the speedy disposition of criminal cases.

424. The Speedy Trial Act first requires that a person arrested on a complaint, who under the Sixth Amendment has a right to be charged by indictment returned by a grand jury, must be indicted within 30 days of arrest; that period may be extended for another 30 days if the grand jury has not met within the first 30 days. 18 U.S.C. section 3161(b). If the detainee has not been indicted within that time, the government must dismiss the charges and release the detainee.

425. After the indictment has been returned, the defendant must be tried within 70 days of the return of the indictment or the defendant's first appearance before a magistrate, whichever occurs last. 18 U.S.C. section 3161(c)(1). Certain intervals are excludable from computation of the 70-day-to-trial period, including delays resulting from proceedings to determine competency or while the defendant is incompetent or physically unable to stand trial, to resolve other criminal charges, to hear pretrial motions, to transfer the case to another district, to consider the possibility of a plea agreement, and while the parties attempt to locate another defendant or witness or evidence. The court may also continue the trial if it finds that the ends of justice are best served by the delay and if it makes a specific explanation on the written record. 18 U.S.C. section 3161(h).

426. If the 70-day-to-trial period has expired, the court may dismiss the indictment with or without prejudice. 18 U.S.C. section 3162. Dismissal with prejudice means that charges cannot be refiled. The Speedy Trial Act provides that the court should consider, among other factors, the seriousness of the offence, the facts and circumstances that led to the dismissal, and the impact of reprosecution on the administration of the statute and the administration of justice. If either the prosecutor or the defence counsel acts deliberately to violate the defendant's rights under the Speedy Trial Act the court may also impose personal sanctions on the attorney.

427. State constitutions and statutes. As noted previously, states may impose limitations and follow procedures that are more, but not less, protective of individual rights than required by the U.S. Constitution. Many states have enacted speedy trial acts similar to the federal statute. States differ on whether speedy trial rights apply to juveniles. Florida includes a speedy trial provision in its Rules of Juvenile Procedure. Fla. R. Juv. P. 8.090 (as amended in 1991 and 1992); State v. Perez, 400 So.2d 91 (Fla. Ct. App. 1981). Other states may consider delinquency proceedings as civil matters to which speedy trial acts are not applicable. See Robinson v. State, 707 S.W.2d 47 (Tex. Ct. Crim. App. 1986); Matter of Beddingfield, 257 S.E.2d 643 (N.C. Ct. App. 1979).

428. Right to be tried in own presence and to defend in person**.** The "constitutional right to presence" at trial is rooted in the Confrontation clause of the Sixth Amendment and the Due Process clause of the Fifth Amendment. United States v. Gagnon, 470 U.S. 522, 526 (1985) (per curiam). The Confrontation clause has been held to be applicable to the states through operation of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). In another case involving a state prosecution, the U.S. Supreme Court declared that "the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge". Snyder v. Massachusetts, 291 U.S. 97, 105-6 (1934).

429. Federal law requires that non-corporate defendants be present at every major stage in a prosecution, including arraignment, entry of plea, all stages of trial and sentencing. Exceptions apply in cases in which the defendant has voluntarily absented himself or herself after the trial has commenced, or has been removed by the court for disruptive behaviour after warnings, as well as in cases involving offences punishable by fine or imprisonment for not more than one year, if the defendant has consented in writing to trial in absentia. Corporate defendants may appear by counsel in any case. Fed. R. Crim. P. 43. In a state proceeding, the defendant's absence from a court hearing is not always a violation of the Due Process or Confrontation clauses, although he has a guaranteed right to be present at critical stages, but depends on whether "his presence would contribute to the fairness of the procedure". Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (no violation when Kentucky defendant was excluded from hearing on competency of a child witness to testify); McMillian v. State, 594 So.2d 1253, 1270 (Ala. Cr. App. 1991) (no violation where defendant's lawyer argued motion for mistrial during trial intermission after state judge had inquired whether lawyer wanted client present).

430. When a defendant flees during the trial the proceedings may continue to verdict even in the defendant's absence, though the defendant cannot be sentenced in absentia. Bartone v. United States, 375 U.S. 52 (1963). However, in Crosby v. United States, 113 S.Ct. 748 (1993), the Supreme Court held that Fed. R. Crim. P. 43 prohibits the trial in absentia of a defendant who is not present at the start of trial. The Court found a rational distinction between flight before and during trial, for the purpose of deciding whether to permit the trial to proceed in the defendant's absence. The defendant's presence at the commencement of trial bolsters a later finding that the costs of delaying the trial would be unjustified; it also helps to ensure that the defendant's waiver is knowing and voluntary and deprives the defendant of the option of terminating a trial that does not appear to be going in his or her favour.

431. Right to legal assistance of own choosing**.** The right to counsel in all federal criminal prosecutions is provided for by the Sixth Amendment. This right has been extended to state courts through operation of the Due Process clause of the Fourteenth Amendment. In the landmark case of Gideon v. Wainwright, 372 U.S. 335 (1963), the U.S. Supreme Court mandated that every indigent person accused of a felony in a state court must be provided with counsel. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court extended this rule to provide for the appointment of counsel to indigent persons charged with any offence, including misdemeanours, which could result in incarceration.

432. For purposes of the Sixth Amendment, this right attaches from the time of the initial appearance before the court. Fed. R. Crim. P. 44(a) reads as follows:

> "Right to assigned counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate or the court through appeal, unless that defendant waives such appointment."

Rule 44 comports with a series of Supreme Court decisions regarding the right to appointed counsel at critical stages of a prosecution. White v. Maryland, 373 U.S. 59 (1967) (preliminary hearing at which a guilty plea had been entered before a magistrate); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment at which certain defences were deemed waived if not pleaded); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing to determine if sufficient evidence exists to present case to grand jury and if so to fix bail); United States v. Wade, 388 U.S. 218 (1967) (post-indictment line-up); Mempa v. Rhay, 389 U.S. 128 (1967) (sentencing hearing).

433. Courts have also held that the Sixth Amendment guarantee of the assistance of counsel also protects the defendant's right to represent himself or herself without the assistance of counsel if the defendant so chooses. Faretta v. California, 422 U.S. 806 (1975). That right is qualified, however, by requirements that it be asserted in a timely fashion and that the defendant abide by procedural rules and requirements of courtroom protocol. The court must also ensure that a defendant's waiver of the right to the assistance of counsel is knowing and intelligent. Moreover, the court may appoint standby counsel over the objection of the defendant. McKaskle v. Wiggins, 465 U.S. 168 (1984).

434. As discussed under article 9, even before the commencement of judicial proceedings, an accused person has a right to counsel under the Fifth Amendment, if he or she is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966). Police must inform a suspect, prior to questioning, that the person has a right to remain silent, that any statements made by the suspect can be used against the suspect in court, that the suspect has the right to have an attorney present, and that an attorney will be appointed for the suspect if the suspect cannot afford to retain one. Rule 5 of the Federal Rules of Criminal Procedure requires a magistrate to inform a defendant of these rights during the initial appearance of the accused in court.

435. **Right of confrontation**. The Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him, and to have compulsory process for obtaining witnesses in his favor". These rights extend to state prosecutions through the Due Process clause of the

Fourteenth Amendment.

436. The Confrontation clause guarantees a defendant the right to be present at any stage at which the defendant's presence would contribute to the defendant's opportunity for effective cross-examination, and at any stage of a criminal proceeding that is "critical to its outcome if his presence would contribute to the fairness of the procedure". Kentucky v. Stincer, 482 U.S. 730 (1987). The defendant may waive this right to be present by voluntarily failing to appear in the courtroom, Taylor v. United States, 414 U.S. 17, 19-20 (1973), or by continued disruption of the proceeding after warnings from the court, Illinois v. Allen, 397 U.S. 337, 342 (1970).

437. Although face-to-face confrontation of adverse witnesses at trial by the defendant is protected by the Confrontation clause, this is not an absolute right. Maryland v. Craig, 497 U.S. 836, 844 (1990) (upholding child witness' testimony by one-way closed circuit television). The clause chiefly is concerned with ensuring reliable testimony. Therefore, the meeting requirement can be waived with a proper showing of necessity, where the furtherance of an important public policy is at stake and the witness in question testifies under oath, subject to full cross-examination, and can be observed by judge, jury, and the defendant. Id. at 850, 857. A criminal defendant may waive the right to a face-to-face confrontation by preventing a witness from testifying, United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984), or by failing to make a timely objection to the violation, United States v. Gagnon, 470 U.S. 522, 527 (1985) (per curiam).

438. The Confrontation clause also guarantees criminal defendants the "opportunity for effective cross-examination", but does not require that the defendant cross-examine witnesses. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis in original). In cross-examination, the defendant has the right to test the witness' credibility and knowledge of the facts relevant to the case. If a witness invokes the Fifth Amendment privilege against self-incrimination and remains silent, and this invocation of the witness' right prevents the defence from inquiring into relevant issues, the court may strike the witness' direct testimony. The court may also limit cross-examination if questions are prejudicial, irrelevant, cumulative, collateral, unsupported by facts, confusing, or if they may jeopardize an ongoing government investigation. See United States v. Balliviero, 708 F.2d 934, 943 (5th Cir. 1983) (Confrontation clause not violated when court prohibited use of transcript of witness' sentence reduction hearing because use would jeopardize ongoing government investigation), cert. denied, 464 U.S. 939 (1983); United States v. Hirst, 668 F.2d 1180, 1184 (11th Cir. 1982) (Confrontation clause not violated when court limited inquiry into confidential informant's criminal activities because further responses would impair government investigation).

439. The admission into evidence of hearsay statements (statements made by an out-of-court declarant, recounted at trial by another, and offered for the truth of the matter asserted) against a defendant implicates the defendant's confrontational right, because the defendant cannot confront the out-of-court declarant. However, if the prosecution can establish that the declarant is unavailable at trial and that the statement introduced is sufficiently reliable, these out-of-court statements may be admitted. To establish that a declarant is unavailable, the government must show that it is unable to bring the declarant to trial despite good-faith efforts to do so. Reliability may be established if the statement falls within an established exception to the hearsay rule, or if the prosecution shows that the statement has a particularized guarantee of trustworthiness.

440. The Compulsory Process clause of the Sixth Amendment guarantees a defendant the right to obtain the attendance of witnesses on the defendant's behalf. To exercise this right, the defendant must show that the witness' testimony would be material, favourable to the defence, and not merely cumulative. See United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 873 (1982). Furthermore, a defendant may not be able to compel testimony from a witness who chooses to invoke the Fifth Amendment privilege against self-incrimination. In its instrument of ratification, the United States noted its understanding that paragraph 3(e) of article 14 "does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defence".

441. In applying criminal procedural rules, a state may not limit arbitrarily a defendant's ability to secure the testimony of favourable witnesses. Washington v. Texas, 388 U.S. 14 (1967) (Texas law permitting a codefendant to testify as a prosecution witness, but not in favour of defendant, violated right to have compulsory

process for obtaining witnesses in defendant's favour). A state cannot rigidly apply otherwise valid rules if the defendant's right to compulsory process or basic notions of due process are abridged. For example, in Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court held that applying state rules limiting cross-examination of a party's own witness and excluding hearsay statements actually denied the defendant a fair trial.

442. The Compulsory Process clause also prohibits government prosecutors from intimidating or threatening potential defence witnesses to discourage them from testifying for the defendant. It is not clear whether prosecutors have the duty to take affirmative steps to secure the testimony of potential defence witnesses. See Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

443. The Compulsory Process clause, however, does not guarantee that the defendant obtains the attendance of witnesses under precisely the same conditions as adverse witnesses. In general, a criminal defendant has no absolute right to have witnesses brought into court at public expense. The Compulsory Process clause does not give witnesses a right to claim fees from the government, unless required by statutes. Under the federal rules, the defendant may ask the court to issue a subpoena to compel the attendance of a witness at federal expense only after establishing that (i) the defendant is financially unable to pay the fees of the witness and (ii) that the presence of the witness is necessary to an adequate defence. If the court issues the subpoena, the rule requires that the cost and witness fees "be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed on behalf of the government". Fed. R. Crim. P. 17(b). Each state may have different procedural regulations regarding the payment of subpoena costs and witness fees. Once in court, however, the same procedural and evidentiary rules apply to witnesses for all parties.

444. **Assistance of an interpreter**. The right of a criminal defendant to be assisted by an interpreter if the defendant cannot understand or speak the language used in court is implicit in both the Due Process clause of the Fifth Amendment and the Confrontation clause of the Sixth Amendment. This right is accorded in federal and state practice.

445. In United States Ex. Rel. Negron v. State of New York, 434 F.2d 386, 389 (2d Cir. 1970), the Second Circuit held that without the benefit of an interpreter, the trial of a defendant who spoke no English "lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment". In addition, the inability to understand the language at trial impairs the defendant's right to confront witnesses against him; like the due process protections of the Fifth Amendment, the criminal defendant's Sixth Amendment right to confrontation is applicable to state prosecutions through the Fourteenth Amendment as well. Pointer v. Texas, 380 U.S. 400 (1965).

446. Rule 28 of the Federal Rules of Criminal Procedure provides:

> "The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct."

The notes of the Advisory Committee on Rules explain that Rule 28 uses:

"[g]eneral language ... to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel."

447. Rule 43(f) of the Federal Rules of Civil Procedure is the civil counterpart to Rule 28. It governs the use of interpreters for taking testimony in civil cases. In addition, the Court Interpreters Act, 28 U.S.C. section 1827, requires the administrative arm of the federal court system to establish and maintain a programme for the provision of certified court interpreters in criminal proceedings and in civil actions initiated by the United States. 28 U.S.C. section 1827(d) provides that the "presiding judicial officer" (i.e., U.S. district court judge, U.S. magistrate, or bankruptcy referee) shall, either sua sponte or on motion of a party (including a criminal

defendant), order the use of an interpreter if the defendant or a witness "speaks only or primarily a language other than the English language ...". Although the court has discretion in deciding whether to use an interpreter, 28 U.S.C. section 1827(e)(2) ensures that:

> "In any criminal or civil action in a United States district court, if the presiding judicial officer does not appoint an interpreter under subsection (d) of this section, an individual requiring the services of an interpreter may seek assistance of the clerk of the court or the Director of the Administrative Office of the United States Courts in obtaining the assistance of a certified interpreter."

448. Other federal statutes authorize the use and payment of interpreters in depositions to authenticate foreign public documents in criminal cases. 18 U.S.C. sections 3493, 3495, 3496. Interpreters are subject to the same procedural rules regarding qualifications as are other expert witnesses. Fed. R. Crim. P. 604.

449. Most states recognize that non-English-speaking criminal defendants have a right to an interpreter. Two states provide for such interpreters in their state constitutions: California and New Mexico. Cal. Const. art. 1, section 14; N.M. Const. art. 2, section 14. Otherwise, the right is found in regulations or statutes. V.A.M.S. section 476.060 (Missouri); Ohio Rev. Code Ann. section 2311.14 (civil cases); Ohio Rev. Code Ann. section 2335.09 (criminal cases).

450. Protection against self-incrimination**.** The Fifth Amendment provides that "No person shall be ... compelled in any criminal case to be a witness against himself". This constitutional protection of the individual's right against self-incrimination in criminal cases is applicable to the states as well as the federal government.

451. The Fifth Amendment thus prohibits the use of involuntary statements. It not only bars the government from calling the defendant as a witness at his trial, but also from taking statements from the accused against the accused's will. If a defendant confesses, he may seek to exclude the confession from trial by alleging that it was involuntary. The court will conduct a factual inquiry into the circumstances surrounding the confession to determine if the law enforcement officers acted in a way to pressure or coerce the defendant into confessing and, if so, whether the defendant lacked a capacity to resist the pressure. Colorado v. Connelly, 479 U.S. 157 (1986). Physical coercion will render a confession involuntary. Brown v. Mississippi, 297 U.S. 278 (1936).

452. An individual's right against compelled self-incrimination applies regardless of whether charges have been formally filed. To ensure that the individual has knowingly waived Fifth Amendment rights when he gives a statement during questioning by government agents, the investigating officer conducting a custodial interrogation is obligated to inform the suspect that the suspect has a right to remain silent, that anything he says can be used against him, and that the suspect has a right to speak with an attorney before answering questions. Miranda v. Arizona, 384 U.S. 436 (1966). If the questioner does not follow this procedural step, evidence obtained through the interrogation cannot be used at the defendant's criminal trial. If the defendant is given the proper warnings and waives these rights, any statement and information derived as a result of that statement may be used as evidence at a subsequent criminal trial.

453. Thus, the Fifth Amendment guarantees that persons have the right to refuse to testify as to matters which would incriminate them. There are times, however, when the Government deems a person's testimony, even though it would be self-incriminating, to be essential. The federal immunity statute, 18 U.S.C. sections 6001 et seq., addresses the accommodation between the right of government to compel testimony, whether before a grand jury or at trial, and the individual's right to remain silent. In re Special Grand Jury, 480 F. Supp. 174, 177-78 (E.D.Wis. 1979). A witness is entitled to immunity from criminal prosecution if compelled to testify despite the constitutional privilege. Gardner v. Broderick, 392 U.S. 273, 279 (1968). When immunity has been ordered, the federal immunity statute, 18 U.S.C. section 6002, explains the reach of that immunity for testimony compelled in federal proceedings: "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order" (emphasis added). The immunity protects witnesses from the use of their compelled

testimony in any later prosecution, regardless whether it is a state or federal prosecution. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

454. Under 18 U.S.C. section 6003, the U.S. Attorney (chief federal prosecutor) for a federal district, with the approval of the Attorney General or other statutorily specified Department of Justice official, has the discretion to request and obtain a court order requiring "any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States ... to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination" if, in the U.S. Attorney's judgment, "(1) the testimony or other information ... may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination". 18 U.S.C. section 6003 (b). Section 6004 authorizes compulsion and immunity orders in certain administrative proceedings, when approved by the Department of Justice. Section 6005 provides for court-ordered immunity for witnesses called to testify in a congressional hearing; that provision does not require prior Department of Justice approval but it does require that Congress give 10 days' notice to the Justice Department in advance of its conferral of immunity.

455. The government is not obligated to grant immunity. United States v. Lang, 589 F.2d 92, 123 (2d Cir. 1978). If the government refuses to grant immunity, however, a defendant may exercise his usual rights under the Fifth Amendment. United States v. Karas, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). In sum, testimony compelled from a witness under a grant of immunity must leave the witness and the government in substantially the same positions as if the witness had exercised the right to remain silent. United States v. North, 910 F.2d 843 (D.C. Cir. 1990); United States v. Semkiw, 712 F.2d 891, 894 (3d Cir. 1983). The government will be precluded from using a witness's compelled testimony against the witness, but may prosecute that witness for offences that this evidence concerned if the government can prove that it obtained sufficient evidence from a legitimate source wholly independent of the compelled testimony. Kastigar v. United States, 406 U.S. 441, 460 (1972).

456. State statutes similarly govern grants of immunity by the respective states. Some restrict the types of cases in which immunity may be offered. For example, Connecticut provides for immunity only in grand jury investigations or trials of specified, serious offences. Conn. Gen. Stat. section 54-47 a (1989). However, just as under federal law, the scope of the constitutional privilege and scope of state-granted immunity are coextensive:

> "No witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence."

Conn. Gen. Stat. section 54-47 a (b).

457. Other states, however, grant full transactional immunity for compelled testimony. "Transactional immunity" forbids prosecution of the witness for the offence to which the compelled testimony is related. Since United States citizens are protected both by the United States Constitution and their own states' constitutions - which may provide protections broader, but not narrower, than the U.S. Constitution - states may expand on the protections required by the Constitution and federal law. Transactional immunity granted by a state does not prevent federal prosecution for the same transaction; the defendant's protection is limited to use immunity. United States v. Anzalone, 555 F.2d 317, 320-321 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978). "Use immunity" forbids compelled testimony and its fruits from being used against the witness in any way related to the criminal prosecution of the witness. However, the trend in the states is also to cut back from full transactional immunity to use and derivative use immunity.

458. Finally, there are instances, such as post-immunity prosecutions for perjury, where, notwithstanding the grant of use immunity, the testimony itself or its substance may be introduced against the individual.

Review of conviction and sentence

459. All criminal conviction and sentences in the U.S. criminal justice system are subject to review. Direct appeal is the primary avenue for review of a conviction or sentence in a criminal case. The normal review, whether called an appeal or a proceeding in error, is confined to consideration of the record below, with no new testimony taken or new issues raised in the appellate court.

460. The right to direct appeal of a conviction in a criminal case has not been regarded under the law as a due process protection or otherwise guaranteed by the U.S. Constitution. McKane v. Durston, 153 U.S. 684, 687-88 (1894). However, under federal law criminal defendants have a statutory right to appeal their convictions or sentences to the intermediate court of appeals. See 28 U.S.C. section 1291 (statutory right to appeal from final judgements, including criminal judgements of conviction and sentences, in federal district court); 18 U.S.C. section 3742 (providing a statutory right to defendants to appeal their sentences). If unsuccessful on appeal, they have a right to seek review (petition for a writ of certiorari) by the U.S. Supreme Court. However, unlike the absolute obligation of appellate courts to accept the appeals brought from district court, the Supreme Court has discretion to decline to hear the case.

461. Every state also provides, either by state constitution (e.g. Florida, State ex rel. Cheney v. Rowe, 11 So.2d 585, 152 Fla. 316 (1943); Pennsylvania, Commonwealth v. Passaro, 476 A.2d 346, 504 Pa. 611 (1984); Indiana, Bozovichar v. State, 103 N.E.2d 680, 230 Ind. 358 (1952); Alabama (Const. art. 1, section 6; Delaware (Const. art. I, section 7)) or statute (Connecticut, State v. Curcio, 463 A.2d 566, 191 Conn. 27 (1983); Maryland, Cubbage v. State, 498 A.2d 632, 304 Md. 237 (1985)), or both, that criminally convicted defendants have a right to appeal their convictions and/or sentences. State prisoners whose appeals throughout the state's system have been unsuccessful may also file petitions for a writ of certiorari in the Supreme Court.

462. Moreover, individuals who allege their convictions or punishments are in violation of federal law or the Constitution may seek review in federal court by way of an application for a writ of habeas corpus. Ex parte Bollman, 8 U.S. (4 Cranch) 74, 95 (1807); Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976); Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). State prisoners in custody may seek federal court review on the ground that they are in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. sections 2241, 2254. The prisoner seeking federal review must first exhaust all state appellate remedies. 28 U.S.C. section 2254 (b), (c). All states, as noted above, guarantee the right to appeal a conviction to at least one higher court, and a right of discretionary review by (if not of direct appeal to) the state's highest court. All states provide some form of collateral relief, either a writ of habeas corpus or error coram nobis, or under specific statutory post-conviction relief procedures.

463. In such cases, federal courts ordinarily will not resolve claims that the prosecution was inconsistent with requirements under state laws or procedures that are not of constitutional magnitude. Estelle v. McGuire, 112 S.Ct. 475, 479-80 (1991); Pulley v. Harris, 465 U.S. 37, 41-2 (1984). If the prisoner's application to a federal district court for habeas corpus relief is denied, he has a right to appeal that denial to the federal court of appeals; if that is denied, he may file a petition for a writ of certiorari and thereby ask the Supreme Court to hear his case.

464. A federal prisoner in custody may also seek habeas corpus relief in the same federal court in which the conviction was entered on the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court had no jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized by law, or any other ground by which the conviction and sentence may be challenged. 28 U.S.C. section 2255. Ordinarily a petition under section 2255 is not permitted to substitute for a direct appeal, but it does provide a substantial right to additional review, particularly for issues that could not have been raised in the direct appeal from the conviction.

Right to compensation for miscarriage of justice

465. As discussed under article 2, United States law provides a variety of mechanisms by which victims of illegal arrests or other miscarriages of justice may seek to obtain compensation. For example, federal law provides an enforceable right to seek compensation against officers or employees of the federal government alleged to have committed a violation of constitutionally protected rights. Bivens v. Six Unknown Named Agents, 403 U.S. 386 (1971). Under the Federal Tort Claims Act, civil actions for damages arising from negligent or malicious conduct may be brought against the federal government in certain circumstances.

466. However, neither federal nor state law contains an absolute guaranteed right to obtain or recover compensation in every situation involving a miscarriage of justice. For example, U.S. law does not generally accord a right to compensation for an arrest or detention made in good faith but ultimately determined to have been unlawful. Thus, if upon review of a particular case, the U.S. Supreme Court were to adopt a new interpretation of a constitutional provision, which had the effect of retroactively invalidating an arrest which had been properly conducted under the rule previously in effect, no compensation would typically be owed to the subject of the arrest. Moreover, to the extent it has not been waived, the doctrine of sovereign immunity generally restricts opportunities for recovery of compensation against the government.

467. U.S. understanding. In view of the above, the United States included the following in its instrument of ratification:

> "The United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law."

Double jeopardy

468. The Fifth Amendment to the U.S. Constitution provides, among other protections: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb". The Double Jeopardy clause thus protects against reprosecution by the federal government for the same offence after a previous conviction or acquittal. It also protects against the imposition of multiple punishments for the same criminal act. See United States v. Halper, 490 U.S. 435 (1990). Because the Double Jeopardy clause of the Fifth Amendment applies to the states (Benton v. Maryland, 395 U.S. 784, 793-96 (1969)), a state may not prosecute persons more than once for the same crime.

469. The Double Jeopardy clause has been interpreted to bar successive prosecutions for greater- as well as lesser-included offences, Illinois v. Vitale, 447 U.S. 410, 421 (1980); United States v. Dixon, 113 S.Ct. 2849, 2861-62 (1993); Brown v. Ohio, 432 U.S. 161 (1977), and "when an issue of ultimate fact has once been determined by a valid and final judgment". When an issue of fact has been determined with finality in a prior trial, "that issue cannot again be litigated between the same parties in any future lawsuit". Ashe v. Swenson, 397 U.S. 436, 443 (1970).

470. The Double Jeopardy clause does not erect an absolute bar to successive prosecutions, however. For example, if circumstances occurring during the first trial require its termination for reasons unrelated to the sufficiency of the evidence and before a verdict has been issued, the Double Jeopardy clause will not protect against bringing the defendant again to trial. Richardson v. United States, 468 U.S. 317 (1984). Similarly, if the defendant appeals his conviction and prevails on appeal on an issue other than a claim that the evidence was insufficient, the Double Jeopardy clause does not bar the state from reprosecuting the defendant. Burks v. United States, 437 U.S. 1 (1978).

471. Additionally, because of the complexity of modern criminal laws, defendants may face more than one criminal charge arising from the same acts or series of acts. In an effort to simplify the analysis where there are

either multiple punishments or multiple prosecutions, the Supreme Court has recently returned to a "same-elements" test: "whether each offence contains an element not contained in the other; if not, they are the `same offence' and double jeopardy bars additional punishment and successive prosecution". United States v. Dixon, 113 S.Ct. 2849, 2856 (1993), citing Blockburger v. United States, 284 U.S. 299, 304 (1932). Thus, where a person is charged with two different crimes, the doctrine of double jeopardy will not bar either sequential trials on the two charges or cumulative sentences as long as each count requires the government to prove a factual element that is not required in the other count. Nor will the Double Jeopardy clause bar separate and multiple prosecutions for the same crime by different sovereignties. Because federal and state jurisdiction are separate, the Supreme Court has interpreted the Double Jeopardy clause not to bar prosecutions by both the federal government and a state government, or by multiple state governments, for the same offence. See Heath v. Alabama, 474 U.S. 82 (1985); Abbate v. United States, 359 U.S. 187 (1959).

472. **Protections for defendants**. Notwithstanding that the U.S. Supreme Court has held that the Fifth Amendment does not bar those multiple prosecutions, the federal government imposes certain procedures to protect defendants in federal criminal cases. The U.S. Department of Justice's long-standing policy provides that "several offences arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions". Petite v. United States, 361 U.S. 529, 530 (1960) (per curiam).

473. The government's Petite policy is set out in the United States Attorney's Manual 9-2.142 (1988). Briefly, the policy states the presumption against prosecuting a defendant federally after he has been prosecuted either by state or federal authorities for "substantially the same act, acts or transaction unless there is a compelling federal interest supporting the dual or successive federal prosecution". In order to protect against overreaching prosecutions, the Assistant Attorney General of the Criminal Division must approve the initiation or continuation of the successive federal prosecution. The statement of policy spells out factors to be taken into account in making the Petite decision. First, "[a] federal prosecution will not be authorized unless the state/prior federal proceeding left substantial federal interests demonstrably unvindicated". Even then, the statement continues, the prosecution "normally will not be authorized unless an enhanced sentence in the subsequent federal prosecution is anticipated". Other factors include: if the prior proceedings were "infect[ed] ... by incompetence, corruption, intimidation, or undue influence", or if the verdict represented "court or jury nullification involving an important federal interest, in blatant disregard of the evidence".

474. Many states have imposed more rigorous double jeopardy prohibitions against multiple prosecutions by different legal jurisdictions, either in statutes or their state constitutions. For example, New York State protects persons from reprosecution in state court for conduct that previously formed the basis for a federal prosecution. New York State's purpose in enacting its double jeopardy statute was "primarily to supersede the 'dual sovereignties' doctrine which permitted successive state and federal prosecutions based on the same transaction or conduct". People v. Rivera, 456 N.E.2d 492, 495 (N.Y. 1983).

475. U.S. understanding. As a result of these protective procedures and policies, multiple prosecutions occur only rarely. However, because it is permissible in certain narrowly defined situations and has on occasion proven an effective method for ensuring that those who violate others' basic rights are brought to justice, the United States included the following understanding in its instrument of ratification:

> "The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgement of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause."

Procedure in the case of juvenile persons

476. A separate system for juveniles, fundamentally different in theory and practice from adult criminal procedure, has been developed by the states. In addition, the federal court system follows the requirements set forth in 18 U.S.C. sections 5031-42 for juveniles addressed under the federal juvenile delinquency procedures. The federal statute mirrors state statutes in a number of ways and codifies various rights held by juveniles in any

delinquency proceeding.

477. Juvenile delinquency proceedings are not, strictly speaking, criminal procedures. Juvenile proceedings take into account the age of the offenders and the desirability of promoting their rehabilitation, in part by avoiding the stigma of criminal arrest and conviction. See In re Gault, 387 U.S. 1, 15-16 (1966). Proceedings in juvenile court may be held for three reasons. A juvenile may be accused of an act that if committed by an adult would be a crime. Second, a juvenile may be involved in a proceeding where he or she is judged a person in need of supervision (PINS) for reasons such as truancy or being a runaway. Finally, juvenile court may be the setting for a child neglect case or a case involving cessation of parental rights.

478. The exact age limits for the juvenile justice system vary. In some four fifths of the states, persons are considered juveniles and are subject to juvenile proceedings up to age 18. The maximum age is 19 in one state and 16 or 17 in the remainder. Each state provides for waiver to adult criminal court depending upon the crime and sometimes the wishes of the juvenile.

479. Juvenile courts make a finding of delinquency. A juvenile may be found delinquent in a PINS case or where there is a "violation of a law of the United States committed by a person prior to his 18th birthday which would have been a crime if committed by an adult". 18 U.S.C. section 5031. For many years, one consequence of the difference in approach between criminal courts and juvenile courts was that juvenile proceedings did not afford the same procedural rights as are guaranteed by the Constitution in adult criminal proceedings. Beginning in the 1960s, however, courts in the United States extended constitutional guarantees to juvenile proceedings where punishments such as incarceration could result. Today, juveniles enjoy most of the same procedural guarantees as adults.

480. The U.S. Supreme Court in Gault found that the Constitution affords juveniles involved in delinquency proceedings (for criminal-type actions) the following: written notice of the charges in advance of the proceedings; assistance of counsel for the child with notice to the parents that this is the child's right and if the family cannot afford an attorney, one will be appointed by the court; protection from self-incrimination; and the right to confrontation of witnesses and cross-examination. Gault, 387 U.S. at 33, 36, 55, 56-7. The Court also has stated that a finding of delinquency must be based on proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Courts have found that the Fourth Amendment requirement for probable cause applies to pretrial detention hearings. Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976). The Supreme Court has noted, however, that where the state employs procedural safeguards such as a probable cause hearing, the legitimate state interests in preventive detention do not violate the Constitution. Schall v. Martin, 467 U.S. 253 (1984).

481. These and other protections for juveniles are codified in federal law at 18 U.S.C. sections 5031 to 5047 (notice-section 5034; counsel-section 5035; speedy trial-section 5036; dispositional hearing within 20 days-section 5037; privacy of juvenile delinquency records-section 5039; no juveniles in adult jails or correctional institutions-section 5039). Minors who are incarcerated are entitled to be segregated from adult inmates and to be accorded treatment appropriate for their age and legal status. 18 U.S.C. section 5035.

482. Although one quarter of the states provide for jury trials for juveniles, the U.S. Supreme Court has found that given the special aspects of juvenile proceedings, juveniles do not have a constitutional right to a jury in a delinquency proceeding. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

483. Confidentiality is one of the special aspects of juvenile proceedings. Juvenile proceedings are generally closed to the public and press. Most states provide for strict limitations on access to juvenile records or files.

484. Police provide the majority of referrals to juvenile court. Usually offenders are not detained beyond the need to complete the necessary processing and contact with the parents or guardians. Juveniles may be detained in juvenile facilities if the juvenile has committed a serious offence and is considered a danger to the public. See 18 U.S.C. section 5035; Schall v. Martin, 467 U.S. 253 (1984).

485. The treatment of juvenile offenders by methods other than institutionalization generally is encouraged.

These include counselling, rehabilitation, community service, and restitution. Such programmes are often employed in the case of less serious crimes such as theft. The federal government has supported the growth of such alternatives, with the passage of the Juvenile Justice and Delinquency Act of 1974. 42 U.S.C. sections 5601 et seq.

486. The design and operation of the juvenile justice system throughout the United States are subject to continuing re-examination. This results in part from the tension between the historic concept of delinquency proceedings as non-adversarial, akin to parental punishment, and the more recent determination that juveniles should enjoy the protections of adult criminal procedure. In addition, concerns about the quantity and severe quality of some "juvenile" crime have caused many to question whether the juvenile justice system, as presently conceived, is adequate or appropriate for certain serious offenders.

487. The increase in serious violent crime committed by juveniles in particular is cause for growing concern. According to U.S. Department of Justice statistics, juvenile arrests for violent offences increased 50 per cent in the five years between 1987 and 1991, with arrests for murder increasing by 85 per cent. Although those arrested for violent crime constitute only a small percentage of all juvenile arrests - only about 5 per cent - they constitute a significant portion of arrests for violent crime overall. In 1991, for example, juvenile arrests constituted some 17 per cent of all arrests for violent crime.

488. The juvenile system is not well designed to deal with particularly serious or "hard core" offenders. One approach to this problem in certain cases where a particularly serious crime has been committed or, in view of the juvenile's previous record, juvenile proceedings are no longer considered effective, is to remove such persons from the juvenile justice system to the adult criminal justice system.

489. The determination whether to treat a person within the statutory age category of "juveniles" as an adult is made by a juvenile transfer procedure in nearly all states. Under such a procedure, a judge decides after a hearing whether a transfer is in the best interests of the child and the public. Appeals are permitted. In some states, a prosecutor has discretion over whether to bring a case in criminal or juvenile court. Some state laws also provide for automatic prosecution in criminal court for serious offences, repeat offenders, or routine traffic citations. A juvenile who is subject to the adult criminal justice system is entitled to the constitutional and statutory rights and protections provided for adults and described in this report.

490. U.S. reservation. In view of the above, the United States conditioned its ratification of the Covenant on the following reservation:

> "The policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18."

Military justice system

491. The rules for the operation of military courts provide a similar range of protections to those afforded civilians, although with some exceptions. For example, Rule for Court-Martial (R.C.M.) 706, Manual for Courts-Martial (1984), mandates that courts-martial shall be open to the public, including members of both the military and civilian communities.

492. An accused is presumed innocent until proven guilty beyond a reasonable doubt. Under Rule for Court-Martial 910, if an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

493. Article 30 of the Uniform Code of Military Justice (UCMJ) requires that the accused be informed of the charges as soon as practicable (Section 830, Title 10, United States Code). Rule for Court-Martial (R.C.M.) 602 requires that charges which have been referred to trial be served upon the accused by the trial counsel and that, in time of peace, no person may, over objection, be brought to trial by general court-martial within a period of five days after service of charges, or before a special court-martial within three days after service of charges. The accused must be brought to trial within 120 days of referral of charges, imposition of restraint, or entry on active duty (R.C.M. 707).

494. The independence of military judges is of paramount importance to the military justice system. Federal law mandates that the military judge shall be a commissioned officer, and a member of the bar of a federal court or a member of the bar of the highest court of a state. 10 U.S.C. section 826. Neither the convening authority nor any member of the convening authority's staff may prepare or review the military judge's effectiveness report.

495. Rule for Court-Martial 104 prohibits unlawful command influence of the court-martial process and court personnel, including the military judge. No convening authority or commander may censure, reprimand, or admonish a military court or its personnel with respect to the findings or sentence adjudged or other exercise of the court proceedings or functions.

496. Under R.C.M. 804, the accused is required to be present at every stage of the trial proceedings, unless, after arraignment, the accused is voluntarily absent or his disruptive conduct causes the accused's removal or exclusion from the courtroom.

497. The accused has the right to be represented at a general or special court-martial or at a pretrial investigation by civilian counsel if provided by him, by detailed military counsel, or by military counsel of the accused's own choosing if that counsel is reasonably available. Military counsel are provided at no expense to the accused. 10 U.S.C. section 838.

498. The defence counsel has an opportunity to obtain witnesses and other evidence. The process to compel witnesses to appear and to testify and to compel the production of evidence is similar to that of other criminal courts in the United States. 10 U.S.C. section 846.

499. The military rules make provision for the employment of interpreters, when necessary, under R.C.M. 501 and 502. No person may be compelled to incriminate himself or herself or to answer any question the answer to which may tend to incriminate him or her. 10 U.S.C. section 831. Military Rule of Evidence 304 forbids the use of a statement obtained in violation of section 831, or evidence derived therefrom.

500. Cases involving a punitive discharge, dismissal of an officer, death, or confinement of one year or more are reviewed by the accused's service Court of Military Review, unless the accused waives such review. The Court of Military Review can correct any legal error it may find, and it can reduce an excessive sentence. The accused is assigned an appellate defence counsel at no cost before the Court of Military Review. The accused also may retain civilian counsel at the accused's expense to pursue an appeal. 10 U.S.C. section 866.

501. If the accused is not satisfied by the decision of the Court of Military Review, the accused may petition the U.S. Court of Military Appeals for further review. The Court of Military Appeals must review any sentence extending to death. That court consists of five civilian judges, and it can correct any legal error it may find. Counsel will be made available to assist in the petition to the Court of Military Appeals. 10 U.S.C. section 867.

502. Unless the accused waives review, special courts-martial not involving a punitive discharge or a sentence of confinement for one year or longer will be reviewed by a judge advocate. 10 U.S.C. section 864. In the case of a general court-martial, involving a similar sentence, the record shall be reviewed in the Office of The Judge Advocate General. 10 U.S.C. section 869.

503. Upon motion by the accused, a charge or specification will be dismissed if the accused has previously been tried by court-martial or federal civilian court for the same offence. Rule for Court-Martial 907.

504. Non-judicial punishment is permitted by article 15 of the UCMJ, 10 U.S.C. section 815, and governed by the Manual for Courts-Martial. This procedure permits commanders to dispose of certain offences without trial by court-martial unless the service member objects.

505. Service members first must be notified by their commanders of the nature of the charged offence, the evidence supporting the offence, and of the commander's intent to impose non-judicial punishment. The service members may then consult a defence counsel to determine whether or not to accept non-judicial punishment or demand trial by court-martial.

506. A member accepting non-judicial punishment may have a hearing with the commander. The member may have a representative at the hearing, may request that witnesses appear and testify on behalf of the member, and may present other evidence. The commander must consider any information offered during that hearing and must be convinced of guilt by reliable evidence before imposing punishment.

507. Members who wish to contest their commander's determination of guilt or the severity of the punishment imposed may appeal to the next higher commander. The appeal authority may set aside the punishment, decrease its severity, or deny the appeal. Non-judicial punishment does not constitute a criminal conviction.

Article 15 - Prohibition of ex post facto laws

508. The U.S. Constitution forbids both the federal government and states from enacting ex post facto laws. Article I, section 9 of the Constitution, addressing the duties of the U.S. Congress, states that "No ... ex post facto Law shall be passed". Article I section 10 provides that "No State shall ... pass any ... ex post facto Law". An ex post facto law would retroactively make unlawful conduct that was lawful when it was committed or would increase criminal penalties retroactively. The prohibition on ex post facto laws applies to Congress and the states. See Calder v. Bull, 3 U.S. (3 Dall.) 386 (1789); Dobbert v. Florida, 432 U.S. 282, 292-94 (1977); Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 2719 (1990).

509. These constitutional provisions preclude the retroactive application of a penal statute where the statute would, after the fact, make criminally punishable an act that was legal when done. The prohibition against ex post facto legislation also forbids the State from imposing a higher penalty for a criminal act than was available at the time the crime occurred. This prohibition has been relied on to invalidate application of a statutory change that would have made mandatory a maximum penalty that was not required at the time the crime was committed, Lindsey v. Washington, 301 U.S. 397 (1937), or that would have imposed a higher "guideline" sentence for the underlying criminal conduct than was in force at the time the crime was committed, Miller v. Florida, 482 U.S. 423 (1987), or that would eliminate prison credit for good behaviour, Weaver v. Graham, 450 U.S. 24 (1981). The U.S. Supreme Court also has invalidated the retroactive application of certain procedural changes, such as a law requiring fewer jurors in a state criminal trial, under the ex post facto clause. Thompson v. Utah, 170 U.S. 343 (1898). The ex post facto clause bars the application of an extended statute of limitations after the period under the original statute of limitations had run.

510. At the same time, however, other matters may be subject to retroactive amendment. Changes in trial or post trial procedures or in the rules governing admission of evidence, for example, may apply to prosecutions for offences that occur before the statutory or rule changes; retroactive application does not trigger ex post facto concerns. E.g. Collins v. Youngblood, supra (change in procedure allowing reformation of an improper jury verdict); Splawn v. California, 431 U.S. 595 (1977) (change in jury instructions); Thompson v. Missouri, 171 U.S. 380 (1898) (change in evidentiary rules).

511. While the Constitution thus prohibits imposition of punishment upon an offender that was statutorily unavailable at the time he committed the offence, the Constitution does not require that offenders benefit from less onerous laws passed after the commission of the crime. As the Supreme Court explained, "for a law to be ex post facto it must be more onerous than the prior law". Dobbert v. Florida, 432 U.S. 282, 294 (1977). In other words, new laws that are less onerous do not raise ex post facto concerns. State and federal courts permit the

retroactive application of more lenient statutes but do not require it. For example, when the Federal Sentencing Commission lowers a sentencing range, that change is not automatically applicable to those defendants previously sentenced under the earlier, higher range. The sentencing court may reduce the sentence "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. section 3582(c)(2).

512. **U.S. reservation**. Because of the contrast between article 15, paragraph 1, clause 3 - which requires post offence reductions in penalty to accrue to the offender's benefit - and U.S. laws, which do not necessarily give an offender the benefit of subsequent reductions of penalty, the United States conditioned its ratification of the Covenant upon the following reservation to paragraph 1 of article 15:

> "As U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15."

Article 16 - Recognition as a person under the law

513. All human beings within the jurisdiction of the United States are recognized as persons before the law. Slavery and involuntary servitude were outlawed in 1865 by the Thirteenth Amendment to the U.S. Constitution, as discussed in greater detail under article 8. Aliens are granted basic constitutional rights and entitled to the protection of the courts, as discussed under articles 2 and 13.

514. The common law doctrine of civil death, which provided that a convicted felon was deprived of legal personality and could not perform legal functions such as entering into contracts, does not exist today, although prisoners sometimes are not permitted to vote (see discussion under article 25). Federal and state prisoners enjoy a constitutional right of access to the courts. See McCrary v. Maryland, 456 F.2d 1 (4th Cir. 1972); McCuiston v. Wanicka, 483 So.2d 489 (Fla. Ct. App. 1986). Prisoners frequently file actions in the federal courts seeking writs of habeas corpus and suing governmental authorities for alleged violations of their civil rights under 42 U.S.C. section 1983.

Article 17 - Freedom from arbitrary interference with privacy, family, home

515. **Right to privacy**. The freedom from arbitrary and unlawful interference with privacy is protected under the Fourth Amendment to the Constitution. As explained previously, the Fourth Amendment protects persons from unlawful searches and seizures by the Government at both state and federal levels. The U.S. Supreme Court has defined search under the Fourth Amendment to be a government infringement of a person's privacy. Rakas v. Illinois, 439 U.S. 128, 140-49 (1978). An infringement of that privacy occurs when the individual exhibits an actual subjective expectation of privacy and when that expectation is one that society is prepared to deem reasonable. Katz v. United States, 389 U.S. 347 (1967). Put another way, the reasonable expectation of privacy is the linchpin of the Fourth Amendment.

516. Under that analysis, persons have no subjective or reasonable privacy interest in property that they have abandoned, Hester v. United States, 265 U.S. 57 (1924), or in items that they expose to the public, such as contraband lying in plain view. Coolidge v. New Hampshire, 403 U.S. 443 (1971). They do, however, have a privacy interest in such areas as their homes, cars and correspondence.

517. Although the literal language of the Fourth Amendment does not require a warrant for searches and seizures, the U.S. Supreme Court interprets the Fourth Amendment to mandate a warrant (absent exceptions, like exigency, that are inapplicable here) where the intrusion might compromise a "reasonable expectation of privacy". Katz v. United States, 389 U.S. 347 (1967). Conversely, where the individual has no reasonable expectation that his conduct or possessions will be private, there is no requirement that government agents first secure a warrant. "What a person knowingly exposes to the public, even in her own home or office, is not a subject of Fourth Amendment protection". Katz v. United States, 389 U.S. at 351.

518. Where there exists a reasonable expectation of privacy, the Constitution does not permit government violation of that reasonable expectation without probable cause to believe that a crime is occurring or that evidence of crime will be found. The Supreme Court has imposed a presumption that government officials will first secure a warrant. When officers seek a warrant, they must make a showing of probable cause before a neutral and detached official. This official need not, however, be a judge or a magistrate; the primary requirement is that he be neutral and detached, i.e. not an agent or arm of the police department. Shadwick v. City of Tampa, 407 U.S. 345, 348-50 (1972).

519. Exclusionary rule**.** If officers do not first obtain a warrant they must have good justification for the warrantless action; in addition, the government's decision to search or seize property must have been accompanied by probable cause. If a judge later determines that the search was not supported by probable cause, or that the officers did not have sufficient reason to forego seeking a prior warrant - i.e. that the search was illegally conducted and evidence illegally seized - the court may exclude that evidence, and any further evidence and leads from it, at the criminal trial. This rule of suppression is known as the exclusionary rule. See Weeks v. United States, 232 U.S. 383 (1914) (requiring suppression and exclusion from trial of evidence seized in violation of Fourth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (applying exclusionary rule to items seized by state officers and offered into evidence at state prosecution). Where the search and seizure is supported by an underlying facially valid warrant issued by a proper official upon his or her satisfaction with the sufficiency of probable cause, even if there is some defect in the process the courts will apply a good faith exception to the exclusionary rule. United States v. Leon, 468 U.S. 897 (1984).

520. Family. United States law has long recognized the right of families to privacy. The scope of this privacy right has changed considerably over time and remains a source of significant controversy. Early in the nation's history, for example, family privacy prevented prosecution of abusive husbands, forbade spouses from testifying against each other, limited the availability of divorce, and even allowed women to sue men for broken promises to marry. More recently, the Supreme Court has relied upon the concept to define and protect important individual rights within the family.

521. In the landmark case of Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court found a "marital privacy" right to use contraception within the "sacred precincts of marital bedrooms". This right was founded upon the "penumbra" of privacy created by the Bill of Rights. In subsequent decisions, the Supreme Court has relied upon the same concepts in finding the right of unmarried individuals to obtain contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972), of women to obtain abortions, Roe v. Wade, 410 U.S. 113 (1973), and of a grandmother to live with her grandchildren despite zoning ordinances, Moore v. City of Cleveland, 431 U.S. 494 (1977). In California, the concept has been applied to permit unmarried individuals to sue each other for support ("palimony") at the end of an intimate relationship. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 103 (1976).

522. The right of families to privacy, in particular from governmental intrusion, is not unconditional, however, and may be limited to traditional American concepts of family. In one of the most controversial cases recently to consider the extent of this right, the Supreme Court upheld the constitutionality of a Georgia statute criminalizing sodomy. Bowers v. Hardwick, 478 U.S. 186 (1986). In its decision, the Court declined to find a correlation between the rights to found a family and to procreate, on the one hand, and the asserted right of homosexual persons to engage in acts of sodomy. The Court has also indicated that family privacy will not prevent governmental actions where that action will assist one family member as against another, for example by sending social welfare workers to the homes of welfare recipients without prior announcement to ensure the well-being of a child, Wyman v. James, 400 U.S. 309 (1971), and in permitting a woman to waive her privilege regarding testifying against a spouse in order to limit her own criminal liability, Trammel v. United States, 445 U.S. 40 (1980).

523. Several recent cases have underscored the continuing effort to define the family and to determine how rights may be allocated among family members. For example, during 1993, a child was permitted to "divorce" her natural parents in favour of the unrelated man who had unwittingly raised her as his own child (the "Baby Sway" case). Another couple was awarded custody of their natural child after the mother had previously offered the child for adoption and after the child had lived with the adoptive parents for more than two years (the "Baby

Jessica" case). One state court refused to allow a natural mother to retain custody of her child because the mother was a lesbian (the "Little Tyler" case). These cases indicate that the courts - and Americans as a society - continue to struggle with these important issues and how the parameters of family privacy and familial rights continues to evolve.

524. Home**.** As noted above, the Fourth Amendment protects persons from unlawful government searches and seizures within their home or property. Of these interests, the Constitution is particularly protective of the sanctity and privacy of the home. E.g. United States v. Orito, 413 U.S. 139, 142 (1973) (the "Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education"); Payton v. New York, 445 U.S. 573, 601 (1980) ("the sanctity of the home ... has been embedded in our traditions since the origins of the Republic"); Id. at 590. As one law professor and commentator on the Constitution explained, "[t]he home not only protects us from government surveillance, but also 'provide[s] the setting for those intimate activities that the fourth amendment is intended to shelter from government interference'". Laurence H. Tribe, American Constitutional Law 1413 (2d ed. 1988), quoting Oliver v. United States, 466 U.S. 170, 179 (1984).

525. Correspondence**.** The right to privacy in one's correspondence is also recognized under the Fourth Amendment. The government may not open a person's mail without a warrant issued by a judicial officer based on probable cause.

526. There is an exception to that rule for mail entering the United States from abroad. In United States v. Ramsey, 431 U.S. 606 (1977), the Supreme Court applied a historic border exception to the general inviolability of personal correspondence and held that the government may search mail entering the United States based on its longstanding right to self-protection by stopping and examining persons and property crossing borders into the country.

527. Technology: movements and conversations: electronic surveillance**.** The U.S. Congress has also recognized that there could be substantial privacy infringements through the use of electronic devices to track the movements of persons or things and to intercept private communications. Such devices include wiretaps, pen registers and trap and trace devices (which record telephone numbers called from a particular phone and the numbers of telephones from which calls are made to a particular phone, respectively), digital "clone" pagers, beepers, and surreptitiously installed microphones.

528. Consequently, in 1968 Congress enacted a statute, which has subsequently been modified to accommodate technological advances, to regulate the use of electronic audio surveillance and interception. 18 U.S.C. sections 2510-21 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968 - Wiretapping and Electronic Surveillance, Pub. L. No. 90-351, 82 Stat. 212.) The statute essentially bans the use of certain electronic surveillance techniques by private citizens. It makes punishable as a felony any intentional interception of any wire, oral, or electronic communication that would not be otherwise readily accessible to the public; use of an interception device; or disclosure of the contents of any communication that has been unlawfully intercepted. 18 U.S.C. section 2511.

529. However, law enforcement officials are exempted from the prohibition under certain explicit conditions. The primary condition is that the government agent obtain a court order before it may utilize many types of electronic surveillance, such as wiretaps and pen registers.

530. Having obtained approval, the agent must then apply for an order from a federal court. The application must set forth sufficient facts to satisfy the court that probable cause exists to believe that (i) certain identified persons have committed, are committing, or will commit one of the specific serious felony offences covered by the statute; (ii) all or some of the persons have used, are using, or will use a targeted communication facility or premises in connection with the commission of the listed offence; and (iii) the targeted communication facility or premise has been used, is being used, or will be used in connection with the crime. The agent's application must also satisfy the judge that other less intrusive investigative procedures have been tried without success, would not be likely to succeed, or would be too dangerous to use. The application must also include a complete

statement of all other applications that have been made for electronic surveillance involving the persons, facilities, or premises.

531. The interception order is valid for no longer than 30 days but can be extended repeatedly. In granting the extension request the court may require progress reports on the past surveillance and need for continuing surveillance. In addition, the judge issuing the order and the Department of Justice are required to make reports to the Administrative Office of U.S. Courts on each court-ordered electronic surveillance and the number of arrests, suppression orders, and convictions that resulted from them. 18 U.S.C. section 2519.

532. There is an exception to the requirement of prior judicial approval where there is an emergency involving immediate danger of death or serious bodily injury to any person or where conspiratorial activities threaten national security interests or are characteristic of organized crime. When electronic surveillance is utilized in these emergency instances, the government must obtain a court order within 48 hours.

533. During the period of surveillance the agents are under a continuing duty to minimize - that is, to not record or overhear conversations that are not related to the crimes or persons for which the surveillance order was obtained. The recordings must also be sealed in a manner that will protect them from public disclosure.

534. The 1968 statute predated the use of video surveillance and was passed in the wake of two Supreme Court decisions that addressed non-consensual interception of oral communications. Moreover, in 1968 video cameras were too bulky and too noisy to be effective as surreptitious recording devices, and thus were not considered when the electronic surveillance statute was enacted. For both these reasons, the statute did not address the use of electronic video interception for gathering evidence. However, the federal appellate courts that have considered the issue all agree that the government may conduct surveillance by use of videotape interception as well as by intercepting wire, oral, and electronic communications. Because the statute governing electronic and wire communications does not apply to videotape surveillance, the courts analyse the question under the Constitution alone and permit its use if it is done consistent with the requirements of the Fourth Amendment. United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992) (en banc); United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir. 1990); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987); United States v. Biasucci, 786 F.2d 504 (2d Cir. 1985), cert. denied, 479 U.S. 827 (1986); United States v. Torres, 751 F.2d 875 (7th Cir. 1984), cert. denied, 470 U.S. 1087 (1985).

535. The federal wiretap statute does not forbid the warrantless use of eavesdropping equipment to record or transmit what the suspect says to a person acting unbeknownst to him as an agent of the government when that person has given prior consent to the interception. 18 U.S.C. section 2511(2)(c) provides:

> "It shall not be unlawful under this chapter for a person acting under colour of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to the interception."

Similarly, the Fourth Amendment's protection of one's reasonable expectations of privacy does not require that the government obtain a warrant for a consensual interception, i.e. where one of the parties consents. In a case where a secret agent wore a recording device concealed on his person, the Supreme Court explained:

> "[The] case involves no 'eavesdropping' whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of [the suspect's] premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with [the suspect's] assent, and it neither saw nor heard more than the agent himself." Lopez v. United States, 373 U.S. 427, 439 (1963).

536. Though federal judges need not authorize interception orders where one party to the conversation has consented to the electronic eavesdropping, the U.S. Department of Justice has adopted certain written guidelines for federal prosecutors. These guidelines are set forth in the Attorney General's Memorandum of 7 November 1983, which states:

> "When a communicating party consents to the interception of his or her verbal communications, the device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual interceptions must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party." See United States v. Padilla, 520 F.2d 526 (1st Cir. 1975).

537. The same rule applies to consensual videotaping. An expert on U.S. Fourth Amendment law has explained that the reasoning offered with respect to the use of eavesdropping-wiretapping equipment "is generally true as well as to electronic visual surveillance. It is no search to videotape what a police officer is observing in a plain view situation, nor is any justified expectation of privacy violated by the videotaping of activity occurring in full public view. By analogy ... it has also been held that Fourth Amendment protections do not extend to the videotaping of 'private' activities between the defendant and another when the other party has consented to the taping". Wayne R. LaFave, Search and Seizure: A Treatise On The Fourth Amendment, Vol. 1, section 2.2(e), at 365 (2d ed. 1987).

538. Also by analogy, persons can have no reasonable expectation of privacy under the Fourth Amendment that their presence and physical appearance, which is constantly exposed to the public, will be "private". United States v. Dionisio, 410 U.S. 1 (1973) (the Fourth Amendment does not require a warrant before the government may demand voice exemplars because "the physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public" so that "no person can have a reasonable expectation that others will not know the sound of his voice"). Warrantless visual surveillance does not implicate the Fourth Amendment, even when that surveillance is accompanied by the taking of photographs or the use of videotape equipment. United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972); United States v. Knotts, 460 U.S. 276, 280-86 (1983) (warrantless visual surveillance of the defendants in the course of monitoring a beeper placed with consent of the owner in a transported container does not violate the Fourth Amendment).

539. Another area of note regarding technology and privacy is individuals' privacy with respect to information maintained on computer databases. In general, individuals are entitled to privacy by the Privacy Act, 5 U.S.C. section 552a. The Privacy Act generally bars federal agencies from using information collected for one purpose for a different purpose. The Computer Matching and Privacy Protection Act of 1988 specifically addresses the use by federal agencies of computer data. The Act regulates the computer matching of federal data for federal benefits eligibility or recouping delinquent debts. The government may not take adverse action based on such computer checks without giving individuals an opportunity to respond. Three other federal laws that protect information commonly maintained on computer database are the Fair Credit Reporting Act (15 U.S.C. sections 1681-81t), the Video Privacy Protection Act (18 U.S.C. section 2710), and the Right to Financial Privacy Act (12 U.S.C. section 3401). The first regulates the distribution and use of credit information by credit agencies. The second prevents the disclosure and sale of customers' video-rental records without the customers' consent. The last sets procedures regarding when federal agencies may review customers' bank records.

540. None the less, certain facts about individuals are matters of public record such as date of birth, fact of marriage, military record, licences, or court pleadings. There is no liability for release of such information. The majority of courts have found that maintenance and release of databases on an exonerated arrestee's criminal record is not a privacy violation.

541. Unlawful attacks on honour or reputation**.** While U.S. law, primarily civil law, protects an individual from false and defamatory attacks on his reputation, this protection is tempered by the fundamental right, embodied in the First Amendment, of people to speak and write without fear of civil or criminal liability. The First Amendment right of free speech significantly shields persons engaged in critical, even derogatory speech, particularly where that speech concerns a "public person", i.e. a public official, candidate for public office, or other person known by the public because of the incident in question.

542. The First Amendment right of free speech does not protect persons who engage in libel, defamation, or slander from liability. Claims for libel or slander may be pursued under state law, typically in a civil suit for damages. A few states have criminal libel laws. For instance, Massachusetts imposes criminal liability for material intended to maliciously promote hatred through libel of groups of persons because of race, colour, or religion. See Mass. Ann. Laws ch. 272 section 98(C). Alabama maintains a criminal libel statute based upon material tending to provoke a breach of peace, the traditional standard before several states repealed their criminal libel and slander laws. See Ala. Code section 13A-11-160 (1993). California, by contrast, has repealed its criminal slander code provisions. Cal. [Penal] Code sections 258-60, repealed 1991 (West 1993).

543. Communication is defamatory where it tends or is reasonably calculated to cause harm to another's reputation. The harm may be to the person's personal or business reputation. Language is defamatory if it tends to expose another to hatred, shame, contempt, or ostracism in his community. Criminal defamation may be claimed where the defamation was made with malicious intent. Both civil and criminal claims are limited by certain privileges. Where a privilege exists, the claimant must show the defamatory communication is false and was made with actual "malice". Public persons, for example, may only assert a claim based on criticism of their official conduct where the tests of falsity and actual malice have been met. New York Times v. Sullivan, 376 U.S. 254 (1964) (civil liability limited). Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal liability limited). "Malice" in this context has been defined to mean "with actual knowledge of the falsity or reckless disregard as to whether [a statement] is true or false". Id In this instance, the constitutional right to free speech and corresponding principle of free and open debate limits the ability of public officials to make a civil or criminal claim of defamation.

544. Other privileges apply to statements made in the context of religious and church matters, expulsion and disciplinary proceedings, and fiduciary and professional communications. The U.S. Constitution provides an absolute privilege to members of Congress for statements made in the performance of their legislative duties. U.S. Const. art. I, section 6. A similar privilege may be applied to judicial proceedings and proceedings of state and local legislative bodies.

Article 18 - Freedom of thought, conscience, and religion

545. Early immigrants to the United States came to the New World to practise their respective religions free from governmental persecution. Freedom of religion, and the related freedoms of thought and conscience, are consequently among the most fundamental and carefully guarded building blocks of American judicial and political theory.

546. The First Amendment to the U.S. Constitution includes a guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The First Amendment is made applicable to state and local governments by the Fourteenth Amendment to the Constitution. Cantwell v. Connecticut, 310 U.S. 296 (1940). As discussed below, U.S. law takes a broad view of what constitutes "religion" for purposes of these protections. The right to freedom of "thought" and "conscience" is thus in many circumstances subsumed within freedom of "religion". To the extent it is not, the right to freedom of thought and conscience is protected by the First Amendment guarantees of freedom of speech and opinion, as discussed under article 19.

547. Federal, state and local laws and practices may be challenged in the federal courts as violating either the Establishment clause or the Free Exercise clause of the First Amendment. In consequence, governmental

approval may not be required for religious activities and practices, and the scope of governmental regulation is extremely limited. The separation of church and state has also been preserved by the judicial doctrine that, when there is a dispute within a religious order or organization, courts will not inquire into religious doctrine, but will defer to the decision-making body recognized by the church and give effect to whatever decision is officially and properly made. For example, in Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), the U.S. Supreme Court struck down a state statute that purported to "recognize" the autonomy of North American branches of the Russian Orthodox from the "mother" church. Disputes over church property, the Court held, must respect the church's own structure (hierarchical, congregational, etc.).

548. **Free exercise**. People in the United States have broad freedom to practise their religions. Government restrictions on the exercise of religion have been permitted only to the extent that those restrictions are embodied in neutral laws designed to protect public health and welfare, or where religious practices otherwise pose a substantial threat to public safety.

549. The earliest Free Exercise cases upheld various attempts to restrict the Mormons' practice of polygamy. See e.g. Reynolds v. United States, 98 U.S. 145 (1879) (prosecution for bigamy); Murphy v. Ramsey, 114 U.S. 15 (1885) (federal statute barring polygamists from voting or serving on juries); Davis v. Beason, 133 U.S. 333 (1890) (territorial legislation requiring prospective voter to swear not to be a polygamist and not a member of any organization encouraging or practising polygamy); The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (revocation of charter of Mormon Church and confiscation of church property). See also Cleveland v. United States, 329 U.S. 14 (1946) (transporting a plural wife across state lines violates Mann Act).

550. In a later case, Amish parents challenged a law requiring compulsory education to age 16, arguing that their children were being exposed to worldly influences contrary to Amish beliefs and way of life. Wisconsin v. Yoder, 406 U.S. 205 (1972). The Supreme Court ruled in favour of the Amish, allowing them to take their children out of school a few years early. The Court found that the law of compulsory education significantly interfered with the children's religious development in violation of the Free Exercise clause. The state's interest in educating its citizenry was not found to be so compelling as to override the interests of the Amish, and cutting short their education by a few years was not seen to cause harm to either the children or society in general. The Court described prior case law as establishing "a charter of the rights of parents to direct the religious upbringing of their children". Id. at 233.

551. The Court has also ruled that unemployment compensation may not be denied to a beneficiary who is unwilling to accept employment that would require working on his or her sabbath. Sherbert v. Verner, 374 U.S. 398 (1963); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987). Further, the beneficiary may not be denied benefits where his or her belief is a sincere religious one, but not based on the tenets or dogma of an established religious sect. Frazee v. Illinois Department of Employment, 489 U.S. 829 (1989). Recently, the Court struck down a local ordinance punishing animal cruelty, including animal sacrifice not intended primarily for food consumption, on the grounds that the ordinance had both the purpose and effect of restricting religious conduct, and did not reach other conduct producing the same type of harm. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1993).

552. The Sherbert and Yoder cases, supra, suggest that a law which substantially burdens the exercise of religion will be subjected to strict judicial scrutiny and will be upheld only if it is neutral, it furthers a compelling state interest and is the least burdensome means of furthering that interest. In another line of cases, however, the Court has upheld certain neutral laws of general applicability without applying strict scrutiny. For example, the Court upheld the validity of compulsory vaccination laws despite religious proscriptions against medical care. Jacobson v. Massachusetts, 197 U.S. 11 (1905). The Court has also ruled that the Free Exercise clause does not mandate an exemption from Sunday closing laws for Orthodox Jewish merchants who observe Saturday as the sabbath and are therefore required to be closed two days of the week rather than one, Braunfield v. Brown, 366 U.S. 599 (1961). Indeed, the Court has ruled that a state statute providing sabbath observers with an absolute and unqualified right not to work on the sabbath, taking no account of the needs of the employer or of non-observant employees, violates the Establishment clause. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). Further,

the Court has upheld the application of federal tax laws to an Amish farmer who refused to pay on religious grounds. United States v. Lee, 455 U.S. 252 (1982). Most recently, the Court has re-examined the level of scrutiny to be applied in certain Free Exercise cases. In Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Court explicitly held that neutral laws of general applicability are not subject to strict judicial scrutiny and found that state drug laws may be applied to bar the sacramental ingestion of controlled substances such as peyote.

553. Reacting adversely to the Smith decision, the U.S. Congress enacted the Religious Freedom Restoration Act of 1993 (Pub. L. No. 103-141, 107 Stat. 1488). The stated purpose of the Act was to restore the compelling interest test as set forth in Verner and Yoder, supra. The Act provides that the government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. It remains to be seen precisely what effect the statute will have on free exercise cases, but it is already being invoked in a number of prisoners' rights cases. See e.g., Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994); Allah v. Menei, 844 F. Supp. 1056 (E.D. Pa. 1994).

554. The Supreme Court has for the most part avoided addressing the delicate question of what constitutes a religious belief or practice. However, the Court has noted that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has an important interest". Wisconsin v. Yoder, supra, at 215-16. The Court has speculated that some beliefs may be "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the free exercise clause". Thomas v. Review Board, Indiana Employment Security Div., 450 U.S. 707, 715 (1981). In identifying such "non-religious" beliefs, the Court has focused on the credibility and sincerity of an individual's beliefs, rather than on the orthodoxy or popularity of a particular faith. Thus, the Court has held that a state could not make membership in an organized church, sect, or denomination a prerequisite for claiming a religious exemption to an unemployment insurance statute requirement that claimants be able to work on all days of the week. Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989).

555. **Charitable status for taxation and solicitation**. A further government accommodation of the free exercise of religion is through the tax code. A religious organization can qualify for exemption from federal income tax and be eligible to receive tax-deductible contributions if it meets the requirements under the Internal Revenue Code, 26 U.S.C. section 501(c)(3) and 26 U.S.C. section 170. Failure to meet the Code requirements does not affect an organization's legal right to operate. Rather, it merely means it is subject to income tax on its net income and that donors may not claim charitable tax deductions for the value of gifts to the organization.

556. Section 501(c)(3) of the Internal Revenue Code provides that an organization will qualify for exemption from federal income tax if it is organized and operated exclusively for religious, charitable, or educational purposes, if no part of its net earnings inures to the benefit of any private shareholder or individual, if no substantial part of its activities is carrying on propaganda, or otherwise attempting to influence legislation, and if it does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. The prohibition on the inurement of earnings to private individuals is intended to ensure that an exempt organization serves the public good, and to prevent it from conferring financial benefits (other than reasonable compensation) on persons with a personal or private interest in its activities. Inurement can take many forms, including the payment of dividends or unreasonable compensation. The issue of inurement most often arises in religious organizations where the entity is controlled by one person or a very small group of persons. Similar requirements are contained in section 170(c)(2) concerning eligibility to receive deductible contributions.

557. The Internal Revenue Code does not define the term "religious" for purposes of section 501(c)(3). Internal Revenue Service determinations concerning the tax-exempt status of religious organizations do not involve judgement of the merits of a claimed religious belief. Rather, the Service looks to whether the asserted religious beliefs of the organization are truly and sincerely held, and whether the practices and rituals (as opposed to beliefs) associated with the organization's religious belief or creed are not illegal or contrary to clearly defined public policy. A religious organization may also serve other exempt purposes under section 501(c)(3). For

example, it may also be charitable or educational. These could serve as independent bases for qualification for exemption, assuming the organization satisfies the other requirements of section 501(c)(3).

558. State tax laws also exempt religious and charitable organizations from state income taxes. In addition, though the states vary in the degree to which they regulate charitable organizations, state laws governing charitable organizations generally exempt religious organizations from whatever requirements they do impose.

559. Religious organizations are also generally exempt from state laws regulating charitable solicitations by charitable organizations. For example, both Executive Law section 172-a, Book 18, McKinney's Consolidated Laws of New York, and section 45:17A-5(a) of New Jersey Revised Statutes, which concern the solicitation and collection of funds for charitable purposes, specifically exclude religious corporations and other religious agencies and organizations, and charities, agencies, and organizations operated, supervised, or controlled by or in connection with a religious organization. When a state does attempt to regulate the activities of a religious organization, it must not do so in a manner that violates the rights guaranteed by the First Amendment to the U.S. Constitution. A Minnesota statute that limited exemption from registration only to those religious organizations that received more than half their support from members was found by the Supreme Court to violate the First Amendment in Larson v. Valente, 456 U.S. 228 (1982). The Court concluded the law had the effect of preferring some religions over others, thus violating the Establishment clause.

560. **Remedies**. As discussed under article 2, federal statutes make it a crime for a person acting "under color of law" to deprive another person of any right protected by the Constitution or laws of the United States. 18 U.S.C. section 242. A parallel civil statute, 42 U.S.C. section 1983, authorizes a civil action by the victim to recover damages. It is also a crime for two or more persons to conspire to injure or intimidate another person in the free exercise of any such right, or because that person has exercised such a right, 18 U.S.C. section 241; and for any person, "under color of law", by force or threat of force, to injure, intimidate or interfere with another person because of that person's race, colour, national origin or religion, because that person is attending public school, applying for employment, or engaged in other such protected activities. 18 U.S.C. section 245.

561. In addition to these criminal civil rights provisions, a recently enacted federal statute explicitly makes it a crime for a person intentionally to deface, damage, or destroy any religious real property because of its religious character, or intentionally to obstruct, by force or threat of force, another person's free exercise of religious beliefs. 18 U.S.C. section 247.

562. Federal civil rights statutes prohibit discrimination on the basis of religion (along with such other factors as race, sex, and national origin). For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e et seq., bars discriminatory employment practices. However, an exception is made for religious institutions to allow them to employ people of a particular religious background if their work is related to the employer's religious activities. Title VII also requires an employer to make "reasonable accommodation" of an employee's religious practices if it is possible to do so without imposing undue hardship on the conduct of business. 42 U.S.C. section 2000e(j). The case law on what constitutes a reasonable accommodation resembles the case law regarding the free exercise of religion.

563. **Establishment**. The Establishment clause of the First Amendment promotes religious freedom by limiting the influence of federal and state governments on religious thought and practice. The U.S. Supreme Court has often described its method of assessing whether a government practice violates the Establishment clause as follows: the statute must have a secular non-religious purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and the statute must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971). The appropriateness of this precise standard, and the nuances of its application, are often subject to dispute. But there is common agreement that the clause clearly forbids either a state or the federal government from setting up a church. As the U.S. Supreme Court has clearly stated:

> "Neither [federal nor state governments] can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away

> from church against this will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

564. The recurring areas of controversy involving application of the Establishment clause fall into three general areas. The first involves public aid to religion, such as the indirect provision of government benefits to private parochial schools. Such issues involve reconciling the interest of government in permitting parents and legal guardians "to ensure the religious and moral education of their children in conformity with their own convictions" by permitting the provision of benefits to such education in a like manner as to secular education, while avoiding government entanglement with such practices. In a recent case, Zobrest v. Catalina Foothills School Dist., 113 S.Ct. 2462 (1993), the U.S. Supreme Court emphasized that the Establishment clause does not prevent religious institutions from participating in government programmes that neutrally provide benefits to a broad class of citizens, such as tax deductions for educational expenses or vocational assistance programmes, and upheld the provision of government-paid interpreters to deaf children attending sectarian as well as public schools. The Court distinguished the direct provision of aid to religious schools from aid to handicapped children attending those schools, as well as public involvement with other personnel - such as teachers or guidance counsellors - who might have a more profound role in the education of the children. Most recently, the Court struck down a New York statute carving out a special education school district for Orthodox Jewish children on the grounds that the statute impermissibly advanced religion. Board of Education of Kyras Joel Village School District v. Grumet, 62 U.S.L.W. 4665 (27 June 1994).

565. A second category of cases involves the recognition and practice of religion in public schools, in particular the question of school prayer. These cases ultimately involve the degree to which the government will foster or permit religious practices in public institutions. The courts have been particularly careful to protect schoolchildren from any coercive exposure to religious exercises. For example, in Engel v. Vitale, 370 U.S. 421 (1962), a school board had adopted a directive which required a specific prayer to be said aloud in each classroom at the start of every school day. The Court declared the directive unconstitutional even though the prayer was denominationally neutral and even though children could be excused from participating. The Court noted that the Establishment clause does not merely forbid direct government compulsion, but also extends to prohibit any law establishing or respecting an official religion, regardless of whether non-observing individuals are directly coerced. The Court noted that there is substantial indirect coercive pressure where the power, prestige, and financial support of the government is placed behind a particular religious belief.

566. The Court recently reaffirmed this principle in Lee v. Weisman, 112 S.Ct. 2649 (1992). When a public middle school arranged to have members of the clergy read an invocation and benediction at their graduation ceremonies, the Court held the Establishment clause was violated because even non-sectarian invocations and benedictions in public school graduations create an identification of governmental power with religious practice, thereby endorsing religion. The Court focused on the element of coercion, particularly "for the dissenter of high school age, who has a reasonable perception that she is being forced by the state to pray in a manner her conscience will not allow".

567. This is not to say that parents may not choose to provide religious education for their children as part of a school curriculum. The tens of thousands of privately owned and operated religious schools around the country are free to mingle religion and education as much as they wish. Religious institutions are also free to provide religious education separately from a regular school curriculum, and parents are of course free to provide religious education of their choice through religious schools, separate religious education programmes, or at home. It is towards public schools, operated with public funds, that the Establishment clause is directed. Public schools may teach religion for its historical or literary qualities, but may never preach it as such.

568. One of the most difficult issues to face the Supreme Court, almost every term, is the issue of governmental financial assistance that may inure to the benefit of religious schools. At one time, it was possible to discern a test that permitted aid "to the students" but not to schools. For example, the Court allowed governments to provide free transportation and free loans of textbooks for parochial school students. Everson, supra (transportation); Board of Education v. Allen, 392 U.S. 236 (1968) (textbooks). This distinction broke down, however, as it became apparent that all assistance to children attending parochial schools relieved the schools themselves of some expenses, or took a burden off parents and thereby encouraged them to send their children to parochial schools. Thus, the "student benefit" test eventually yielded to the "Lemon test" outlined above: aid must have a primarily secular purpose and effect, and not require excessive government "entanglement" to administer.

569. Programmes providing direct financial assistance to church-connected schools have generally been struck down on the ground that excessive government entanglement would be required to ensure that the state aid was not used to inculcate religion. Among the programmes struck down have been a programme of direct money grants for maintenance of school facilities and equipment, Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); and a programme for lending instructional materials and equipment (e.g., slide projectors, tape recorders) to religious schools; providing auxiliary services (e.g., remedial and accelerated instruction, diagnostic services, guidance counselling, testing) by public employees on religious school premises, Meek v. Pittenger, 421 U.S. 349 (1975). The U.S. Supreme Court has, however, upheld a programme in which state supplied standardized tests and scoring services, provided diagnostic services by public employees on the premises, and provided guidance and remedial services off premises, Wolman v. Walter, 433 U.S. 229 (1977); provision of free transportation to parochial school students, Everson, supra; loan of public school textbooks to parochial schools, Allen, supra. Most recently, the Court held that providing a sign language interpreter to a deaf child in Catholic high school does not violate the Establishment clause. Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (1993).

570. More lenient standards have been applied where the governmental assistance goes to an institution of higher education. See, e.g., Tilton v. Richardson, 403 U.S. 672 (1971), in which the Court theorized that it is possible, with respect to an institution of higher learning, to assist the secular facet of the school without appearing to endorse its religious mission.

571. More than once in this century, the issue has arisen whether states can prohibit the teaching of evolution, or require that biblical "creationism" be included in public school texts. The Court struck down a state statute which made it unlawful for any teacher in any state-supported educational institution to teach the theory of evolution or to use a textbook that teaches this theory, since the statute's sole purpose was a religious one, i.e., to suppress a particular theory because of its supposed conflict with the Bible. Epperson v. Arkansas, 393 U.S. 97 (1968). Similarly, the Court recently struck down a state statute prohibiting public schools from teaching evolution science unless creation science was also taught. Edwards v. Aguillard, 482 U.S. 578 (1987).

572. A third general category of controversial cases involves more general public endorsement of religion. One particular area of conflict involves the display of nativity scenes on government property during the Christmas season. For example, in County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989), a county was sued over two different displays. The first was outside in a public park, and contained a Christmas tree, a Hanukkah menorah, and a sign saluting "liberty". The Court found no violation of the Establishment clause, as the tree is a secular symbol of Christmas, there were symbols of different faiths, and the sign referring to liberty showed no favouritism or hostility toward any one faith. The second display, on the other hand, contained a crèche, unaccompanied by non-religious Christmas elements, in the main part of the county courthouse during the Christmas season. A sign hung over it, proclaiming "Gloria in Excelsis Deo!" Furthermore, the courthouse had a very grand staircase where the crèche was set up, and the county further associated itself with the display by means of press releases and by placing decorations similar to those in the display next to the official county signs in the courthouse. The Court held that the crèche violated the Establishment clause, because the grandeur of the setting might be fairly understood to express views that received the support and endorsement of the government. The display was found to endorse a patently Christian

message, and the Court declared that the government may not celebrate Christmas as a religious holiday, because such a celebration would mean that the government is declaring Jesus to be the Messiah, a specifically Christian belief, and such a proclamation would contradict the logic of secular liberty which it is the purpose of the Establishment clause to protect.

573. **Freedom of conscience and compulsory military service**. At the current time, U.S. law does not provide for conscription into the armed forces. All service in the armed forces is voluntary. Congress is actively considering eliminating even the current requirement that individuals register with the government for purposes of conscription, which is known as the Selective Service System. In times of national emergency, U.S. law does provide for the possibility of conscription. But in relatively recent emergencies, such as the Persian Gulf war, conscription was neither used nor even seriously considered. U.S. law does not provide for the conscription of women.

574. If it becomes necessary to use conscription to fill the ranks, applicable U.S. law (i.e., the Selective Service Act, codified at 50 U.S.C. App. section 456(j)) provides for full consideration of conscientious objector claims. Under this law, personnel who claim, by reason of religious training or belief, conscientious objection to either: (i) participation in armed combat, or (ii) war in any form, are upon review and confirmation by the local Selective Service Board, designated as non-combatants, or if opposed to participation in non-combatant service, assigned to civilian national service. The period of such national service would be the same as the initial service required if the individual were conscripted. There are no political or social penalties consequent upon conscientious objector status. U.S. law specifies that the term "religious training or belief" does not include political, sociological, or philosophic views, or merely a personal moral code.

575. Under implementing regulations, 32 C.F.R. sections 1648.1-7, conscientious objector claims may be heard at or before induction by a local draft board. Claimants are entitled to notice and an opportunity to be heard before a board. Claimants may appear in person at the hearing and may be accompanied by an adviser of their choice. Claimants may present evidence and witnesses, discuss the pending conscription classification, direct attention to any information in the file considered material or relevant, and present such further information as he may believe will assist the board in evaluating his claim. The claimant may summarize in writing such oral information as he presented, and the summary must be included in the file. Proceedings of the board are open if the claimant so requests. The task of the board is to determine the honesty and sincerity with which the individual holds the belief. This is done on a case-by-case basis. The belief need not be "religious", in the orthodox sense, nor is membership in a particular church required. Denial of conscientious objector status may be appealed, first to the district Selective Service Board, and ultimately to the federal court system.

576. Generally, the same rules apply to persons who, while serving in the armed forces, develop beliefs inconsistent with continued service. According to applicable regulations, a member wishing to claim conscientious objector status may make application to his or her commander for either administrative discharge or change to non-combatant status. See Department of Defense Directive 1300.6 (20 August 1971) as amended, and implementing regulations. As a matter of policy, an effort is made to assign such personnel to administrative or other duties posing the minimal practical conflict with the professed beliefs pending action on their claims.

577. Claimants are entitled to notice and a hearing before an impartial hearing officer who is charged with determining the sincerity and honesty with which the stated beliefs are held, and producing a report with findings and recommendations. The cognizant commander may not deny the application, but must review, comment upon, and forward it to the Secretary concerned, through the chain of command. Authority to approve, but not to deny, such applications may be delegated to the officer exercising general court-martial jurisdiction over the applicant. Hearings are informal in nature and not conducted in strict compliance with the rules of evidence. Claimants are generally afforded the same procedural rights as are provided to preinduction claimants. Substantive standards are also the same. There is, for example, no requirement that a belief be associated with a particular church, or even that a belief be consistent with the dogma of an established church. Honest disagreement with the theology of one's chosen church is not a bar to conscientious objector status. Depending on the nature of the objection, an individual found to be a conscientious objector will either be honourably discharged or designated as a non-combatant.

578. Denial of the claim may be administratively or judicially appealed. For example, a member may petition the cognizant Service Secretary for correction of the member's records through the applicable Boards for Correction of Naval or Military Records. Alternatively, or subsequently, a member may appeal to the cognizant federal district court.

579. A person discharged as a conscientious objector forfeits most, but not all, benefits administered by the Veterans Administration. The individual is advised of this fact prior to making application and signs a document signifying his or her understanding. There are no other political effects or changes in civil status consequent upon declaration of conscientious beliefs. A person designated as a non-combatant does not lose veterans benefits but may, at the discretion of the military department concerned, be denied an opportunity to re-enlist at the end of the current enlistment. Again, there are no political effects or civil status changes consequent upon non-combatant designation.

Article 19 - Freedom of opinion and expression

580. The First Amendment to the U.S. Constitution provides that "Congress shall make no law abridging the freedom of speech". Although the First Amendment refers specifically to Congress, the U.S. Supreme Court has held that freedom of speech is also protected from state infringement, and similarly from interference by executive branch officials. As with the other components of the Constitution's Bill of Rights, freedom of speech is protected against government interference, and also actions by private individuals so closely associated with government officials that they may be described as state action.

581. **Freedom of opinion**. While the literal language of the First Amendment is confined to the freedom of speech, that right - together with the due process guarantees of the Fifth and Fourteenth Amendments - has long been held to extend the right to hold opinions described in article 19, paragraph 1, of the Covenant. "If there is any fixed star in our constitutional horizon, it is that no official, high or petty, can proscribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion". West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943).

582. In the few cases addressing attempts to invade freedom of opinion among the general citizenry, the courts have zealously protected the rights of individuals to dissent. In Barnette, for example, the U.S. Supreme Court prohibited the states from requiring school children to pledge allegiance to America at the start of the school day. The Court has also proscribed punishing individuals for obscuring a state motto imprinted on their licence plates, reasoning that "the right of freedom of thought protected by the First Amendment against state action includes both the right to refrain from speaking at all", and that an individual may not be forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable". Wooley v. Maynard, 430 U.S. 705 (1977). While these cases have proceeded to evaluate whether the state has a compelling interest in its regulation, that test can be demanding, and the state interest may not in any event serve an ideological function.

583. The only significant area in which the freedom of opinion has arguably been limited concerns the imposition of restrictions on public employment. In this context, which chiefly implicates the right of freedom of association, public employees or candidates for public employment may constitutionally be required to express adherence to certain propositions fundamental to the U.S. system of government - indeed, various provisions of the Constitution themselves require that federal officers take oaths to uphold the Constitution. Similar oaths imposed by statute have been upheld, at least to the extent that they require affirming adherence to the federal or state constitutions, or require a promise to oppose the violent, forceful, or illegal overthrow of the government. Cole v. Richardson, 405 U.S. 676 (1972). At present, federal employees may not advocate the overthrow of the constitutional form of government, or be a member of an organization they know to advocate the same. 5 U.S.C. section 7311. It is elsewhere made clear, however, that an ordinary citizen's membership in the Communist Party is not enough, absent other acts, to violate the criminal law. 50 U.S.C. section 783.

584. **Freedom of expression**. The freedom of speech protected by the First Amendment has been given a broad reading in its application by the courts. Perhaps its most obvious purpose is to prevent the government from

restricting expression "because of its message, its ideas, its subject matter, or its content". Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated". Regan v. Time, Inc., 468 U.S. 641 (1984). The First Amendment also limits content-neutral or incidental infringements on speech and speech-related activities, subjecting them to an assessment of whether the regulation furthers a substantial government interest not related to the suppression of speech, and whether the regulation is narrowly tailored to accomplish that interest. O'Brien v. United States, 393 U.S. 900 (1968).

585. The First Amendment has been applied to a broad range of activities. Symbolic speech, moreover, is also protected, as evidenced by recent cases striking down state and federal legislation against flag-burning. Texas v. Johnson, 491 U.S. 397 (1989) (striking a state statute designed to protect the flag from desecration). United States v. Eichman, 496 U.S. 310 (1990) (striking a federal statute enacted in response to Johnson attempting to protect the flag's physical integrity). Other cases have emphasized that money is a form of speech, and that laws limiting campaign expenditures, by reducing the quantity of political expression, may unconstitutionally impact the quality and diversity of speech. Buckley v. Valeo, 424 U.S. 1 (1976).

586. Freedom of speech also encompasses certain rights to seek and receive information. The most important means by which these rights are promoted is by the First Amendment's special concern for freedom of the press, which is protected from prior restraint (that is, censorship in advance of publication) in the absence of proof of direct, immediate, and irreparable and substantial damage to the public interest. New York Times, Inc. v. United States, 403 U.S. 713 (1971). The press, and the public as a whole, have been held to have the right to gather information concerning matters of public significance. For example, the public generally has a right of access to observe criminal trials, since such access is viewed as instrumental to the effectuation of the rights to speak and publish concerning the events at trial. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). This constitutional right has been supplemented by a number of laws promoting access to government, such as the Freedom of Information Act, 5 U.S.C. section 552, the Government in the Sunshine Act, 5 U.S.C. section 552b, and the Federal Advisory Committee Act, 5 U.S.C. App. 2.

587. The question of access to information invariably entails consideration of how to ensure access to points of view or messages that may be inadequately presented by the popular media. Both the political branches and the courts have been careful to restrict governmental regulation of the media - even in the interest of public access - because of the restrictions it may impose on the other First Amendment ideals. Thus, while the U.S. Supreme Court has suggested that the First Amendment encompasses "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences", and upheld government requirements of fairness and diversity in broadcasting, Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), it has stopped short of suggesting that there is a constitutional right of access to the broadcast media, and has never extended a guaranteed right of access or fairness doctrine to the print media.

588. The courts have also held, in the context of government or government assisted programmes, that the government may limit the extent to which such programmes provide access to information for the beneficiaries. Thus, in Rust v. Sullivan, 111 S.Ct. 1759 (1991), the U.S. Supreme Court upheld government regulations proscribing abortion counselling in programmes receiving federal funding, but noted that the recipient of those funds could still provide counselling and related services through separate and independent programmes. The Court noted that its holding merely allowed the government to refrain from funding speech activity that it did not support, and did not suggest that the government could condition or restrict speech in areas that have been traditionally open to the public for free expression, such as public parks or universities.

589. **Limitations on the freedom of expression**. Constitutionally acceptable limits to the freedom of expression fall into at least two broad types. First, and perhaps the most important type of regulation, is that which does not regulate the content of speech - a type of restriction that is rarely upheld - but only incidentally burdens expression to promote non-speech interests. Thus, for example, a law regulating the distribution of handbills may be intended to reduce litter, rather than suppress expression. Such regulations are permitted if they are content-neutral and promote a substantial governmental interest by the least intrusive means. Similarly, laws may regulate the time, place, or manner of speech if they are not attempts to censor content or unduly

burdensome to expression.

590. A second category of permissible limitations describes types of speech that are afforded less protection under the First Amendment. One such type, speech posing a "clear and present danger" to public order, may be punished, but only if the government can establish that such speech was intended to incite or produce imminent lawless action and is likely to achieve that end. Brandenburg v. Ohio, 395 U.S. 444 (1969). Another type of speech, "fighting words", may be proscribed if the prohibition is content-neutral and the words would "by their very utterance inflict injury or tend to incite an immediate breach of the peace". Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). A third type of speech, obscenity, is entirely excluded from First Amendment protection. But obscenity, which is defined as patently offensive representations of sexual conduct without redeeming value, must be regulated in a manner consistent with due process. Miller v. California, 413 U.S. 15 (1973). A fourth type of speech, commercial speech, is entitled to somewhat lesser protection than non-commercial speech, and may for example be regulated to avoid misleading or coercing consumers. City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993).

591. Although speech causing injury to the rights and reputations of others is also subject to some restrictions, in that the person who is injured may bring a civil action for libel or slander, the First Amendment values at stake have also been recognized in this context. An especially significant case, New York Times v. Sullivan, 376 U.S. 254 (1964), and its progeny, have declared that public officials and figures may recover for defamatory statements - at least those relating to public controversies - only if it is proven that the defamatory statement was made with knowledge of or reckless disregard for its falsity. The U.S. Supreme Court has since indicated that the First Amendment also limits defamation actions alleging injury to private persons, and requires at a minimum that the false statement at issue be reasonably interpretable as a statement of actual fact about the individual and that the plaintiff establish fault on the part of the defendant. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

592. **Electronic media**. The Federal Communications Act of 1934 (the "FCA") established the Federal Communications Commission (FCC) for the purpose of regulating interstate and foreign communications by wire and radio. Essentially the FCC is responsible for an equitable and efficient distribution among various users of the available radio frequency spectrum for non-government communications. The constitutional underpinning for the regulation of electronic media is based on the scarcity of available spectrum and the need for an orderly system of interstate communication.

593. Private sector users of this spectrum, e.g. radio and television stations and interstate telephone companies, are licensed by the FCC. Applicants for such licences must demonstrate certain legal, technical and other qualifications. The FCA generally restricts the granting of such licences to U.S. citizens or entities controlled by U.S. citizens. Additionally, there are ownership restrictions as to the overall number of licences that may be held by one person or corporation and in some instances where such licences may be operated. Potential licensees much also show that the frequencies applied for will be used in a technically compatible manner with those already in operation.

594. A fundamental concept of the regulation of electronic media in the U.S. is that use of the radio spectrum is not owned per se by licensees. Licences are issued for a set period of time after which licensees must seek renewal of their authorizations together with a demonstration that the licence has been used in the public interest. Licences may and have been revoked in instances where it has been shown that the licensee violated provisions of the FCA or regulations promulgated pursuant to the FCA.

595. Mass media outlets such as radio and television stations are free to determine the nature and content of programming aired. The federal government may not censor the programming of any such outlet with certain extremely limited exceptions, e.g. the broadcasting of obscene programming is specifically prohibited by the FCA. Additionally, the Act does require that licensees grant equal time to candidates for federal elective office.

Article 20 - Prohibition of propaganda relating to war or racial, national, or religious hatred

596. **U.S. reservation**. Because of the strength of the First Amendment's protection of freedom of speech, the United States conditioned its ratification of the Covenant on the following reservation:

> "That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."

597. Under the First Amendment, opinions and speech are protected categorically, without regard to content. Thus, the right to engage in propaganda of war is as protected as the right to advocate pacifism, and the advocacy of hatred as protected as the advocacy of fellowship. The U.S. Supreme Court recently struck down a city ordinance that punished written or symbolic "fighting words" that insult or provoke violence on the basis of race, colour, creed, religion or gender. The Court found that the First Amendment does not permit prohibitions on speakers who express ideas on disfavoured subjects. "The government may not regulate use based on hostility - or favouritism - towards the underlying message expressed". R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538 (1992). Similarly, this article would punish certain types of expression inciting discrimination, hostility or violence, but not others, a result that is not permissible under the U.S. Constitution.

598. There remain constitutional means by which the goals of this article have been addressed in the United States. As discussed in connection with article 19, "fighting words" and speech intended and likely to cause imminent violence may be constitutionally restricted, so long as regulation is not undertaken with respect to the speech's content. Moreover, bias-inspired conduct may be singled out for especially severe punishment. Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993). While the federal and state governments are addressing the problem of hate crimes, and trying to address the underlying causes of such crime, they may not do so in a manner inconsistent with the First Amendment.

599. **Hate crimes**. The Civil Rights Division of the U.S. Department of Justice enforces several criminal statutes which prohibit acts of violence or intimidation motivated by racial, ethnic, or religious hatred and directed against participation in certain activities. The Department of Justice has recently prosecuted such cases involving interference with employment, housing, public accommodations, use of public facilities, and the free exercise of religion. Three federal criminal statutes prohibit such forceful discriminatory activity: 18 U.S.C. section 245 prohibits such interference with a number of protected activities; 42 U.S.C. section 3631 prohibits such interference with buying, selling, or occupying housing; and 18 U.S.C. section 247 prohibits certain activities that interfere with the free exercise of religion. In addition, conspiracies to interfere with protected rights may be prosecuted as violations of section 241.

600. Section 245 prohibits acts of violence or intimidation based on race, colour, religion, or national origin which interfere with certain protected activities. These protected activities include enroling in and attending public school or college, using any government-provided facility or benefit, engaging in public or private employment, serving as a juror, using any facilities of interstate commerce such as buses, airplanes, or boats, and enjoying certain establishments of public accommodation such as hotels and motels, restaurants, movie theatres, sports arenas, bars, night clubs, or other similar establishments.

601. Section 3631 of Title 42 prohibits acts of violence or intimidation in the area of housing. The statute prohibits violence intended to intimidate people in their buying, selling, or occupying housing when that intimidation is motivated by a purpose to discriminate based on race, colour, religion, sex, handicap, familial status, or national origin.

602. Section 247 prohibits the destruction of or significant damage to religious real property, and prohibits the forceful obstruction of any person in that person's enjoyment of his free exercise of religious beliefs. The jurisdiction of section 247 is limited to incidents where the defendant travels in interstate or foreign commerce or where facilities of interstate or foreign commerce are used.

603. The Department of Justice has also begun implementing the Hate Crimes Statistics Act, which was enacted

by Congress in April 1990. This Act provides for the collection of statistics on hate crimes nationwide, both from state and federal law enforcement sources. The Department of Justice, through the Federal Bureau of Investigation, is working to obtain the cooperation of all state and local law enforcement agencies in collecting this data.

604. Recent prosecutions under these hate crime statutes include the following:

(a) In United States v. Pierce, in Louisiana, 14 Ku Klux Klan members and associates pleaded guilty to participating in a series of cross burnings at predominantly African-American schools, homes, churches and in front of the Shreveport federal courthouse on the day that their Grand Dragon was to report to prison on a federal firearms violation. The defendants were sentenced to confinement ranging from a period of home detention to 72 months in prison;

(b) In United States v. Lawrence, in Oklahoma, 17 Oklahoma Skinhead Alliance associates pleaded guilty and were sentenced to as much as nine years imprisonment for their violent interference with the use by minorities of a public park and a live music club, in violation of 18 U.S.C. section 245;

(c) In United States v. Piche, in North Carolina, the defendant was convicted for the assault and death of an Asian man who was patronizing a bar, in violation of 18 U.S.C. section 245. The court sentenced the defendant to four years in prison and ordered him to pay $28,000 restitution. An appellate court has since agreed with the government's position that this sentence is illegally low, and resentencing is pending;

(d) In United States v. LeBaron, in Texas, several members of a religious sect were convicted under 18 U.S.C. section 247 for murdering several former members of the sect. These defendants believed in and actively practised the concept of "blood atonement", whereby defecting members were sentenced to death for their breach of faith. They believed that these defecting members must be killed before the Kingdom of God can arrive. After travelling interstate from Arizona to Texas, the defendants carefully planned the murders. The defendants ambushed three former sect members and one witness, the daughter of one of the victims, and killed them. These defendants were sentenced to life imprisonment.

605. Hate crime perpetrators are not limited to members of organized groups. Cross burnings, arsons and shootings involving the homes of African-American families have also been prosecuted in rural areas of Virginia and North Carolina against individuals who were not affiliated with any racist organization. In both cases, the newly purchased homes of African-American families were set afire before they were occupied.

606. Some states have attempted to deal with hate crimes by enhancing the punishment for acts of violence or intimidation when they were motivated by racial or religious hatred. Recently, such a statute was challenged on the theory that it punished "thought". The U.S. Supreme Court rejected this challenge, holding that it has always been acceptable to make motive a variable in the definition and punishment of crime, Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993).

Article 21 - Freedom of assembly

607. The First Amendment to the U.S. Constitution proscribes the making of any law abridging "the right of people peaceably to assemble". This right has been interpreted quite broadly. Thus, for example, it was held nearly 50 years ago that participation in a Communist Party political meeting could not be made criminal unless violence is advocated. DeJonge v. Oregon, 299 U.S. 353 (1937). The assembly for marches, demonstrations, and picketing is also protected, see Hague v. CIO, 307 U.S. 496 (1939), as is the right to conduct labour organization meetings, Thomas v. Collins, 323 U.S. 516 (1945).

608. Because the freedom of speech under the U.S. Constitution entails the freedom to engage in symbolic

speech and expressive conduct, cases involving the right to assemble are frequently resolved by applying free speech analysis. The right to assemble is thus subject to reasonable time, place, and manner restrictions when exercised in a traditional or government-created public forums, and may be subject to reasonable, non-content-based restrictions in other forums. The Court has defined three different categories of public property or types of "public" forums. First is the fully public forum, which includes streets, parks, and other places traditionally used for public assembly and debate. In these areas, the government may not prohibit all communicative activity and must justify any content-neutral, time, place, and manner restrictions as narrowly tailored to serve a legitimate state interest. The second category is the "limited public forum" where the government has opened property for communicative activity and thereby created a public forum. In this category, the government may limit the forum to use by certain groups; Wider v. Vincent, 454 U.S. 263 (1981) (student groups), or for discussion of certain subjects, City of Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) (school board business). The last forum category is where the government "reserve(s) a forum for its intended purposes ... as long as the regulation or speed is reasonable and not an effort to suppress, express or merely because public officials oppose the speaker's views". Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). Government regulation of the second category requires a "compelling" state interest while regulation of the third category need only be reasonable.

609. Where a public forum has multiple, competing uses, the U.S. Supreme Court has upheld a regulation limiting the time when a public park can be used, even when that limitation restricted the ability to demonstrate against homelessness by sleeping in symbolic "tent cities" in the park. See Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Similarly, governments may impose permit requirements on those wishing to hold a march, parade, or rally. See Forsyth County v. Nationalist Movement, 112 S.Ct. 2395, 2401 (1992). The power to regulate is at its greatest when more limited forums, such as military bases or airports, are at issue. See e.g. International Society of Krishna Consciousness v. Lee, 112 S.Ct. 2701 (1992).

610. However, there are important constitutional limits to such intrusions. A law limiting certain types of picketing or demonstration but not others, for example, would be an impermissible content-based restriction. E.g. Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). Moreover, licensing or permit systems may not delegate overly broad licensing discretion to government officials, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication. In Forsyth County v. Nationalist Movement, for example, the U.S. Supreme Court struck down as unconstitutional a law which empowered a county administrator to adjust a permit fee for demonstrators based on the likely expense of maintaining public order. Reviewing a challenge brought by a controversial group that was expected to cause considerable disruption, the Court held that such a rule was unconstitutional both because it vested too much discretion in the administrator and because it was based inevitably on content: to estimate the cost of providing security, the administrator would have to examine the content of the parade's message, the likely public reaction, and judge the number of police necessary to provide protection. Similarly, in Shuttleworth v. City of Birmingham, 394 U.S. 147 (1969), a city ordinance permitting denial of a parade permit where required by "the public welfare, peace, safety, health, decency, good order, morals or convenience" was held to be unconstitutional on its face because of the discretion it vested in the city administrator.

611. The ability of governments to limit assembly depends considerably on the primary activity of the locales in question, in tandem with the type of regulation. For example, the government may prohibit the distribution of leaflets inside a courthouse, but not outside the courthouse, where it is limited to reasonable time, place, or manner restrictions, as the area around a courthouse is traditionally considered a public forum appropriate for public demonstration or protest. See United States v. Grace, 461 U.S. 171 (1983). However, demonstrations or assemblies near a jail may be entirely prohibited, Adderly v. Florida, 385 U.S. 39 (1966), and the government may prohibit demonstrations within a defined proximity to a courthouse when the purpose of the demonstration is to influence judicial proceedings. Cox v. Louisiana, 379 U.S. 559 (1965).

612. American courts will closely scrutinize the intent of government regulation of the right of assembly and require that intrusive regulations be narrowly tailored. Thus, in Boos v. Barry, 485 U.S. 312 (1988), the U.S. Supreme Court struck down a statute prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tended to bring the embassy's government into disrepute. The Court held that the law was a

content-based restriction on political speech that was not narrowly tailored to prevent actual intimidation or harassment of foreign diplomats. However, the Court upheld a second portion of the law prohibiting three or more persons from congregating within 500 feet of the embassy if the group refused to disperse after being requested by the police. The Court narrowly interpreted the statute to permit ordering dispersal only when such congregations were reasonably believed to threaten the security or peace of the embassy.

Article 22 - Freedom of association

613. **U.S. Constitution**. Although the freedom of association is not specifically mentioned in the U.S. Constitution, it has been found to be implicit in the rights of assembly, speech, and expression. See NAACP v. Claiborne Hardware Co., 458 U.S. 898 (1982); Healey v. James, 408 U.S. 169 (1972). Taken together, these provisions of the First, Fifth and Fourteenth Amendments guarantee freedom of assembly in all contexts, including the right of workers to establish and join organizations of their own choosing, without previous authorization by or interference from either the federal government or the state governments. See Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 (1967).

614. Accordingly, attempts to subject association membership to undue burdens have been strictly reviewed, at least where the association's function is related to other fundamental rights. In Scales v. United States, 367 U.S. 203 (1961), for example, the U.S. Supreme Court held that membership in a political association could be criminally punished only if the state was required to show active membership, knowledge of the association's illegal objectives, and specific intent to further those objectives. This requirement has likely been heightened by subsequent developments in the "clear and present danger" doctrine, discussed under article 19.

615. Lesser impositions, such as attempts to compel the disclosure of membership in such associations, are also subjected to heightened review, and will ordinarily not survive review where there is a reasonable probability that disclosure will subject those identified to threats, harassment, or reprisals. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982). Similarly, constraints on the organization of political parties must be narrowly tailored and serve compelling state interests. Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989). The right of association members to engage in protected activities is also secured, and may not generally be subjected to the risk of liability for the actions of other group members. NAACP v. Claiborne Hardware Corp., 458 U.S. 886 (1982). At the same time, the right to associate (and the corollary right to be free from association) may be subject to narrow regulation justified by a substantial public interest. Thus, in Roberts v. United States Jaycees, 468 U.S. 609 (1984), the U.S. Supreme Court held that a private organization engaged in expressive activities might nevertheless be subject to state laws prohibiting discrimination in its membership.

616. Associations less clearly dedicated to protected activities, such as those that are commercial in nature, will typically enjoy less freedom from regulation. Roberts, supra. The distinction between expressive and commercial activities of associations is an important one, and explains how the states are permitted to regulate the membership of labour unions in their representation of the business interests of employees, but not to compel the association with unions engaged in ideological or expressive activities. Roberts, supra (O'Connor, J., concurring).

617. **Labour associations**. The rights of association and organization are supplemented by legislation, including the Railway Labor Act (1926), the Norris-LaGuardia Act (1932), the National Labor Relations Act (1935), the Labor-Management Relations Act (1947), the Labor-Management Reporting and Disclosure Act (1959), the Postal Reorganization Act (1970), and the Civil Service Reform Act (1978), as well as state and local legislation. The National Labor Relations Act, 29 U.S.C. sections 151 et seq. (NLRA), which enunciates U.S. national labour relations policy, governs the relationship between most private employers and their non-supervisory employees.

618. The NLRA guarantees the right of covered employees to organize and bargain collectively with their employers or to refrain from such activity. Section 7 of the NLRA guarantees that "employees shall have the right to self-organization, to form, join or assist labour organizations, to bargain collectively through

representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection...". 29 U.S.C. section 157. Examples of rights protected by Section 7 are: forming or attempting to form a union among the employees of a company; joining a union whether the union is recognized by the employer or not; assisting a union to organize the employees of an employer; and refraining from activity on behalf of a union.

619. The NLRA expressly protects covered employees against acts of anti-union discrimination. Section 8(a)(3), 29 U.S.C. section 158(a)(3), makes it an unfair labour practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labour organization ...". Section 8(a)(4), 29 U.S.C. section 158(a)(4), makes it an unfair labour practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]".

620. The NLRA protects workers' and employers' organizations from interference by each other. Section 8(a)(1), 29 U.S.C. section 158 (a)(1), provides that it is an unfair labour practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA. It is also an unfair labour practice for an employer to "dominate or interfere with the formation or administration of any labour organization or contribute financial support to it ...". 29 U.S.C. section 158(a)(2).

621. The NLRA also protects labour organizations from employer interference by generally prohibiting the payment of anything of value by an employer to any worker representative, to any labour organization, or to any labour organization officer or agent. In addition, no payments may be made to a group of employees in excess of their normal wages and compensation, for the purpose of causing the group to influence other employees in the exercise of their right to bargain collectively through representatives of their own choosing. These provisions carry criminal penalties and are enforced by the U.S. Department of Justice. 29 U.S.C. section 186.

622. The provisions of the NLRA generally apply to all employers engaged in an industry affecting interstate commerce (the vast majority of employers), and thus, to their employees. As with U.S. labour laws generally, it applies to employees regardless of their nationality or legal status in the U.S. However, the NLRA excludes from coverage railway and airline workers, and government employees; as well as agricultural, domestic and supervisory employees, employees of entirely non-profit hospitals, independent contractors, and individuals employed by a spouse or a parent. 29 U.S.C. section 152(3).

623. Railway and airline employees are covered by the Railway Labor Act (RLA), 45 U.S.C. sections 151-88, and are provided protections against anti-union discrimination similar to those contained in the NLRA. The RLA expressly recognizes that employees "have the right to organize and bargain collectively through representatives of their own choosing", prohibits a carrier from denying "the right of its employees to join, organize, or assist in organizing the labour organization of their choice", and makes it unlawful for an employer to "interfere in any way with the organization of its employees ... or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labour organization ...". 45 U.S.C. section 152.

624. The right of employees of the U.S. Government to organize is governed by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. sections 7101-35. The CSRA applies to almost all federal civilian employees, and provides that "[e]ach employee shall have the right to form, join, or assist any labour organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right". Id. at section 7102. State and local governments have a diverse variety of legislation covering collective bargaining by state and local employees; however, those laws must be consistent with the fundamental Constitutional guarantees of freedom of association.

625. Private-sector employees who are not covered by the NLRA or the RLA (primarily agricultural, domestic, and supervisory employees who are excluded from NLRA coverage under 29 U.S.C. section 152(3)), are none the less protected by the Constitution of the United States. As noted above, the First, Fifth and Fourteenth Amendments of the Constitution guarantee that workers are entitled to establish and join organizations of their own choosing, without previous authorization by or interference from either the federal government or the state

governments. The exclusion of these categories of employees from coverage means only that they do not have access to the specific provisions of the NLRA or RLA for enforcing their rights to organize and bargain collectively.

626. In addition to the NLRA and RLA, the Norris-LaGuardia Act protects employees in the exercise of their right to organize and bargain collectively by limiting federal court jurisdiction to grant injunctive relief in labour disputes. The policy of the Act expressly recognizes that it is necessary for an employee to "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labour, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...". 29 U.S.C. section 102. Employees such as agricultural and supervisory workers who are not covered by the NLRA are none the less covered by the Norris-LaGuardia Act.

627. In addition to federal legislation, most states have constitutional provisions or legislation that expressly guarantee the right to organize and bargain collectively. Thus, state laws frequently provide coverage for employees who are not within the jurisdiction of the NLRA. These state laws are in most cases patterned on the NLRA or the Norris-LaGuardia Act, or provide other similar provisions. As noted above, even in the absence of state law, the fundamental right of association is guaranteed by the First and Fourteenth Amendments of the United States Constitution.

628. The National Labor Relations Board (NLRB) is an independent federal agency that administers, interprets, and enforces the NLRA. The NLRB consists of five board members (the Board) appointed by the President with the approval of the Senate for five-year staggered terms; the General Counsel, an independent officer appointed by the President with the approval of the Senate for a four-year term; and the regional offices.

629. An unfair labour practice case is initiated by an individual, union, or employer by filing a charge with an NLRB regional office alleging a violation of the NLRA by an employer or labour organization. The charge is investigated by the regional office on behalf of the General Counsel to determine whether there is reasonable cause to believe that the NLRA has been violated. If the Regional Director concludes that the charge has merit, the Regional Director will seek to remedy the apparent violation by encouraging a voluntary settlement by the parties. Most cases are settled voluntarily.

630. If a case is not settled, a formal complaint is issued and a hearing is held before an Administrative Law Judge (ALJ). At the hearing, the parties are entitled to appear; to call, subpoena, examine and cross-examine witnesses; and to introduce evidence. The case is prosecuted by an attorney from the regional office on behalf of the General Counsel. After the hearing and after the parties have briefed the issues, the ALJ issues a decision containing proposed findings of fact and a recommended order.

631. Any party may appeal the ALJ's decision to the Board, which may adopt, modify or reject the findings and recommendations of the ALJ. If no exceptions are filed to the ALJ's decision, that decision and recommended order automatically become the decision and order of the Board.

632. If a party fails to comply with the Board's order voluntarily, the office of the General Counsel files an enforcement petition in the United States Court of Appeals. Similarly, any "person aggrieved" (which includes both the respondent and the charging party) by a final order of the Board may seek to have the order reviewed and set aside by filing a petition with the United States Court of Appeals.

633. The Federal Labor Relations Authority performs functions for federal employee labour organizations similar to those performed by the NLRB for private-sector employees, including resolution of complaints of unfair labour practices and disputes over the scope of collective bargaining negotiations. 5 U.S.C. sections 7104-05. In addition, the Federal Mediation and Conciliation Service (FMCS) (which is responsible for assisting parties to labour disputes, at their request, to settle such disputes through conciliation and mediation) has authority to help resolve bargaining disputes between federal agencies and labour organizations.

634. Machinery for ensuring protection of freedom of association is also provided under the RLA and state laws. The RLA establishes the National Mediation Board which performs for the railway and airline industries functions similar to those performed for other industries by the National Labor Relations Board and the Federal Mediation and Conciliation Service. However, the RLA's provisions are enforced by civil suit, and are subject to criminal penalties for wilful failure or refusal of a carrier to comply. 45 U.S.C. section 152. State law machinery varies, with some states providing administrative procedures similar to the NLRA, and other states relying on enforcement by private actions in the judicial system.

635. **Trade union structure and membership**. The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), which comprised 85 national union affiliates as of August 1993, is the largest federation of trade unions in the United States. Another 82 national unions are independent. These include the National Education Association, with some 2 million members, and the United Electrical Workers, with 80,000 members.

636. The AFL-CIO network comprises its national headquarters, which houses the various trade and industrial departments, and eight regional divisions. The regions include 50 state federations and one commonwealth central body at the state level, and hundreds of central councils at the local level. The AFL-CIO lobbies for labour's interests before Congress and state legislatures, monitors state and federal regulatory activities, and represents labour in various national and international forums. It disseminates labour policy developed by its affiliates, provides research and other assistance through its various departments, and assists in coordinating organizing among its affiliates. Member unions pay dues to support the activities of the federation and its various trade and industrial departments. Affiliated unions usually belong to a number of trade and industrial departments that represent their interests before the government and elsewhere.

637. Unaffiliated unions operate much like those affiliated with the AFL-CIO. On legislation and in election campaigns, they often coordinate with the AFL-CIO to present a common front.

638. According to the Department of Labor's Bureau of Labor Statistics (BLS), in 1992, an estimated 16,390,000 employed wage and salary workers in the United States (15.8 per cent of all employed wage and salary workers) belonged to labour unions. Of those, 6,650,000 were employed in government, and 9,740,000 were employed in private industry.

639. Among the private industry groups, manufacturing had the largest number of union members (3,749,000), followed by transportation and public utilities (1,922,000); services (1,487,000); wholesale and retail trade (1,402,000); construction (906,000); finance, insurance and real estate (144,000); mining (94,000); and agriculture (37,000).

640. Nearly 37 per cent of government (federal, state and local) employees were union members, as compared to some 11 per cent of wage and salary workers in private industry. Although, as seen above, the manufacturing industry accounted for the largest number of union members, transportation and public works had the highest percentage of union employees (nearly 31 per cent), followed by construction and manufacturing (20 per cent each), and mining (15.1 per cent). Percentages for the other private industry groups ranged from 2 to 7 per cent.

641. The percentage of union members was greater among full-time workers (nearly 18 per cent) than part-time workers (some 7 per cent), and among men (19 per cent) than women (nearly 13 per cent). African-Americans (21 per cent) were more likely than either whites or Hispanics (both 15 per cent) to belong to unions.

642. In addition to the estimated 16.4 million wage and salary employees who belonged to unions in 1992, there were more than 2 million workers whose jobs were covered by a union (or employee association) contract, but who were not union members.

643. **Political parties and political activities of tax-exempt organizations**. Political parties were somewhat disdained by many of the founding fathers and are not mentioned in the U.S. Constitution. Nevertheless,

political parties soon became an integral part of the American system and, reflecting the federal structure, have functioned at both the state and national levels. Even today, political parties are seldom mentioned in federal law and regulations. None the less, political parties are protected through the constitutionally guaranteed freedom of association.

644. A fundamental purpose of political parties is the selection and promotion of candidates for elected office who can advance that party's platform. Since the states, not the federal government, are the locus of ballot formulation, the registration of political parties is a matter of state jurisdiction, generally under the purview of each state's Secretary of State or equivalent chief electoral official. The primary benefit of a party attaining recognition by the state government is that its nominees usually are automatically placed on the general election ballot without the petition requirement required for individuals running as independents. In most of the states in which the party's nominees are selected through a primary election, obtaining recognition also affords a government-financed and -administered election. To qualify as a party, an association generally has to demonstrate some measure of popular support within the state, either by petition or by securing a percentage of the vote in the previous election. This threshold can be as low as 500 signatures (New Mexico) or as high as 20 per cent of the vote in the last state-wide election (Georgia).

645. Since ballot access is secured at the state level, the importance of a political party obtaining recognition at the national level is not as great in the United States as in countries that administer elections at the national level. There is no federal ballot; all federal candidates, even those for the President, must share placement with state and local candidates on a state ballot.

646. There are, however, certain financial benefits for a federal political committee qualifying as a "national political party". It may receive contributions from individual supporters up to $20,000 a year, rather than the $5,000 annual limit applied to other non-candidate federal political committees.

647. Moreover, the "national committee" of a political party engaged in the presidential election may qualify for government payments to conduct a nominating convention. The nominee of a national political party for the presidential general election can also qualify for a public subsidy for his or her campaign expenses. Candidates seeking the presidential nomination of a national political party are also entitled to a measure of public matching funds for their state primary campaigns if they can demonstrate a relatively small, but broad, financial base ($5,000 comprising individual donations of $250 or less in each of 20 states - for a total of $100,000). At present, the public subsidies to parties and candidates extend only to expenses in connection with campaigns for the office of President; there are no public subsidies for candidates for the U.S. Senate or House of Representatives for either primary or general elections.

648. To attain national party committee status under the Federal Election Campaign Act, a prospective party organization need only demonstrate that it is an ongoing political association with the traditional organizational attributes and objectives of a political party and place candidates for federal office on the ballot in several states. If a new or minor party's presidential general election candidate secures at least 5 per cent of the popular vote in a general election, the candidate may qualify for government reimbursement for part of the general election expenses and the party will be entitled to partial public funding for its next general election nominee. Major party nominees (those securing 25 per cent or more of the vote in the last election) are entitled to full, advance public funding of their general election campaigns. Any candidate that accepts public funds must abide by the expenditure limits and conditions that accompany that grant.

649. Although the national committees of political parties supporting presidential candidates enjoy certain financial benefits, there are regulatory costs associated with being recognized as a federal political committee. Any local party organization or group of any kind spending more than $1,000 to influence a federal election must register as a political committee with the Federal Election Commission (FEC); restrict its sources of revenue according to the law; report its financial activity to the FEC; and abide by the limitations on contributions to, and spending on behalf of, candidates. At the local level, political party committees who wish only to support state and local candidates may seek to avoid this obligation.

650. Because of the reporting requirements and restrictions on fund-raising, some national non-profit organizations that address political issues also try to avoid characterization as a political party or political committee. In addition to being subject to the FEC requirements noted above, such organizations would lose a federal tax benefit if they became political committees. While the federal tax code exempts both charitable organizations and political parties from taxation, a contribution from an individual to a political party is not tax deductible for the donor whereas a donation to a public charitable organization is tax deductible. In sum, a non-profit, public charity can offer its donors a tax deduction and can spend unlimited amounts of money speaking publicly on issues, even political issues, without incurring legal obligations under the Federal Election Campaign Act.

651. In some situations, organizations that are exempt from federal income tax under section 501(a) of the Internal Revenue Code as organizations described in section 501(c) may engage in activities that relate directly or indirectly to the political process. In particular, charitable organizations described in section 501(c)(3) that are eligible to receive tax-deductible contributions may conduct non-partisan voter education activities or advocate positions on issues that are also being addressed by candidates for public office. However, section 501(c)(3) organizations are prohibited from participating in, or intervening in (including the publishing or distributing of statements) any political campaign for or against any candidate for public office. The courts have confirmed that this prohibition is absolute. Thus, any political activity by a section 501(c)(3) organization may jeopardize its exempt status. Other section 501(c) organizations are similarly precluded from political activities because the subparagraph in which they are described limits them to an exclusive purpose (for example, section 501(c)(2) title holding companies and section 501(c)(20) group legal services plans).

652. On the other hand, some organizations that are exempt from federal income tax, pursuant to other provisions of section 501(c) of the code, may engage in a certain amount of political activity without jeopardizing their exempt status. A section 501(c) organization (other than those such as section 501(c)(3) organizations that are specifically prohibited from engaging in political activities) may generally make expenditures for political activities if such activities (and other activities not furthering its exempt purposes) do not constitute the organization's primary activity. Some of the section 501(c) organizations that have been held to be able to engage in political activities are social welfare organizations described in section 501(c)(4), labour organizations described in section 501(c)(5), business leagues described in section 501(c)(6), and fraternal beneficiary societies described in section 501(c)(8). Generally, these organizations are not eligible to receive tax-deductible contributions.

653. Political organizations under section 527 of the Code include organizations that operate primarily for the purpose of accepting contributions, or making expenditures, or both, in order to influence or attempt to influence the selection, nomination, election or appointment of an individual to a federal, state or local public office or office in a political organization. These organizations are not required to pay federal income tax on contributions and other fund-raising income, but are required to pay federal income tax on their investment income. Contributions to political organizations are not tax-deductible.

654. A proliferation of small political parties, focusing on narrow issues, is structurally discouraged by the majoritarian nature of the United States electoral process, which provides for single member districts with a plurality victor. This system of representation tends to encourage the establishment and maintenance of a two-party system with both parties appealing to a broad cross-section of the population. Attractive new political parties and issues tend to be absorbed over time within one or the other mainstream party.

Article 23 - Protection of the family

Right to marry

655. United States law has long recognized the importance of marriage as a social institution which is favoured in law and society. Marriage has been described as an institution which is the foundation of society "without which there would be neither civilization nor progress". Maynard v. Hill, 125 U.S. 190, 211 (1888).

656. Marriage may be defined as the status of relation of a man and a woman who have been legally united as husband and wife. Marriage is contractual in nature, in that it creates certain rights and responsibilities between the parties involved. However, the contract of marriage is unique in the eyes of the law. As one court stated:

> "While we may speak of marriage as a civil contract, yet that is a narrow view of it. The consensus of opinion in civilized nations is that marriage is something more than a dry contract. It is a contract different from all others. For instance: only a court can dissolve it. It may not be rescinded at will like other contracts. Only one such can exist at a time. It may not exist between near blood kin. It legitimizes children. It touches the laws of inheritance. It affects title to real estate. It provides for the perpetuity of the race. It makes a hearthstone, a home, a family. It marks the line between the moral of the barnyard and the morals of civilized men, between reasoning affection and animal lust. In fine, it rises to the dignity of a status in which society, morals, religion, reason and the state itself have a live and large interest."

Bishop v. Brittain Inv. Co., 129 S.W. 668, 676 (Mo. 1910).

657. This report focuses only on legal and civil aspects of marriage. Persons in the United States are free to marry within or outside a religious setting; the choice in no way affects the legal status of a marriage.

658. **Constitutional limitations**. Marriage and the regulation thereof is generally regarded as a matter for the states. The U.S. Supreme Court has recognized, however, that the states' rights in this area are subject to certain constitutional limitations. For example, in Loving v. Virginia, 388 U.S. 1 (1967), the U.S. Supreme Court struck down a Virginia law that prohibited interracial marriages. The Court held that the statute, which was similar to those in effect in 15 other states at the time, discriminated on the basis of race in violation of the Equal Protection clause of the Fourteenth Amendment. The Court went on to hold that the law violated a fundamental liberty protected by the Due Process clause of the Fourteenth Amendment - the right to marry.

659. The Loving decision served as the catalyst for the reform of many archaic state laws such as those forbidding marriage between paupers or very distant relatives. In addition, subsequent decisions have expanded upon the right to marry as a limitation on the power of the states to regulate the institution of marriage. For instance, the Court has found that the penumbra of constitutional privacy rights includes not only the right to marry, but also a right to privacy within marriage. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (overturning a Connecticut State statute forbidding the use or sale of contraceptives to married persons). In Zablocki v. Redhail, 434 U.S. 374 (1978), the U.S. Supreme Court struck down a Wisconsin statute that withheld marriage licences from persons required to pay child support unless they could provide proof to a court that they had been making regular payments. In its opinion, the Court noted the traditional right of states to regulate marriage. But, the Court said, these restrictions must be reasonable, must not interfere with the right to marry and must be narrowly tailored to achieve their required ends. The Supreme Court has also viewed the Fourteenth Amendment as a limitation on the reasons for which parents may be separated from their children. See Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that the Fourteenth Amendment prohibits consideration of the race of a step-parent in deciding whether the natural parent is fit to retain custody of a child).

660. Within these constitutional parameters, states have primary authority for regulating the inception, status, duration and termination of the right to marry. Indeed, it has been said that there can be no valid marriage without the consent of the state. See Eaton v. Eaton, 92 N.W. 995 (1902); Campbell v. Moore, 1 S.E.2d 784 (1939). In general, each state has the power to regulate marriages within that state, and Congress has jurisdiction over marriages in the territories of the U.S., in the District of Columbia, and between members of certain Indian tribes. In practice, Congress has largely delegated its authority in these areas to local legislative bodies. Among the types of regulations governing marriage are those restricting age, limiting marriage between close relatives, and creating certain procedural requirements such as licensing and blood tests.

661. **Capacity to marry**. The traditional common-law rule in most American jurisdictions, before the enactment of statutes covering the issue, had been that males had the capacity to contract marriage at the age of 14, and

females at 12. Legislative changes have significantly increased the age. Today, there is a substantial consensus among the states that 18 is the age at which a person should be allowed to marry without parental consent. Most states also agree that this age should be the same for men and women. See, e.g., Alaska Stat. section 25.05.011 (1991); Colo. Rev. Stat. section 14-2-106 (1989); Mass. Gen. Laws Ann. ch. 207 section 7 (1981); Tenn. Code Ann. section 36-3-106 (1991); W.Va. Code section 48-1-1 (1992). Only one state - Mississippi - permits marriage before age 18 without parental consent. However, marriage of even younger persons is frequently authorized where pregnancy or birth of an illegitimate child is involved. A handful of states still have different age requirements for males than for females. This raises the question of whether these statutes are in violation of the Equal Protection clause of the U.S. Constitution, but the U.S. Supreme Court has never addressed this question.

662. In addition to age restrictions, most states have restrictions prohibiting the marriage of mental incompetents. There is no general rule among the states as to what constitutes sufficient mental capacity. The most accepted test appears to be whether a party to a marriage contract has the capacity to understand the nature of the marriage contract and the duties and responsibilities it creates.

663. **Consanguinity restrictions**. Incestuous marriages between persons closely related by blood or by marriage have been said to violate public policy. See Catalano v. Catalano, 170 A.2d 726 (Conn. 1961). Marriages between close blood relatives, such as brothers and sisters, parents and children, grandparents and grandchildren, are universally prohibited by the states. In addition, uncle-niece and aunt-nephew marriages are also forbidden throughout the United States. One exception is Rhode Island, which permits Jews to marry within the degrees of consanguinity permitted by their religion. This has been interpreted to permit uncle-niece marriages. In Re Mays Estate, 114 N.E.2d 4 (Ct. App. N.Y. 1953).

Procedures for marriage

664. Within the constitutional framework described above, all states have procedures for the licensing, solemnization and registration and recording of marriages. The purpose of these statutes is to clarify the status of parties who live together as man and wife and to provide concrete evidence of the marriage. Reaves v. Reaves, 82 P. 490 (1905). These procedures, which require the parties voluntarily to take the necessary steps to affirm their desire to marry, also ensure that marriages are not entered into without the free and full consent of both parties. There is a difference of opinion among the states as to the effect of non-compliance with these statutes. Some states follow the rule that failure to follow a particular requirement does not invalidate the marriage unless the statute expressly so states or unless so many formalities are disregarded that there is, in effect, no ceremonial marriage at all. See Carabetta v. Carabetta, 438 A.2d 109 (Conn. 1980). Other states hold that failure to fulfil a particular requirement may render the marriage invalid. Henderson v. Henderson, 87 A.2d 403 (Md. 1952).

665. **Blood tests**. Most states require a blood test as a prerequisite to the issuance of a marriage licence. The tests are generally to be taken from both parties, and results are presented to the authority issuing the licence. Most statutes require that in order for the licence to be issued, the parties must be free of certain sexually-transmitted or other communicable diseases. Failure to comply with this requirement generally does not invalidate the marriage, although it may subject the parties and the issuing authority to penalties.

666. **Waiting periods**. In an effort to protect against hasty or ill-advised marriages, most states now require some form of waiting period. These typically last a maximum of 30 days either between the blood test and the issuance of a licence or from the issuance of the licence and the actual ceremony. Failure to comply with this requirement generally will not invalidate the marriage if it is the only defect.

667. **Celebration or solemnization**. The individual state legislatures have the authority to set qualifications and licensing requirements for those persons who are permitted to legally perform marriage ceremonies. In most states, no particular form of ceremony is prescribed as long as the parties declare their intention in the presence of the person solemnizing the marriage. Most states permit the wedding to be performed by either a clergyman or by a justice of the peace or other judicial officer. Generally, performance of a marriage by an unauthorized person does not render the marriage void unless such is expressly declared by the statute.

668. **Common-law marriage**. Common-law marriage is a non-ceremonial or informal marriage by agreement, entered into by a man and woman having capacity to marry, ordinarily without compliance with statutory formalities. Less than one fourth of the states still recognize common-law marriages. In addition to capacity and an agreement, most jurisdictions require some act of consummation, such as cohabitation, to make the common-law marriage valid. Some courts also require proof that the parties held themselves out to the world as husband and wife or that they were thought of as husband and wife in the community in which they lived. In those states that continue to recognize common-law marriages, the marriage is considered just as valid as those contracted in full compliance with the statutory requirements.

Status during marriage

669. Until the 1960s, U.S. law generally recognized traditional roles for men and women. The husband was viewed as the provider of the family, charged with meeting the family's needs through work, investments or other activities. Since then, however, societal changes in the United States have radically altered this approach. Several states have enacted laws providing that the duty of support rests equally upon husband and wife and should be shared equally in proportion to their individual abilities. See, e.g., West's Cal. Civ. Code Ann. section 5100 (1983); Conn. Gen. Stat. Ann. section 46b-37 (1986). In 1978, the Supreme Court invalidated a state law that authorized alimony payments only for wives as a violation of the Equal Protection clause of the Fourteenth Amendment. Orr v. Orr, 440 U.S. 268 (1979). In some states which have constitutional provisions forbidding the denial or abridgment of rights on account of sex, it has been held that it is a form of sexual discrimination to impose the duty of support solely on husbands. See, e.g., Rand v. Rand, 374 A.2d 900 (1977); Henderson v. Henderson, 327 A.2d 60 (1974).

670. In addition, a number of states have enacted community property laws which treat marriage as a joint enterprise between the husband and the wife. The philosophy of these community property states is that earnings by each spouse during marriage should be owned equally by both spouses. The profits or acquisitions of those earnings are also owned equally. Property acquisitions by gift, bequest, or devise, and property acquired before marriage are considered separate property. In some community property states, when a marriage ends in divorce, all community property must be divided equally. Other community property states give the court discretion to divide community property equitably. Community property states allow each spouse to specify in his or her will how his or her half-share of the property should be disposed of at death. If a spouse in a community property state dies intestate (without a will), some states provide that the decedent's half of the property passes to the surviving spouse. In other states, the decedent's half passes to his or her heirs. Nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) have community property laws.

671. At early common law, wives acquired "dower" at the time of their marriage. Dower was a life-estate in one third of each piece of the husband's qualifying real property. If a wife survived her husband, she was entitled to this third. Dower could only be released by the wife's consent. In those few states that still recognize dower, both the husband and wife must sign any deed in order to release dower. "Courtesy" was a similar right of husbands to their wives' real property if the wife died before the husband. Virtually all states now have statutes that ensure that surviving spouses will inherit some share of the decedent spouse's estate. Even where a will includes no provision for the surviving spouse, some states will allow the surviving spouse to renounce the will and take a statutorily defined share of the estate, usually one third to one half. See, e.g., Ill. Rev. Stat., ch. 110 1/2, sections 2-8(a)(1978). Section 2-102 of the Uniform Probate Code provides for inheritance when a spouse dies intestate. If there are no surviving children or parents of the decedent spouse, the surviving spouse inherits the entire estate. If there are surviving children or parents, the Code awards the surviving spouse an initial portion of the estate and then directs that half of the remainder of the estate go to the surviving spouse and half to the other heirs.

672. **Equal rights of spouses**. Title I of the Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406, 88 Stat 829 (1974), helps to ensure the equality of rights for spouses. ERISA, which protects the rights of pension plan participants, generally requires that pension benefits be paid in the form of a joint and survivor annuity unless the participant's spouse consents to a different form of payment or unless the plan otherwise

protects the interests of the spouse. The joint and survivor annuity guarantees that a portion of the participant's benefit will go to his or her surviving spouse.

673. ERISA also generally prohibits a plan participant from assigning his or her benefits to a third party. An exception is provided upon dissolution of the marriage. In such a case, plan benefits may be used to provide child support, alimony payments, or marital property rights to a plan participant's spouse, former spouse, child or other dependant.

The parent-child relationship

674. U.S. courts have recognized the primacy of the parent's role in child rearing. In particular, courts generally give wide discretion to parental decisions over such matters as the child's education, health care and religious upbringing. According to the Supreme Court, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder ... And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter". Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

675. Despite these broad parental rights, there are certain areas in which the states have legitimate interests. For example, every state has laws which require that children be sent to school between the ages of 6 and 16. See e.g., Ala. Code section 16-28-1 (1985); Miss. Code section 37-13-91 (1990); and Va. Code section 22.1-254 (1993). However, while the state may require that a child attend school, it will not make decisions on where the child attends school or whether the child receives a public or a private school education. In addition, where an intact family has a disagreement over the course of a child's education, the courts have been reluctant to step in and break the deadlock. See, e.g., Kilgrow v. Kilgrow, 107 So.2d 885 (Ala. 1958).

676. Similarly, in the area of medical care, it is generally the responsibility of parents to determine whether and what type of care is to be provided. However, many states have given minors the right to consent to limited treatment without parental consent. See Or. Rev. Stat. section 109.640 (1990) (minor may receive birth control information; minors 15 and older may consent to treatment). Moreover, the states have been willing to intervene to require medical treatment in certain cases in which parents have declined treatment on the basis of religious beliefs. See Jehovah's Witnesses in the State of Wash. v. King County Hospital Unit No. 1, 278 F. Supp. 488 (W.D. Wash. 1967), aff'd, 390 U.S. 598 (1968) (U.S. Supreme Court refused to enjoin the giving of blood transfusions to Jehovah's Witnesses. It upheld the statutes that empowered judges to order the transfusions since the procedure is both safe and necessary in many cases).

"Extended" families

677. Categories of both "relatives" (including relatives by marriage) and "dependants" (persons forming part of the household or receiving a percentage of their support) are recognized under U.S. law for various purposes such as entitlement to benefits and income taxation. These relationships do not, however, generally constitute defined legal relationships with fixed rights and obligations akin to the relationships among spouses, parents, and children.

Termination of the marital relationship

678. Traditionally, divorce was only available upon a showing of one of several fault-based grounds such as adultery, desertion, or cruelty. Under the traditional view, if the conduct that formed the basis of the claim for divorce did not fit into one of the statutory categories, a court could deny the request for a divorce. Today, every state grants "no-fault" divorces. Most states provide for both a no-fault basis and a fault basis for dissolving marriages. In about one third of the states, a no-fault divorce is not simply an alternative, but the only basis for divorce. State statutes frequently allow for a no-fault divorce when there has been an "irretrievable breakdown of the marriage", "irremediable breakdown of the marriage", or "irreconcilable differences". See, e.g., Alaska Stat. section 25.24.050 (1991) (incompatibility of temperament causing the irremediable breakdown of the marriage on joint petition); Arizona Rev. Stat. sections 25-312, 25-316 (1991) (marriage is irretrievably broken);

West's Cal. Civ. Code Ann. sections 4506, 4507 (1983) (irreconcilable differences which have caused irremediable breakdown of the marriage); Colo. Rev. Stat. sections 41-10-106, 41-10-110 (1989) (marriage is irretrievably broken); Fla. Stat. Ann. section 61.052 (1985) marriage is irretrievably broken); Ky. Rev. Stat. section 403.170 (1990) (marriage is irretrievably broken); Miss. Code section 93-5-2 (Supp. 1986) (irreconcilable differences if the parties file a joint bill and separation agreement); N.H. Rev. Stat. Ann. section 458:7-a (1992) (irreconcilable differences causing irremediable breakdown of marriage); Tenn. Code Ann. section 36-4-101(11) (1984) (irreconcilable differences between the parties).

679. Where a state provides both a fault and no-fault option, individuals may choose to pursue a "fault" divorce to circumvent an otherwise mandatory period for spouses to live separately. Individuals may also prefer certain economic consequences of a fault divorce. The increased use of no-fault divorces has allowed for consensual divorces (where previously one spouse had to divorce the other) and for unilateral divorces (where only one spouse wants to divorce).

680. **Alimony and support**. U.S. courts have traditionally followed the English practice of awarding alimony as an incident to a divorce proceeding. This practice arose out of a recognition of the duty of a husband to support his mate and of the control that the husband typically maintained over his wife's assets during the course of the marriage. Also, since divorce was typically fault-based, many courts awarded alimony as a recognition that the payer spouse was in some way at fault. However, as noted above, with the rise of women in the workforce, these traditional arguments have less merit and many courts are today awarding alimony only in small amounts or for limited periods to help a spouse adjust to being on his or her own or to restart a career. In making these determinations, most courts operate on a case-by-case basis taking into consideration such factors as the relative incomes of the parties, their ages, their health, future employment prospects and the standard of living to which they are accustomed.

681. Although as a practical matter alimony is most often awarded to the wife, most states provide by statute that alimony may be awarded to either spouse. These statutes are the natural outgrowth of the U.S. Supreme Court's decision in Orr v. Orr, 440 U.S. 268 (1979), which invalidated an Alabama statute placing the burden of alimony only upon the husband.

682. **Custody and visitation**. With the recognition of constitutionally based doctrines of gender equality, both mothers and fathers are now considered equal candidates for custody of minor children in the event of divorce. Fathers increasingly seek to obtain custody of their children, either exclusively or on a shared or joint basis. As a practical matter, however, mothers tend to receive custody in the large majority of cases.

683. All states have adopted the "best interests of the child" standard in deciding custody matters between two biological parents. See, e.g., In re Marriage of Ellerbrook, 377 N.W.2d 257 (Iowa App. 1985); Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985). Courts typically consider a number of factors in determining what is in the child's best interests. These factors include a presumption that the child should be placed with the parent, whether father or mother, who was the primary caretaker before the divorce. Courts also include factors such as the relationship that each parent has with the child, and, depending upon the child's age, the child's preference. Joint custody is now an option in all states. In many states joint custody is the presumed or preferred custody resolution. What joint custody entails, however, varies from case to case and may mean the children actually live a few days each week with each parent, or may mean simply that the parents share in decision-making.

684. One ongoing problem in custody disputes has been the issuance of conflicting custody orders by different states. This practice has allowed parents to "forum shop" to find a court willing to award them custody. The Uniform Child Custody Jurisdiction Act (UCCJA), adopted by all 50 states, and the federal Parental Kidnapping Prevention Act (PKPA), Pub. L. No. 96-611, 94 Stat. 3568 (1980), 27 U.S. section 1738A, have helped to ensure that states honour custody orders by another state. The PKPA requires states to give full faith and credit to custody orders by another state rendered within the principles of the UCCJA.

685. The only area where the "best interests of the child" standard is not followed is in custody disputes between a biological parent and a third party. In these cases, the courts have recognized the constitutional rights of

biological parents to retain custody over a third party. Unless a parent is found to be unfit, the courts will not terminate parental rights simply on an assertion that a third party has a superior ability to meet the child's interests. See DeBoer v. Schmidt, 442 Mich. 648, 502 N.W.2d 649 (1993) (refusing standing or jurisdiction in Michigan courts for couple attempting adoption where Iowa courts had ruled in favour of putative father). Two evolving issues remain. First, with regard to the rights of putative fathers, where the father has not been involved in the care of the child, courts may terminate parental rights. Lehr v. Robertson, 463 U.S. 248 (1983) (denying putative father rights where he failed to comply with New York State registration requirements). Second, where the mother transfers custody, often to a relative, and then seeks to reverse that decision, courts have ordered a "best interests of the child" hearing.

686. Abduction of children by their parents or guardians is a problem that sometimes arises in the context of child custody disputes. All states are now parties to the Uniform Child Custody Jurisdiction Act, which is designed to prevent abductions by establishing uniform jurisdictional standards for child custody determinations. These goals have been further implemented by the PKPA. Internationally, the United States is party to the Hague Convention on Civil Aspects of International Child Abduction, and has taken legislative steps to ensure that the provisions of the Convention are binding in U.S. courts.

687. **Child support and enforcement of decrees**. It is well settled that both parents are responsible for the support of their children. Thus, in making child support orders, courts normally take into consideration the property and income of both parents. This does not mean that both parents are required to contribute equally. Rather, they are expected to contribute in proportion to the resources each possesses. See Silva v. Silva, 400 N.C. 2d 1330 (1980); Henderson v. Levkold, 657 P.2d 125 (1983). In determining the amount of support to be awarded, courts normally take into consideration such factors as the financial resources and needs of the child, the standard of living enjoyed by the child during the marriage, the child's educational and medical needs, and finally, the financial needs and resources of the parents.

688. All states provide for the enforcement of child support through both civil and criminal procedures. Failure to provide support for a minor child is a criminal offence in all of the states even without a court order for support. Where there is an order, state law provides such traditional measures as contempt of court and other enforcement procedures applicable to any civil judgment. Interstate enforcement is facilitated by use of the Uniform Reciprocal Enforcement of Support Act, a law enacted by all of the states, which provides a mechanism for public officials to enforce orders made in one state against the obligated party in another state.

689. In recognition of the need to improve child support enforcement by the states both interstate and within each state, the United States Congress passed in 1975 comprehensive legislation (Title IV-D of the Social Security Act [IV-D Programme] - 42 U.S.C. sections 651-55) establishing a mandatory requirement for the states to set up a state agency to locate obligors, establish paternity, and enforce child support. The legislation also established on the federal level an Office of Child Support Enforcement in the Department of Health and Human Services to regulate and evaluate the state programmes and to operate a federal Parent Locator Service. The enforcement services under this programme are available to all children. Since 1975, Congress has enacted a number of measures, notably in 1984 and 1988, to improve and strengthen the enforcement programme and to require the states to establish child support guidelines, and to provide efficient enforcement procedures such as liens, capture of tax refunds for overdue support, automatic wage withholding, and direct interstate wage withholding.

690. Because interstate enforcement remained a major problem, Congress also established a commission to review the problem and make recommendations. The commission report recommended numerous changes in the procedures for handling and enforcing interstate cases, most of which have been introduced in legislation now pending in Congress. During the same time period, the National Conference of Commissioners on Uniform State Laws reviewed the state uniform act, and developed a new interstate enforcement act - The Uniform Interstate Family Support Act - to improve interstate enforcement. Congress has also made failure to provide support a crime in some interstate cases.

691. In spite of these legal safeguards and extensive programmes, however, it is clear that more needs to be done

to address the problem of inadequate child support in the United States.

Other measures of protection

692. In addition to the protections outlined above, the United States provides a number of programmes to assist families. While these programmes do not exist as a matter of right, they are designed to assist in areas in which there are special needs. Many of these programmes are operated in concert with the private sector. Other programmes aimed particularly at maternal and child welfare are discussed in connection with article 24.

693. In February 1993, the United States enacted the Family and Medical Leave Act of 1993 (FMLA), Pub. L. 103-3, 107 Stat. 6. "The F.M.L.A. - like similar state laws and employer policies - is intended to promote a healthier balance between work and family responsibilities, ensuring that family development and cohesiveness are encouraged by this nation's public policy". 58 F.R. 31,1794. The FMLA, which covers private employers with 50 or more employees and most public employers, including the federal government, entitles qualified employees to up to 12 weeks of unpaid leave per 12-month period for the birth or adoption of a child, to care for a spouse or immediate family member with a serious health condition or when the employee is unable to work because of a serious health condition. Covered employers are required to maintain any pre-existing health insurance during the leave period and to reinstate the employee in the same or an equivalent job following the end of the leave.

694. The FMLA, which went into effect on 5 August 1993, is administered largely by the U.S. Department of Labor's Employment Standards Administration. The U.S. Office of Personnel Management, however, administers Title II of the Act, as this deals with most federal employees.

695. Under current law, the United States also has numerous programmes for protecting the economic viability of families during times of job loss and for training workers for new employment opportunities. These programmes include Unemployment Insurance, the Economic Dislocation and Worker Adjustment Assistance Act (which amended Title III of the Job Training Partnership Act), the Defense Conversion Adjustment Programme, the Defense Diversification Programme, the Clean Air Employment Transition Assistance Programme, and the Trade Adjustment Assistance Programme. These programmes provide retraining, placement, income support and other support services to workers who are dislocated for a variety of reasons. In addition, the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. sections 11441 et seq., authorizes the Secretary of Labor to make grants for job training demonstration projects for homeless individuals.

Women and family law

696. The development and enforcement of women's legal rights within the family have been a major area of attention in recent years. Over the past two decades, domestic violence including rape, incest and battering, child custody, child support, and marriage and divorce law generally have all been redefined in the U.S. as women's experiences have been articulated in the legal and policy arena. Domestic violence law has been fundamentally transformed as more women have defined physical, sexual and emotional violence by male partners both as unacceptable and as deserving a legal remedy. In addition to prosecution for relevant criminal offences such as assault, many states currently provide more specialized remedies such as eviction of the aggressor and civil protection orders that trigger criminal penalties when violated. In addition, mandatory arrest law, training programmes for police, victims assistance programmes in prosecutors' offices and new prosecutorial procedures that place the burden of the decision of prosecuting on the government rather than on the victim have all received support. One of the more controversial areas remains marital rape. Some states do not by criminal statute specifically prohibit rape within an ongoing marriage. Others require evidence of significant additional violence at the time of the alleged rape.

Article 24 - Protection of children

Non-discrimination

697. Children in the United States are entitled to constitutional and statutory protections against discrimination which are described elsewhere in this report. As described in connection with article 2, the Fifth and Fourteenth Amendments to the Constitution, together with numerous federal and state statutes, ensure that all U.S. citizens are protected against discrimination on the basis of race, colour, sex, language, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In the context of equal protection doctrine generally, U.S. law provides special measures of protection aimed at preventing discrimination against children.

698. **Education**. Principles of non-discrimination have been enforced with special vigour in the field of education. It is notable that the seminal Supreme Court decision on equal protection in the United States, Brown v. Board of Education, 347 U.S. 483 (1954), concerned the education rights of children. In that case, the Supreme Court ruled that racial segregation in public school education was unconstitutional under the Equal Protection clause of the Fourteenth Amendment. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, colour, or national origin in programmes and activities receiving federal financial assistance. 42 U.S.C. section 2000d. In the years since Brown, courts and legislators have articulated a host of other educational protections for children. For example, it is now illegal for schools to discriminate against children on the basis of their status as illegal aliens, Plyer v. Doe, 457 U.S. 202 (1982); on the basis of sex, Title IX of the Education Amendments of 1972, 20 U.S.C. sections 1681 et seq.; on the basis of language status, Lau v. Nichols, 414 U.S. 563 (1974); on the basis of disability, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, Individuals with Disabilities Act, 20 U.S.C. sections 1400 et seq., and the Americans with Disabilities Act; or on the basis of homelessness, McKinney Homeless Assistance Act, Pub. L. No. 100-77 (1987), 101 Stat. 482, as amended, 42 U.S.C. section 11431.

699. **Children born outside of marriage**. The U.S. Supreme Court has adopted a standard of heightened scrutiny in reviewing instances of discrimination against children born outside of marriage. In the important area of child support, the Court has held that a state's failure to accord full support rights to such children constitutes a violation of equal protection. Gomez v. Perez, 409 U.S. 535 (1978).

700. More recently, the Court has held that a six-year limit on paternity and support actions denied illegitimate children equal protection. Clark v. Jeter, 486 U.S. 456 (1988). Particularly in the areas of inheritance and Social Security benefits, however, the Court has upheld the state's interest in facilitating property succession and administering the Social Security programme despite unequal treatment of illegitimates. See Lalli v. Lalli, 439 U.S. 259 (1978) (upholding a statute restricting inheritance by illegitimates from father's estate to instances where a court of competent jurisdiction, during the father's lifetime, had entered an order declaring paternity); Mathews v. Lucas, 427 U.S. 495 (1976) (upholding Social Security benefits awarded only where illegitimate child met one of "presumptions" of dependence on deceased parent or where child was living with or being supported by parent at parent's death).

701. **Non-citizen children**. Similarly, the Supreme Court has applied heightened scrutiny in adjudicating the equal protection rights of alien children. The Court has held, for example, that alien children have a constitutional right to public school education in the United States, whether or not they are legally documented aliens. Plyer v. Doe, 457 U.S. 202 (1982). The Court has also found that aliens have a right to equal access to educational assistance benefits. Nyquist v. Mauclet, 432 U.S. 1 (1977).

702. **Disabled children**. Disabled children in the United States are protected against discrimination by the Americans with Disabilities Act of 1990, which expanded the guarantees of the Civil Rights Act of 1964 to millions of persons with physical and mental handicaps. In particular, disabled children benefit from entitlements to access to public accommodation, including recreational facilities, restaurants, retail facilities and transportation. As noted above, children with disabilities are fully guaranteed the right to equal educational opportunities in the United States. See 20 U.S.C. section 1400 et seq. (Individuals with Disabilities Education Act, IDEA). Also, disabled children are protected by section 504 of the Rehabilitation Act of 1973, which prohibits discrimination in federally funded programmes on the basis of disability or perceived disability.

Primary responsibility

703. **Parental responsibility**. Parents bear the primary responsibility for the protection and upbringing of children in the United States. As noted above in connection with article 23, U.S. courts have long recognized the rights of parents to raise their children free from government intervention: "The history and culture of Western civilization reflect a strong tradition of parental concern for the upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition". Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Under U.S. law, parents have both the right and the duty to prepare their children for adulthood: "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations". Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

704. **Child custody**. As discussed under article 23, all states adhere to the "best interests of the child" doctrine in determining the custody of children between biological parents. As a Kansas court indicated, "without question, the paramount concern of courts in child custody proceedings is the welfare of the child .... [W]hen a controversy arises as to the custody of a minor child, the primary question to be determined by the court is what is for the best interest of the child". Chapsky v. Wood, 26 Kan. 650 (1881). Since then, the "best interests" doctrine has been articulated in the statutes or case law of all the states and in the Uniform Child Custody Jurisdiction Act.

705. **Adoption**. Adoption is a legal process which establishes a parent-child relationship between individuals who are not each other's biological parent or child. In the United States, adoptions are regulated primarily by state law. Although the states have yet to adopt uniform guidelines for adoptions, there are certain characteristics common to all state adoption laws. First, adoption is permitted only after a court has been satisfied that the biological parents have given voluntary and informed consent, or that there are other appropriate grounds for waiver of such consent. Second, before an adoption is approved, a court must find that the child is being placed with suitable adoptive parents and that the proposed adoptive relationship is in the best interests of the child. Third, adoption in the United States is not a bargained-for exchange. Although parents may pay agencies and other professionals for certain adoption-related expenses, they are prohibited from "purchasing" children for adoption. Finally, adoption constitutes a permanent substitute for the prior legal relationship between the child and his or her biological parents. The federal government plays a limited role in providing financial support for families of adopted children. For example, under the Adoption Assistance and Child Welfare Act, 42 U.S.C. sections 670 et seq., the government provides reimbursements to states for financial and other assistance given to families adopting children with "special needs".

706. At present, a Uniform Adoption Act is being drafted which would establish common guidelines for handling adoptions among the various states. In addition, the U.S. Government has participated in the effort by the Hague Conference on Private International Law to develop an international covenant on inter-country adoptions and is actively considering prompt ratification.

Oversight and support of the primary care-giver

707. **Parental role**. As discussed above, states require parents to provide support for their minor children to the extent of their financial abilities. In setting out the requirements for child support, states are prohibited from discriminating against children on the basis of their sex, legitimacy, or adoptive status. The only exception to this rule is in the area of inheritance by children born out of wedlock, as discussed above. Failure of parents to provide adequate support to children within their care can lead to civil abuse or neglect proceedings and removal of the child from parental care. Mechanisms for enforcement of child support obligations by non-custodial parents in case of divorce are discussed under article 23.

708. **Financial support programmes**. The federal government administers a number of social programmes designed to provide financial support for children whose parents cannot afford to bear the full burden of child support. Aid for Families with Dependent Children (AFDC), 42 U.S.C. sections 601 et seq., is the principal support programme for poor families. Poor families with children are also eligible for the Earned Income Credit (EIC), 26 U.S.C. section 32, a federal tax credit which offsets social security taxes and supplements wages for

poor families with children. In addition, the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988), provides federal support for state job training programmes for families receiving AFDC payments.

709. Children in the United States also benefit from more general social insurance programmes. Each child of a retired, disabled or deceased insured wage earner is entitled to receive social security benefits through the age of 18 (or 19 if the child is still enrolled full-time in secondary school). As of 1987, 2.6 million minor children were direct beneficiaries of social security, and millions more were indirect beneficiaries through their parents or guardians. In addition, children in the United States benefit from other social insurance programmes such as unemployment insurance and workers compensation.

710. **Foster care**. The foster care system in the United States provides care and financial assistance for children whose parents are either unable or unwilling to care for them. The system is administered by state and local child welfare agencies. Most foster children are placed in individual foster homes or in group homes where they are cared for by foster parents or group home staff. When homes are unavailable, children may be placed in institutions; however, the use of institutional child care is limited under both federal and state law. See, e.g., West's Calif. Welf. & Instit. Code sections 206, 207.1, 361.2; 42 U.S.C. section 672(c)(2).

711. Many children in the United States are brought into the foster care system through involuntary removal from their parents by child protective services workers. Others are placed there voluntarily by parents who need assistance in child care. Those children who are permanently separated from their parents are cared for through adoption, guardianship, or long-term foster care. In such cases, both federal and states laws encourage the placement of children in permanent homes as soon as possible.

712. Foster care is funded primarily by the states through direct grants to care-givers. The federal government provides additional funding through the Adoption Assistance and Child Welfare Act, 42 U.S.C. sections 670 et seq. As a prerequisite to funding, the Act sets out minimum requirements for state foster care agencies. These include case plans, regular case reviews, minimum standards for foster homes, mandated reporting of abuse by out-of-home care-givers, and procedural protections for parent-child visitation and changes in placement.

713. **Child abuse**. The federal government and the states have devoted considerable resources to combating the problem of child abuse in the United States. Each state now has a reporting statute which requires professionals working with children, such as teachers and doctors, to report evidence of child abuse and neglect to designated law-enforcement or child protection authorities. Most statutes impose a minor criminal penalty for failure to report. Upon receiving an abuse report, a state enforcement agency is required to investigate to determine whether there is a basis for the report. In extreme cases, U.S. law permits state authorities to take abused children into emergency protective custody.

714. Every state has a juvenile or family court with jurisdiction over child abuse cases. Proceedings are commenced by a state agency filing a petition alleging that a child has been abused and is in need of protection. Upon an affirmative determination of abuse or neglect, the court has a range of available remedies, including protective orders, supervision of parents, awarding temporary custody to foster parents or the state, requiring medical or psychiatric treatment for either the parents or the child, and in extreme cases, termination of parental rights.

Other special measures of protection for children

715. **Minority**. The common law in the United States traditionally imposed both privileges and disabilities on persons under age. The purpose was to protect the child at a time when he or she lacked the capacity to exercise good judgment. This purpose underlies most of the legal privileges and disabilities imposed on minors, such as the privilege to disaffirm contracts or the disability to consume alcohol. Until the 1970s, the legal age of majority in the United States for most purposes was 21. Since then, all but five states have reduced the age to 18. Many of those states which have reduced the age of majority still maintain restrictions, such as prohibitions on purchasing liquor, on persons up to the age of 21. The Twenty-Sixth Amendment to the Constitution now ensures that all persons 18 years of age have the right to vote in the United States.

716. **Ability to contract**. Minors in the United States, while they may enter into contracts and enforce them, also have the right to disaffirm their contracts, and thereby avoid liability, at any time before reaching majority or within a reasonable time thereafter. Several states have modified this doctrine to allow children to enter fully binding contracts for the purchase of necessaries, which are defined as goods and services needed for the child's support. These include food, clothing, housing, medical care, legal services, and in some cases an automobile.

717. **Child labour laws**. The federal Fair Labor Standards Act (FLSA) establishes national minimum wage, overtime, record-keeping and child labour standards affecting more than 80 million full- and part-time workers in both the public and private sectors. 29 U.S.C. sections 201 et seq. It applies to workers engaged in interstate commerce, the production of goods for interstate commerce or in activities closely related and directly essential to such commerce. The FLSA also applies to all employees of certain enterprises including business enterprises with more than $500,000 in annual volume of business.

718. The FLSA's child labour provisions are designed to protect the educational opportunities of younger minors and to prevent employment in jobs and under conditions detrimental to the health or well-being of all minors. These provisions include certain restrictions on occupations and hours of work for youth under 16 years of age in non-agricultural work. They also restrict to non-school hours the working hours of children aged 12 through 14 employed in agriculture under specific conditions. In addition, the FLSA prohibits employment of minors under age 16 in farm occupations declared by the Secretary of Labor to be hazardous for minors to perform; similarly, minors under age 18 in non-agriculture work may not be employed in occupations declared hazardous by the Secretary. Violators may be charged in the form of administrative civil money penalties of up to $10,000 for each violation and, in certain circumstances, may be subject to criminal penalties. The Secretary of Labor may also seek injunctions against violators in federal district courts.

719. In addition to federal child labour statutes, most states have child labour laws designed to protect young workers.

720. The U.S. Labor Department's Employment Standards Administration, Wage and Hour Division (WH), enforces the FLSA child labour provisions. In fiscal year 1993, WH assessed employers over $8.2 million in civil money penalty fines and found over 10,000 minors illegally employed.

721. **Armed conflict**. Children in the United States are not permitted to participate in armed conflict. The only exception to this policy is for persons not less than 17 years of age who have obtained written parental consent. In practice, the Department of Defense ensures that individuals under the age of 18 are not stationed in combat situations. See Regular Army and Army Reserve Enlistment Programme, Army Regulation 601-210, Headquarters, Department of the Army, 1 December 1988, Chapter 2.

722. **Drugs**. The abuse of narcotic and psychotropic drugs by children is a serious problem in the United States. The production, sale, and use of such drugs is illegal in every state, and several states have taken steps to target specifically the sale of drugs to children, for example, by increasing the penalties for drug sales in the proximity of schools. Education is another key aspect of the war on drug abuse by children, and most states now require that public school students be exposed to drug education curricula at several stages in their education. Perhaps the weakest link in the war on drugs is in funding for rehabilitative services. At present, many American children who are already addicted to drugs do not have access to meaningful support and assistance in curing themselves of their habits.

723. **Sexual exploitation of children**. U.S. federal and state law contain comprehensive protections against sexual exploitation of children. Most cases concern sexual contacts or molestation, which are criminal acts in all states. Child prostitution is also illegal in every state, and in most states, criminal liability extends to any person participating in or profiting from the acts of a child prostitute. Statutory rape laws have also been applied in the context of child prostitution. The problem of sexual abuse of children in the home is addressed through state child abuse laws. In addition, the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. sections 5101 et seq., requires states receiving federal funding to include "sexual exploitation" in their

definitions of reportable child abuse. Finally, child pornography is now illegal under both federal and state law. In a recent decision, the Supreme Court ruled that the government has a compelling interest in the protection of victims of child pornography, one which overrides the free speech interests of pornographers. Osborne v. Ohio, 495 U.S. 103 (1990).

724. **Trafficking in children**. Trafficking in children is illegal under the Thirteenth Amendment to the Constitution, which prohibits all forms of slavery and involuntary servitude, except as punishment for crime. This constitutional prohibition is supplemented by numerous federal and state statutes. The Mann Act, for example, prohibits trafficking in individuals for purposes of prostitution and imposes heightened penalties in the case of children. See 18 U.S.C. sections 2421 et seq.

Education

725. All children in the United States are entitled, through the laws of each state, to universal, public, free primary and secondary school education. Each state has a compulsory education statute requiring children between certain ages (typically 6 through 16 years old) to attend primary and secondary school. In addition, the constitutions of all 50 states contain provisions supportive of education. See, e.g., N.Y. Const. art. XI section 1. Although the federal Constitution does not expressly provide for a right to education, the U.S. Supreme Court has suggested that children have an implied right to "some identifiable quantum of education" sufficient to provide the "basic minimum skills" needed to enjoy the freedom of speech and to participate in the political process. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 36 (1973). The Headstart programme, 42 U.S.C. sections 9801 et seq., provides special pre-school education programmes for qualifying children. The Individuals with Disabilities Education Act, 20 U.S.C. sections 1400 et seq. guarantees a free appropriate public education for children with disabilities.

Health care

726. The federal government administers a number of health care programmes which are designed to ensure that all children in the U.S. receive adequate care, free of charge if necessary.

727. The primary financing mechanism for publicly funded health care in the United States is the Medicaid insurance programme, 42 U.S.C. sections 1396 et seq. Operated by the states under broad federal guidelines, Medicaid covers most, but not all, low-income pregnant women, children, and caretaker relatives of children. Medicaid has been a vehicle for improving prenatal care and reducing infant mortality. In addition, under the preventive component of Medicaid - the Early and Periodic Screening Diagnosis and Treatment (EPSDT) programme - federal law requires the states to provide a package of preventive, screening, diagnostic and follow-up services to children. The federal government has set a target whereby 8 out of 10 eligible children must receive medical screening by 1995. As of 1990, however, only about one half of poor children older than six received any Medicaid services at all.

728. There are three principal programmes for delivery of public medical services in the United States. The Title V Maternal and Child Health Block Grant programme makes federal funds available to states to "provide and assure mothers and children (in particular those with low income or with limited availability of health services) access to quality maternal and child health services". Most states combine these federal grants with state revenue funds to deliver services at the local level. Although it has suffered from funding constraints, Title V represents a commitment on the part of the United States to provide primary health care to all American children free of charge if necessary.

729. The second initiative is the Community and Migrant Health Centre programme, which finances community health centres in medically underserved communities. Over 2,000 health care sites, run by approximately 600 public and private non-profit entities, provide comprehensive primary care to the target population in all states except Wyoming and in Puerto Rico and the District of Columbia. Of the more than 5 million patients served each year, two thirds are women of child-bearing age and children.

730. The third principal programme is the National Health Service Corps, which sends individual physicians to areas in need of better health care, primarily inner cities and rural areas.

731. Another federal health care programme is the Title X Family Planning programme. Finally, one programme that contributes significantly to the well-being of women and children is the Supplemental Food Programme for Women, Infants and Children (WIC), 42 U.S.C. section 1786. This latter programme provides nutritious foods, nutrition education, and semi-annual physical exams to low-income, high-risk women and children under 5 years of age.

732. **Immunization**. One of the most important health services provided for children in the United States is immunization. Approximately one half of childhood vaccines administered in the U.S. are financed through the private sector. The other half are financed through a combination of state funds and federal funds which are paid through the Childhood Immunization Program at the Centres for Disease Control. In spite of these funding efforts, however, there is need for improvement in the United States, as hundreds of thousands of American children still do not have adequate immunization. At present, largely as a result of inadequate health care delivery, only about one half of preschool-age children in the inner city are fully immunized. In 1993, Congress enacted a new childhood immunization programme under Medicaid (Pub. L. No. 103-66, 107 Stat. 312, section 13631).

733. **Services for disabled children**. Many of the publicly funded health care programmes described above provide special services for disabled children. For example, current law now requires that a minimum of 30 per cent of federal Title V funds be used for children with special health needs. With funding from Title V, states administer programmes for Children with Special Health Care Needs, which in recent years have broadened in scope to encompass, among others, children with AIDS or HIV infection, mental retardation and speech-lung-hearing disorders.

734. Disabled children also benefit from the 1989 Amendments to the Medicaid EPSDT programme. With full implementation of the Amendments, these children will be entitled to a full range of rehabilitation services including physical, occupational and speech therapy.

735. Under the Supplemental Security Income (SSI) programme, low-income individuals who are blind or disabled are provided with cash income payments from the federal government. Children are eligible if they are disabled and if their family income and resources fall below a certain level. As of the end of 1993, approximately 750,000 children, most with severe disabilities, receive SSI monthly cash payments.

736. In the area of education, the Individuals with Disabilities Education Act was promulgated to assist families in securing free and appropriate public education for disabled children. The Act also requires that the government provide disabled children with so-called "related services", which include education-related therapies and health services. These services are provided free of charge. As of 1990, approximately 4 million children received services from this programme.

737. Disabled children also benefit from the non-discrimination provisions of Section 504 of the Rehabilitation Act of 1973 and from the Americans with Disabilities Act of 1990, discussed under article 2.

Registration and identity

738. The United States does not have a system of national identification cards or registration. Rather, birth registration has traditionally been a state and local function in the United States. Every state requires the registration of every child born in the state. See e.g., Cal. [Health & Safety] Code section 10100 (1987) ("Each live birth shall be registered within 10 days following the date of the event."); Ariz. Rev. Stat. Ann. section 36-322; Ill. Stats. ch. 111 1/2, para. 73-12 (Vital Records Act). Birth certificates may be obtained as proof of citizenship or birth.

739. A number of courts have considered the issue of naming children. They have found that "parents have a common law right to give their child any name they wish, and that the Fourteenth Amendment protects this right

from arbitrary state action". Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979). Courts have rejected state arguments for statutes limiting acceptable names for children, finding that administrative convenience is not a sufficient state interest to impair the right to name one's child. See Jech, 466 F. Supp. at 720; O'Brien v. Tilson, No. 79-463-CIV-5 (E.D.N.C. 2 October 1981) (memorandum finding that N.C.G.S. section 130-50(e) violated the plaintiff's constitutional rights); Sydney v. Pingree, No. 8208291-CIV-JAG (S.D. Fla. 17 December 1982) (order granting plaintiff's motion for summary judgement).

Nationality

740. Acquisition of U.S. citizenship is governed by the U.S. Constitution and by federal statute. The Fourteenth Amendment of the Constitution provides that "[a]ll persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States" regardless of the nationality of their parents. The Immigration and Nationality Act further provides that a child born abroad to a U.S. citizen parent (or parents) shall acquire U.S. citizenship at birth provided the U.S. citizen parent (or parents) complied with specified requirements for residency or physical presence in the U.S. prior to the child's birth. 8 U.S.C. section 1401. (Previous versions of this statute required that, in order to retain U.S. citizenship, the child reside or be physically present in the U.S. for a certain period of time before a certain age.) The Immigration and Nationality Act also permits and establishes requirements and procedures for acquisition of U.S. citizenship by naturalization. 8 U.S.C. sections 1421 et seq.

Article 25 - Access to the political system

741. The U.S. political system is open to all adult citizens without distinction as to gender, race, colour, ethnicity, wealth or property. Effective access to the political system is important not only as a right in and of itself, but as an additional guarantee of the respect for other human rights.

Voting

742. The right to vote is the principal mechanism for participating in the U.S. political system. The requirements for suffrage are determined primarily by state law, subject to limitations of the Constitution and other federal laws. Over the course of the nation's history, various amendments to the Constitution have marked the process toward universal suffrage. In particular, the Supreme Court's interpretations of the Equal Protection clause of the Fourteenth Amendment have expanded voting rights in a number of areas. The summary below sets out those respects in which suffrage has been expanded and those in which some limitations still remain.

743. **Gender**. The Nineteenth Amendment to the Constitution, ratified in 1920, guarantees women the right to vote in the United States. In many states, women had already been enfranchised prior to that date.

744. **Race and colour**. The Fifteenth Amendment to the Constitution, ratified in 1870 following the Civil War, prohibits the denial of voting rights "on account of race, colour, or previous condition of servitude". At the time it was first passed, however, the Fifteenth Amendment and legislation adopted to enforce it did not sufficiently ensure the full and permanent enfranchisement of African Americans in all states in practice. Through both physical and economic coercion supported by state legal systems, African Americans were still almost totally excluded from the political process of several southern states through the end of the nineteenth century.

745. During this century, African-Americans have won a number of Supreme Court victories in the area of voting rights. See, e.g., Guinn v. United States, 238 U.S. 347 (1915) (restricting franchise to those whose grandfathers were eligible to vote unconstitutional); Lane v. Wilson, 307 U.S. 268 (1939) ("The [15th] Amendment nullifies sophisticated as well as simple-minded modes of discrimination"); Terry v. Adams, 345 U.S. 461 (1953) (excluding African Americans from primaries unconstitutional); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redrawing boundaries of town to exclude African Americans unconstitutional). Further progress was made through Civil Rights Acts enacted by Congress in 1957, 1960, and 1964, and especially through the Voting Rights Act of 1965. See 42 U.S.C. sections 1971 and 1973 et seq. As a result, African Americans now enjoy the uninhibited right to vote in every part of the United States.

746. The Voting Rights Act authorizes the U.S. Attorney General and private parties to bring lawsuits to enforce the Fifteenth Amendment and bans the use of literacy tests and other devices which had been used to disqualify African-American voters. The courts subsequently determined that illiterate persons are entitled to receive assistance in marking their ballots, United States v. State of Mississippi, 256 F. Supp. 344 (S.D. Miss. 1966), and in 1982 Congress amended the Voting Rights Act to provide that illiterate persons (and those who require assistance because of blindness or disability) must be permitted to select their own helpers. 42 U.S.C. section 1973aa-6. As a safeguard, voters are not permitted to receive assistance from their employers or agents of their employers or from officers or agents of their unions. The assistance requirement applies to the voter registration process as well as to voting itself. Rules with respect to who could give assistance (e.g. poll workers, relatives, registered voters) had varied greatly from state to state.

747. In addition, the Voting Rights Act contains three specialized mechanisms that apply to certain problem areas through the year 2007:

(a) Federal registrars are authorized to conduct voter registration in areas in which local registrars refuse to register minority applicants, or make it difficult for them to register;

(b) Federal approval is required for changes in voting laws and practices, to prevent the implementation of new laws and practices aimed at continuing the disenfranchisement of minorities;

(c) Federal observers are authorized to monitor elections to assure that minority voters are permitted to vote and their votes are actually counted.

See 42 U.S.C. section 1973(a)(8). As a result of the enforcement of the Voting Rights Act and of the efforts of civil rights workers, African Americans in affected states now register to vote and vote at roughly the same rates as other citizens. Prior to the Voting Rights Act, for example, about 19 per cent of the African Americans of voting age in Alabama were registered to vote, 27 per cent in Georgia, 32 per cent in Louisiana, and 7 per cent in Mississippi. See United States Commission on Civil Rights, Political Participation, Appendix VII (Washington, D.C. 1968). At the time of the 1992 presidential election, 72 per cent of voting age African Americans in Alabama, 54 per cent in Georgia, 82 per cent in Louisiana, and 79 per cent in Mississippi reported they were registered to vote, compared to 68 per cent for all persons of voting age. See United States Bureau of the Census, Current Population Reports, P20-466, Voting and Registration in the Election of November 1992, Table 4 (Washington, D.C. 1993).

748. The U.S. Department of Justice and various private organizations remain vigilant to ensure that the voting rights of African Americans and of other minorities defined by race or colour are not denied or abridged. The U.S. Attorney General continues to bring lawsuits under the Voting Rights Act; to deny approval for discriminatory voting law changes; and to send federal observers to monitor elections. The need for Voting Rights Act enforcement generally has shifted from practices that deny the right to vote to those that abridge the right to vote, for example, by making it more difficult for African Americans or other minorities than for other persons to elect candidates of their choice to public office.

749. **Ethnicity and language**. The Voting Rights Act was amended in 1975 to ensure the protection of the voting rights of ethnic groups who speak languages other than English. These minorities include Mexican Americans living in Texas and other states of the Southwest and persons of Asian descent living throughout the country. The amendment requires that minority language information, materials, and assistance be provided to enable minority language citizens to participate in the electoral process on an equal basis with other citizens. It applies in jurisdictions with significant concentrations of minority language citizens (under the Act, Hispanics, Asian Americans, Alaska Natives and Native Americans), and expires in 2007, along with the other special provisions of the Voting Rights Act discussed above. The minority language provisions of the Voting Rights Act have since been extended by the Voting Rights Amendments of 1982 and the Voting Rights Language Assistance Act of 1992. See 42 U.S.C. sections 1973b(f) and 1973aa-1a.

750. The Fourteenth and Fifteenth Amendments were not, at the time of their ratifications, understood to enfranchise Native Americans. In 1924, however, Native Americans were declared by Congress to be citizens of the United States, and since then, they have enjoyed the same voting rights as other citizens. See Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948). See also Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975), aff'd, 429 U.S. 876 (1976) (Indians must be counted in the population base for the creation of districting plans). Eskimos and Aleuts in Alaska and Native Hawaiians have been enfranchised since those two states achieved statehood in 1959.

751. **Property and wealth**. Early restrictions limiting the franchise to property owners were gradually eliminated during the eighteenth and nineteenth centuries. Under the Equal Protection clause of the Fourteenth Amendment, restricting the franchise to property owners is only permissible in elections for limited purpose quasi-governmental agencies such as water reclamation agencies. See Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973). The Supreme Court has severely limited such restrictions, holding, for example, that they are not permitted for school board elections. See Kramer v. Union Free School District, 395 U.S. 621 (1969).

752. Under the Twenty-Fourth Amendment to the Constitution and the Supreme Court's interpretation of the Equal Protection clause, the states may not require the payment of a "poll tax" (a fee per person or "head" tax) as a prerequisite to voting. See Harper v. State Board of Elections, 383 U.S. 663 (1966).

753. **Age**. The Twenty-Sixth Amendment, ratified in 1971, prohibits the states from excluding from the franchise anyone 18 years of age or older by reason of age. Previously the standard age for voting was 21. Where primary elections are held, those who are less than 18 but will become 18 by the date of the general election are frequently permitted to vote. States have the discretion to enfranchise those below the age of 18.

754. **Disability**. Voting by the blind and by the disabled has been further facilitated by the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. sections 1973ee et seq., and by the Americans with Disabilities Act of 1990, 42 U.S.C. sections 12131 et seq., which prohibits discrimination against disabled persons in all programmes of state and local governments.

755. **Residency and citizenship**. States and localities are generally permitted to exclude non-residents from voting in local elections; however, they do not have unlimited discretion to define the requirements of residency. For example, the U.S. Supreme Court has held that states may not, on residency grounds, exclude military personnel who have moved in from other states. Carrington v. Rash, 380 U.S. 89 (1965). States are further prohibited from denying the right to vote to residents of a federal enclave. Evans v. Cornman, 388 U.S. 419 (1970).

756. Those who, because of poverty or other problems, have no fixed address have generally been unable to register to vote because they cannot establish that they are residents of the jurisdiction in which they seek to vote. However, such restrictions may violate the Equal Protection clause of the Fourteenth Amendment. See Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984) (refusal to allow registration by those without traditional residences violates Equal Protection clause). Homeless persons in some jurisdictions are permitted to register using shelters as their addresses.

757. In general, states are permitted to impose residency requirements only for very limited periods justified on administrative grounds. See Marston v. Lewis, 410 U.S. 679 (1973) (50-day requirement upheld); but see Dunn v. Blumstein, 405 U.S. 330 (1973) (requirement that one be resident of the state for one year and of the county for three months was invalidated). Under the Voting Rights Act, as amended in 1970, durational residency requirements are not permitted in voting for President of the United States. 42 U.S.C. section 1973aa-1. Voters who move shortly before an election must be permitted to vote either in their new state or their old.

758. **Citizenship**. Under the laws of the various states, the right to vote is almost universally limited to citizens of the United States.

759. **Party membership**. Except where elections are held on a non-partisan basis, those elected to office usually are the nominees of political parties. Political parties use primary elections and conventions to select their nominees. In many states only those affiliated with a party in advance of the primary election day are permitted to vote in that party's primary. In other states, voters can decide at the polls in which party's primary to participate. Under current U.S. law, political parties may not arbitrarily limit access to membership. Thus, a state law that prohibited voters from changing party affiliation during the 23 months prior to a primary election was found unreasonably to restrict the right to vote and thus to violate the Equal Protection clause. Kusper v. Pontikes, 414 U.S. 51 (1973). Political parties are further discussed under article 22.

760. **Absence from jurisdiction**. All states have procedures that permit those who will be out of town on election day, or who are prevented because of injury or illness from going to the polls, to vote by absentee ballot, either by mail or in person in advance of the election. The requirements and procedures for absentee voting vary considerably from state to state. Although the Equal Protection Clause has not been interpreted to require the states to permit absentee voting, it does prohibit wholly arbitrary distinctions between different classes of absentees. See O'Brien v. Skinner, 414 U.S. 524 (1974) (imprisoned persons who have not been convicted of a disqualifying crime cannot be denied absentee ballots).

761. The Uniformed and Absentee Citizens Absentee Voting Act of 1986 requires the states to permit U.S. citizens living abroad to register for and vote in elections for federal office. 42 U.S.C. sections 1973ff et seq. This Act only enfranchises those who have given up their residence in a state and does not apply to citizens who have never established residency in a particular state. The act guarantees the timely delivery of absentee ballots to all eligible overseas citizens.

762. **Criminal conviction and mental incompetence**. Most states deny voting rights to persons who have been convicted of certain serious crimes. Where the disqualification on the basis of criminal conviction is motivated by a racially discriminatory purpose, however, the restriction is not permitted. Hunter v. Underwood, 471 U.S. 222 (1985). The standards and procedures for criminal disenfranchisement vary from state to state. In most states, this disability is terminated by the end of a term of incarceration or by the granting of pardon or restoration of rights. However, the Equal Protection clause of the Fourteenth Amendment does not require the states to re-enfranchise convicted felons who have completed their sentences of incarceration. Richardson v. Ramirez, 418 U.S. 24 (1974).

763. In most states, persons who have been declared by a court to be mentally incapacitated are not permitted to vote. There are procedural safeguards which prevent mistaken or abusive disenfranchisement on this basis.

764. **District of Columbia residence**. Residents of the District of Columbia, the seat of the federal government established under article I, section 8 of the Constitution, enjoy the same constitutional rights described in this report as any other citizen of the United States. Under the Twenty-Third Amendment to the Constitution, ratified in 1961, residents of the District have the right to vote in elections for President and Vice-President. In addition, under a policy of "home rule", established by Congress in 1973, District residents elect their own mayor, city council, and school board. Congress also established representation for the District through an elected delegate to the House of Representatives. It is in this way that District residents' rights differ from those of the residents of the states.

765. District residents' representation in Congress is limited to this delegate. While under House rules the delegate (as well as each of the representatives of the Insular Areas) may vote at all stages of the legislative process except for final passage, this arrangement remains controversial. While some members of the House have criticized giving the District delegate and the other representatives these extensive voting privileges, some advocates for District of Columbia statehood reject even this arrangement as insufficient.

766. Without question, the framers of the Constitution envisioned the District as a separate enclave, apart from the influences of any state government and responsible to the federal government alone.

> "A dependence of the members of the general government on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonourable to the Government and dissatisfactory to the other members of the democracy."

The Federalist, No. 43, 289 (J. Madison) (J. Cooke, ed. 1961). This status, independent from the states, was reinforced by the choice of a substantially undeveloped section of land, donated by Maryland and Virginia, on which to build the capital city.

767. Despite any early expectations that this status would provide greater stability than one where a single state controlled the District, governance of the District has not remained stable throughout its history, but rather varied in the extent to which Congress, the President, and the residents have chosen who would govern the city. This question remains a topic of active debate within the city, within the rest of the country, and within the government.

768. **Insular areas**. Residents of Guam, the U.S. Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and Puerto Rico do not vote in elections for President and Vice-President. The Twelfth Amendment and Twenty-Third Amendments to the Constitution extend the right to vote in presidential elections to citizens of "States" and to citizens of the District of Columbia. These provisions have been interpreted as not to extend to the Insular Areas. See, Attorney General of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984), cert. denied 469 U.S. 1209 (1985) (residents of Guam not permitted to vote in presidential elections). Residents of these areas do, however, elect their respective local governments. In addition, residents of American Samoa, the District of Columbia, Guam, and the Virgin Islands each elect a Delegate to Congress. Puerto Rico elects a Resident Commissioner. These officials may participate at every level of the legislative process in the House of Representatives except for votes on final passage of a bill. The discussion under article 1 contains further information on the Insular Areas.

769. **Procedural impediments to voter registration**. In 1993, in response to evidence that practical difficulties in registering to vote resulted in depressed rates of electoral participation, Congress enacted the National Voter Registration Act. Pub. L. No. 103-31, 107 Stat. 77. Effective generally on 1 January 1995, the Act requires the states to permit persons to register to vote when they apply for motor vehicle drivers' licences or have interactions with various other governmental agencies, or to register by mail. The Act also limits the circumstances under which a voter's name can be removed from the roll of registered voters. Although the Voter Registration Act applies only to registration for voting for federal offices, the local governmental authorities that are responsible for conducting elections almost invariably maintain a single list of voters eligible to vote in any election that occurs within a geographical area, and thus the act is expected to facilitate voter registration for all elections.

770. **Equality of the vote**. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to require that the votes of residents of different geographic jurisdictions carry equal weight. The one person-one vote rule, which had its origin in Supreme Court cases from the early 1960s, requires districts used for the election of members of the United States House of Representatives, state legislatures, county and city governing bodies and the like to be equal (with some minimal variance permitted) in population. See e.g., Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964). Of course, the one person-one vote rule does not apply to the U.S. Senate, which is composed of two Senators from each state, irrespective of population.

Access to public office

771. In the United States a large number and wide variety of public offices are filled through popular elections, from positions on the governing boards of small villages to President of the United States. In general, anyone eligible to vote is eligible to run for office. For certain public offices, however, there are additional limitations.

772. **Constitutional requirements**. Under the Constitution, only a native-born citizen is eligible to be President. Further, the President must be at least 35 years of age and must have been a resident of the United States for at least 14 years. No person may be elected to more than two 4-year terms as President, or be elected more than once if he or she has served more than two years of a term to which someone else was elected. U.S. Senators must be at least 30 years of age, must have been citizens of the United States for at least 9 years, and must be inhabitants of the state from which they are elected. Members of the U.S. House of Representatives must be at least 25 years of age, must have been citizens for at least 7 years, and must be inhabitants of the state from which they are elected.

773. These are the only limitations on access to public office found in the Constitution. Other limitations have their source in state law, subject to restrictions in the Constitution, such as the Equal Protection Clause of the Fourteenth Amendment, and other federal law.

774. **State and local candidacy requirements**. Candidates for state and local offices may be required to reside in the jurisdiction in which they seek to serve and in the district from which they seek to be elected, and reasonable durational residency requirements are permitted. See e.g. Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), aff'd mem. 414 U.S. 802 (1973). Age requirements vary from state to state; however, requirements that a person be over the age of 30 to hold a particular office are unusual. To hold some offices, many states require that certain educational or experience standards be satisfied.

775. Restrictions on access to public office may apply to persons already holding elected office or who are government employees. The federal Hatch Act, for example, prohibits federal employees from being candidates for public office in partisan elections. 5 U.S.C. section 7321. In some states, limitations have been imposed on the number of consecutive terms of office one can serve. Office holders customarily take an oath of office; however, burdensome loyalty oaths may be struck down as an infringement on First Amendment rights of free speech. See Communist Party v. Whitcomb, 414 U.S. 441 (1974). Where candidates are required to pay filing fees to run for office, an alternative means of qualifying must be made available for those unable to pay the fee. See Lubin v. Panish, 415 U.S. 709 (1974). At the federal level, the Federal Election Campaign Act of 1971 provides money for presidential candidates who have demonstrated sufficient popular support. 2 U.S.C. sections 431 et seq. Additional federal campaign finance reform legislation is under consideration.

776. Finally, in many states and localities, prior criminal conviction will disqualify a person from holding public office.

777. **Access to the ballot**. In general, there are three ways in which a person can qualify to have his or her name on the ballot. Candidates can run as the nominees of major parties, as the nominees of minor parties, or as independents. Rules and procedures vary from state to state, but a major party is generally one that has achieved a certain level of support at a recent election and thus qualifies to have its nominees automatically placed on the ballot. A minor party, on the other hand, will generally have to satisfy a petition requirement, demonstrating some significant level of support, before its nominees will be placed on the ballot. Independent candidates likewise will generally have to demonstrate that they have significant support. Under the Equal Protection clause of the Fourteenth Amendment to the Constitution and under the guarantees of free speech and association of the First Amendment, restrictions designed to limit the number of parties and candidates on the ballot must be reasonable. See Williams v. Rhodes, 393 U.S. 23 (1968) (petition requirement of signatures equalling 15 per cent of votes cast in last election struck down); Moore v. Ogilvie, 394 U.S. 814 (1969) (requirement that signatures come from 50 different counties struck down); Storer v. Brown, 415 U.S. 724 (1974) (restriction on party members running as independents upheld); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (signature requirement higher for local than for state office struck down); Anderson v. Celebrezze, 460 U.S. 780 (1983) (independent candidate filing deadline in advance of major party deadline and far in advance of general election struck down); Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (1 per cent signature requirement upheld). In many jurisdictions, for many offices, a person has the alternative of running as a write-in candidate.

778. Removal from office. Article 2, section 4 of the Constitution provides that "The President, Vice President

and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanours". Under Article 1, the Senate has the sole power to try impeachments, and the House of Representatives has the sole power to impeach. In addition, each House of the Congress has the power to pass judgement on the qualifications of its members and expel members. Similar procedures are generally available at the state and local level, and there are legal safeguards to protect office holders from abuse of these processes. See Powell v. McCormack, 395 U.S. 486 (1969) (Congress cannot exclude a member who has the qualifications prescribed in the Constitution); Bond v. Floyd, 385 U.S. 116 (1966) (exclusion for the expression of political views violates the free speech guarantee of the First Amendment). Also commonly available at the state and local level is the recall process, by which voters can petition for an election to determine whether an elected official should remain in office.

Access to public service

779. The U.S. Government employs approximately 2,970,000 civilian workers, located in the 50 states and the District of Columbia, of whom some 300,000 are hired annually. With few exceptions, federal employees are selected pursuant to statutes establishing a merit-based civil service system designed to make employment opportunities available to the most qualified applicants through recruitment, hiring, retention and evaluation procedures that are free from considerations of politics, race, sex, religion, national origin, disability and age.

780. The statutory mandate for the federal civil service is as follows:

> "Recruitment should be from qualified individuals from appropriate sources in an endeavour to achieve a workforce from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."

5 U.S.C. section 2301 (b)(1).

781. The federal civil service system has its origin in the Civil Service Act of 1883. Until this Act, it was the practice of the federal government to reward political loyalists with jobs. It was not surprising, therefore, that the primary purpose of this first Civil Service Act was to remove political influence from federal personnel management decisions. The concept of merit selection, that was codified in this Act, remains in effect to this day.

782. Central to the United States' merit-based system is the process of open competition, and today more than half of all federal jobs are filled through such competition. The federal competitive service requires applicants to compete for positions based on a written examination and/or an evaluation of their education and work experience. Once hired, advancement is also competitive and based on performance and merit. Moreover, as a result of the leadership of the federal government and the success of the federal merit system, the great majority of state and local governments, who employ in excess of 15,680,000 civil servants, have adopted similar merit-based employment procedures.

783. The 1978 Civil Service Reform Act created a federal equal opportunity recruitment programme to meet the statute's goal of recruitment from all segments of the workforce. One of the purposes of the Act is to promote "a competent, honest, and productive federal workforce reflective of the nation's diversity". Pursuant to this mandate, special efforts are taken to recruit minorities and women who may be underrepresented in various job categories. Efforts are also made to ensure that the selection procedures themselves are not culturally biased and do not artificially eliminate from consideration otherwise qualified members of underrepresented groups.

784. In addition, the federal civil service and many state and local civil service programmes have taken important steps to protect their employees from political influence. In accordance with the principles of a merit-based civil service, the Hatch Act, passed in 1939, prohibits federal employees from actively participating in partisan politics. Congress determined that partisan political activity must be limited in order for public institutions to perform fairly and effectively. However, the law does not prohibit federal employees from

registering, voting, making financial contributions to political candidates, and expressing their personal opinions on political candidates and questions.

785. National policy in this area has also been codified in various federal, state and local civil rights laws. These laws ensure that employment decisions at all levels of government are free from bias based upon race, sex, religion, national origin, disability and age. The laws also provide aggrieved individuals access to impartial and independent tribunals to adjudicate alleged violations of their rights.

786. The policies and protections of the federal, state and local civil service systems offer all Americans the promise of being treated equally in civil service employment. Women and minorities are still overrepresented at the lower levels of pay and authority, but their status in public sector employment exceeds their status in private sector employment. Women constitute 53 per cent of the average total government employees, 50 per cent of state employees, and roughly 59 per cent of federal government workers.

Foreign nationals

787. In general, foreign nationals are not permitted to vote or to hold elected offices in the United States. With certain exceptions for federal officials, the U.S. Constitution does not prohibit political participation by foreign nationals, but the states almost invariably require voters to be U.S. citizens (with a few exceptions for voting in local elections). Nevertheless, there are many ways people participate in politics other than voting and serving as elected officials. These avenues are fully open to non-citizens, and participation by non-citizens is constitutionally protected.
788. The general bar to foreign nationals voting in U.S. elections is not a federal proscription but rather a restriction imposed by state law. This bar has been supported by some who argue that voting is the quintessential right of citizenship and that aliens may be unfamiliar with institutions and values, or that strong ties to their native country may impair their loyalty to the United States and render them incapable of voting responsibly.

789. The right of foreign nationals to participate in public service is less limited than their right to vote in national or state elections. The Supreme Court has held that aliens as a group constitute a "discrete and insular minority" deserving heightened judicial protection in the face of discrimination. Graham v. Richardson, 403 U.S. 365 (1971). Nevertheless, states have the power to require citizenship for "political functions" that go to the heart of representative government, such as elective or important non-elective legislative and judicial positions, and positions involving the formulation of public policy. See Sugarman v. Dougall, 413 U.S. 634 (1973). The general rationale for the "political function" exception is that the composition of state government is a matter firmly within the state's constitutional prerogatives. As democratic societies are ruled by their people, a state may deny aliens the right to vote, or run for elective office, for these lie at the heart of our political institutions.

790. In recent years, the Supreme Court has expanded the scope of the "political function" exception. While the exception was originally interpreted to allow a citizenship requirement only for positions which comprised the core of the representative government system, states have now been permitted to apply the exception to more general public positions. For example, states may require police officers or public school teachers to be citizens, or at least non-citizens who intend to become citizens.

791. In expanding the definition of "political function", the Court reasoned that, as states have the authority to limit the political community, a state may exclude aliens from positions relating to "the right of the people to be governed by their citizen peers", particularly where the position involves discretionary decision-making or execution of policy. Police officers have substantial discretionary powers in executing state policy, and affect the public to an enormous degree. The Court noted that a state may assume that citizens are "more familiar with and sympathetic to American traditions", which is important if citizens are to submit to such police powers as arrest, search, and seizure. Foley v. Connelie, 435 U.S. 291 (1978).

792. Likewise, in upholding a citizenship requirement for public school teachers, the Court emphasized the importance of education in teaching social and civic virtues and in preparing students to be good citizens. The

Court held that furthering educational goals is a legitimate state objective, and that a citizenship requirement for teachers is rationally related to that goal. Ambach v. Norwick, 441 U.S. 68 (1979).

793. Employment of aliens in the federal government is also restricted. Non-citizens cannot be hired for the federal competitive service. They can sometimes be hired for the "excepted" service; the appropriations language for each federal department or agency spells out the countries from which non-citizens can be hired.

Women in government

794. Women's participation in elective office has increased slowly but consistently over the last two decades. Women officeholders set many records on election day, 1992. However, women still do not hold more than about one fifth of the available elective positions at any level of office, including the U.S. Congress, statewide elective executive offices, state legislatures, county governing boards, mayoralties, and municipal and township governing boards.

795. **U.S. Congress**. In 1992, women were elected to fill 47 of the 435 seats in the U.S. House of Representatives (10.8 per cent) in the 103rd Congress. In addition, a woman was elected as the non-voting delegate from the District of Columbia. This represents a significant increase over the previous Congress, which included only 29 female representatives. It is also worthy of note that these women include the first Mexican American woman and the first Puerto Rican woman to serve in the House of Representatives.

796. Six women were elected in 1992 to serve in the U.S. Senate in the 103rd Congress, and a seventh woman was added to the rolls in a 1993 special election in Texas, thereby more than tripling the previous number of women among the nation's 100 Senators. Among these women senators is the first African American woman to win a major party Senate nomination and to serve in the Senate.

797. These 54 women Senators and Representatives account for 10 per cent of the total seats in the 103rd United States Congress. Fourteen, or 26 per cent of them, are women of colour. Ten are African American, one is Asian/Pacific American, and three are Latino.

798. In the 103rd Congress, two of the top congressional leadership positions are held by women. No women chair any standing congressional committees. No woman has yet been Speaker of the House or majority or minority leader of the Senate.

799. **State elective executive offices**. Women made substantial gains at the state level in the 1992 elections. The number of women holding statewide elective executive posts increased four percentage points, from 18.2 per cent (59 women) to 22.2 per cent (72 women).

800. As of 1993, 72 women hold statewide elective executive offices across the country. This figure does not include officials in appointive state cabinet level positions; officials elected to executive posts by the legislature; members of the judicial branch; or elected members of university Boards of Trustees or Boards of Education. Of these 72 women, 4, or 5.6 per cent, are women of colour - one African American, two Asian/Pacific American and one Latino.

801. Currently, 3 of the 50 state governors are women. Eleven women serve as lieutenant governors, 8 women are attorneys general, and women hold statewide elective secretary of state positions in 11 states. Women hold statewide elective state treasurer positions in 17 states.

802. State legislative offices. The 1992 election increased the proportion of women in the state legislatures as well as at the national level. In 1993 women constituted 20.4 per cent of the 7,424 state legislators throughout the United States. This is a two percentage point increase in women serving in state legislatures (from 18.4 per cent [1,375 women] to 20.4 per cent [1,517 women]). Women hold 338, or 17.0 per cent, of the 1,984 state senate seats and 1,179, or 21.7 per cent, of the 5,444 state house seats. The number of women serving in state legislatures has increased fivefold since 1969 when 301, or 4.0 per cent, of all state legislators were women.

803. Of the 1,517 women state legislators in office in 1993, 202, or 13.3 per cent, are women of colour. Forty-four are senators and 158 are representatives. African American women hold 151 seats; Asian/Pacific American women hold 18 seats; Latinos hold 27 seats; and Native American women hold 6 seats.

804. **Municipal officials**. In March 1993, 19 of the 100 largest cities in the United States had women mayors; 176 (18 per cent) of the 974 mayors of U.S. cities with populations over 30,000 were women. (These figures include Washington, D.C., but do not include cities from the following states for which data were incomplete: Illinois, Indiana, Kentucky, Missouri, Pennsylvania, Wisconsin). In April 1993, of the 23,729 mayors and municipal council members (and their equivalents) serving nationwide in cities with populations over 10,000, 19.6 per cent were women.

805. Women appointed to government positions. With the increased awareness of women as active voters and elected officials has come an increase in the number of women appointed to cabinet-level positions in federal, state, and local government, women judges, and women as members of special advisory commissions on a wide range of specialized topics. Nevertheless, the systematic inclusion of women at all levels of the planning process in policy making is far from complete.

806. Judiciary. As of 1 July 1994, there were 746 members of the federal judiciary of whom 117 were women. Two of the nine U.S. Supreme Court Justices are women. Among members of the lower federal courts, 13 were African American women and 6 were Hispanic women. At the state level, in 1991, 10 per cent of judges on courts of last resort were women, as were 10 per cent of intermediate appellate court judges. According to figures from 1985, women constituted 10 per cent of all state trial court judges.

807. National executive offices. Women serve in a number of Cabinet-level positions in the Administration. The first female Attorney General of the United States, Janet Reno, was appointed in 1993. Donna Shalala is the Secretary of Health and Human Services. Hazel O'Leary, an African American, serves as the Secretary of the Energy Department.

808. Women in public service. Women represent 48 per cent of the 1.5 million full-time white-collar workers in the executive branch of the federal government; however, they are disproportionately represented at the lower grades, especially in clerical and secretarial jobs. The average woman worker is paid $23,000, while the average man receives $31,000. Limited progress has been made during the past decade on access of women and minorities to policy-making positions. These groups currently comprise approximately 17 per cent of federal government executives; by comparison, in the private sector they comprise less than 10 per cent. None the less, problems remain. According to the recent U.S. Merit Systems Protection Board study, A Question of Equity: Women and the Glass Ceiling in the Federal Government, women in professional occupations are promoted at a lower rate than men in two critical grades, GS-9 and GS-11 (jobs that pay from $26,000 to $42,000). These grades and the categories of professional and administrative occupations are the gateway through which one must pass in moving from the entry level to the senior level.

809. The necessary legal framework exists for a concerted effort to eliminate employment discrimination and to integrate top policy positions in government. Current laws and regulations creating equal employment obligations in government and government contractors include the Civil Rights Restoration Act; the Civil Rights Act of 1991; Executive Order 11246, as amended; and Title IX of the Education Amendments of 1972.

810. A variety of policies, identified over the past 30 years of experience with affirmative action and equal opportunity, have been implemented by various employers to make the workplace gender- and ethnically inclusive, such as integrating responsibility for equal employment into reward structures, paid pregnancy leave, use of sick leave for care of sick dependants, and the creation of firm policies on and sanctions for sexual and racial harassment.

Minorities in government

811. The representation of minorities at all levels of public service has increased significantly in the United States over the past several decades. None the less, as the following information demonstrates, minority groups of particular concern continue to be underrepresented, particularly at the highest levels.

812. U.S. Congress**.** Like women, minorities have made significant gains in Congressional representation as a result of the 1992 elections. Although African Americans have served in Congress since Reconstruction, the first African American woman ever to serve in the U.S. Senate was elected in 1992. Also in 1992, the first Native American to serve in the Senate in 60 years was elected. Thirteen African Americans were newly elected to the House of Representatives in 1992, as were six new Hispanic members. By the end of the 103rd Congress, more African Americans and Hispanics will be serving in Congress, 39 and 19 respectively, than ever before. More Asian and Pacific Islanders have also become Members of Congress in the last few years. Both of the current Senators from Hawaii as well as four Representatives and the Delegates from Guam and American Samoa are Asian Americans serving in Congress.

813. Although no minority group members serve in the top Congressional leadership as Speaker of the House or Senate majority or minority leader, African American, Hispanic, and Asian Members serve in leadership posts in the House as chief deputy whips and deputy whips in addition to being chairs of key committees including the House Public Works and Transportation Committee, the House Armed Services Committee, the Senate Indian Affairs Committee, and the Senate Defense Appropriations Subcommittee.

814. Minority group representation in Congress has been supported by the Voting Rights Act and the significant number of majority-African American (32) and majority-Hispanic (20) congressional districts the Act has helped to produce.

815. State legislative and elective executive offices**.** While the number of minority group members serving in state legislative and executive office has increased, representation does not match their presence in the population. In 1993, the first African American governor of Virginia since Reconstruction finished his term of office. At this time, no minority group member serves as a governor of one of the 50 states. Eight elected state administrators were African Americans and seven elected state executives were Hispanics in 1993. Minorities represented less than 10 per cent of state legislators in 1993, including 520 legislators who were African Americans and 156 legislators who were Hispanics.

816. Municipal officials**.** Minority group members make significant contributions to local government as mayors and other elected officials. In 1993, more than 350 of the nation's mayors were African Americans as were over 3,500 other municipal elected officials. While information on Hispanic mayors was not readily available, almost 1,500 municipal elected officials in 1993 were of Hispanic origin.

817. Judiciary**.** As of 1 July 1994, there were 746 members of the federal judiciary of whom approximately 10 per cent were members of a minority group. In addition to one African American Supreme Court Justice, 60 African Americans served on the lower federal courts, with 35 Hispanics, 5 Asian Americans, and 1 Native American. At the state court level, 12 African Americans served on a state supreme court in addition to more than 580 in other judicial offices. More than 630 Hispanics served in judicial offices in 1993.

818. National executive offices**.** A number of minority group members served as Cabinet secretaries and at other senior levels of the Administration. Cabinet officials include Commerce Secretary Ronald Brown, Energy Secretary Hazel O'Leary, Housing and Urban Development Secretary Henry Cisneros, Transportation Secretary Federico Pena, and Veteran's Affairs Secretary Jesse Brown.

819. Minorities in public service**.** More than 600,000 of the 3 million federal government employees are minority group members. These include more than 480,000 minorities in white-collar jobs. Of these employees, approximately 290,000 are African Americans, 94,000 are Hispanics, 65,000 are Asians, or Pacific Islanders, and 34,000 are Native American. The average annual white-collar salary for all white-collar workers in the federal government in 1993 was approximately $36,000. Members of minority groups earn less on average. African Americans earned an average of approximately $29,000, Hispanics $32,000, Asians and Pacific Islanders

$37,000, and Native Americans $28,000. A significant legal framework of statutes and executive orders serves to protect minority rights and encourage minority advancement in the federal workforce as discussed in the section on Women in Government.

Article 26 - Equality before the law

820. As indicated in the discussion of the previous 25 articles, all persons in the United States are equal before the law. Subject to certain exceptions, such as the reservation of the right to vote to citizens, they are equally entitled to all the rights specified in the Covenant.

821. In addition, as discussed at length under article 2, all persons in the United States enjoy the equal protection of the laws. Any distinction must at minimum be rationally related to a legitimate governmental objective, and certain distinctions such as race can be justified only by a compelling governmental interest, a standard that is almost never met.

822. U.S. understanding**.** Because not all distinctions are absolutely prohibited under the U.S. Constitution and U.S. laws, the United States stated the following understanding in ratifying the Covenant:

> "That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective."

Article 27 - The rights of minorities to culture, religion and language

823. **Religion and culture**. As discussed under article 18, the U.S. Constitution guarantees the right of all persons, members of minority groups or otherwise, to practise their own religion. The right to practise one's own culture, although not an explicit constitutional guarantee, is also embodied in the protection of civil and political rights in the U.S. Constitution. For example, the guarantee to practise one's culture is a subset of religious freedom, where religion is determined by culture. The issue of culture may be an element of self-determination, as political status and the pursuit of social and economic development often reflects cultural values. Further, the issue is related to the freedoms of association and assembly. Finally, the issue can encompass freedom of expression, opinion, thought, and conscience, where one chooses to express cultural beliefs and traditions.

824. **Linguistic freedom**. The First Amendment to the Constitution guarantees all persons in the United States the right to converse or correspond in any language they wish. Virtually every major language or dialect is spoken somewhere in the U.S., and there are no restrictions on the use of foreign language in the print or electronic media.

825. Although there is no official language in the United States, 19 States have passed statutes, constitutional amendments, or resolutions declaring English to be the official language of the state. The exact impact of these enactments is not yet settled or clear. One federal court struck down a local law requiring one half the space of a foreign language sign to be devoted to English alphabetical characters. Asian American Business Group v. City of Pomona, 716 F. Supp. 1328 (C.D. Calif. 1989); another invalidated as too broad under the First Amendment a state constitutional amendment requiring state employees to speak English while performing official duties, Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990). As for the private settings, a U.S. court recently ruled that employers may enact rules requiring English to be spoken in the workplace. Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (holding that plaintiffs failed to meet disparate-impact standards and establish a prima facie showing of discrimination where certain assembly-line workers were required to converse in English).

826. In the field of education, however, the U.S. Supreme Court has articulated clear protections for linguistic

minorities. In 1974, the Court concluded that under Title VI of the Civil Rights Act of 1964, language minority students are entitled to educational opportunities equal to those of other students. Lau v. Nichols, 414 U.S. 563 (1974). Accordingly, schools are required to conduct programmes which meet the needs of their language minority students. In addition, the Bilingual Education Act, administered by the Department of Education, provides assistance to schools and other eligible grantees in the development and support of instructional programmes for students with limited English proficiency. The Act also supports the collection of data on the number of limited English proficient persons in the United States and the educational services available to them, the evaluation of the effectiveness of programmes under the Act, research on improving those programmes, and the training of teachers and other educational personnel to provide educational services to limited English proficient students.

827. Under the Voting Rights Act, the federal government and the states are required to provide multilingual election services for all elections in those jurisdictions in which persons with limited English proficiency constitute more than 5 per cent of the voting age population.

828. As a requirement for naturalization as a U.S. citizen, applicants are required to demonstrate an understanding of the English language including an ability to read, write, and speak words in ordinary usage in the English language. 8 C.F.R. section 312.1. Exceptions are provided for persons physically unable to take an English literary test - such as blind or deaf persons - and long-time residents of the U.S. over a certain age. Persons exempt from the literacy test or who have passed the literacy test but who cannot take the United States history/government exam in English may employ an interpreter in their native language.

829. **Protection of Native American culture**. The fundamental civil and political rights discussed elsewhere in this report are generally sufficient to ensure that members of minority groups have the right to practise their own culture. In the case of Native Americans, however, additional special protections have been thought warranted in view of their particular circumstances. Accordingly, the protections afforded by article 27 are strongly implicated in principles of Native American self-governance discussed with regard to article 1. Policies adopted by the United States over the last 60 years, and particularly in the last 25 years, have sought to protect Native American linguistic, religious and cultural freedoms.

830. Religious freedom. Historically, policies of the federal government did not favour the practice of Native American religions. Beginning in the 1930s, however, the Bureau of Indian Affairs began to remove restraints on Indian religious practice. In 1962, recognizing the importance of eagle feathers to Native American religions, Congress amended the Bald and Golden Eagle Protection Act of 1940 to provide an exception for the taking of bald eagles for Native American religious purposes. 16 U.S.C. section 668a.

831. In 1968, Congress enacted the Indian Civil Rights Act (ICRA), which requires Native American tribes to respect the civil rights of persons living in their jurisdictions. 25 U.S.C. sections 1301-03. Among other things, the ICRA provides that "[n]o Indian tribe in exercising its powers of self-government shall ... make or enforce any law prohibiting the free exercise of religion ...". 25 U.S.C. Section 1302.

832. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. section 1996, which requires the federal government to respect and promote the religious rights of Native Americans. Recognizing that Native American religions had often been misunderstood or disregarded by the majority culture, AIRFA established the following policy for the United States:

> "... to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."

42 U.S.C. section 1996.

833. As discussed under article 18, the right to free exercise of religion in the United States is not absolute, and the government is not required to accommodate the religious practices of all persons in every instance. Accordingly, the U.S. Supreme Court has found that Native American religious rights are not unqualified, but must be appropriately balanced against other public and private rights and interests. For example, in Lyng v. Northwest Indian Cemetery Protective Ass'n, the Court held that the federal government could not be prohibited from building a timber road across federal lands, which had traditionally been considered sacred for purposes of Native American religious practices. In reaching this decision, the Court found that AIRFA did not establish judicially enforceable rights. 485 U.S. 439 (1988). Two years later, the Court upheld a generally applicable state law which effectively prohibited the use of peyote by Native American Church practitioners. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, reh'g denied 496 U.S. 913 (1990).

834. As discussed under article 18, disapproving of the Smith decision on peyote, the U.S. Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. section 2000bb, which seeks to guarantee application of the "compelling interest" test in free exercise cases. It remains to be seen how the rights of Native Americans to believe, express, and exercise their traditional religion, including access to sacred sites, use and possession of sacred objects such as peyote and eagle feathers, and the freedom to worship through ceremonial and traditional rites, will be affected by this legislation.

835. The Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, 25 U.S.C. sections 3001-13, requires federal agencies and federally-funded museums to inventory their holdings of human remains, funerary and sacred objects, and objects of cultural patrimony. The agencies and museums must work with Native American tribes and Native Hawaiian organizations to reach agreements on the repatriation or other disposition of these remains and objects. The Act also protects Native American burial sites and controls the removal of objects on federal, Indian, and Native Hawaiian lands.

836. Native languages. Scholars estimate more than 600 Native American languages were spoken in North America prior to contact with the Europeans. In 1991, 187 of the 600 remained as "living" languages. However, only 38 of these languages were being taught to children in organized educational programmes.

837. Congress addressed the issue of native languages in the Native American Languages Act of 1990, 25 U.S.C. sections 2901, et seq. The Act contains the following legislative findings:

> "(1) the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages ... (3) the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic integral part of their cultures and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values ... (8) acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans ... (9) languages are the means of communication for the full range of human experiences and are critical to the survival of cultural and political integrity of any people. ..."

838. The Act provides that the right of Native Americans to express themselves through the use of native languages shall not be restricted in any public proceeding, including publicly supported education programmes, and requires the President to direct the heads of federal agencies to evaluate their policies and procedures in order to determine and implement or propose changes needed to preserve, protect and promote native languages. 25 U.S.C. sections 2904-05.

839. The Indian Native Languages Act of 1992, 42 U.S.C. sections 2991, et seq., gives grant authority to the Secretary of the Department of Health and Human Services to award grants to eligible organizations that establish language projects bringing younger and older Native Americans together, to train native speakers to teach others, to develop materials, to produce television and radio programmes in Native American languages, to

record and preserve Native American languages and to purchase equipment.

840. Arts and crafts. In 1990, the Indian arts and crafts industry was estimated to have a market value of $400 to $800 million annually. It was also estimated that $40 to $80 million is lost annually by unmarked imitations, imported and domestic. As much as 50 per cent of items sold as authentic Zuni, Navajo and Hopi designs, many of which are religious symbols, were in fact imported.

841. The 1990 Amendments to the Indian Arts and Crafts Act, 25 U.S.C. sections 305, et seq., provide Native Americans with legal recourse against imitations of arts and crafts, including jewellery, beadwork, pottery, baskets, and other items, being marketed as "Indian Made". In addition, the Act allows Native American tribes to certify artists who are members of the tribe or who are otherwise linked to the tribe. Also, the Act established a Board whose mandate is to promote the development of Indian arts and crafts and to assist Native American tribes in the development of a framework to support the "preservation and evolution" of tribal cultural activities.

842. Education. Throughout the first half of the nineteenth century, the federal government provided only limited educational services to Native Americans, leaving educational programmes to tribes themselves and to Christian religious organizations. Beginning in the 1870s, federal educational services were greatly expanded. The focus of these services was on assimilation and education to suppress aboriginal ways. Off-reservation boarding schools were established to educate and promote assimilation among the Indians. Students who attended federally operated boarding schools and day schools were forbidden to speak their own language, forced to cut their hair, and disciplined to reject their Indian cultures and heritage in line with the policy of assimilation.

843. Federal policy shifted somewhat during the 1930s, as the Bureau of Indian Affairs (BIA) adopted curricular policies that sought to relate the instruction in Bureau schools to the needs and interests of the children with an emphasis on community day schools rather than boarding schools. Enrolment in off-reservation boarding schools decreased.

844. At the same time, the federal government began to encourage attendance of Native American students in public schools. The Johnson-O'Malley Act of 1934, 25 U.S.C. sections 452-57, provided for federal-state cooperation in funding the education of Indian students who attended public schools. In the 1950s, many BIA schools were closed as part of the general policy of termination.

845. As of 1993, 43,700 students are enrolled in grades K through 12 basic instruction programmes operated by the Bureau of Indian Affairs or by tribes under BIA contracts or grants. This represents about 11 per cent of Indian students enrolled in elementary and secondary programmes in the United States. Another 245,102 Native American students attend public schools that receive funds from the BIA under the Johnson-O'Malley Act. Under BIA regulations, these funds are to be used to meet the specialized and unique educational needs of eligible Native American students. 25 C.F.R. 273.1 (1992).

846. In 1978, Congress enacted legislation to provide for greater Native American control over education in BIA schools. 25 U.S.C. sections 2001-19. The legislation calls for minimum academic and dormitory standards or alternative tribal standards, a standardized formula to determine the minimum annual funding necessary to sustain each government-operated and tribally operated contract school, a process for renovating and repairing Indian school facilities, and a more flexible personnel system for educators and staff employed in government and tribal schools.

847. In 1988, the Tribally Controlled Schools Act of 1988, 25 U.S.C. sections 2501-11, set forth findings that the federal administration and domination of the contracting process in Indian education matters under the Indian Self-Determination Act had not provided Indian people leadership opportunities or an effective voice in planning and implementing of programmes for the benefit of Indians. To remedy these concerns, the statute offered tribes and tribal organizations the option to receive grants for the total operation of tribal schools. Under these grants, tribes or tribal organizations are given total tribal control of funds and personnel, limited federal reporting requirements, and the ability to invest federal funds received under this programme for the schools' benefit.

848. Indian child welfare. In 1978, Congress passed the Indian Child Welfare Act, 25 U.S.C. sections 1902, et seq., to promote the placement of Native American children in foster and adoptive homes reflective of their unique cultural environment and heritage. The policy was designed to increase involvement by tribal governments and other Native American organizations in the planning and delivery of child welfare-related services, and as a result, there has been a significant increase in child welfare personnel who are familiar with tribal customs and values.

849. The Act resolves conflicts between federal, state and tribal governments in such a way that tribal governments have primary jurisdiction over the placement of Native American children. The Act vests initial authority for Native American child placements with tribal courts and provides that full faith and credit be accorded to the laws and court orders of Indian tribes in child placement matters. The statute also authorizes the federal government to provide grants to tribes and tribal organizations to establish tribal codes and family development programmes on and off Native American reservations.

Annex I

ABBREVIATIONS

ACA: American Corrections Association
BHRHA: Bureau of Human Rights and Humanitarian Affairs
BIA: Board of Immigration Appeals or Bureau of Indian Affairs
BOP: Bureau of Prisons
CCC: Community corrections centres
CFR: Code of Federal Regulations
Cir.: Circuit
cl.: clause
DOD: Department of Defense
DOJ: Department of Justice
F. Supp.: Federal Supplement
F.2d: Federal Reporter Second Edition
FEMA: Federal Emergency Management Agency
F.R.: Federal Register
Fed. R. Civ. P.: Federal Rules of Civil Procedure
Fed. R. Crim. P.: Federal Rules of Criminal Procedure
GDP: Gross Domestic Product
ICC: Indian Claims Commission
INS: Immigration and Naturalization Service
IRCA: Immigrant Reform and Control Act of 1986
N.E.2d: Northeastern Reporter second edition
N.W.2d: Northwestern Reporter second edition
P.2d: Pacific Reporter second edition
Pub. L. No.: Public Law Number
S.Ct.: Supreme Court Reporter
UCMJ: Uniform Code of Military Justice
U.S.: United States Reporter
U.S.C.: United States Code

Annex II

GLOSSARY

appearance bond: type of bail bond required to insure presence of defendant in criminal case

arraignment: procedure whereby accused is brought before the court to hear crime with which he is charged and to plead guilty or not guilty

bail: in a criminal case, surety provided to obtain release of person under arrest; surety, frequently money, is retained by the court if defendant fails to appear at designated future time in court or leaves the jurisdiction of the court

bail bondsman: one who is in the business of providing surety bail bonds for arrested persons

boot camp: usually a training camp for military personnel; with regard to convicted criminals, "boot camp" is used to describe alternative to traditional incarceration in which prisoners live, work, and train in an environment similar to military boot camps

breach: the breaking or violating of a law, obligation, engagement, or duty, particularly "breach of contract" or the breaking of one's contractual obligations

burden of proof: the necessity or duty of one party to affirmatively prove a fact in dispute; the obligation of a party to establish by evidence the requisite degree of belief concerning a fact in the mind of the trier of fact or the court

cert. denied: refusal by the United States Supreme Court to grant a writ of certiorari: e.g., to hear a case

citizen: one who under the Constitution and laws of the United States, or of a particular State, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights including all persons born or naturalized in the United States

Code of Federal Regulations (C.F.R.): the annual cumulation of federal executive agency regulations including those published in the daily Federal Register and regulations issued previously; contains the general body of regulatory or administrative law

commonwealth: the official title of certain political units which have a self-governing, autonomous, voluntary relationship with a larger political unit

complaint: in criminal cases, a written statement of the essential facts supporting a claim that a named (or unnamed) person committed a crime; a complaint must be made before a magistrate and if the magistrate finds that probable cause exists that the named person committed the alleged crime, a warrant for his arrest is issued

contempt of court: any wilful act disregarding or disobeying a court in its administration of justice, including acts calculated to lessen the dignity of the court as well as violations of lawful court orders

court martial: a military court; to bring an individual before a military court

custody: the care or control of a thing or person including the custody of a child which may be ordered by a court as part of a divorce or separation proceeding

de novo: anew, afresh, a second time

deposition: the testimony of a witness taken upon interrogatories, not in open court, that is reduced to a writing and duly authenticated; a discovery device by which one party asks oral questions of another party or a witness for the other party; may be used in a civil or criminal trial

discretionary relief: relief which is not a matter of right but rather of discretion

et seq.: an abbreviation meaning "and the following"

ex post facto: after the fact; an "ex post facto law" provides for punishment of a person for an act which when committed was innocent

Federal Register: daily publication making available to the public, often for comment, federal agency regulations and other executive branch documents

Federal Rules of Civil Procedure: body of procedural rules which govern all civil actions in U.S. District Courts

Federal Rules of Criminal Procedure: body of procedural rules which govern all criminal proceedings in U.S. District Courts and where specified before U.S. magistrates

felony: a grave or serious crime, frequently any offence punishable by death or imprisonment for more than one year

first degree: phrase used to describe the most serious of a type of crime as in first degree murder

grand jury: a jury of between 12 and 23 people (16 and 23 in federal court) impanelled to receive complaints in criminal cases, hear the State's evidence, and issue indictments where probable cause exists to bring a case to trial

halfway house: loosely structured institution designed to rehabilitate persons, particularly by assisting former prisoners in the transition from prison to civilian life

immunity: exemption from performing duties the law usually requires including exemption from prosecution usually in exchange for offering inculpatory evidence against another individual

in absentia proceeding: proceeding conducted in the absence of usually a defendant in a case

indictment: written accusation by a grand jury to the court charging a person with doing an act or being guilty of an omission which by law is a public offence

informed consent: a person's agreement to allow something to happen where the agreement is based on a full disclosure of facts needed to make the decision intelligently including facts regarding risks and alternatives

injunction: a prohibitive, equitable remedy, issued or granted by a court forbidding a party to do some act or restraining a party from continuing some act

jail: a building used for the confinement of persons held in lawful custody usually persons either convicted of misdemeanours or persons awaiting trial

jury of one's peers: jury composed of defendant's fellow citizens

magistrate: in federal court a judicial officer appointed by the judges of federal district courts having some but not all the powers of a judge; magistrates usually conduct many of the preliminary or pre-trial civil and criminal proceedings

mandamus: a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board, corporation, or person to perform a particular act specified and belonging to his public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived

material witness: a person who can give testimony that no one or almost no one else can give, such as a victim

or an eyewitness

misdemeanour: an offence other than a felony, usually one that results in a fine or short imprisonment in a jail

motion: an application to a court or judge in order to obtain a ruling or order in favour of the applicant

nationals: persons - including but not limited to citizens - who owe allegiance to a country

parole: release from jail, prison, or other confinement after having served some portion of the sentence, usually is conditional and may be revoked upon violation of any of the conditions

perfect the appeal: to complete or finish an appeal such that it may be submitted to the court

petit jury: the ordinary jury of usually between 6 and 12 persons who decide questions of fact in civil and criminal trials; "petit" distinguishes this jury from "grand" jury

preliminary hearing: hearing by a judge or magistrate to determine whether a
person charged with a crime should be held for trial; held in felony cases prior to indictment; requires the State to establish probable cause that a crime was committed and the defendant committed it

prison: a building used for the confinement of persons usually convicted of more serious crimes, such as felonies; synonym is penitentiary

probable cause: reasonable cause for belief; more evidence for than against; a reasonable ground for belief in the existence of facts warranting the proceedings complained of (such as warrant, indictment, arrest)

probation: a sentence releasing a prisoner into the community under the supervision of a public officer (probation officer)

restitution: act of making good or giving equivalent for any loss, damage, or injury suffered; puts plaintiff in the position he would have been in if no action had occurred

second degree: phrase used to describe a lesser crime among a type of crimes as in second degree murder

See: citation signal indicating that the following supports the proposition stated

State action: phrase used usually in due process and civil rights claims where a private citizen claims improper governmental intrusion in his life

subpoena: command to appear at a certain time and place to give testimony upon a certain matter

summary judgment: motion of a party in a civil action requesting the court to find that there is no genuine issue of material fact and the party is entitled to prevail as a matter of law

supra: above; usually directs the reader to a previous citation
territory: the land and waters under the jurisdiction of a State, nation, or sovereign

tort: a private or civil wrong or injury other than a breach of contract for which the court will provide a damages remedy

warrant: a written order on behalf of the State based upon a complaint that directs a law enforcement officer to arrest a person and bring him before a magistrate

whistleblower: person, usually within an organization such as a business or the government, who reports fraud

or other offence occurring within the organization

writ of habeas corpus: an order requiring a party to be brought before the court; usually used to test the legality of the detention or imprisonment of a person

writ: an order issued by a court requiring the performance of a certain act

Annex III

RATIFICATION OF THE COVENANT BY THE U.S. SENATE

SENATE OF THE UNITED STATES

IN EXECUTIVE SESSION

2 April 1992

Resolved, (*two thirds of the Senators present concurring therein*), That the Senate advise and consent to the ratification of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, and signed on behalf of the United States on 5 October 1977, (Executive E, 95-2), subject to the following Reservations, Understandings, Declarations and Proviso:

I. The Senate's advice and consent is subject to the following reservations:

(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age.

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, colour, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in Articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to "exceptional circumstances" in paragraph 2 (a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3 (b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defence. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understand that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution

in respect to all such restrictions and limitations.

(3) That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.

(4) That the United States declares that the right referred to in Article 47 may be exercised only in accordance with international law.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Attest: Walter J. Stewart
Secretary

EXHIBIT H

UNITED
NATIONS

HRI

International
Human Rights
Instruments

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UNITED STATES OF AMERICA

[29 July 1994]

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I. LAND AND PEOPLE

A. Population

1. When the most recent national census was completed in 1990, the population of the United States of America had reached 248,709,873. The Census Bureau estimates current population to be 258,745,000 (1 September 1993) and increasing by some 3 million persons per year. By the year 2000, the United States population is expected to be 276,241,000. In recent years, the population has shifted from the North-East and Midwest to the South and West. Since 1960, the population in both the North-East and Midwest has decreased approximately 5 per cent and increased approximately 5 per cent in the South and West.

2. Females outnumber males, comprising 51.2 per cent of the population. The median age of all people is 32.9, with 22 per cent under the age of 15 and 12.4 per cent over the age of 65.

3. The United States is home to a wide variety of ethnic and racial groups; indeed, virtually every national, racial, ethnic, cultural and religious group in the world is represented in its population. Overall, 80 per cent of all people are white. Among the minority groups, 12 per cent are African Americans, 9 per cent are of Hispanic origin, 3 per cent are of Asian or Pacific Island origin, and less than 1 per cent are Native Americans.

4. Historically, the United States has been a nation of immigrants. According to the 1990 Census, nearly 20 million people (or more than 12 per cent of the population) were not born in the United States but call it home. In 1992, 973,977 aliens were granted lawful permanent resident status. This figure was inflated as a result of the Immigration Reform and Control Act of 1986 (IRCA), which provided a one-time opportunity for significant numbers of long-term illegal residents and special agricultural workers to gain permanent residence status. The primary countries of origin for legal immigrants were Mexico, Viet Nam, the Philippines, and the countries formerly constituting the Soviet Union. The Immigration and Naturalization Service (INS) estimates that another 300,000 people immigrated illegally. A recent INS analysis indicated that as many as 3.2 million people now reside illegally in the United States; approximately 40 per cent (1.3 million) live in California and 15 per cent (485,000) live in New York. Although the IRCA provided legal status to many Mexicans living in the United States, approximately 30 per cent of illegal aliens are Mexican. Another 9 per cent are from El Salvador and 4 per cent from Guatemala. In total, the INS indicates that illegal immigrants constitute about 1.3 per cent of the United States population.

5. About three quarters of all people in the United States live in urban areas, with "urban" defined as 2,500 or more residents in an area incorporated as a city, village, or town. While almost 30 per cent of all whites reside in rural areas, minorities reside predominantly in urban areas (87.2 per cent of all African Americans, 95 per cent of all Asians, 91 per cent of all Hispanics).

6. English is the predominant language of the United States. However, of approximately 230 million people over the age of 5, some 32 million (approximately 14 per cent) speak a language other than English. Seventeen million people speak Spanish; 4.5 million speak an Asian or Pacific Island language. French, German and Italian are among the next most common. Fourteen million people indicate they do not speak English "very well". The highest percentages of non-English speakers are found in the States of New Mexico, California, Texas, Hawaii and New York.

B. Vital statistics

7. According to 1989 figures, overall life expectancy in the United States was 75.3 years. Women tend to live longer than men, with a life expectancy of 78.8 years, compared with 71.8 years for men. Whites have a longer life expectancy than minorities. For example, the life expectancy for whites is 76 years, but for African Americans it is only 69.2, and only 64.8 for African-American men. However, studies show these figures to be improving for all racial groups. Preliminary 1990 figures show the life expectancy for all of the United States to be 75.4, 76 for whites, and 70.3 for African Americans.

8. The total fertility rate for the United States, according to 1991 figures, was 2,073 births per 1,000 women aged 10-49. In other words, women in the United States on average have 2.1 births over the course of their child-bearing years. This is statistically equivalent to the replacement level of 2.0. Once again, there is significant disparity between racial groups: the white fertility rate is 1,885, with the rate decreasing, but the African-American fertility rate is 2,583, with the rate increasing. Overall, nearly 30 per cent of all births in the United States are currently to unmarried women.

9. The overall mortality rate in 1992 was 853.3 per 100,000, slightly lower than the previous year. The infant mortality rate was 9.8 deaths per 1,000 live births. However, there is a significant disparity between the rates for African American and whites. For example, the rate for whites was 8.2 per 1,000, but the rate for African Americans was more than double that, at 17.7. Lack of adequate prenatal care, socio-economic conditions, drug and alcohol abuse, and lack of education are cited as factors contributing to the difference. A similar pattern exists for the maternal mortality rate: the overall rate was 7.9 maternal deaths per 1,000 births, but the rate for whites was 5.6, compared to the 18.4 rate for African Americans.

10. There are 95.7 million households in the United States, of which 70 per cent contain families. However, married couples with children make up only 26 per cent of all households. In recent years, owing to the increasing acceptance of divorce and single-parenthood, more children are living with only one parent. Among all children under age 18, 27 per cent lived with a single parent in 1992, more than double the 12 per cent of children who lived with only one parent in 1970. Most children who live with one parent live with their mother. For instance, in 1992 approximately 88 per cent of children who lived with one parent lived with their mother. The proportion of children living with one parent varies according to race. Among children under 18, 21 per cent of white children lived with one parent,

whereas 57 per cent of African-American children and 32 per cent of Hispanic children lived with one parent. Children in every group were far more likely to live with their mother than their father. Among children living with their mother or father only, 84 per cent of white children, 94 per cent of African-American children, and 89 per cent of Hispanic children lived with their mother. In total, approximately 3 per cent of children under 18 live with a relative other than their parents or with a non-relative. While similar data is not available for Asians, in 1992 approximately 15 per cent of Asian family households were headed by women.

11. In 1992, it was estimated that there were 2.3 million marriages and 1.2 million divorces in the United States, in both cases slightly fewer than in the preceding year.

C. Socio-economic indicators

12. For the first quarter of 1993, the per capita income in the United States was $23,987 in current dollars. In mean money earnings, males earned $34,886 compared with $22,768 for females in 1990. The gross domestic product (GDP) in billions of current dollars was 6,038.5 for 1992 and 6,327.6 for the second quarter of 1993. The Consumer Price Index, frequently used to measure inflation, has decreased steadily since 1989 from 5.4 per cent for 1989-1990 to 2.8 per cent for the period August 1992 to August 1993.

13. In 1992, 67 per cent of the population 16 years and older (totalling 117,598,000) was in the workforce, including 16.8 million working mothers. The overall unemployment rate was 7.4 per cent. For men, the figure was 7.8 per cent, compared with 6.9 per cent for women. Whites' rate of unemployment was 6.5 per cent, African-Americans' rate was 14.1 per cent, and Hispanics' rate was 11.4 per cent. The minimum wage in 1992 was $4.25 an hour. Women and minorities continue to be over-represented in low-paying jobs.

14. In 1992, 14.5 per cent of the population was below the poverty level, the federally established figure below which a person is considered to have insufficient income for his or her basic needs. For a household of four in 1992, this was equal to $14,335. Of all households headed by females, 34.9 per cent were below the poverty level. The poverty rates for white, African American, and Hispanic households headed by women were, respectively, 28.1 per cent, 49.8 per cent, and 48.8 per cent. Among children, 21.9 per cent lived below the poverty line, including one in four children under six years old.

15. The rate of poverty varies significantly among racial groups in the United States. While 11.6 per cent of whites (9.6 per cent when Hispanics are not included) are below the poverty line, 33.3 per cent of African Americans, 29.3 per cent of Hispanics, and 12.5 per cent of Asian/Pacific Islanders fall below the poverty level. Among the poor in 1992, 73.2 per cent received some form of federal welfare assistance. Assistance may include cash as well as non-cash benefits. In 1992, 42.7 per cent of the poor received means-tested cash assistance. In 1989, the United States spent $956 billion on social welfare expenditures for an average of $3,783 per person in current 1989 dollars.

16. According to the 1990 Census, 78.4 per cent of the population had four years or more of high school education, 39.8 per cent had one or more years of college, and 21.4 per cent had four or more years of college. Males and females achieved similar levels of education, the primary difference being that 24.3 per cent of males versus 18.8 per cent of females received four or more years of college. Educational levels differed more widely, however, on the basis of race. Rates for high school and four or more years of college were 79.9 per cent and 22.2 per cent for whites versus 66.7 per cent and 11.5 per cent for African Americans, and 51.3 per cent and 9.7 per cent for Hispanics. In 1992, 63 per cent of the most recent graduates of high school had enrolled in colleges and universities.

17. Approximately four fifths of all American women have completed high school. Additionally, women constitute 54 per cent of the students in undergraduate, graduate, and professional degree programmes. More specifically, 55 per cent of undergraduate students are women, 53 per cent of graduate students are women, and 39 per cent of professional degree students are women.

18. The last nationwide studies of the literacy rate were in 1982 and 1986. According to the 1982 study, adults in the United States over the age of 20 had a 13 per cent illiteracy rate. The 1986 study concerned young adults between the ages of 20 and 24, measured by standards of fourth, eighth, and eleventh grade reading levels. The results showed that 6 per cent were illiterate at a fourth grade level, 20.2 per cent were illiterate at an eighth grade level, and 38.5 per cent were illiterate at an eleventh grade level.

19. However, the methodology on which these studies were based has proven inadequate to indicate how well the tested individuals can actually use their reading and writing skills. Accordingly, the United States Department of Education has recently developed a new method for evaluating functional literacy by testing prose, document and quantitative literacy. In a study of 26,000 individuals conducted in conjunction with authorities in 12 States, almost half of the participants scored in the lowest of five levels in each of the three literacy categories. Less than 5 per cent of participants scored in the highest skill levels. The survey found that older adults, who have typically completed the fewest years of schooling, demonstrated lower literacy skills than other age groups. Among participants scoring in the lowest skill levels, 62 per cent had not completed high school and 35 per cent had eight or fewer years of formal schooling; 25 per cent were born in another country; and 26 per cent had some physical or mental condition that prevented them from fully working. Almost half of these participants lived in poverty. Adults in prison were disproportionately likely to perform in the lowest two levels of literacy skill.

20. Freedom to worship and to follow a chosen religion is constitutionally protected in the United States. As a result, literally hundreds of religions and sects exist. The population is overwhelmingly Christian, although obtaining accurate statistical data with regard to religion is extremely difficult, as this information is not included in the decennial census or otherwise collected by the Government. The available figures are often rough, based on self-reporting studies which leave great room for error. According to the 1992 Yearbook of American and Canadian Churches, practising church

members make up 59.3 per cent of the general population. Of those church members, the major groups include Protestants (chiefly Baptists, Methodists, Lutherans, Presbyterians, Episcopalians, Pentecostals and Mormons) (49.4 per cent) and Roman Catholics (38.6 per cent). Jews and Muslims make up about 2 per cent each, and followers of Eastern religions comprise about 3 per cent.

D. Land

21. In its totality, the United States of America covers 9.4 million km^2, including the 48 coterminous States which span the North American continent, Alaska, Hawaii and the various insular areas in the Pacific Ocean and Caribbean Sea.

22. The geography of the continental United States is widely varied, with great mountain ranges, flat open prairies, and numerous rivers. On the Atlantic shore, much of the northern coast is rocky, but the middle and southern Atlantic coast rises gently from the sea. It starts as low, wet ground and sandy flats, but then becomes a rolling coastal lowland somewhat like that of northern and western Europe. The Appalachians, which run roughly parallel to the east coast, are old mountains with many open valleys between them. To the west is the Appalachian plateau underlain by extensive coal deposits, and beyond is the Central Lowland, which resembles the plains of eastern Europe or the Great Plains of Australia. The Central Lowland is drained chiefly by the vast Mississippi-Missouri river system, which extends some 5,970 km and which experienced disastrous flooding during 1993. In the south, the Gulf Coastal Lowlands, including Florida and westward to the Texas Coast, include many lagoons, swamps and sandbars in addition to rolling coastal plain.

23. North of the Central Lowland, extending for almost 1,600 km, are the five Great Lakes, four of which the United States shares with Canada. The lakes are estimated to contain about half of the world’s fresh water.

24. West of the Central Lowland are the Great Plains, likened to the flat top of a table which is slightly tilted upward to the west. They are stopped by the Rocky Mountains, the "backbone of the continent". The Rockies are considered young mountains, of the same age as the Alps in Europe or the Himalayas in Asia. They are high, rough and irregular in shape, with peaks exceeding 4,200 metres above sea level. Through the Rockies runs the Continental Divide which separates drainage into the Atlantic Ocean from drainage into the Pacific Ocean.

25. The land west of the Rockies is made up of distinct and separate regions. One region encompasses the high Colorado Plateau, in which the Grand Canyon of the Colorado River is cut, 1.6 km in depth. Other regions include the high Columbia tableland to the north, the Basin and Range Province to the south, the Sierra Nevada mountain range, and at the border of the Pacific Ocean, the Coast Ranges, relatively low mountains in a region with occasional earthquakes. Death Valley, located in eastern California and south-western Nevada, contains the lowest point in the Western Hemisphere, 86 metres below sea level.

26. The Cascade Mountains and the Sierra Nevada Mountains, close to the west coast of the continent, catch the largest share of the rain off the Pacific Ocean before it can go inland. As a result, there is too little rain for almost the whole western half of the United States, which lies in the "rain shadow" of the mountains. In a great part of that territory, farmers must depend on irrigation water from the snows or rains that are trapped by the mountains. Most of the western half of the country, with the exception of the Pacific North-West States, receives less than 50 cm of rainfall a year. Regions in the eastern half receive at least 50 cm, and often much more, through moist air masses from the Gulf of Mexico and Atlantic Ocean that travel inland.

27. Along the western or Pacific coast, the temperature changes little between winter and summer. In some places, the average difference between July and January is as little as 10° C. The climate along the northern part of this coast is similar to that of England. However, in the north central part of the country, summer and winter are vastly different. The average difference between July and January is 36° C, and more violent extremes are common. In the eastern part of the United States, the difference between summer and winter is also distinct, but not nearly so extreme. Near the south-western and south-eastern corners of the country, the climate is mild in winter, but in summer the temperature may reach equatorial levels.

28. Natural vegetation ranges from the mixed forests of the Appalachians to the grasslands of the Great Plains, from the conifers of the Rocky Mountains to the redwood forests of California, the cacti and mesquite of the south-western deserts and the subtropical pines, oaks, palms, and mangroves of the Gulf and southern Atlantic coasts.

29. The variations in temperature within the continental United States have had a marked effect on the country’s economy and living standard. There is a long crop growing season along the south-east coast. This is also true in several small strips and pockets to the west where crops like grapes grow well during a large part of the year. In some of the cooler climates, animals and produce such as apples, wheat and corn thrive. Subtropical climates in parts of the United States allow for particularly long growing seasons. Citrus fruit is grown in Florida, California, Arizona and Texas. Sugar cane is grown in Louisiana and rice in Arkansas, California, Louisiana and Texas. Cotton is grown throughout the south-eastern United States as well as in Texas, Arizona and California. As a result, the United States produces a large range of agricultural products. Approximately one half of the land is occupied by farms, with dairies important in the north and north-east, livestock and feedgrains in the Midwest, wheat in the Great Plains, and livestock on the High Plains and in the South.

30. Located at the extreme north-western corner of the continent and separated from the 48 contiguous States by western Canada, Alaska is the largest State (1.5 million km^2) and the only one extending longitudinally into the Eastern Hemisphere. Alaska includes two major mountain chains, the Brooks Range in the north and the Alaska Range in the south, as well as the highest point in the United States, Mt. McKinley (6,194 metres above sea level). The two ranges are separated by a Central Plateau through which the Yukon River flows. The northernmost part of the State contains the

Arctic Slope. With thousands of offshore islands, Alaska has 54,552 km of shoreline. Alaska is one of the least populous States (in 1992, only Wyoming had a smaller population), but indigenous people constitute over 15 per cent of the total.

31. The Aleutian Islands extend 1,930 km into the northern Pacific Ocean from the Alaskan Peninsula and include some 150 islands of volcanic origin totalling 17,666 km^2. The population of 8,000 is largely indigenous.

32. Hawaii, the fiftieth State, comprises a chain of some 130 islands representing the peaks of submerged volcanic mountains extending across 2,400 km in the North Pacific Ocean. The main islands (Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau) are located at the south-eastern end, approximately 3,800 km from the mainland. There are several active volcanoes, including Mauna Loa (4,169 metres) and Kilauea (4,205 metres). The climate is generally subtropical; Mt. Waialeale on Kauai is the wettest spot in the United States, with an average annual rainfall of 1,168 cm. The population exceeds 1.1 million and is of diverse origins: 20 per cent are Native Hawaiians of Polynesian and Tahitian descent, 25 per cent Japanese, 12 per cent Filipino, and 29 per cent Caucasian of American, European, and South American lineage.

33. Guam, a self-governing territory of the United States, is located approximately 9,600 km from the mainland in the western Pacific Ocean. The largest and southernmost of the Mariana Islands, it is 48 km long and encompasses 541 km^2 of land. The highest point is Mt. Lamlam (405 metres above sea level). The population totals 146,000, of which 47 per cent is Chamorro, 25 per cent Filipinos and 20 per cent stateside immigrants.

34. The Commonwealth of the Northern Mariana Islands includes an archipelago of 16 islands stretching some 750 km in the Western Pacific, approximately 2,400 km east of the Philippines. The three main islands are Saipan, Tinian and Rota; the total land mass is 477 km^2. The population of 49,000 is largely of Chamorro descent. The principal industry is tourism, although many residents engage in subsistence agriculture and copra export.

35. The most southern United States jurisdiction is American Samoa, an unincorporated territory of seven small islands at the eastern end of the Samoan Island chain in the South Pacific Ocean, midway between Honolulu and Sydney, Australia. They include Tutuila, Aunu'u, the Manu'a group, Rose Island and Swains Island, covering 199 km^2. Volcanic and mountainous, and surrounded by coral reefs, the islands retain much of their original Polynesian culture. The population of 53,000 is composed of United States nationals approximately 90 per cent of whom are Samoans with the remainder being primarily Tongan or other Pacific Island origin.

36. Other United States dependencies in the Pacific Ocean include Wake Island (and its sister islands Wilkes and Peale), an atoll in the central Pacific with a population of 300 (mostly United States government personnel with no indigenous population); Midway Islands (including Sand and Eastern Islands) in the northern Pacific with no indigenous population; Johnston Atoll, with a total area of 2.8 km^2 and no indigenous population; Howland, Jarvis and Baker Islands, which are uninhabited and administered by the Department of

the Interior; Kingman Reef, which is uninhabited and administered by the United States Navy; and Palmyra Atoll, privately owned and administered by the Department of the Interior.

37. In the Caribbean, Puerto Rico is a self-governing commonwealth located at the eastern end of the Greater Antilles. The main island is largely mountainous with a surrounding coastal plain; Cerro del Punta in the Cordillera Central is the highest elevation, at 1,325 metres above sea level. The main island extends 153 km east-to-west and 58 km north-to-south, and encompasses approximately 9,100 km^2. Puerto Rico enjoys a mild tropical climate but is subject to hurricanes. The population of 3.8 million is largely Hispanic, descended from Spanish conquerors and slaves. Some 2.7 million Puerto Ricans reside on the mainland. The primary economic activities include tourism, light manufacturing and agriculture.

38. Some 60 miles to the east of the main island of Puerto Rico lie the United States Virgin Islands, the westernmost group of the Lesser Antilles in the West Indies. The three largest are St. Thomas, St. John and St. Croix; altogether, the territory covers some 352 km^2 of land. The highest point is Crown Mountain on St. Thomas, with an elevation of 474 metres. The climate is subtropical, and the principal activities involve tourism, light manufacturing and agriculture. The population totals 98,000, of which 85 per cent are African Americans. Off the western tip of Haiti is Navassa Island, uninhabited and administered by the United States Coast Guard.

II. GENERAL POLITICAL STRUCTURE

A. Republican form of government

39. The United States of America is a federal republic of 50 States, together with a number of commonwealths, territories and possessions. The United States Constitution is the central instrument of government and the supreme law of the land. Adopted in 1789, the Constitution is the world's oldest written constitution still in force, and owes its staying power to its simplicity and flexibility. Originally designed to provide a framework for governing 4 million people in 13 very different former British colonies along the Atlantic coast, its basic provisions were so soundly conceived that, with only 27 amendments, it now serves the needs of some 250 million people in 50 even more diverse States and other constituent units which stretch from the Atlantic to the Pacific Ocean.

40. Although the Constitution has changed in a number of respects since it was first adopted, most of its basic principles remain the same as they were in 1789:

- The will of the people forms the basis of governmental legitimacy, and the people have the right to change their form of national government by legal means defined in the Constitution itself.

- The three main branches of the federal government (the executive, legislative, and judicial) are separate and distinct from one another. The powers given to each are delicately balanced by the powers of the other two. Each branch serves as a check on potential excesses of the others.

- The Constitution stands above all other laws, executive acts and regulations, including treaties.

- All persons are equal before the law and are equally entitled to its protection. All States are equal, and none can receive special treatment from the federal government. Within the limits of the Constitution, each State must recognize and respect the laws of the others. State Governments, like the federal government, must be republican in form, with final authority resting with the people.

- Powers not granted to the federal government are reserved to the States or the people.

41. The Constitution and the federal government stand at the peak of a governmental pyramid which includes the 50 States and many hundreds of local jurisdictions. In the United States system, each level of government has a large degree of autonomy. Disputes between different jurisdictions are typically resolved by the courts. However, there are questions involving the national interest which require the cooperation of all levels of government simultaneously, and the Constitution makes provision for this as well. By way of example, the public (government-funded) schools are largely administered by local jurisdictions, adhering to statewide standards even at the university level. Private schools are also generally required to meet the same standards. Nevertheless, the federal government also aids the schools, as literacy and educational attainment are matters of vital national interest. In other areas, such as housing, health and welfare, there is a similar partnership between the various levels of government.

42. Within the States there are generally two or more layers of government. Most States are divided into counties, and areas of population concentration are incorporated in municipalities or other forms of local government (cities, towns, townships, boroughs, parishes or villages). In addition, school districts and special service districts provide systems of public education and various other services (for example, water and sewer services, fire and emergency services, higher education, hospital services, public transportation). The leaders of the federal, State, county, municipal and other local Governments are for the most part democratically elected, although some are appointed by other officials who are themselves democratically elected. The leaders of special service districts are likewise either elected or appointed, with election more common in the case of school districts.

43. The federal Constitution establishes a democratic system of governance at the federal level and guarantees a republican system at the State and local levels. Elected at the federal level are the President, the Vice President, and members of the United States Senate and House of Representatives. There is considerable variation in the governmental structures of the States and of lesser governmental units. From State to State there are large differences in the number of officials who are elected per unit of government and in the number of officials elected per capita. Elected at the State level typically are the governor, a lieutenant governor, an attorney-general, other leaders of State governmental departments, members of a bicameral legislature (Nebraska has a unicameral legislature). In many States, justices of the State supreme court and judges in various lower courts are also elected. Elected at the

county level typically are members of a county governing body, a chief executive, a sheriff, a clerk, an auditor, a coroner, and the like, and minor judicial officials, such as justices of the peace and constables. Officials elected at the municipal level usually include a mayor and members of a governing council, board, or commission. All elections, even those for federal office, are conducted by the States or their political subdivisions.

44. Officials at all levels are elected at regularly scheduled elections to terms of fixed duration, usually varying in length between one and six years. Vacancies are filled either through special elections or by appointment or by a combination of the two methods. Elections are conducted by secret ballot.

45. While the Constitution does not establish or regulate political parties, most federal and State elections are in fact dominated by two long-established parties: the Democratic Party, the origins of which may be traced to Thomas Jefferson, who was President from 1801 to 1809, and the Republican Party, founded in 1854. Each party is a loose alliance of private organizations formed at the State and local levels which unite every four years for the presidential election. While the Democratic Party is generally considered more liberal and the Republican Party more conservative in terms of ideology, there are no tests for party registration and beliefs vary widely across the country. Some Democrats are more conservative than most Republicans, and some Republicans are more liberal than most Democrats. Where one party dominates the local politics, the only truly competitive electoral race may in fact be an initial, intra-party election of the party's candidate for office. Particularly during a presidential election, each party tends to compete for voters with a "moderate" or centrist ideology, considered to comprise the majority of voters nationwide. None the less, each party has both a liberal and a conservative "wing" or group of members.

46. While the United States may generally be said to have a "two party" system, many Americans consider themselves "independents" or unaffiliated with either the Democratic or Republican Party. Currently, one independent holds a seat in the United States Congress and two independents are State governors. An independent candidate for President won 18.9 per cent of the popular vote in the 1992 election.

47. Most elections involve a two-step process. The first (or "primary") step involves the selection or designation of a candidate to represent a political party; second, the respective parties' candidates run against each other and any independent candidates in a general election. Local and State party organizations vary widely in the degree to which a voter must demonstrate party allegiance before participating in the party's nominating methods. Commonly, "primary" elections are held among a party's candidates to determine who will be the nominee of that party for office. Other methods include party caucuses and conventions. Primary elections usually require a voter to demonstrate at least a minimal commitment to a particular party; however, the voter may not be required to register as a member of the party before voting in that party's primary. On the other hand, party caucuses and conventions typically require a greater degree of party affiliation by the voter and may be open only to certain party officials. Once the parties have designated their candidates for office, State-run general elections are held. In almost all elections, voters are permitted to "split" their ballots by, for example,

voting for a Democrat for President and a Republican for Senator. The result is that at both the federal and State levels, the individual holding the highest executive office (e.g. President or Governor) may be of a different political party from the majority of elected representatives in the legislative branch.

B. Federal government

48. The federal government consists of three branches: the executive, the legislative and the judicial.

1. The executive branch

49. The executive branch of government is headed by the President, who under the Constitution must be a natural-born United States citizen, at least 35 years old, and a resident of the country for at least 14 years. Candidates for the presidency are chosen by political parties several months before the presidential election, which is held every four years (in years divisible evenly by four) on the first Tuesday after the first Monday in November.

50. The method of electing the President is peculiar to the United States system. Although the names of the candidates appear on the ballots, technically the people of each State do not vote directly for the President and Vice President. Instead, they select a slate of "presidential electors," equal to the number of Senators and Representatives each State has in Congress. The candidate with the highest number of votes in each State wins all the electoral votes of that State.

51. According to the Constitution, the President must "take care that the laws be faithfully executed". To carry out this responsibility, the President presides over the executive branch of government, with broad powers to manage national affairs and the workings of the federal government. When authorized by statute, the President can issue rules, regulations and instructions called executive orders, which are binding upon federal agencies. As commander-in-chief of the armed forces of the United States, the President may also call into federal service the State units of the National Guard. The Congress may by law grant the President or federal agencies broad powers to make rules and regulations under standards set in those laws. In time of war or national emergency, these grants may be broader than in peacetime.

52. The President chooses the heads of all executive departments and agencies, together with hundreds of other high-ranking federal officials. The large majority of federal workers, however, are selected through the Civil Service system, in which appointment and promotion are based on ability and experience rather than political affiliation.

53. Under the Constitution, the President is the federal official primarily responsible for the relations of the United States with foreign nations. In this sense the President is both "head of government" and "head of State". Presidents appoint ambassadors, ministers and consuls, subject to confirmation by the Senate, and receives foreign ambassadors and other public officials. With the Secretary of State, the President manages all official communication with foreign Governments. On occasion, the President may personally participate in summit conferences where heads of government meet for direct consultation.

54. Through the Department of State, the President is responsible for the protection of United States citizens abroad. Presidents decide whether to recognize new nations and new governments, and negotiate treaties with other nations, which are binding on the United States when approved by two thirds of the Senators present and voting. The President may also negotiate executive agreements with foreign powers that are not subject to Senate advice and consent, based on statutory authority as well as inherent constitutional powers.

55. Although the Constitution provides that "all legislative powers" shall be vested in the Congress, the President, as the chief formulator of public policy, also has a major role in the legislative process. The President can veto any bill passed by Congress, and, unless two thirds in each house vote to override the veto, the bill does not become law. Much of the legislation dealt with by Congress is drafted at the initiative of the executive branch. In his annual report (the "State of the Union" address) and in other special messages to Congress, the President may propose legislation he believes is necessary. The President has the power to call the Congress into special session. Furthermore, the President, as head of a political party and as chief executive officer of the United States Government, is in a position to influence public opinion and thereby to influence the course of legislation in Congress.

56. The President also nominates federal judges, including Justices of the Supreme Court of the United States, subject to the advice and consent of the Senate. The President has the power to grant a full or conditional pardon to anyone convicted of breaking a federal law, except in a case of impeachment. The pardoning power has come to embrace the authority to shorten prison terms and reduce fines.

57. The day-to-day enforcement and administration of federal laws is in the hands of the various executive departments created by Congress to deal with specific areas of national and international affairs. The heads of the departments, chosen by the President and approved by the Senate, form a council of advisers generally known as the President’s Cabinet. The Cabinet is an informal consultative and advisory body, not provided for by the Constitution. Currently, the members of the Cabinet include the secretaries of the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, State, Transportation, Treasury, and Veterans Affairs, as well as the Attorney-General, who heads the Justice Department. Some executive departments include major subordinate agencies, such as the United States Coast Guard and the Federal Aviation Administration (the Department of Transportation), the Federal Bureau of Investigation (the Department of Justice), and the Bureau of Indian Affairs and the National Park Service (the Department of the Interior).

58. In addition to the secretaries of the 14 executive departments, the chiefs of a number of other governmental organizations are also considered part of the Cabinet. Currently, these include the chiefs of the White House staff, the National Security Council, the Office of Management and Budget, the Council of Economic Advisers, the Office of the United States Trade Representative, the Environmental Protection Agency, Drug Control Policy,

Domestic Policy Council, the National Economic Council, and the United States Ambassador to the United Nations. The Office of the President includes certain other organizations such as the Office of Science and Technology and the Office of Environmental Policy.

59. In addition to the executive departments, more than 50 other agencies within the executive branch have important responsibilities for keeping the government and the economy working. These are often called independent agencies, as they are technically not part of the executive departments. Some are regulatory groups, with powers to supervise certain sectors of the economy, such as the Securities and Exchange Commission, the Nuclear Regulatory Commission and the Interstate Commerce Commission. Others provide special services, either to the government or to people, such as the United States Postal Service, the Central Intelligence Agency, and the Federal Election Commission. In most cases, the agencies have been created by Congress to deal with matters that have become too complex for the scope of ordinary legislation. Among the best known independent agencies are the Peace Corps and the National Aeronautics and Space Administration (NASA).

60. All together, the executive branch currently employs approximately 3 million civilian personnel.

61. The Department of Defense is responsible for providing the military forces required to deter war and protect the security of the United States. The major elements of these forces include the Army, Navy, Marine Corps and Air Force, consisting in September 1993 of approximately 1.7 million active duty personnel. Women make up 11 per cent of the armed forces, but fewer than 1 per cent serve in the infantry, in gun crews or aboard ship. Under the authority of the President, the Secretary of Defense exercises civilian authority, direction and control over the Department of Defense, which includes the separately organized departments of Army, Navy and Air Force, the Joint Chiefs of Staff, the unified and specified combatant commands, and various subordinate agencies established for specific purposes.

2. The legislative branch

62. The legislative branch of the federal government is the Congress, which has two houses: the Senate and the House of Representatives. Powers granted Congress under the Constitution include the powers to levy taxes, borrow money, regulate interstate commerce, declare war, discipline its own membership, and determine its rules of procedure. Including related entities such as the Library of Congress, the General Accounting Office, the Government Printing Office and the Congressional Budget Office, the legislative branch employs some 38,000 people.

The Senate

63. Each State elects two senators. Senators must be at least 30 years old, residents of the State from which they are elected, and citizens of the United States for at least nine years. Each term of service is for six years, and terms are arranged so that one third of the members are elected every two years.

64. The Senate has certain powers especially reserved to that body, including the authority to confirm presidential appointments of high officials and ambassadors of the federal government, as well as authority to give its advice and consent to the ratification of treaties by a two thirds vote.

65. The Constitution provides that the Vice President of the United States shall be president of the Senate. The Vice President has no vote, except in the case of a tie. The Senate chooses a president pro tempore from the majority party to preside when the Vice President is absent.

The House of Representatives

66. The 435 members of the House of Representatives are chosen by direct vote of the electorate in each State, with the number of representatives allotted to each State on the basis of population. Each representative represents a single congressional district. Members must be at least 25 years old, residents of the States from which they are elected, and previously citizens of the United States for at least seven years. They serve for a two-year period.

67. The House of Representatives chooses its own presiding officer, the Speaker of the House. The Speaker is always a member of the political party with the majority in the House.

68. The leaders of the two political parties in each house of Congress are respectively the majority floor leader and the minority floor leader; they are helped by party whips who maintain communication between the leadership and the members of the House. Legislative proposals (termed "bills" prior to enactment as "statutes") introduced by members in the House of Representatives are received by the standing committees which can amend, expedite, delay, or kill the bills. The committee chairmen attain their positions on the basis of seniority. Among the most important House committees are those on Appropriations, Foreign Affairs, Ways and Means, and Rules.

69. Each house of Congress has the power to introduce legislation on any subject, except that revenue bills must originate in the House of Representatives. Each house can vote against legislation passed by the other house. Often, a conference committee made up of members from both houses must work out a compromise acceptable to both houses before a bill becomes law.

The role of committees

70. One of the major characteristics of the Congress is the dominant role committees play in its proceedings. Committees have assumed their present-day importance by evolution, not design, as the Constitution makes no provision for their establishment. At present, the Senate has 16 standing committees; the House of Representatives has 22. The Houses share a number of joint committees, such as the Joint Committee on Taxation, and each also has a number of special and select committees. Each specializes in specific areas of legislation and governmental activity, such as foreign affairs, defence, banking, agriculture, commerce, appropriations and other fields. Every bill introduced in either house is referred to a committee for study and recommendation. The committee may approve, revise, reject or ignore any

measure referred to it. It is nearly impossible for a bill to reach the House or Senate floor without first winning committee approval. In the House, a petition to discharge a bill from committee requires the signatures of 218 members; in the Senate, a majority of all members is required. In practice, such discharge motions rarely receive the required support.

71. The majority party in each house controls the committee process. Committee chairs are selected by a caucus of members of the majority party in that house or by specially designated groups of members. Minority parties are proportionately represented in the committees according to their strength in each house.

72. Bills are developed by a variety of methods. Some are drawn up by standing committees, some by special committees created to deal with specific legislative issues, and some are suggested by the President or other executive branch officers. Citizens and organizations outside the Congress may suggest legislation to members, and individual members themselves may initiate bills. Each bill must be sponsored by at least one member of the house in which it is introduced. After introduction, bills are sent to designated committees which may schedule a series of public hearings to permit presentation of views by persons who support or oppose the legislation. The hearing process, which can last several weeks or months, opens the legislative process to public participation.

73. When a committee has acted favourably on a bill, the proposed legislation may then be brought to the floor for open debate. In the Senate, the rules permit virtually unlimited debate. In the House, because of the large number of members, the Rules Committee usually sets limits. When debate is ended, members vote to approve the bill, defeat it, table it (set it aside), or return it to committee. A bill passed by one house is sent to the other for action. If the bill is amended by the second house, the bill may return to the first house for another vote, or a conference committee composed of members of both houses may attempt to reconcile the differences.

74. Once passed by both houses, the bill is sent to the President, who must act on the bill for it to become law. The President generally has the option of signing the bill, in which case it becomes law, or vetoing it. A bill vetoed by the President must be reapproved by a two thirds vote of both houses in order to become law. If the President refuses either to sign or veto a bill, it becomes law without his signature 10 days after it reaches him (not including Sundays). The single exception to this rule is when Congress adjourns after sending a bill to the President and before the 10-day period has expired; the President’s refusal to take any action then negates the bill - a process known as the "pocket veto".

Congressional powers of oversight and investigation

75. Among the most important functions of the Congress are oversight and investigation. Oversight functions include reviewing the effectiveness of laws already passed and assessing their implementation by the executive branch, as well as inquiring into the qualifications and performance of members and officials of the other branches. In addition, investigations are conducted to gather information on the need for future legislation. Frequently, committees call on outside (non-governmental) experts to assist in conducting investigative hearings and to make detailed studies of issues.

76. There are important corollaries to the powers of oversight and investigation. One is the power to publicize the proceedings and their results. Most committee hearings are open to the public and are widely reported in the mass media. Congressional hearings thus represent one important tool available to lawmakers to inform the citizenry and arouse public interest in national issues. A second power is to compel testimony from unwilling witnesses and to cite for contempt of Congress witnesses who refuse to testify, and for perjury those who give false testimony.

3. The judicial branch

77. The third branch of the federal government, the judiciary, consists of a system of courts headed by the Supreme Court of the United States and including subordinate courts throughout the country. The federal judicial power includes cases arising under the Constitution, laws, and treaties of the United States; admiralty and maritime cases; cases affecting ambassadors, ministers and consuls of foreign countries in the United States; controversies in which the United States Government is a party; and controversies between States (or their citizens) and foreign nations (or their citizens and subjects). In practice the vast majority of litigation in federal courts is based on federal law or involves disputes between citizens of different States under the courts' "diversity" jurisdiction.

78. The power of the federal courts extends both to civil actions for money damages and other forms of redress, and to criminal cases arising under federal law. Article III of the Constitution establishes the Supreme Court of the United States and gives Congress the power to establish other federal courts as needed. Under Article I, Congress also has the power to establish courts; Article I courts include territorial courts, certain District of Columbia courts, courts martial, and legislative courts and administrative agency adjudicative procedures.

79. The Constitution safeguards judicial independence by providing that federal judges shall hold office "during good behaviour" - in practice, until they die, retire, or resign, although a judge who commits an offence while in office may be impeached in the same way as the President or other officials of the federal government. Federal judges are appointed by the President and confirmed by the Senate. Altogether, there are approximately 1,000 federal judges, and the federal judiciary employs some 28,000 people.

The Supreme Court

80. The Supreme Court is the highest court of the United States and the only one specifically created by the Constitution. A decision of the Supreme Court cannot be appealed to any other court. Congress has the power to fix the number of judges sitting on the Court (currently a Chief Justice and eight Associate Justices) and, within limits, to decide what kind of cases it may hear, but it cannot change the powers given to the Supreme Court by the Constitution itself.

81. The Supreme Court has original jurisdiction (i.e. the authority to hear cases directly rather than on appeal) in only two kinds of cases: those involving foreign dignitaries, and those in which a State is a party. All other cases reach the Supreme Court on appeal from lower federal courts or

from the various State courts. The right of appeal is not automatic in all cases, however, and the Supreme Court exercises considerable discretion in selecting the cases it will consider. A significant amount of the work of the Supreme Court consists of determining whether legislation or executive acts conform to the Constitution. This power of judicial review is not expressly provided for by the Constitution. Rather, it is a doctrine inferred by the Court from its reading of the Constitution, and stated in the landmark case of Marbury v. Madison, 5 United States (1 Cranch) 137 (1803). In that case, the Court held that "a legislative act contrary to the Constitution is not law", and observed that "it is emphatically the province and duty of the judicial department to say what the law is". The doctrine of judicial review also covers the activities of State and local governments.

82. Decisions of the Court need not be unanimous; a simple majority prevails, provided at least six Justices participate in the decision. In split decisions, the Court usually issues both a majority and a minority or dissenting opinion, both of which may form the basis for future decisions by the Court. Often Justices will write separate concurring opinions when they agree with a decision, but for reasons other than those given by the majority.

Courts of appeals and district courts

83. The second highest level of the federal judiciary is made up of the courts of appeals. The United States is currently divided into 12 appellate circuits, each served by a court of appeals. The courts of appeals have appellate jurisdiction over decisions of the district courts (trial courts with federal jurisdiction) within their respective geographic areas. They are also empowered to review orders of the independent regulatory agencies, such as the Federal Trade Commission, in cases where the internal review mechanisms of the agencies have been exhausted and there still exists substantial disagreement over legal issues. There is also a thirteenth court of appeals, which hears appeals from certain courts with specialized jurisdiction. Approximately 180 judges sit on the various courts of appeals.

84. Below the courts of appeals are the federal district courts. The 50 States are divided into 89 districts so that litigants may have a trial within easy reach. Additionally, there are district courts in the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and the territories of Guam and the Virgin Islands. Congress fixes the boundaries of the districts according to population, size, and volume of work. Some States (such as Alaska, Hawaii, Idaho and Vermont) constitute a district by themselves, while the larger States (such as New York, California and Texas) have four districts each. In total, there are approximately 650 federal district judges.

Courts with specialized jurisdiction

85. In addition to the federal courts of general jurisdiction, it has been necessary from time to time to set up courts for special purposes. Perhaps the most important of these special courts is the United States Court of Federal Claims, established in 1855 to render judgment on monetary claims against the United States. Other special courts include United States Tax Court, the Court of Veterans Appeals, and the Court of International Trade, which has exclusive jurisdiction over civil actions involving taxes or quotas on imported goods.

Military courts

86. A separate system exists for military justice. Members of the military are subject to the Uniform Code of Military Justice for disciplinary matters. Cases of alleged criminal conduct are investigated, and when substantiated are resolved, in appropriate forums ranging from nonjudicial punishment to one of three types of courts martial. In a trial by court martial, an accused is accorded the full range of constitutional rights, including representation by a qualified defense counsel at no charge to the individual. Any court martial that results in a sentence of confinement for a year or more, discharge from the service or capital punishment is automatically reviewed by the relevant court of military review for the concerned service. Those courts, which are composed of senior military (and sometimes civilian) attorneys serving as judges, examine the records of trial for both factual and legal error. Decisions can be appealed to the court of military appeals, on which five civilian judges sit. Adverse decisions can be further reviewed by the Supreme Court of the United States on a discretionary basis.

Relationship between federal and State courts

87. Over the course of the nation's history, a complex set of relationships between State and federal courts has arisen. Ordinarily, federal courts do not hear cases arising under the laws of individual States. However, some cases over which federal courts have jurisdiction may also be heard and decided by State courts. Both court systems thus have exclusive jurisdiction in some areas and concurrent jurisdiction in others. Taking into account that there are 50 separate State court systems, which often include subordinate judicial bodies (e.g., county and city courts), as well as the judicial systems of the insular areas, the District of Columbia and other nonstate entities, there are over 2,000 courts with general jurisdiction and approximately 18,000 judicial districts of either general or limited jurisdiction in the United States. Many States have large numbers of courts with very limited jurisdiction, such as New York (which has 2300 town and village justice courts) and Texas (which has approximately 850 municipal courts and 920 justice of the peace courts).

C. The State Governments

88. The governments of the 50 States have structures closely paralleling those of the federal government, each with a constitution and executive, legislative, and judicial branches. The State governor acts as the head of the executive, but not all States bestow the same amount of power upon their governors; some are quite powerful, others less so. All State legislatures have two houses, except Nebraska's, which is unicameral. The size of State legislatures varies widely; the largest include those in New Hampshire (424 representatives), Pennsylvania (253), and Georgia (236), while the smallest are found in Nebraska (49) and Alaska (60). Most State judicial systems mirror the federal system, with lower trial courts, appellate courts, and a court of last resort. States and insular areas divide relatively evenly among those that elect their judges (22), those that appoint judges (16 including the District of Columbia and four of the insular areas), and those where judges are initially appointed and subsequently run on a retention ballot (18 including Guam).

89. The power of State government is vast. Essentially, each State is a sovereign entity, free to promulgate and enforce policy and law that pertain exclusively to that State, limited under the Constitution only to the extent that the relevant authority has been delegated to the federal government. The power of a State and its cities and localities to regulate its own general welfare has traditionally been termed the "police power." Besides enforcement of criminal laws, the police power encompasses agriculture and conservation, highway and motor vehicle supervision, public safety and correction, professional licensing, regulation of intrastate business and industry, and broad aspects of education, public health, and welfare. The interpretation of a State's constitution falls exclusively within the domain of that State's own court system. Only where there is direct conflict with federal law or the federal Constitution, or where the federal government has "pre-empted" the field, can State law be overridden or invalidated. The retention of most aspects of governmental authority at the State and local levels generally serves to keep that authority in the hands of the people.

90. Distribution of authority between the States and the federal government has historically been among the most basic dynamics of the federal system. Although the powers of Congress are limited, and those powers not expressly delegated to the federal government are reserved to the States or to the people, the twentieth century has seen increasingly broad judicial interpretation of the national legislative power. Today there is an abundance of federal legislation, touching on many areas which 100 years ago would have been exclusively considered a State concern. One beneficial result of this expansion of federal authority, especially in the latter half of this century, has been the increased protection of individual rights and freedoms, especially in the area of civil and political rights.

D. Other governmental levels

91. A significant number of United States citizens and/or nationals live in areas outside the 50 States and yet within the political framework and jurisdiction of the United States. They include people living in the District of Columbia, American Samoa, Puerto Rico, the United States Virgin Islands, Guam, the Northern Marianas, and the remaining islands of the Trust Territory of the Pacific. The governmental framework in each is largely determined by the area's historical relationship to the United States and the will of its residents.

92. The District of Columbia was established at the founding of the Republic to serve as the home of the nation's capital outside of any State. In 1783 the Continental Congress voted to establish a federal city; the specific site was chosen by President George Washington in 1790. Congress moved to the District from Philadelphia in 1800, and the District remains the seat of the federal government today. Originally, Maryland and Virginia donated land for the District. The land donated by Virginia was given back in 1845 and the District now covers 179.2 km^2 located on the west central edge of Maryland, along the eastern bank of the Potomac River. Residents of the District, numbering some 600,000, are United States citizens and have been entitled to vote in presidential elections since 1964. Residents elect a delegate to the United States Congress as well as a mayor and a city council with authority to levy its own taxes. The United States Congress retains final authority in a

number of important areas, including the District's laws and budget. Whether the District should be admitted to statehood remains an issue of active public debate.

93. American Samoa is an unincorporated territory of the United States, acquired in 1900 and 1904 through Deeds of Cession executed by its Chiefs, and ratified by Congress in 1929. Residents are United States nationals who do not vote in federal elections; they are, however, represented by an elected nonvoting delegate in the House of Representatives. Fundamental rights are guaranteed by both the United States Constitution and the territorial constitution. American Samoa is under the general administrative supervision of the Department of the Interior; none the less, American Samoa has been self governing since 1978, with an elected governor and lieutenant governor and bicameral legislature (Senate and House of Representatives). American Samoa also has its own high court and five district courts.

94. Puerto Rico has been a United States territory since 1899 and is currently a self-governing commonwealth freely associated with the United States. Puerto Ricans have been citizens of the United States since 1917; however, they cannot vote in presidential elections. Residents elect the Commonwealth's "resident commissioner" to the United States House of Representatives. Puerto Rico has a popularly elected chief executive (governor), a bicameral legislature, and a judicial branch consisting of a Supreme Court and lesser courts. There is also a federal district court. The federal government conducts foreign relations for Puerto Rico and has responsibility for defence, the post office, customs, and certain agricultural activities. The future relationship of Puerto Rico and the United States continues to be a matter of vigorous public debate. Most recently, in November 1993, through a nonbinding plebiscite, the citizens of Puerto Rico chose to retain the commonwealth arrangement, although nearly as much support was voiced for statehood. By comparison, a small minority of approximately 5 per cent sought independence.

95. The United States Virgin Islands are an unincorporated territory of the United States. They were acquired from Denmark in 1917; residents are United States citizens who do not vote in federal elections. Since 1973, they have been represented by an elected delegate in the House of Representatives. Residents elect their chief executives, the governor and lieutenant governor, as well as the 15 members of their unicameral legislature. There is a federal judicial district for the United States Virgin Islands, whose judge is appointed by the United States President.

96. Guam is an unincorporated territory of the United States, acquired by the United States in 1899 after the Spanish-American War and administered by the Navy until 1950. Residents of Guam are United States citizens who do not vote in federal elections; since 1972, they have been represented by a delegate in the House of Representatives. The territory is under the general administrative supervision of the Department of the Interior. The residents elect their own governor, lieutenant governor, and unicameral legislature. The district court of Guam operates within jurisdiction very similar to a United States district court.

97. The Northern Marianas are a self-governing commonwealth in political union with the United States. Formerly part of the Trust Territory of the Pacific Islands assigned to the United States by the United Nations in 1947, the Northern Marianas became self-governing in 1976. Residents are United States citizens. They do not participate in federal elections but do vote for their popularly elected governor, lieutenant governor, and bicameral legislature. Residents maintain control over domestic affairs; the United States Government provides for defence and foreign affairs. The Northern Marianas adopted this governmental form in a United Nations referendum in 1975.

98. Two other areas formerly encompassed within the Trust Territory of the Pacific Islands include the Federated States of Micronesia, a federation including Pohnpei, Kosrae, Chuuk and Yap, and the Republic of the Marshall Islands. Both are now independent, sovereign nations in free association with the United States. The sole remaining entity of the Trust Territory is the Republic of Palau, consisting of 200 islands in the Caroline Island chain. The majority of the population of 15,000 lives on the main island of Koror. Palau has been self-governing since the adoption of its constitution in 1980. In November 1993 the citizens of Palau ratified a compact of free association negotiated with the United States in 1986, which should soon lead to the termination of the Trusteeship and independence for Palau.

III. GENERAL FRAMEWORK FOR THE PROTECTION OF HUMAN RIGHTS

A. Legal framework

99. The essential guarantees of human rights and fundamental freedoms within the United States are set forth in the Constitution and statutes of the United States, as well as the constitutions and statutes of the several States and other constituent units. In practice, the enforcement of these guarantees ultimately depends on the existence of an independent judiciary with the power to invalidate acts by the other branches of government which conflict with those guarantees. Maintenance of a republican form of government with vigorous democratic traditions, popularly elected executives and legislatures, and the deep-rooted legal protection of freedoms of opinion, expression and the press, all contribute to the protection of fundamental rights against governmental limitation and encroachment.

United States Constitution

100. Since the Constitution was ratified in 1789, there have been 27 amendments to it. Amending the Constitution requires approval by two thirds of the Congress, or by a national convention, followed by ratification by three quarters of the States. The first 10 amendments, known collectively as the Bill of Rights, were added in 1791. These amendments provide for the basic protection of those individual rights which are fundamental to the democratic system of government. They remain at the heart of the United States legal system today, just as they were written two centuries ago, although the specific rights they guarantee have been extensively elaborated by the judiciary over the course of time. Individuals may assert these rights against the government in judicial proceedings.

101. The First Amendment guarantees freedom of worship, speech and press, the right of peaceful assembly, and the right to petition the government to correct wrongs. The Second Amendment restricts the federal government from infringing on the right of citizens to keep and bear arms, bearing in mind the necessity for a "well regulated militia". The Third Amendment provides that troops may not be quartered in a private home without the owner's consent. The Fourth Amendment guards against unreasonable searches, arrests and seizures of persons and property.

102. The next four amendments deal with the system of justice. The Fifth Amendment forbids trial for a major crime except after indictment by a grand jury; it prohibits repeated trials for the same offence, forbids punishment without due process of law, and provides that an accused person may not be compelled to testify against him or herself. The Sixth Amendment guarantees a speedy public trial for criminal offences; it requires trial by an unbiased jury, guarantees the right to legal counsel for the accused, and provides that witnesses shall be compelled to attend the trial and testify in the presence of the accused. The Seventh Amendment assures trial by jury in civil cases involving anything valued at more than 20 United States dollars. The Eighth Amendment forbids excessive bail or fines, and cruel or unusual punishment.

103. The last 2 of the first 10 amendments contain very broad statements of constitutional authority. The Ninth Amendment declares that the listing of individual rights is not meant to be comprehensive, and that the people have other rights not specifically mentioned in the Constitution. Importantly, the Tenth Amendment provides that powers not delegated by the Constitution to the federal government, nor prohibited by it to the States, are reserved to the States or the people.

104. Amendments to the Constitution subsequent to the original Bill of Rights cover a wide range of subjects. One of the most far-reaching is the Fourteenth Amendment, by which a clear and simple definition of citizenship was established and broadened guarantees of due process, equal treatment, and equal protection of the law were confirmed. In essence, this amendment, adopted in 1868, has been interpreted to apply the protections of the Bill of Rights to the States. By other amendments, the judicial power of the national government was limited; the method of electing the president was changed; slavery was forbidden; the right to vote was protected against denial because of race, colour, sex or previous condition of servitude; the congressional power to levy taxes was extended to incomes; and the election of United States Senators by popular vote was instituted.

105. The Constitution provides explicitly that it is the "supreme Law of the Land". This clause is taken to mean that when State constitutions or laws passed by State legislatures or laws adopted by the federal government are found to conflict with the Constitution, they have no force or effect. Decisions handed down by the Supreme Court of the United States and subordinate federal courts over the course of two centuries have confirmed and strengthened this doctrine of constitutional supremacy.

State constitutions

106. As indicated above, the protections provided by the federal Constitution and statutes are applicable nationwide, generally providing a minimum standard of guarantees for all persons in the United States. While the law of individual States may therefore offer citizens no less than the protection guaranteed by the Constitution, States may offer greater protection of civil and political rights. During the most intense period of civil and political rights advancement during the past three decades, the federal courts were largely at the forefront. Accordingly, State courts were called upon less frequently to rule on civil rights issues. Gradually, however, some State courts were presented with State constitutional questions regarding human rights and in many cases found that State constitutions provided greater protection than the federal Constitution required. While the extent to which State courts may interpret their constitutions more expansively than the federal Constitution is not settled, the Supreme Court has in fact upheld a State court determination that the right to freedom of expression and petition accorded by the State constitution was broader than the federal First Amendment right. Prune Yard Shopping Center v. Robins, 447 United States 74 (1980) (upholding the California Supreme Court in Robins v. Prune Yard Shopping Center, 592 P.2d 341 (Cal. 1979)).

107. State courts have interpreted their constitutions more expansively than the federal Constitution in a number of areas, including free speech, religious liberty, the provision of government services, and the right to privacy in the home. State constitutions vary widely in length, detail, and similarity to the United States Constitution. As a result, a State court decision, while it may expand upon a right protected by the United States Constitution, may rest on grounds very different from those upon which a similar federal case would be decided.

108. With regard to religious liberty and separation of church and State, both Idaho and Nebraska are examples where the State constitution has been found to require a more rigorous separation of church and State than the First Amendment requires. Based on the State constitution's broad prohibition of governmental assistance to an institution not owned by the State, the Supreme Court of Nebraska found unconstitutional a statute under which public school books were loaned to parochial schools; on similar grounds, the Supreme Court of Idaho struck down a statute authorizing publicly provided transportation of students to nonpublic schools. Gaffney v. State Department of Education, 220 N.W.2d 550 (Neb. 1974); Epeldi v. Engelking, 488 P.2d 860 (Id. 1971). While the United States Supreme Court has ruled that the display of a nativity scene on public property did not violate the Establishment Clause, the California Supreme Court has none the less held that the State constitution's ban on preference for religious sects prohibited the display of a lighted cross on public grounds in celebration of Christmas and Easter. Lynch v. Donnelly, 465 United States 668 (1984); Fox v. City of Los Angeles, 587 P.2d 663 (Cal. 1978).

109. State courts have also interpreted a State right to equal access to government benefits more broadly than the Supreme Court has interpreted a similar federal right. In 1980, the United States Supreme Court held that while women have a right to choose an abortion, they do not have a federal

right to financial support and federal health benefits for obtaining an abortion. Harris v. McRae, 448 United States 297 (1980). The Massachusetts Supreme Judicial Court, in contrast, has held that under the Massachusetts Declaration of Rights, once the State has allocated public funds for child-bearing and health in general, the State must show "genuine indifference" in that allocation and consequently fund abortions as well. Moe v. Secretary of Administration, 417 N.E.2d 387 (Mass. 1981).

110. Similarly, State courts have found that the right to privacy under State law may be far broader than that guaranteed by the penumbra of privacy rights guaranteed by the United States Constitution, as determined by the Supreme Court. The Supreme Court of Alaska, for example, has found a right to use marijuana in the home to be within the State constitution's privacy provisions. See Breese v. State, 501 P.2d 159 (Alas. 1972).

111. Despite these examples, State courts are not uniform in their willingness to find greater protections within the State constitutions than those guaranteed by the federal Government. Termed "judicial federalism", the practice at times has been sharply criticized as an ineffective method for protecting individual rights.

Statutes

112. There is no single statute or mechanism by which basic human rights and fundamental freedoms are guaranteed or enforced in the United States legal system. Rather, domestic law provides extensive protection through enforcement of the constitutional provisions cited above and a variety of statutes which typically provide for judicial and/or administrative remedies.

113. At the federal level, for example, the constitutional protection afforded by the Equal Protection Clause of the Fourteenth Amendment against discrimination by the State governments on the basis of race, colour or national origin has been applied to the federal Government through the Fifth Amendment. It has also been supplemented by a number of specific federal statutes, including the 1866 and 1871 Civil Rights Acts (protecting property rights, freedom to contract, and providing federal remedies for private individuals subjected to unlawful discrimination by persons acting "under colour of law"), the 1964 Civil Rights Act (ensuring equal treatment in places of public accommodation, non-discrimination in federally funded programmes, and non-discrimination in employment), the 1965 Voting Rights Act (invalidating discriminatory voter qualifications), and the 1968 Fair Housing Act (providing the right to be free from discrimination in housing). Similarly, in the area of gender discrimination, individuals benefit from the protections of the Equal Protection Clause, the 1963 Equal Pay Act (equal pay for equal work), the Civil Rights Act of 1964 (non-discrimination in hiring and employment practices and policies), the Education Amendments of 1972 (assuring gender equality in education), the Equal Credit Opportunity Act (equal access and non-discrimination in credit and lending), the Fair Housing Act (non-discrimination in housing, real estate and brokerage), and the Pregnancy Discrimination Act of 1978. Protection against age discrimination is provided by the Age Discrimination in Employment Act of 1967 (prohibiting discrimination in employment against workers or applicants 40 years of age or older). The Civil Rights of Institutionalized Persons Act of 1980 provides

protection to mentally disabled persons in State facilities. Although disabled persons have long been protected against discrimination in the federal service, an important and much broader set of protections was recently added with the enactment of the Americans with Disabilities Act of 1990, which prohibits discrimination against disabled individuals in employment, public accommodations, State and local government services, and public transportation. The Indian Civil Rights Act of 1968 imposes upon tribes such basic requirements as free speech protection, free exercise of religion, due process and equal protection.

114. Most States and large cities have adopted their own statutory and administrative schemes for protecting and promoting basic rights and freedoms. For the most part, State statutory protections mirror those provided by the United States Constitution and federal law. Typically, State constitutions and statutes protect individuals from discrimination in housing, employment, accommodations, credit and education. For example, Minnesota's statute prohibits discrimination in sales, rentals or lease of housing. Minn. Stat. § 363.03 (1992). Massachusetts makes it unlawful to refuse to hire or to discharge someone from employment on discriminatory grounds, or to discriminate in education. Mass. Ann. Laws ch. 151B, § 4; ch. 151C, § 1 (1993). California requires that all persons be "free and equal" in accommodations, advantages, facilities, privileges and services of business establishments. Cal. Civ. Code § 51 (1993). Texas prohibits discrimination in credit or loans. Texas Revised Civil Statutes Annotated art. 5069-207 (1993).

115. To varying extents, States may provide protection exceeding the minimum requirements of federal law. For example, Massachusetts extends its employment discrimination protection to prohibit discrimination on the basis of sexual orientation. Mass. Ann. Laws ch. 151B, § 4 (1993). California's Street Terrorism Enforcement and Protection Act ensures every person freedom from "intimidation, physical harm, and the activities of violent groups and individuals" regardless of race, colour, creed, religion, national origin, sex, age, sexual orientation or handicap. Cal. Pen. Code § 186.21 (1993). Texas forbids discrimination in the provision of emergency medical services. Tex. Health & Safety Code Ann. § 311.02 (1993).

Derogation/states of emergency

116. Neither the Constitution nor the laws of the United States provide for the declaration of a general state of emergency entailing suspension of the normal operations of the Government or permitting derogations from fundamental rights. On the contrary, the basic requirement for a republican form of government, the general functions of the three branches of the federal Government, and most of the fundamental civil and political rights enjoyed by individuals, are all enshrined in the Constitution and thus remain in effect at all times, even during crisis situations.

117. The one exception to this rule concerns the privilege of the writ of habeas corpus. Article I, § 9, cl. 2 of the Constitution states that the privilege shall not be suspended, "unless when in cases of rebellion or invasion the public safety may require it". Congress is considered to hold the authority to suspend the privilege; President Lincoln suspended the

privilege during the Civil War but sought congressional authorization for his actions. Ex Parte Bollman, 8 U.S. (4 Cranch) 74, 101 (1807); Ex Parte Merryman, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861) (Circuit Justice Taney found Lincoln's action invalid). The privilege has been suspended only three other times, each pursuant to an act of Congress.

118. At the national level, there is a general statutory prohibition against the use of the armed forces for domestic law enforcement purposes. However, the President is authorized in limited circumstances to order the use of federal troops to assist State and local authorities in controlling violence and to suppress insurrections and enforce federal law. The President may also declare an emergency with respect to catastrophic domestic situations (for example, in the event of an earthquake, a hurricane, flooding or a drought), thus permitting the federal Government to provide disaster relief and emergency assistance to State and local governments and to the individual victims of the crisis. These laws do not, however, permit the executive branch to interfere with the responsibilities of the legislative or judicial branches of the federal Government or to arrogate the authority of the States.

119. Other statutes permit the President to declare national emergencies with respect to foreign affairs and international economic transactions (thus providing a basis, for example, for implementation of international sanctions imposed by the United Nations Security Council or other competent international authority). While these laws permit the imposition of civil and criminal penalties for prohibited activities, they remain subject to constitutional limitations and do not circumscribe basic human rights or permit interference in the normal functioning of the Government.

120. Under State and local law, the responsible authorities (State governors, city mayors, county executives) are typically permitted to take a wide range of emergency actions pursuant to the general "police power" in order to respond to emergencies (for example, by imposing curfews in cases of civil unrest, establishing quarantines in response to public health concerns, and restricting water usage in the event of drought). While the "police power" is reserved to the States under the Constitution, actions taken pursuant to it may not limit or infringe upon federally protected rights. Individuals thus retain their constitutional protections and human rights at all times and may challenge the exercise of emergency authority in the courts. As a general rule, the exercise of emergency authority by the Government - at any level - is given particularly careful judicial scrutiny when it infringes upon individual rights and liberties. In several notable cases, the United States Supreme Court has invalidated presidential actions taken in emergency situations.

B. Responsible authorities

121. Within the federal Government, all three branches share responsibility for the protection and promotion of fundamental rights under the Constitution and the statutes of the United States. The President is responsible for enforcing the law. Within the Department of Justice, the Civil Rights Division bears principal responsibility for the effective enforcement of federal civil rights laws. These include the various civil rights acts mentioned above as well as specific criminal statutes prohibiting wilful

deprivation of constitutional rights by officials acting with actual or apparent legal authority or through conspiracy, involuntary servitude, and violent interference with federally protected activities. In addition, most other agencies have civil rights sections charged with enforcing civil rights issues within their scope of authority.

122. The United States Commission on Civil Rights, a statutorily established independent agency within the executive branch, collects and studies information on discrimination or denials of equal protection of the laws because of race, colour, religion, sex, age, handicap, national origin or in the administration of justice in such areas as voting rights, enforcement of civil rights laws, and equality of opportunity in education, employment and housing. It also evaluates federal laws and the effectiveness of governmental equal opportunity programmes and serves as a clearing house for civil rights information. The Commission makes findings of fact and recommendations for the President and the Congress but has no independent enforcement authority.

123. The United States Equal Employment Opportunity Commission, also an independent agency within the executive branch, works to eliminate discrimination based on race, colour, religion, sex, national origin, disability or age in all aspects of the employment relationship. The Commission conducts investigations of alleged discrimination, makes determinations based on gathered evidence, attempts conciliation when discrimination has occurred, files lawsuits, and conducts voluntary assistance programmes for employers, unions and community organizations. The Commission has oversight responsibility for all compliance and enforcement activities relating to equal employment opportunity among federal employees and applicants, including discrimination against individuals with disabilities.

124. At the State and local levels, a variety of schemes and mechanisms exist to protect and promote basic rights. At the State level, enforcement responsibility is typically found in the Attorney-General’s Office or in separate civil or human rights offices within the State government or at the county level. Examples include the Massachusetts Commission Against Discrimination, the Illinois Department of Human Rights, the Cook County (Illinois) Human Rights Commission, the California Fair Employment and Housing Department, and the Texas Commission on Human Rights. Many large city governments have also established offices or commissions to address civil rights and discrimination issues. These organizations vary. Some emphasize enforcement of housing and employment anti-discrimination laws. Others facilitate community development and strategies to address human rights issues. Examples include the Boston (Massachusetts) Human Rights Commission, the Chicago (Illinois) Commission on Human Relations, the Los Angeles (California) Human Relations Commission, and the Austin (Texas) Human Rights Commission.

125. Non-governmental organizations also play an important role in ensuring the protection and promotion of human rights within the United States. Professional groups such as the American Bar Association and the various State and local bar associations provide legal expertise as well as forums for the development of considered positions on legal developments and matters of human rights concern. A number of organizations devoted primarily to human rights, including among many others the NAACP Legal Defense and Education Fund,

The Mexican-American Legal Defense Fund, the National Council of La Raza, Amnesty International, Human Rights Watch, the Lawyers' Committee for Human Rights, and the International Human Rights Law Group, are active participants at the national level. Many church and religious groups, as well as organizations representing particular constituencies with particular human rights concerns (such as women, children, the disabled, the indigenous) are actively involved in the consideration and application of laws relating to their constituencies.

C. Remedies

126. United States law provides extensive remedies and avenues for seeking redress for alleged violations of basic rights and fundamental freedoms. The principal method, if administrative remedies are insufficient to produce the desired result, is through recourse to court. A person claiming to have been denied a constitutionally protected right may assert that right directly in a judicial proceeding in State or federal court. In addition, in instances involving "State action" or actions "under colour of State law", the injured party may seek civil damages and injunctive relief against the individual responsible for the denial of rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Federal officials may be sued for damages directly under provisions of the Constitution, subject only to various doctrines of immunity from liability.

127. Many federal statutes specifically provide for enforcement through administrative procedures or by civil actions filed in court. All States have judicial procedures by which official action may be challenged, though the procedure may go by various names (such as "petition for review").

128. Where Congress has so provided, the federal Government may bring civil actions to enjoin acts or patterns of conduct that violate some constitutional rights. This is the case, for example, under the principal civil rights acts discussed above. Thus, the Attorney-General can sue under the Civil Rights of Institutionalized Persons Act to vindicate the rights of persons involuntarily committed to prisons, jails, hospitals, and institutions for the mentally retarded. Similarly, the Voting Rights Act of 1965 authorizes the Attorney-General to bring suit to vindicate the right to vote without discrimination based on race. The federal Government may also prosecute criminally the violations of some civil rights, for example, the denial of due process through the abuse of police power and conspiracies to deny civil rights. The Government may also bring criminal prosecutions against defendants for use of force or threat of force to violate a person's rights.

129. Any person prosecuted under a statute or in conjunction with a governmental scheme (such as jury selection) which he or she believes to be unconstitutional may challenge that statute as part of the defence. This may be done in the context of federal or State prosecutions. Even in civil actions, the defendant may pose a constitutional challenge to the statute that forms the basis of the suit. Any court, from the lowest to the United States Supreme Court, may consider such a claim of unconstitutionality, though normally it must be raised at the earliest opportunity to be considered at all. Detention pursuant to a statute believed to be unconstitutional or as a result of a procedure that allegedly violated a constitutional right may also

be challenged by a writ of habeas corpus in State and/or federal court. To a limited degree, post-conviction relief is also available by State and federal writs of habeas corpus or, in the case of federal convictions, by a motion for relief from a sentence. All States have similar remedies as part of their criminal procedure.

D. Human rights instruments

Multilateral treaties

130. The United States is at present party to the following multilateral human rights instruments:

- Slavery Convention and its amending Protocol;
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery;
- Protocol Relating to the Status of Refugees;
- Inter-American Convention on the Granting of Political Rights to Women;
- Convention on the Political Rights of Women;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- ILO Convention No. 105 concerning the Abolition of Forced Labour;
- International Covenant on Civil and Political Rights.

131. In addition, the United States is moving actively to ratify three other treaties:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the Senate gave advice and consent to ratification in 1990;
- International Convention on the Elimination of All Forms of Racial Discrimination, signed by the United States in 1966, and given advice and consent to ratification in 1994;
- Convention on the Elimination of All Forms of Discrimination against Women.

132. Moreover, the United States has signed but not yet ratified the following multilateral human rights treaties:

- International Covenant on Economic, Social and Cultural Rights;
- American Convention on Human Rights.

133. In addition, the United States has entered into many bilateral treaties (including consular treaties and treaties of friendship, commerce and navigation) which contain provisions guaranteeing various rights and protections to nationals of foreign countries on a reciprocal basis. In some cases, these may be invoked directly in United States courts for that purpose.

Treaties as law

134. Under the Constitution, duly ratified treaties are the supreme law of the land, equal with enacted federal statutes. Accordingly, they displace previously adopted federal law and may be displaced by subsequently adopted federal law to the extent of any inconsistency. As federal law, they also prevail over inconsistent State and local law. Where they touch on matters previously within the purview of State and local government (as opposed to the federal Government), they may also serve to "federalize" the issue, thus affecting the allocation of authority between the States and the central Government.

135. Historically, the prospect that the constitutional treaty power could be used to override or invalidate State and local law generated considerable domestic political controversy, especially when it concerned individual rights. Although it has been recognized that Congress may act under the treaty power when it might not otherwise have the authority to do so (see Missouri v. Holland, 252 U.S. 416 (1920)), reliance upon that power to legislate changes in State and local law has been considered by some to be an interference with the rights of the constituent States reserved to them under the Constitution. Consequently, the expectation has been that any changes to United States law required by treaty ratification will be accomplished in the ordinary legislative process.

136. Also, as a matter of domestic law, treaties as well as statutes must conform to the requirements of the Constitution; no treaty provision will be given effect as United States law if it conflicts with the Constitution. Reid v. Covert, 354 U.S. 1 (1957). Thus, the United States is unable to accept a treaty obligation which limits constitutionally protected rights, as in the case of article 20 of the International Covenant on Civil and Political Rights, which infringes upon freedom of speech and association guaranteed under the First Amendment to the Constitution.

137. Consequently, in giving advice and consent to ratification of a treaty concerning the rights of individuals, Congress must give careful consideration to the specific provisions of the treaty and to the question of consistency with existing State and federal law, both constitutional and statutory. When elements or clauses of a treaty conflict with the Constitution, it is necessary for the United States to take reservations to those elements or clauses, simply because neither the President nor Congress has the power to override the Constitution. In some cases, it has been considered necessary for the United States to state its understanding of a particular provision or undertaking in a treaty, or to make a declaration of how it intends to apply that provision or undertaking.

Implementation

138. In the United States system, a treaty may be "self-executing", in which case it may properly be invoked by private parties in litigation without any implementing legislation, or "non-self-executing", in which case its provisions cannot be directly enforced by the judiciary in the absence of implementing legislation. This distinction derives from the Supreme Court's interpretation of article VI, cl. 2, of the Constitution. The distinction is one of domestic law only; in either case, the treaty remains binding on the United States as a matter of international law. Thus, in the case of human rights treaties, a "non-self-executing" treaty does not, in and of itself, accord individuals a right to seek enforcement of its protections in a domestic court, even though the United States continues to be bound to recognize those protections.

139. So long as it complies with its undertakings and responsibilities under duly ratified treaties, the United States considers that it remains generally free to determine the specific modalities of treaty implementation under domestic law. In other words, unless it has specifically agreed to make the provisions of a given treaty part of the judicially enforceable body of domestic law, the United States may follow the alternatives available to it under its own law for implementing treaty obligations in domestic law.

140. When necessary to carry out its treaty obligations, the United States generally enacts implementing legislation rather than relying on a treaty to be "self-executing". Thus, for example, to implement the Genocide Convention, the United States Congress adopted the Genocide Convention Implementation Act of 1987, codified at 18 U.S.C. §§ 1091-93. When such legislation is required, the United States will not deposit its instrument of ratification until the necessary legislation has been enacted. It is for this reason, for example, that the United States has refrained from depositing its instrument of ratification for the Torture Convention, even though the Senate gave its advice and consent to ratification of that treaty in 1990. Implementing legislation was only approved by the Congress and enacted by the President in May 1994.

141. However, the United States does not believe it necessary to adopt implementing legislation when domestic law already makes adequate provision for the requirements of the treaty. Again, the Torture Convention provides a case in point. While final ratification awaited enactment of legislation giving United States courts criminal jurisdiction over extraterritorial acts of torture which had not previously been covered by United States law, no new implementing legislation was proposed with respect to torture within the United States because United States law at all levels already prohibited acts of torture within the meaning of the Convention. Similarly, because the basic rights and fundamental freedoms guaranteed by the International Covenant on Civil and Political Rights (other than those to which the United States took a reservation) have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. That important human rights treaty was accordingly ratified in 1992 shortly after the Senate gave its advice and consent.

IV. INFORMATION AND PUBLICITY

142. Information concerning human rights treaties is readily available to any interested person in the United States. All treaties, including human rights treaties, to which the United States is a party are published by the federal Government, first in the Treaties and International Agreements Series (TIAS) and thereafter in the multi-volume United States Treaties (UST) series. Annually, the Department of State publishes a comprehensive listing of all treaties to which the United States is a party, known as Treaties in Force (TIF). The constitutional requirement that the Senate give advice and consent to ratification of all treaties ensures that there is a public record of its consideration, typically including a formal transmission of the treaty from the President to the Senate, a record of the Senate Foreign Relations Committee's public hearing and the Committee's report to the full Senate, together with the action of the Senate itself.

143. The texts of all human rights treaties (whether or not the United States has ratified) can also be readily obtained from the Government or virtually any public or private library, as they have been published in numerous non-governmental compilations and are also available in major computerized databases. The United Nations Compilation of International Instruments on Human Rights (ST/HR/1) is also widely available.

144. Although there is no national educational curriculum in the United States, instruction in fundamental constitutional, civil and political rights occurs throughout the educational system, from grammar and secondary school, through the college and university levels. Most institutions of higher education, public and private, include courses on constitutional law in their departments of political science or government. Constitutional law is a required subject in law school curricula, and most law schools now offer advanced or specialized instruction in the area of civil and political rights, non-discrimination law and related fields. Nearly every law school curriculum includes instruction in international law including basic human rights law. Several textbooks have been published in the field, including documentary supplements which contain the texts of the more significant human rights instruments. The numerous non-governmental human rights advocacy groups in the United States, which operate freely, also contribute to public awareness and understanding of domestic and international rights and norms.

145. With particular respect to the International Covenant on Civil and Political Rights, the original transmittal of the treaty to the Senate was published in 1978 (Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, 95th Cong., 2d Sess., Exec. E, 23 Feb. 1978). The record of Senate consideration has also been published (see Hearing before the Senate Committee on Foreign Relations, 102d Cong., 1st Sess., 21 Nov. 1991, S. Hrg. 102-478; Report of the Senate Foreign Relations Committee, Exec. Rept. 102-23, 24 March 1992; 102 Cong. Rec. S4781-4784 (daily ed. 2 April 1992). The full text of the treaty has also been published in the official journal of the federal Government (see 58 Federal Register 45934-45942, No. 167, 31 Aug. 1993). Copies of the Covenant have also been sent to the attorneys-general of each State and constituent unit in the United States, with a request that they be further

distributed to relevant officials. The fact of United States ratification and the text of the treaty have also been brought to the attention of State bar associations. Governmental officials have participated in a number of presentations at academic and professional meetings to highlight the significance of United States ratification.

146. Finally, the advice and input of various non-governmental organizations and other human rights professionals was sought and considered during the preparation of this report, and the report will be given wide distribution to the public and through interested groups such as the bar associations and human rights organizations.

EXHIBIT I

Human Rights Committee, Comments on United States of America, U.N. Doc. CCPR/C/79/Add 50 (1995).

INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS
CCPR/C/79/Add 50
Original: English

HUMAN RIGHTS COMMITTEE
Fifty-third session

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 40 OF THE COVENANT

Comments of the Human Rights Committee

United States of America [1]

1. The Committee considered the initial report of the United States of America (CCPR/C/81/Add.4 and HRI/CORE/1/Add.49) at its 1401st, 1402nd, 1405th and 1406th meetings held on 29 and 31 March 1995 (CCPR/C/SR.1401-1402 and SR.1405-1406) and adopted [2] the following comments.

A. **Introduction**

2. The Committee expresses its appreciation at the high quality of the report submitted by the State party, which was detailed, informative and drafted in accordance with the guidelines. The Committee regrets, however, that, while containing comprehensive information on the laws and regulations giving effect to the rights provided in the Covenant at the federal level, the report contained few references to the implementation of Covenant rights at the state level.

3. The Committee appreciates the participation of a high-level delegation which included a substantial number of experts in various fields relating to the protection of human rights in the country. The detailed information provided by the delegation in its introduction of the report, as well as the comprehensive and well-structured replies provided to questions raised by members, contributed to making the dialogue extremely constructive and fruitful.

4. The Committee notes with appreciation that the Government gave publicity to its report, thus enabling non-governmental organizations to become aware of its contents and to make known their particular concerns. In addition, a number of representatives of these organizations were present during the Committee's examination of the report.

B. **Factors and difficulties affecting the implementation of the Covenant**

5. The Committee notes that, despite the existence of laws outlawing discrimination, there persist within society discriminatory attitudes and prejudices based on race or gender. Furthermore, the effects of past discriminations in society have not yet been fully eradicated. This makes it difficult to ensure the full enjoyment of the rights

provided for under the Covenant to everyone within the State party's jurisdiction. The rise in crime and violence also affects the enjoyment of the rights provided in the Covenant.

6. The Committee also notes that under the federal system prevailing in the United States, the States of the Union retain extensive jurisdiction over the application of criminal and family law in particular. This factor, coupled with the absence of formal mechanisms between the federal and state levels to ensure appropriate implementation of the Covenant rights by legislative or other measures may lead to a somewhat unsatisfactory application of the Covenant throughout the country.

C. **Positive aspects**

7. The Committee recognizes the existence at the federal level of effective protection of human rights available to individuals under the Bill of Rights and Federal laws. The Committee notes with satisfaction the rich tradition and the constitutional framework for the protection of human rights and freedoms in the United States.

8. The Committee notes with satisfaction that the United States has recently ratified or acceded to some international human rights instruments, including the Covenant, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Racial Discrimination. These ratifications reflect a welcome trend towards acceptance of international scrutiny, supervision and control of the application of universal human rights norms at the domestic level.

9. The Committee welcomes the efforts of the Federal Government to take measures at the legislative, judicial and administrative levels to ensure that the States of the Union provide human rights and fundamental freedoms. It further appreciates the expression of readiness by the government to take such necessary further measures to ensure that the States of the Union implement the rights guaranteed by the Covenant.

10. The Committee notes with satisfaction that the first understanding made at the time of ratification in relation to the principle of non-discrimination is construed by the Government as not permitting distinctions which would not be legitimate under the Covenant.

11. The Committee takes note of the position expressed by the delegation that, notwithstanding the non-self-executing declaration of the United States, American courts are not prevented from seeking guidance from the Covenant in interpreting American law.

12. The Committee further notes with satisfaction the assurances of the Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United Sates.

D. **Principal subjects of concern**

13. The Committee has taken note of the concerns addressed by the delegation in writing to its Chairman about the Committee's General Comment No.24(52) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto (CCPR/C/21/Rev.1/Add.6). Attention is drawn to the observations made by the Chairman of the Committee at the 1406th meeting, on 31 March 1995 (CCPR/C/SR.1406).

14. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

15. The Committee regrets that members of the Judiciary both at the federal, state and local levels have not been fully made aware of the obligations undertaken by the State party under the Covenant, and that judicial continuing education programmes do not include knowledge of the Covenant and discussion on its

implementation. Whether or not courts of the United States eventually declare the Covenant to be non-self-executing, information about its provisions should be provided to the judiciary.

16. The Committee is concerned about the excessive number of offenses punishable by the death penalty in a number of States, the number of death sentences handed down by courts, and the long stay on death row which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain States. It also deplores provisions in the legislation of a number of States which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.

17. The Committee is concerned at the reportedly large number of persons killed, wounded or subjected to ill-treatment by members of the police force in the purported discharge of their duties. It also regrets the easy availability of firearms to the public and the fact that federal and State legislation is not stringent enough in that connection to secure the protection and enjoyment of the right to life and security of the individual guaranteed under the Covenant.

18. The Committee is concerned that excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely. The situation of a number of asylum-seekers and refugees is also a matter of concern to the Committee.

19. The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject matter jurisdiction of a state party even when outside that state territory.

20. The Committee is concerned about conditions of detention of persons deprived of liberty in federal or state prisons, particularly with regard to planned measures which would lead to further overcrowding of detention centres. The Committee is also concerned at the practice which allows male prison officers access in women detention centres and which has led to serious allegations of sexual abuse of women and the invasion of their privacy. The Committee is particularly concerned at the conditions of detention in certain maximum security prisons which are incompatible with article 10 of the Covenant and run counter to the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials.

21. The Committee is concerned that, in some states, non-therapeutic research may be conducted on minors or mentally-ill patients on the basis of surrogate consent, in violation of the provisions in article 7 of the Covenant.

22. The Committee is concerned at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.

23. The Committee is concerned about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the Covenant and welcomes the efforts of a number of states in the adoption of a merit-selection system. It is also concerned about the fact that in many rural areas justice is administered by unqualified and untrained persons. The Committee also notes the lack of effective measures to ensure that indigent defendants in serious criminal proceedings, particularly in state courts, are represented by competent counsel.

24. The Committee welcomes the significant efforts made in ensuring to everyone the right to vote but is concerned at the considerable financial costs that adversely affect the right of persons to be candidates at elections.

25. The Committee is concerned that aboriginal rights of Native Americans may, in law, be extinguished by Congress. It is also concerned by the high incidence of poverty, sickness and alcoholism among Native Americans, notwithstanding some improvements achieved with the Self-Governance Demonstration Project.

26. The Committee notes with concern that information provided in the core document reveals that disproportionate numbers of Native Americans, African Americans, Hispanics and single parent families headed by women live below the poverty line and that one in four children under 6 live in poverty. It is concerned that poverty and lack of access to education adversely affect persons belonging to these groups in their ability to enjoy rights under the Covenant on the basis of equality.

E. **Suggestions and recommendations**

27. The Committee recommends that the State party review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to article 6, paragraph 5, and article 7 of the Covenant.

28. The Committee hopes that the Government of the United States will consider becoming a party to the first Optional Protocol to the Covenant.

29. The Committee recommends that appropriate inter-federal and state institutional mechanisms be established for the review of existing as well as proposed legislation and other measures with a view to achieving full implementation of the Covenant, including its reporting obligations.

30. The Committee emphasizes the need for the government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action. State legislation which is not yet in full compliance with the non-discrimination articles of the Covenant should be brought systematically into line with them as soon as possible.

31. The Committee urges the State party to revise the federal and State legislation with a view to restricting the number of offenses carrying the death penalty strictly to the most serious crimes, in conformity with article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were 18. The Committee considers that the determination of methods of execution must take into account the prohibition against causing avoidable pain and recommends the State party to take all necessary steps to ensure respect of article 7 of the Covenant.

32. The Committee urges the state party to take all necessary measures to prevent any excessive use of force by the police; that rules and regulations governing the use of weapons by the police and security forces be in full conformity with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; that any violations of these rules be systematically investigated in order to bring those found to have committed such acts before the courts; and those found guilty be punished and the victims be compensated. Regulations limiting the sale of firearms to the public should be extended and strengthened.

33. The Committee recommends that appropriate measures be adopted as soon as possible to ensure to excludable aliens the same guarantees of due process as are available to other aliens and guidelines be established which would place limits on the length of detention of persons who cannot be deported.

34. The Committee expresses the hope that measures be adopted to bring conditions of detention of persons deprived of liberty in federal of state prisons in full conformity with article 10 of the Covenant. Legislative, prosecutorial and judicial policy in sentencing must take into account that overcrowding in prisons causes violation of article 10 of the Covenant. Existing legislation that allows male officers access to women's quarters should be amended so as to provide at least that they will always be accompanied by women officers. Conditions of detention in prisons, in particular in maximum security prisons, should be scrutinized with a view to guaranteeing that persons deprived of their liberty be treated with humanity and with respect for the inherent

dignity of the human person, and implementing the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials therein. Appropriate measures should be adopted to provide speedy and effective remedies to compensate persons who have been subjected to unlawful or arbitrary arrests as provided in article 9, paragraph 5, of the Covenant.

35. The Committee recommends that further measures be taken to amend any federal or State regulation which allow, in some States, non-therapeutic research to be conducted on minors or mentally-ill patients on the basis of surrogate consent.

36. The Committee recommends that the current system in a few states in the appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body.

37. The Committee recommends that steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished. The Committee urges the government to ensure that there is a full judicial review in respect of determinations of federal recognition of tribes. The Self-Governance Demonstration Project and similar programmes should strengthened to continue the fight the high incidence of poverty, sickness and alcoholism among Native Americans.

38. The Committee expresses the hope that, when determining whether currently permitted affirmative action programmes for minorities and women should be withdrawn, the obligation to provide Covenant's rights in fact as well as in law be borne in mind.

39. The Committee recommends that measures be taken to ensure greater public awareness of the provisions of the Covenant and that the legal profession as well as judicial and administrative authorities at federal and State levels be made familiar with these provisions in order to ensure their effective application.

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notes

1 Consistent with the practice of the Committee, Mr. Buergenthal, National of the United States of America, did not take part in the adoption of these comments.

2 At its 1413rd meeting (fifty-third session), held on 6 April 1995

EXHIBIT J

CCPR General Comment No. 6: Article 6 (Right to Life)

Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982

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

2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.

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

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

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

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

7. The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.

EXHIBIT K

United Nations CCPR/C/USA/CO/4

International Covenant on Civil and Political Rights

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Human Rights Committee

Concluding observations on the fourth periodic report of the United States of America*

1. The Committee considered the fourth periodic report of the United States of America (CCPR/C/USA/4 and Corr.1) at its 3044th, 3045th and 3046th meetings (CCPR/C/SR.3044, 3045 and 3046), held on 13 and 14 March 2014. At its 3061st meeting (CCPR/C/SR.3061), held on 26 March 2014, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the fourth periodic report of the United States of America and the information presented therein. It expresses appreciation for the opportunity to renew its constructive dialogue with the State party's high-level delegation, which included representatives of state and local governments, on the measures taken by the State party during the reporting period to implement the provisions of the Covenant. The Committee is grateful to the State party for its written replies (CCPR/C/USA/Q/4/Add.1) to the list of issues (CCPR/C/USA/Q/4), which were supplemented by the oral responses provided by the delegation during the dialogue, and for the additional information that was provided in writing.

B. Positive aspects

3. The Committee notes with appreciation the many efforts undertaken by the State party and the progress made in protecting civil and political rights. The Committee welcomes in particular the following legislative and institutional steps taken by the State party:

(a) Full implementation of article 6, paragraph 5, of the Covenant in the aftermath of the Supreme Court's judgment in *Roper* v. *Simmons*, 543 U.S. 551 (2005), despite the State party's reservation to the contrary;

* Adopted by the Committee at its 110th session (10–28 March 2014).

(b) Recognition by the Supreme Court in *Boumediene* v. *Bush*, 553 U.S. 723 (2008) of the extraterritorial application of constitutional habeas corpus rights to aliens detained at Guantánamo Bay;

(c) Presidential Executive Orders 13491 – Ensuring Lawful Interrogations, 13492 – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities and 13493 – Review of Detention Policy Options, issued on 22 January 2009;

(d) Support for the United Nations Declaration on the Rights of Indigenous Peoples, announced by President Obama on 16 December 2010;

(e) Presidential Executive Order 13567 establishing a periodic review of detainees at the Guantánamo Bay detention facility who have not been charged, convicted or designated for transfer, issued on 7 March 2011.

C. Principal matters of concern and recommendations

Applicability of the Covenant at national level

4. The Committee regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State party has only limited avenues to ensure that state and local governments respect and implement the Covenant, and that its provisions have been declared to be non-self-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2).

The State party should:

(a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extraterritorial application of the Covenant under certain circumstances, as outlined, inter alia, in the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant;

(b) Engage with stakeholders at all levels to identify ways to give greater effect to the Covenant at federal, state and local levels, taking into account that the obligations under the Covenant are binding on the State party as a whole, and that all branches of government and other public or governmental authorities at every level are in a position to engage the responsibility of the State party (general comment. No. 31, para. 4);

(c) Taking into account its declaration that provisions of the Covenant are non-self-executing, ensure that effective remedies are available for violations of the Covenant, including those that do not, at the same time, constitute violations of the domestic law of the United States of America, and undertake a review of such areas with a view to proposing to Congress implementing legislation to fill any legislative gaps. The State party should also consider acceding to the Optional Protocol to the Covenant, providing for an individual communication procedure.

(d) Strengthen and expand existing mechanisms mandated to monitor the implementation of human rights at federal, state, local and tribal levels, provide them with adequate human and financial resources or consider establishing an independent national human rights institution, in accordance with the principles relating to the

status of national institutions for the promotion and protection of human rights (the Paris Principles) (General Assembly resolution 48/134, annex).

(e) Reconsider its position regarding its reservations and declarations to the Covenant with a view to withdrawing them.

Accountability for past human rights violations

5. The Committee is concerned at the limited number of investigations, prosecutions and convictions of members of the Armed Forces and other agents of the United States Government, including private contractors, for unlawful killings during its international operations, and the use of torture or other cruel, inhuman or degrading treatment or punishment of detainees in United States custody, including outside its territory, as part of the so-called "enhanced interrogation techniques". While welcoming Presidential Executive Order 13491 of 22 January 2009 terminating the programme of secret detention and interrogation operated by the Central Intelligence Agency (CIA), the Committee notes with concern that all reported investigations into enforced disappearances, torture and other cruel, inhuman or degrading treatment committed in the context of the CIA secret rendition, interrogation and detention programmes were closed in 2012, resulting in only a meagre number of criminal charges being brought against low-level operatives. The Committee is concerned that many details of the CIA programmes remain secret, thereby creating barriers to accountability and redress for victims (arts. 2, 6, 7, 9, 10 and 14).

The State party should ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established. The State party should also consider the full incorporation of the doctrine of "command responsibility" in its criminal law and declassify and make public the report of the Senate Special Committee on Intelligence into the CIA secret detention programme.

Racial disparities in the criminal justice system

6. While appreciating the steps taken by the State party to address racial disparities in the criminal justice system, including the enactment in August 2010 of the Fair Sentencing Act and plans to work on reforming mandatory minimum sentencing statutes, the Committee continues to be concerned about racial disparities at different stages in the criminal justice system, as well as sentencing disparities and the overrepresentation of individuals belonging to racial and ethnic minorities in prisons and jails (arts. 2, 9, 14 and 26).

The State party should continue and step up its efforts to robustly address racial disparities in the criminal justice system, including by amending regulations and policies leading to racially disparate impact at the federal, state and local levels. The State party should ensure the retroactive application of the Fair Sentencing Act and reform mandatory minimum sentencing statutes.

Racial profiling

7. While welcoming plans to reform the "stop and frisk" programme in New York City, the Committee remains concerned about the practice of racial profiling and surveillance by law enforcement officials targeting certain ethnic minorities and the surveillance of Muslims, undertaken by the Federal Bureau of Investigation (FBI) and the New York Police Department (NYPD), in the absence of any suspicion of wrongdoing (arts. 2, 9, 12, 17 and 26).

The State party should continue and step up measures to effectively combat and eliminate racial profiling by federal, state and local law enforcement officials, inter alia, by:

(a) Pursuing the review of its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies and expanding protection against profiling on the basis of religion, religious appearance or national origin;

(b) Continuing to train state and local law enforcement personnel on cultural awareness and the inadmissibility of racial profiling; and

(c) Abolishing all "stop and frisk" practices.

Death penalty

8. While welcoming the overall decline in the number of executions and the increasing number of states that have abolished the death penalty, the Committee remains concerned about the continuing use of the death penalty and, in particular, racial disparities in its imposition that disproportionately affects African Americans, exacerbated by the rule that discrimination has to be proven on a case-by-case basis. The Committee is further concerned by the high number of persons wrongly sentenced to death, despite existing safeguards, and by the fact that 16 retentionist states do not provide for compensation for persons who are wrongfully convicted, while other states provide for insufficient compensation. Finally, the Committee notes with concern reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs (arts. 2, 6, 7, 9, 14 and 26).

The State party should:

(a) Take measures to effectively ensure that the death penalty is not imposed as a result of racial bias;

(b) Strengthen safeguards against wrongful sentencing to death and subsequent wrongful execution by ensuring, inter alia, effective legal representation for defendants in death penalty cases, including at the post-conviction stage;

(c) Ensure that retentionist states provide adequate compensation for persons who are wrongfully convicted;

(d) Ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution; and

(e) Consider establishing a moratorium on the death penalty at the federal level and engage with retentionist states with a view to achieving a nationwide moratorium.

The Committee also encourages the State party to consider acceding to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, on the occasion of the 25th anniversary of the Protocol.

Targeted killings using unmanned aerial vehicles (drones)

9. The Committee is concerned about the State party's practice of targeted killings in extraterritorial counter-terrorism operations using unmanned aerial vehicles (UAV), also known as "drones", the lack of transparency regarding the criteria for drone strikes, including the legal justification for specific attacks, and the lack of accountability for the

loss of life resulting from such attacks. The Committee notes the State party's position that drone strikes are conducted in the course of its armed conflict with Al-Qaida, the Taliban and associated forces in accordance with its inherent right of national self-defence, and that they are governed by international humanitarian law as well as by the Presidential Policy Guidance that sets out standards for the use of lethal force outside areas of active hostilities. Nevertheless, the Committee remains concerned about the State party's very broad approach to the definition and geographical scope of "armed conflict", including the end of hostilities, the unclear interpretation of what constitutes an "imminent threat", who is a combatant or a civilian taking direct part in hostilities, the unclear position on the nexus that should exist between any particular use of lethal force and any specific theatre of hostilities, as well as the precautionary measures taken to avoid civilian casualties in practice (arts. 2, 6 and 14).

The State party should revisit its position regarding legal justifications for the use of deadly force through drone attacks. It should:

(a) Ensure that any use of armed drones complies fully with its obligations under article 6 of the Covenant, including, in particular, with respect to the principles of precaution, distinction and proportionality in the context of an armed conflict;

(b) Subject to operational security, disclose the criteria for drone strikes, including the legal basis for specific attacks, the process of target identification and the circumstances in which drones are used;

(c) Provide for independent supervision and oversight of the specific implementation of regulations governing the use of drone strikes;

(d) In armed conflict situations, take all feasible measures to ensure the protection of civilians in specific drone attacks and to track and assess civilian casualties, as well as all necessary precautionary measures in order to avoid such casualties;

(e) Conduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible;

(f) Provide victims or their families with an effective remedy where there has been a violation, including adequate compensation, and establish accountability mechanisms for victims of allegedly unlawful drone attacks who are not compensated by their home governments.

Gun violence

10. While acknowledging the measures taken to reduce gun violence, the Committee remains concerned about the continuing high numbers of gun-related deaths and injuries and the disparate impact of gun violence on minorities, women and children. While commending the investigation by the United States Commission on Civil Rights of the discriminatory effect of the "Stand Your Ground" laws, the Committee is concerned about the proliferation of such laws which are used to circumvent the limits of legitimate self-defence in violation of the State party's duty to protect life (arts. 2, 6 and 26).

The State Party should take all necessary measures to abide by its obligation to effectively protect the right to life. In particular, it should:

(a) Continue its efforts to effectively curb gun violence, including through the continued pursuit of legislation requiring background checks for all private firearm transfers, in order to prevent possession of arms by persons recognized as prohibited individuals under federal law, and ensure strict enforcement of the Domestic Violence Offender Gun Ban of 1996 (the Lautenberg Amendment); and

(b) Review the Stand Your Ground laws to remove far-reaching immunity and ensure strict adherence to the principles of necessity and proportionality when using deadly force in self-defence.

Excessive use of force by law enforcement officials

11. The Committee is concerned about the still high number of fatal shootings by certain police forces, including, for instance, in Chicago, and reports of excessive use of force by certain law enforcement officers, including the deadly use of tasers, which has a disparate impact on African Americans, and use of lethal force by Customs and Border Protection (CBP) officers at the United States-Mexico border (arts. 2, 6, 7 and 26).

The State Party should:

(a) Step up its efforts to prevent the excessive use of force by law enforcement officers by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;

(b) Ensure that the new CBP directive on the use of deadly force is applied and enforced in practice; and

(c) Improve reporting of violations involving the excessive use of force and ensure that reported cases of excessive use of force are effectively investigated; that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions; that investigations are re-opened when new evidence becomes available; and that victims or their families are provided with adequate compensation.

Legislation prohibiting torture

12. While noting that acts of torture may be prosecuted in a variety of ways at both the federal and state levels, the Committee is concerned about the lack of comprehensive legislation criminalizing all forms of torture, including mental torture, committed within the territory of the State party. The Committee is also concerned about the inability of torture victims to claim compensation from the State party and its officials due to the application of broad doctrines of legal privilege and immunity (arts. 2 and 7).

The State party should enact legislation to explicitly prohibit torture, including mental torture, wherever committed, and ensure that the law provides for penalties commensurate with the gravity of such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. The State party should ensure the availability of compensation to victims of torture.

Non-refoulement

13. While noting the measures taken to ensure compliance with the principle of non-refoulement in cases of extradition, expulsion, return and transfer of individuals to other countries, the Committee is concerned about the State party's reliance on diplomatic assurances that do not provide sufficient safeguards. It is also concerned at the State party's position that the principle of non-refoulement is not covered by the Covenant, despite the Committee's established jurisprudence and subsequent State practice (arts. 6 and 7).

The State party should strictly apply the absolute prohibition against refoulement under articles 6 and 7 of the Covenant; continue exercising the utmost care in evaluating diplomatic assurances, and refrain from relying on such assurances where it is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries; and take appropriate remedial action when assurances are not fulfilled.

Trafficking and forced labour

14. While acknowledging the measures taken by the State party to address the issue of trafficking in persons and forced labour, the Committee remains concerned about cases of trafficking of persons, including children, for purposes of labour and sexual exploitation, and criminalization of victims on prostitution-related charges. It is concerned about the insufficient identification and investigation of cases of trafficking for labour purposes and notes with concern that certain categories of workers, such as farm workers and domestic workers, are explicitly excluded from protection under labour laws, thus rendering those categories of workers more vulnerable to trafficking. The Committee is also concerned that workers entering the United States of America under the H-2B work visa programme are also at a high risk of becoming victims of trafficking and/or forced labour (arts. 2, 8, 9, 14, 24 and 26).

The State party should continue its efforts to combat trafficking in persons, inter alia, by strengthening its preventive measures, increasing victim identification and systematically and vigorously investigating allegations of trafficking in persons, prosecuting and punishing those responsible and providing effective remedies to victims, including protection, rehabilitation and compensation. The State party should take all appropriate measures to prevent the criminalization of victims of sex trafficking, including child victims, insofar as they have been compelled to engage in unlawful activities. The State party should review its laws and regulations to ensure full protection against forced labour for all categories of workers and ensure effective oversight of labour conditions in any temporary visa programme. It should also reinforce its training activities and provide training to law enforcement and border and immigration officials, as well as to other relevant agencies such as labour law enforcement agencies and child welfare agencies.

Immigrants

15. The Committee is concerned that under certain circumstances mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the Covenant. It is also concerned about the mandatory nature of the deportation of foreigners, without regard to elements such as the seriousness of crimes and misdemeanors committed, the length of lawful stay in the United States, health status, family ties and the fate of spouses and children staying behind, or the humanitarian situation in the country of destination. Finally, the Committee expresses concern about the exclusion of millions of undocumented immigrants and their children from coverage under the Affordable Care Act and the limited coverage of undocumented immigrants and immigrants residing lawfully in the United States for less than five years by Medicare and Children Health Insurance, all resulting in difficulties for immigrants in accessing adequate health care (arts. 7, 9, 13, 17, 24 and 26).

The Committee recommends that the State party review its policies of mandatory detention and deportation of certain categories of immigrants in order to allow for individualized decisions; take measures to ensure that affected persons have access to legal representation; and identify ways to facilitate access to adequate health care, including reproductive health-care services, by undocumented immigrants and immigrants and their families who have been residing lawfully in the United States for less than five years.

Domestic violence

16. The Committee is concerned that domestic violence continues to be prevalent in the State party, and that ethnic minorities, immigrants, American Indian and Alaska Native women are at particular risk. The Committee is also concerned that victims face obstacles to obtain remedies, and that law enforcement authorities are not legally required to act with

due diligence to protect victims of domestic violence and often inadequately respond to such cases (arts. 3, 7, 9 and 26).

The State party should, through the full and effective implementation of the Violence against Women Act and the Family Violence Prevention and Services Act, strengthen measures to prevent and combat domestic violence and ensure that law enforcement personnel appropriately respond to acts of domestic violence. The State party should ensure that cases of domestic violence are effectively investigated and that perpetrators are prosecuted and sanctioned. The State party should ensure remedies for all victims of domestic violence and take steps to improve the provision of emergency shelter, housing, child care, rehabilitative services and legal representation for women victims of domestic violence. The State party should also take measures to assist tribal authorities in their efforts to address domestic violence against Native American women.

Corporal punishment

17. The Committee is concerned about corporal punishment of children in schools, penal institutions, the home and all forms of childcare at federal, state and local levels. It is also concerned about the increasing criminalization of students to deal with disciplinary issues in schools (arts. 7, 10 and 24).

The State party should take practical steps, including through legislative measures, where appropriate, to put an end to corporal punishment in all settings. It should encourage non-violent forms of discipline as alternatives to corporal punishment and should conduct public information campaigns to raise awareness about its harmful effects. The State party should also promote the use of alternatives to the application of criminal law to address disciplinary issues in schools.

Non-consensual psychiatric treatment

18. The Committee is concerned about the widespread use of non-consensual psychiatric medication, electroshock and other restrictive and coercive practices in mental health services (arts. 7 and 17).

The State party should ensure that non-consensual use of psychiatric medication, electroshock and other restrictive and coercive practices in mental health services is generally prohibited. Non-consensual psychiatric treatment may only be applied, if at all, in exceptional cases as a measure of last resort where absolutely necessary for the benefit of the person concerned, provided that he or she is unable to give consent, and for the shortest possible time without any long-term impact and under independent review. The State party should promote psychiatric care aimed at preserving the dignity of patients, both adults and minors.

Criminalization of homelessness

19. While appreciating the steps taken by federal and some state and local authorities to address homelessness, the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of discrimination and cruel, inhuman or degrading treatment (arts. 2, 7, 9, 17 and 26).

The State party should engage with state and local authorities to:

(a) Abolish the laws and policies criminalizing homelessness at state and local levels;

(b) Ensure close cooperation among all relevant stakeholders, including social, health, law enforcement and justice professionals at all levels, to intensify

efforts to find solutions for the homeless, in accordance with human rights standards; and

(c) Offer incentives for decriminalization and the implementation of such solutions, including by providing continued financial support to local authorities that implement alternatives to criminalization, and withdrawing funding from local authorities that criminalize the homeless.

Conditions of detention and use of solitary confinement

20. The Committee is concerned about the continued practice of holding persons deprived of their liberty, including, under certain circumstances, juveniles and persons with mental disabilities, in prolonged solitary confinement and about detainees being held in solitary confinement in pretrial detention. The Committee is furthermore concerned about poor detention conditions in death-row facilities (arts. 7, 9, 10, 17 and 24).

The State party should monitor the conditions of detention in prisons, including private detention facilities, with a view to ensuring that persons deprived of their liberty are treated in accordance with the requirements of articles 7 and 10 of the Covenant and the Standard Minimum Rules for the Treatment of Prisoners. It should impose strict limits on the use of solitary confinement, both pretrial and following conviction, in the federal system as well as nationwide, and abolish the practice in respect of anyone under the age of 18 and prisoners with serious mental illness. It should also bring the detention conditions of prisoners on death row into line with international standards.

Detainees at Guantánamo Bay

21. While noting the President's commitment to closing the Guantánamo Bay facility and the appointment of Special Envoys at the United States Departments of State and of Defense to continue to pursue the transfer of designated detainees, the Committee regrets that no timeline for closure of the facility has been provided. The Committee is also concerned that detainees held in Guantánamo Bay and in military facilities in Afghanistan are not dealt with through the ordinary criminal justice system after a protracted period of over a decade, in some cases (arts. 7, 9, 10 and 14).

The State party should expedite the transfer of detainees designated for transfer, including to Yemen, as well as the process of periodic review for Guantánamo detainees and ensure either their trial or their immediate release and the closure of the Guantánamo Bay facility. It should end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantánamo and in military facilities in Afghanistan are dealt with through the criminal justice system rather than military commissions, and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant.

National Security Agency surveillance

22. The Committee is concerned about the surveillance of communications in the interest of protecting national security, conducted by the National Security Agency (NSA) both within and outside the United States, through the bulk phone metadata surveillance programme (Section 215 of the USA PATRIOT Act) and, in particular, surveillance under Section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendment Act, conducted through PRISM (collection of communications content from United States-based Internet companies) and UPSTREAM (collection of communications metadata and content by tapping fiber-optic cables carrying Internet traffic) and the adverse impact on individuals' right to privacy. The Committee is concerned that, until recently, judicial interpretations of FISA and rulings of the Foreign Intelligence Surveillance Court (FISC) had largely been kept secret, thus not allowing affected persons to know the law with

sufficient precision. The Committee is concerned that the current oversight system of the activities of the NSA fails to effectively protect the rights of the persons affected. While welcoming the recent Presidential Policy Directive/PPD-28, which now extends some safeguards to non-United States citizens "to the maximum extent feasible consistent with the national security", the Committee remains concerned that such persons enjoy only limited protection against excessive surveillance. Finally, the Committee is concerned that the persons affected have no access to effective remedies in case of abuse (arts. 2, 5 (1) and 17).

The State party should:

(a) Take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance;

(b) Ensure that any interference with the right to privacy, family, home or correspondence is authorized by laws that: (i) are publicly accessible; (ii) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (iii) are sufficiently precise and specify in detail the precise circumstances in which any such interference may be permitted, the procedures for authorization, the categories of persons who may be placed under surveillance, the limit on the duration of surveillance; procedures for the use and storage of data collected; and (iv) provide for effective safeguards against abuse;

(c) Reform the current oversight system of surveillance activities to ensure its effectiveness, including by providing for judicial involvement in the authorization or monitoring of surveillance measures, and considering the establishment of strong and independent oversight mandates with a view to preventing abuses;

(d) Refrain from imposing mandatory retention of data by third parties;

(e) Ensure that affected persons have access to effective remedies in cases of abuse.

Juvenile justice and life imprisonment without parole

23. While noting with satisfaction the Supreme Court decisions prohibiting sentences of life imprisonment without parole for children convicted of non-homicide offences (*Graham* v. *Florida*), and barring sentences of mandatory life imprisonment without parole for children convicted of homicide offences (*Miller* v. *Alabama*) and the State party's commitment to their retroactive application, the Committee is concerned that a court may still, at its discretion, sentence a defendant to life imprisonment without parole for a homicide committed as a juvenile, and that a mandatory or non-homicide-related sentence of life imprisonment without parole may still be applied to adults. The Committee is also concerned that many states exclude 16 and 17 year olds from juvenile court jurisdictions so that juveniles continue to be tried in adult courts and incarcerated in adult institutions (arts. 7, 9, 10, 14, 15 and 24).

The State party should prohibit and abolish the sentence of life imprisonment without parole for juveniles, irrespective of the crime committed, as well as the mandatory and non-homicide-related sentence of life imprisonment without parole. It should also ensure that juveniles are separated from adults during pretrial detention and after sentencing, and that juveniles are not transferred to adult courts. It should encourage states that automatically exclude 16 and 17 year olds from juvenile court jurisdictions to change their laws.

Voting rights

24. While noting with satisfaction the statement by the Attorney General on 11 February 2014, calling for a reform of state laws on felony disenfranchisement, the Committee reiterates its concern about the persistence of state-level felon disenfranchisement laws, its disproportionate impact on minorities and the lengthy and cumbersome voting restoration procedures in states. The Committee is further concerned that voter identification and other recently introduced eligibility requirements may impose excessive burdens on voters and result in de facto disenfranchisement of large numbers of voters, including members of minority groups. Finally, the Committee reiterates its concern that residents of the District of Columbia (D.C.) are denied the right to vote for and elect voting representatives to the United States Senate and House of Representatives (arts. 2, 10, 25 and 26).

The State party should ensure that all states reinstate voting rights to felons who have fully served their sentences; provide inmates with information about their voting restoration options; remove or streamline lengthy and cumbersome voting restoration procedures; as well as review automatic denial of the vote to any imprisoned felon, regardless of the nature of the offence. The State party should also take all necessary measures to ensure that voter identification requirements and the new eligibility requirements do not impose excessive burdens on voters and result in de facto disenfranchisement. The State party should also provide for the full voting rights of residents of Washington, D.C.

Rights of indigenous peoples

25. The Committee is concerned about the insufficient measures taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism and toxic contamination. It is also concerned about the restriction of access of indigenous peoples to sacred areas that are essential for the preservation of their religious, cultural and spiritual practices, and the insufficiency of consultation with indigenous peoples on matters of interest to their communities (art. 27).

The State party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the indigenous communities that might be adversely affected by the State party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for proposed project activities.

26. The State party should widely disseminate the Covenant, the text of its fourth periodic report, the written replies to the list of issues drawn up by the Committee and the present concluding observations among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, as well as the general public.

27. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should provide, within one year, relevant information on its implementation of the Committee's recommendations made in paragraphs 5, 10, 21 and 22 above.

28. The Committee requests the State party to provide in its next periodic report due to be submitted on 28 March 2019 specific, up-to-date information on the implementation of all its recommendations and on the Covenant as a whole. The Committee also requests the State party, when preparing its next periodic report, to continue its practice of broadly consulting with civil society and non-governmental organizations.

EXHIBIT L

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA, MAGISTRATE DIVISION

GERALD ROSS PIZZUTO, JR., Petitioner, v. ASHLEY DOWELL, EXECUTIVE DIRECTOR, COMMISSION OF PARDONS & PAROLE; JANIE DRESSEN, COMMISSIONER, COMMISSION OF PARDONS & PAROLE; TERRY KIRKHAM, COMMISSIONER, COMMISION OF PARDONS & PAROLE; MIKE MATTHEWS, COMMISSIONER, COMMISSION OF PARDONS & PAROLE; PATRICK MCDONALD, COMMISSIONER, COMMISSION OF PARDONS & PAROLE; SHELLY PARKER, COMMISSIONER, COMMISSION OF PARDONS & PAROLE; MICHAEL ROSS, COMMISSIONER, COMMISSION OF PARDONS & PAROLE; SCOTT SMITH, COMMISSIONER, COMMISSION OF PARDONS & PAROLE; TIM RICHARDSON, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION Respondents.	Case No. CV01-22-00888 PETITION FOR WRIT OF HABEAS CORPUS CAPITAL CASE

1. Pursuant to the Habeas Corpus and Institutional Litigation Procedures Act, Idaho Code § 19-4201 et seq., Petitioner Gerald Ross Pizzuto, Jr. seeks the writ of habeas corpus because he continues to be treated as a death-row inmate when his death sentences have effectively been commuted to life without the possibility of parole under the state constitution.

2. Mr. Pizzuto is pursuing other avenues for relief based on the same or similar claims to the one asserted here. He is doing so to ensure that his claims are considered on the merits and does not thereby concede that any particular avenue is an improper vehicle for his challenge.

I. Procedural Background

3. Mr. Pizzuto was convicted of two counts of first-degree murder in Idaho County District Court in case number CR-85-22075. He received two death sentences. Judgment was entered on May 27, 1986.

4. In 1991, the Idaho Supreme Court upheld the judgment on direct appeal and affirmed the denial of Mr. Pizzuto's first post-conviction petition. The grounds asserted in those proceedings are described in *State v. Pizzuto*, 810 P.2d 680 (Idaho 1991).

5. The Idaho Supreme Court subsequently denied relief on several successive petitions for post-conviction relief and other collateral challenges to his convictions and sentences. *See Pizzuto v. State*, 484 P.3d 823 (Idaho), *cert. denied*, 142 S. Ct. 601 (2021); *Pizzuto v. State*, 233 P.3d 86 (Idaho 2010); *Rhoades v. State*, 233 P.3d 61 (Idaho 2010); *Pizzuto v. State*, 202 P.3d 642 (Idaho 2008); *Pizzuto v. State*, 10 P.3d 742 (Idaho 2000); *Pizzuto v. State*, 903 P.2d 58 (Idaho 1995). The grounds asserted in those proceedings are described in the opinions cited above.

6. Mr. Pizzuto has also been denied federal habeas relief from his convictions and sentences. *See Pizzuto v. Yordy*, 947 F.3d 510 (9th Cir. 2019) (per curiam); *Pizzuto v. Ramirez*, 783 F.3d 1171 (9th Cir. 2015); *Pizzuto v. Blades*, 673 F.3d 1003 (9th Cir. 2012); *Pizzuto v. Arave*, 386 F.3d 938 (9th Cir. 2004) (per curiam). The grounds asserted in those proceedings are described in the opinions cited above.

7. As a result of the convictions and sentences set forth above, Mr. Pizzuto is incarcerated under sentences of death at the Idaho Maximum Security Institution ("IMSI") in Kuna, Idaho, Ada County, a facility operated by the Idaho Department of Correction ("IDOC").

8. IMSI is located at 13400 S. Pleasant Valley Road, Kuna, Idaho 83634.

9. Mr. Pizzuto is not an out-of-state prisoner.

10. Tim Richardson is the Warden of IMSI.

11. Warden Richardson has custody over Mr. Pizzuto.

12. Warden Richardson is the state officer entrusted with carrying out a death warrant against Mr. Pizzuto and executing him. *See* Idaho Code § 19-2715(4).

13. This Court has jurisdiction over the petition under Idaho Code § 19-4202(2).

14. Ashley Dowell is the Executive Director of the Idaho Commission of Pardons and Parole ("the Commission").

15. Janie Dressen is a Commissioner on the Commission.

16. Terry Kirkham is a Commissioner on the Commission.

17. Mike Matthews is a Commissioner on the Commission.

18. Patrick McDonald is a Commissioner on the Commission.

19. Shelly Parker is a Commissioner on the Commission.

20. Michael Ross is a Commissioner on the Commission.

21. Scott Smith is a Commissioner on the Commission.

22. The address of the Commission, and thus of all individuals described here associated with the Commission, is 3056 Elder Street, Boise, Idaho 83705.

II. Grounds for Relief

23. Mr. Pizzuto asserts the following ground for relief. He incorporates each paragraph of this petition into every other paragraph.

A. First Ground: Mr. Pizzuto's confinement on death row is unconstitutional because his death sentences were commuted under the state constitution.

24. Mr. Pizzuto's confinement on death row violates Article IV, Section 7 of the Idaho Constitution because his death sentences were commuted as a matter of state law.

1. Supporting Facts

25. On April 19, 2021, Mr. Pizzuto submitted a petition for commutation to the Commission. *See* Ex. 1.[1] The petition asked the Commission to commute Mr. Pizzuto's death sentences to life without the possibility of parole. *See id.*

26. On May 18, 2021, the Commission decided to hold a hearing on Mr. Pizzuto's commutation petition. *See* Ex. 2.

27. The Commission provided advance notice of Mr. Pizzuto's commutation hearing in the Idaho Statesman, a newspaper of general circulation, at least once a week for four months. *See* Ex. 3.

28. The commutation hearing was held on November 30, 2021 at IMSI, with various individuals participating remotely.

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[1] The exhibits attached to this petition are all true and correct copies of the documents they purport to be, and the undersigned have direct knowledge of their contents.

29. After the hearing, the Commission deliberated regarding Mr. Pizzuto's petition.

30. The deliberations continued until the next day, December 1, 2021.

31. The commutation hearing was streamed live on Idaho public television's website.

32. There are seven members of the Commission. *See* Idaho Code § 20-1002(2).

33. The seven members of the Commission are the individuals listed above as Commissioners.

34. At Mr. Pizzuto's commutation hearing, all seven members of the Commission participated.

35. On December 30, 2021, the Commission announced that a four-person majority of its members had voted in favor of commuting Mr. Pizzuto's death sentences to life without the possibility of parole. *See* Ex. 4.

36. Three members dissented. *See* Ex. 4.

37. Both sides explained their rationales in writing. *See* Ex. 4.

38. Pursuant to Idaho Code § 20-1016, the Commission characterized its determination as a recommendation to the Governor and forwarded the decision to him on December 30, 2021. *See* Ex. 5.

39. On the same day, the Governor purported to "deny the Commission's recommendation." *See* Ex. 6.

40. On information and belief, Executive Director Dowell has not filed a copy of a commutation of Mr. Pizzuto's death sentences with the Idaho Secretary of State.

41. Executive Director Dowell has not provided an original commutation to Mr. Pizzuto.

42. On information and belief, Executive Director Dowell has not filed notice with the state courts that a commutation has been granted in the case.

43. On information and belief, neither the Commission nor any of its agents have taken any measures to formalize Mr. Pizzuto's commutation or recognize that his death sentences have been effectively reduced to life without the possibility of parole.

44. Instead, the Commission has taken the position that its vote on Mr. Pizzuto's commutation petition only represented a recommendation to the Governor and not a final determination.

45. IDOC continues to treat Mr. Pizzuto as a death-row inmate in all respects.

46. Death row in Idaho is typified by isolation.

47. For instance, death-row inmates in IDOC's custody live by themselves in single cells.

48. Such inmates typically spend twenty-three hours a day in their cells and are let out only to shower, have "recreation," and for other limited exceptions, such as medical appointments.

49. The "recreation" that is afforded to a death-row inmate generally involves an hour outside, by himself, with no exercise equipment and, at most, something along the lines of a soccer ball.

50. In addition, death-row inmates have no access to programming made available to other IMSI prisoners, including educational and vocational opportunities.

51. Death-row inmates also have no ability to work at jobs within the prison, such as in the kitchen or in the laundry, which other prisoners do.

52. Death-row inmates are limited to a single face-to-face visit per year, other than with their legal team.

53. For every other visit the inmates have, they are separated from their visitor by glass.

54. Prisoners who are not on death row are allowed to have more face-to-face visits with friends, family, spiritual advisors, and so forth.

55. IDOC has a policy in place (control number 319.02.01.002) that purports to create a framework for regularly reviewing the security classification, housing conditions, and working opportunities applicable to inmates under sentence of death.

56. However, in practice, on information and belief, no IMSI inmate under sentence of death is ever given a meaningful review.

57. Instead, every IMSI inmate under sentence of death is indefinitely maintained under the restrictive conditions described above without regard to their disciplinary records, health status, psychological assessments, and so forth.

58. On information and belief, if Mr. Pizzuto were not treated as a death-row inmate by IDOC, he would—like other such prisoners—be given a meaningful review and a meaningful opportunity to become eligible for different conditions, such as increased socialization, more programming, less time restricted to his cell, working opportunities, etc.

2. Timeliness

59. Under Idaho Code § 19-2719(5), a successive post-conviction petition is only permitted where the inmate establishes that he is raising the claims within forty-two days of when he "knew or reasonably should have known of" them. *Pizzuto*, 202 P.3d at 649.

60. "Any remedy available by . . . habeas corpus . . . must be pursued . . . within the time limitations" of § 19-2719. Idaho Code § 19-2719(4).

61. The claim in this petition is based on the Commission's decision regarding Mr. Pizzuto's commutation petition, which was not made until December 30, 2021.

62. This petition is being filed within forty-two days of December 30, 2021, the time when Mr. Pizzuto knew or reasonably should have known of his claim.

63. Therefore, the petition is timely.

3. Legal Basis for Relief

64. Article IV, Section 7 of the Idaho Constitution (sometimes referred to here as "Section 7") places the commutation power exclusively in the hands of the Commission.

65. The commutation criteria in Section 7 were all satisfied in Mr. Pizzuto's case.

66. That is, a majority of the Commission's members voted to commute Mr. Pizzuto's death sentences to life without the possibility of parole.

67. In addition, the Commission had a full hearing in open session on Mr. Pizzuto's commutation hearing after providing the requisite public notice.

68. Finally, the Commission members in the majority and the dissent both reduced the reasons for their votes to writing.

69. Because the commutation requirements in Section 7 were all met, the Commission's determination legally reduced Mr. Pizzuto's death sentences to life without the possibility of parole.

70. Under Section 7, the Governor had no authority to overrule the Commission's determination.

71. Section 7 gives the Governor no role to play in deciding who receives or does not receive commutations.

72. Rather, it is the Commission alone that has the commutation power under Section 7.

73. Section 7 is the only part of the Idaho Constitution addressing commutations.

74. In Section 7, the only power given to the Governor is to grant respites or reprieves in certain cases.

75. Such respites cannot extend beyond the next session of the Commission.

76. At such session, the Commission determines whether it will commute the offense.

77. In other words, under Section 7, the Governor is involved in commutations only when he issues a respite or reprieve, and it is still the Commission that ultimately commutes the offense or elects not to.

78. Thus, under Section 7, the Governor has one narrow function: to postpone an execution.

79. Every step taken to commute a sentence rests with the Commission.

80. Idaho Code § 20-1016 did not justify the Governor's intervention in Mr. Pizzuto's clemency proceedings because the statute is unconstitutional under Section 7.

81. Section 20-1016(2) purports to provide that, with respect to death-eligible offenses, the Commission's "determination shall only constitute a recommendation subject to approval or disapproval by the [G]overnor."

82. It is unconstitutional for § 20-1016 to condition commutations on the Governor's approval when Section 7 confers the commutation power solely on the Commission.

83. That is especially so when Section 7 expressly gives the Governor only the authority to grant respites and reprieves, with the commutation power residing exclusively with the Commission.

84. Section 20-1016's purported conversion of the Commission into a mere recommending body and the Governor into the actual commuting authority likewise violates Section 7.

85. Because § 20-1016 conflicts with and violates the state constitution, it cannot be legally enforced in Mr. Pizzuto's case.

86. As a result, the Governor's intervention in Mr. Pizzuto's commutation proceeding was unlawful, and his veto void.

87. Section 7 states that the Commission is to grant commutations "only as provided by statute."

88. However, this clause did not permit the legislature to insert an entirely different actor (the Governor) into a process left by the Constitution in the hands of a particular agency (the Commission).

89. In context, the "only as provided" language merely confirms that the legislature is entitled to regulate the process by which the Commission exercises its power, not to take that power and give it to someone else.

90. Because Mr. Pizzuto's death sentences were commuted under Section 7, the conditions of his confinement as a death-row inmate violate the state constitution. *See* Idaho Code § 19-4203(2)(a).

91. Because Mr. Pizzuto's death sentences were commuted under Section 7, the respondents' continued treatment of him as a death-row inmate constitutes a miscalculation of his sentence. *See* Idaho Code § 19-4203(2)(c).

92. Because Mr. Pizzuto is being held under death-row conditions despite his sentences having been commuted, he is being unlawfully held in restraint under Idaho Code § 19-4901(a)(5).

93. When a commutation is granted, the Executive Director is required by statute to file a copy of the commutation with the Secretary of State, provide an original of the commutation to the petitioner, and file notice with the state courts. *See* Idaho Code § 20-1018.

94. Because Mr. Pizzuto's death sentences were lawfully commuted, Executive Director Dowell was required by statute to file a copy of the commutation with the Secretary of State, provide an original of the commutation to Mr. Pizzuto, and file notice with the state courts. *See* Idaho Code § 20-1018.

95. By refusing to take those steps, Executive Director Dowell is responsible for violating Mr. Pizzuto's constitutional rights. *See* Idaho Code § 19-4205(4)(a).

96. By refusing to recognize that the Commission granted Mr. Pizzuto a final commutation, the Commissioners are responsible for violating Mr. Pizzuto's constitutional rights. *See* Idaho Code § 19-4205(4)(a).

97. By refusing to acknowledge that Mr. Pizzuto no longer has a valid death sentence and by not affording him the conditions that would be afforded to a non-death-sentenced inmate, Warden Richardson is responsible for violating Mr. Pizzuto's constitutional rights. *See* Idaho Code § 19-4205(4)(a).

98. Because Warden Richardson will presumably carry out Mr. Pizzuto's execution if and when a death warrant issued, despite the fact that the death sentence has been commuted, Warden Richardson is responsible for violating Mr. Pizzuto's constitutional rights. *See* Idaho Code § 19-4205(4)(a).

99. The constitutional violation alleged here is occurring at IMSI, where Mr. Pizzuto continues to be treated as a death-row inmate and would be executed, despite the fact that his death sentences were commuted to life under Section 7.

a. Legal Basis For Issuance of Writ of Habeas Corpus

100. Mr. Pizzuto is likely to prevail on the merits of his state constitutional challenge. *See* Idaho Code § 19-4211(2)(b).

101. Mr. Pizzuto will suffer irreparable injury if some relief is not granted, i.e., he will be executed. *See* Idaho Code § 19-4211(2)(c).

102. The balance of potential harm to Mr. Pizzuto substantially outweighs any legitimate governmental interest because he will be executed in the absence of relief and the State has no legitimate interest in treating an inmate as though he still labored under an unconstitutional sentence. *See* Idaho Code § 19-4211(2)(d).

103. Equity favors granting relief to Mr. Pizzuto for the same reasons. *See* Idaho Code § 19-4211(2)(e).

b. Legal Basis For Injunctive Relief

104. Injunction relief is necessary to cure Mr. Pizzuto's unconstitutional conditions of confinement. *See* Idaho Code § 19-4217(2).

105. Such injunctive relief would come in the form of an order that Mr. Pizzuto be removed from the conditions of confinement applicable to inmates under sentence of death and

placed in the conditions applicable to a prisoner with his same convictions and under sentence of life in prison without the possibility of parole.

106. Such injunctive relief would extend no further than necessary to correct the violation of the constitutional right asserted here. *See* Idaho Code § 19-4217(2)(b).

107. Such injunctive relief is the least intrusive means necessary to correct the constitutional violation asserted here. *See* Idaho Code § 19-4217(2)(c).

108. There would be a negligible impact on public safety if such injunctive relief were ordered. *See* Idaho Code § 19-4217(2)(d).

109. Mr. Pizzuto is not a security threat.

110. Mr. Pizzuto is terminally ill with advanced bladder cancer.

111. Mr. Pizzuto has been on hospice care since November 2019 because his life expectancy was calculated by his doctors at that time to be six months or less.

112. Mr. Pizzuto suffers from advanced heart disease and has had several heart attacks and stents.

113. Mr. Pizzuto suffers from type-2 diabetes.

114. Mr. Pizzuto has not been accepting any life-extending medical treatment for months and is only accepting treatment to handle his pain and discomfort.

115. Primarily because of the pain flowing from his cancer, Mr. Pizzuto has been prescribed 160 milligrams of OxyCodone a day by his prison doctor.

116. Eighty milligrams a day of OxyCodone is the amount typically prescribed to a terminal cancer patient.

117. Mr. Pizzuto's OxyCodone prescription has been increased by his prison doctors at least nine separate times.

118. Mr. Pizzuto's OxyCodone prescription reflects the debilitating amount of pain and suffering he experiences on a daily basis and the gravity of his illnesses.

119. Mr. Pizzuto is confined to a wheelchair and can only stand and walk with great difficulty.

120. Mr. Pizzuto has not been accused of committing a physical act of violence in prison for many years, despite regular access to staff members.

121. Mr. Pizzuto has had a minimal disciplinary history in prison, which includes few or no acts of physical violence.

122. Mr. Pizzuto is sixty-six years old.

123. The most recent crime for which Mr. Pizzuto was convicted was committed in 1985, when Mr. Pizzuto was twenty-nine years old.

124. Age greatly decreases the chances of violent behavior.

125. The vast majority of offenders do not commit violent crimes after they have reached the age of Mr. Pizzuto.

126. IMSI houses a number of other inmates who have been convicted of first-degree murder and the prison is capable of maintaining their conditions without creating undue security risks.

127. Mr. Pizzuto is willing to accept conditions of confinement that reasonably reflect the severity of the offenses he was convicted of committing, assuming that he is not treated as a death-row inmate in all respects.

c. Administrative Exhaustion

128. In an abundance of caution, and without conceding that it is required, Mr. Pizzuto has begun to pursue the grievance process within IDOC's administrative system regarding the constitutional violation articulated here.

129. Mr. Pizzuto has not completed the grievance process.

130. But Mr. Pizzuto is not required to exhaust his administrative remedies because he is in imminent danger of serious physical injury since, in the absence of relief, there is a significant likelihood that the State will seek to execute him. *See* Idaho Code § 19-4206(1).

131. Death warrants in Idaho are typically requested in an ex parte fashion, without notice to the inmate or his counsel, and usually signed immediately by the sentencing court. *See* Idaho Code § 19-2715(5).

132. If a death warrant issues, it will set a date for Mr. Pizzuto's execution no more than thirty days in the future. *See* Idaho Code § 19-2715(3).

133. The last time the State sought a death warrant, it obtained one seven days after the final remaining legal impediment was removed, underscoring the imminence of the danger here.

134. There are three tiers of review for IDOC inmates to exhaust their administrative remedies: a concern, a grievance, and an appeal.

135. In the last several years, Mr. Pizzuto has repeatedly pursued administrative exhaustion for claims related to his execution.

136. Despite his diligence, the exhaustion of such a claim has never been accomplished within thirty days.

137. For instance, Mr. Pizzuto exhausted a claim challenging the use of pentobarbital at his execution in the summer of 2021.

138. During that process, IDOC took thirty-eight days just to address Mr. Pizzuto's concern, from the day it was filed to when it was returned.

139. IDOC took another twenty-four days to resolve Mr. Pizzuto's grievance.

140. And it took eighteen days to respond to his appeal.

141. Thus, IDOC took a total of eighty days to deal with Mr. Pizzuto's administrative submissions, not including the reasonable time that Mr. Pizzuto spent preparing the paperwork.

142. IDOC spent that time with the process even though the responding officials refused to even engage with the substance of Mr. Pizzuto's claim at every stage of the administrative proceedings.

143. It would therefore not be reasonable to expect that Mr. Pizzuto would be able to pursue administrative exhaustion here, or to vindicate his right to judicial review after he had done so.

144. Under these circumstances, administrative remedies are effectively unavailable under Idaho Code § 19-4206(1).

145. Finally, the IDOC officials to whom grievances are addressed do not have the authority to reduce Mr. Pizzuto's sentence from death to life without the possibility of parole.

146. Mr. Pizzuto's administrative appeals are resolved by Chad Page, the Chief of the Division of Prisons for IDOC.

147. Mr. Page does not have the authority to change Mr. Pizzuto's sentence.

148. Rather, that modification must be initiated by the Commission, when it recognizes a formal commutation of Mr. Pizzuto's sentence.

149. The Commission does not have an internal administrative process for challenging its decisions. *See* Idaho Code § 19-4206(1).

150. Therefore, administrative remedies are not available in that respect, too. *See* Idaho Code § 19-4206(1).

151. To the extent that Mr. Pizzuto is challenging the calculation of his sentence, his claim is not being pursued "with respect to conditions of confinement," Idaho Code § 19-4206(1), and no exhaustion is necessary.

III. Relief Sought

152. Based on the foregoing, Mr. Pizzuto respectfully prays for the following forms of relief:

a. That the Court grant a writ of habeas corpus without delay and set a hearing as soon as possible under Idaho Code § 19-4211 at a time and place convenient to the Court and the parties.

b. That the Court set a briefing schedule that allows the claims raised here to be fully litigated with the thorough arguments they require in this capital case.

c. That the Court find Mr. Pizzuto's sentences have been miscalculated and order them to be recalculated consistent with the fact that Mr. Pizzuto's death sentences are unconstitutional under Article IV, Section 7. *See* Idaho Code § 19-4214(1).

d. That the Court order Mr. Pizzuto removed from the conditions applicable to inmates under sentence of death and placed under conditions appropriate to an inmate convicted of the same offenses and sentenced to life without the possibility of parole. *See* Idaho Code § 19-4214(2).

e. That the Court hear oral argument on the claim and on any other pleadings that are filed in this case.

f. That the Court, to the extent it is necessary, allow amendment of the petition.

g. That the Court, to the extent it is necessary and to the extent it is unwilling to grant relief on the papers, conduct an evidentiary hearing and, if appropriate, allow for discovery.

h. That the Court order the respondents to take whatever steps are necessary to finalize Mr. Pizzuto's commutation, including by having Executive Director Dowell file a copy of the original commutation with the Secretary of State, provide the original commutation to Mr. Pizzuto, and file notice of the commutation with the state courts.

i. That the Court order Warden Richardson and all of his agents to cease and desist from treating Mr. Pizzuto as a death-row inmate in all regards.

j. That the Court order any other relief that it deems appropriate.

Respectfully submitted this 14th day of January 2022.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Attorney for Petitioner

IV. Verification

I, Gerald Ross Pizzuto, Jr. being duly sworn upon my oath, depose and say that I have subscribed to this petition; that I know the contents of it; and that the matters and allegations set forth are true. I further verify that I am alleging a state constitutional violation concerning the conditions of my confinement and the miscalculation of my sentence.

Gerald R. Pizzuto Jr.
Gerald Ross Pizzuto, Jr.

SUBSCRIBED AND SWORN TO before me this 14th day of January 2022.

GREGORY WORTHEN NOTARY PUBLIC Comm No. 50685 STATE OF IDAHO

NOTARY PUBLIC FOR Ada County

My commission expires: 10/21/25

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January 2022, I caused to be served a true and correct copy of the foregoing document by iCourt File and Serve and U.S. Mail with:

L. LaMont Anderson
Deputy Attorney General
State Mail, Room 10
PO Box 83720
Boise, ID 83720-0010
Lamont.Anderson@ag.idaho.gov

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Deputy Attorney General
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*/s/ L. Hollis Ruggieri*_____
L. Hollis Ruggieri

Exhibit 1

(Petition for Commutation)

FEDERAL DEFENDER SERVICES OF IDAHO

CHARLES PETERSON
EXECUTIVE DIRECTOR

DEBORAH A. CZUBA
SUPERVISING ATTORNEY

CAPITAL HABEAS UNIT
702 W. IDAHO ST., STE. 900
BOISE, IDAHO 83702
(208) 331-5530
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BRUCE D. LIVINGSTON
JONAH HORWITZ
CHRISTOPHER SANCHEZ

April 19, 2021

Ashley Dowell, Executive Director
Idaho Commission of Pardons & Parole
P.O. Box 83720
Boise, Idaho 83720-1807

Re: Gerald Ross Pizzuto, Jr.
IDOC No. 23721

Dear Director Dowell,

Enclosed please find death row inmate Gerald Pizzuto's Petition for Commutation to the Idaho Commission of Pardons & Parole. The Petition is in electronic form as a PDF document on the enclosed thumb drive. Also included on the thumb drive are hyper-linked Exhibits 1 to 31 to the Petition. We are also submitting a hard copy of the Petition without the attached exhibits for your convenience. If you desire a hard copy of the exhibits, we will be happy to provide them to you. However, our understanding from prior discussion with you was that your preference was for an electronic copy that could be easily made available to your commissioners.

In the petition you will see that references to specific exhibits are underlined with a bold blue line. You can click on these hyperlinked exhibit numbers and you will be taken to the supporting documentation. In order to return back to the petition where you left off, click the hyperlinked blue box that reads "Return to the Petition." This box will be at or near the highlighted text in the exhibits.

Your time and consideration of Mr. Pizzuto's Petition is greatly appreciated. Please let me know if you have any questions or if there is other information we can provide in connection with the Petition.

Sincerely,

Deborah Anne Czuba
Supervising Attorney

Enclosure

paroleweb@idoc.idaho.gov
or
P.O. BOX 83720
BOISE, IDAHO 83720-1807
(208) 334-2520

PETITION FOR COMMUTATION

NAME Gerald Ross Pizzuto, Jr. IDOC# 23721

DATE 4/9/2021 INSTITUTION OR DISTRICT SUPERVISED IMSI

A. Please complete the following:

(1) Crime First Degree Murder
Length of Sentence Death Penalty

(2) Crime First Degree Murder
Length of Sentence Death Penalty

(3) Crime _____
Length of Sentence _____

(4) Crime _____
Length of Sentence _____

B. The following must be addressed in your petition or it will be returned.

(1) Explain exactly what you are requesting the Commission commute or change about your sentence, such as: reduce the length of the sentence, change a fixed sentence to indeterminate, or change a consecutive sentence to concurrent, reduce the fixed portion of a sentence, or other.

(2) Explain the reason(s) why you feel the circumstances warrant a change of sentence in your case.

C. You may attach up to 4 additional pages. **All attachments must accompany the petition to be processed and will not be returned to the petitioner.**

D. If you are applying for an **early discharge commutation**, you must complete the following:

Mailing Address: _____

Physical Address: _____

Telephone Number: _____

Message Number: _____

Email Address: _____

NOTE: A petition must be received at the Commission office by the first day of the month preceding a quarterly session. The petition must be typed or will not be considered.

The following witness signature is to acknowledge only that the Petitioner is submitting this Petition:

Petitioner Signature

Case Manager or Supervising Officer Print Name

Case Manager or Supervising Officer Signature

(1) Explain exactly what you are requesting the Commission commute or change about your sentence.

Commutation of two death sentences to two sentences of fixed life (life without parole).

(2) Explain the reasons why you feel the circumstances warrant a change of sentence in your case.

Application for Clemency Hearing and Consideration

"*Your mom and dad are supposed to protect you. They're supposed to feed you, and they're supposed to clothe you, and they're supposed to keep the monsters away from you. But the problem is, sometimes the parents are the monsters."*

Angelinna ("Angie") Pizzuto, Jerry's sister. Exhibit (Ex.) 1.

Jerry Pizzuto was raised by a monster. A monster who raped him. In the shower. In his bed. In a shed in the woods. A monster who beat him. With a cattle prod. With a horse crop. With a 2x4 across the head. A monster who made him eat in the basement, sleep in a doghouse, and have sex with adult men. This monster never paid a price for inflicting all of this torture. Jerry did. Society did. Most of all, Berta Herndon and her nephew Delbert did.

Jerry Pizzuto is not making excuses for the 1986 deaths of Berta and Delbert Herndon. He accepts responsibility for his role in their murders and is remorseful for their deaths. He has carried those regrets for 34 years on death row.

Mr. Pizzuto asks the Commission to grant him a full hearing, to delve deeply into his ghastly childhood, history of brain damage since birth and brain injuries as a boy, as well as his current, terminal health condition. He recognizes the relief he requests is extraordinary, but he asks the Commission to consider the rare and unique constellation of factors in his application. After hearing the evidence, this Commission should commute his sentence to life without parole.

I. Knocking on Death's Door

At 64, Mr. Pizzuto is a frail shell of the man he once was. He has stage 4 cancer and is approaching natural death. He has begun experiencing memory loss and mild disorientation associated with the death process. Ex. 2. In hospice for over a year and confined to a wheelchair, he suffers from terminal bladder cancer, serious heart disease and a bevy of other illnesses that are expected to take his life soon. Ex. 3. His physicians estimated his life expectancy at less than 12 months, as of December 2019. Ex. 4. On March 3, 2021, Mr. Pizzuto's prison doctor noted that he "suspect[ed] . . . some level of metastasis . . . is occurring." Ex. 5. He will likely die very soon.

In addition to the terminal bladder cancer, Mr. Pizzuto has a number of other acute conditions, including chronic heart and coronary artery disease, coronary obstructive pulmonary disease (COPD), and Type 2 diabetes with related nerve damage to his legs and feet. Ex. 3. He has suffered two heart attacks and has four stents around his heart. Ex. 6.

The idea that such a sick, feeble man presents enough of a danger to society that he must be executed is far-fetched. And it is made even more implausible by Mr. Pizzuto's record in prison, which shows that he has not received a single disciplinary write-up in the last ten years. Ex. 7.

Mr. Pizzuto's terminal illness is reason enough for commutation. A number of religious leaders oppose this execution, and his illness is cited by many of them. Ex. 8. His looming death from natural causes makes going forward with his execution an unnecessary exercise, with significant operational and personnel costs for the State.

II. A Tap in the Middle of the Night

Bud Bartholomew often came for his young stepson Jerry in the middle of the night. He'd tap Jerry's head with a flashlight, put a hunting knife to his throat, and the abuse would begin. Ex. 9. Bud savagely beat and raped Jerry. He would string Jerry up in the garage with extension cords and boot laces, tie his hands over his head to a pole, and rape and beat him. Ex. 1.

Jerry was also raped by Bud in the woods, in Bud's car, Ex. 10, and by Bud's buddies. Sometimes Bud charged his friends $10 or $20 to have sex with Jerry and his siblings, depending on what kind of sex was requested. Exs. 11, 12, 13. Bud took nude photos of his step-kids too, sometimes alone, sometimes in sexual positions with each other. Exs. 12, 13.

Bud began physically and sexually assaulting Jerry when he was 5 or 6, not long after Bud and Jerry's mother were married. Jerry first reported the sexual abuse to his aunt. He was walking bowlegged and crying that he had been stung by a bee. Exs. 14, 11. When she asked him to show her, Jerry revealed his testicles, black and blue and swollen. The tip of his penis was bloody. Exs. 14, 11. Jerry's aunt pressed him on whether it was a bee sting and Jerry confided in her that his step-father had done this to him. Ex. 14. Jerry's mother put onion slices on his testicles to reduce the swelling, Ex. 1, but didn't protect her son from further abuse. Ex. 15 at 3, 19.

Bud abused all his step-children, but singled out Jerry for the worst of it. Exs. 12, 13. Jerry would be beaten until he was bleeding, Ex. 16, or unconscious, and many times to the point where he would have convulsions. Exs. 17, 11. Jerry was once "delivered" back to his sister, convulsing, having been beaten from head to toe. Ex. 15 at 4. She was ordered by her step-father

to clean Jerry up, so she and another sibling put Jerry in the bathtub and washed him in cold water. Ex. 15 at 4. He had cuts, bruises, and skin missing from his back. They did not have enough band-aids, so they tore up an old sheet and wrapped Jerry like a mummy. Ex. 15 at 4.

Jerry's sister Elsie remembered that Bud seemed to get "big pleasure" from the abuse, "lining us all up … he'd beat you with the horsewhip once. Whack. Then through the group twice … fifteen … sixteen … twenty-five. You're dropping on the floor unconscious at that point." Ex. 15 at 18–19.

When Jerry was 6, Bud hit him on the back of the head with a 2 x 4 piece of lumber. Ex. 14. He got backhanded across the room once because he didn't know how to tie his shoelaces and let a sister do it for him. Ex. 15 at 2–3. One time Jerry was stabbed with a fork by his step-father for putting his elbows on the table. Ex. 18. Another time, Bud beat Jerry down with a tall metal milk can from the dairy barn. Ex. 15 at 17. Bud also had other tools he liked to use, a cattle prod, a horse crop, a broom, a belt buckle, sticks, or just kicking with his cowboy boots. Ex. 11.

Jerry was also beaten for things his siblings had done. Jerry's step-sister recalled him being beaten across the back with a horse whip until he bled. The infraction—*she* had played with Bud's fountain pens. Ex. 18. The horse whip was a metal bar with leather straps at the end. Exs. 11, 9. It lacerated their arms, legs and backs. Ex. 11.

> *I don't know that we make the right words to describe how bad it was. It was a horrific set of growing up years with physical and sexual and emotional abuse, particularly --- particularly taken out on Mr. Pizzuto.*
>
> *But not only was there horrific abuse that was perpetrated, but just an incredible depersonalization of it. As I understand it, not being able to live in the house, depending on -- different folks indicating either at all or for extended periods, not being allowed to eat with Bartholomew children, just many different ways that not only was the abuse perpetrated, but a real depersonalization that went on.*
>
> *~Dr. Roger Moore, Expert Witness for the State of Idaho, 2010.* Ex. 19.

The children feared or endured violence every day, and never lived long enough, anywhere, as Bud uprooted the family haphazardly, hopscotching from one place to the next to dodge abuse investigations. Ex. 15 at 8, 18, 25–26. The siblings would go to school with noticeable bruises after a night of pounding by Bud. Ex. 15 at 18. When they returned home from school they were told to get in the car, "[e]verything you knew was gone. All you had was the clothes on your back. And you were going off somewhere else, and the whole time you were being drilled on what your new last names were." Ex. 15 at 18.

Bud's emotional abuse added insult to the physical injuries, and he piled it on Jerry more than the others. After raping Jerry, Bud ordered him to go outside and get some chores done. Ex. 15 at 60. Jerry was angry and inconsolable, but managed to get a fire going in a barrel to burn garbage. Ex. 15 at 60. Bud approached holding the teddy bear Jerry had gotten for Christmas. It was Jerry's favorite gift, and a rare source of comfort in his horrible life. Bud taunted him and threw it into the fire, screaming "[y]ou son of a bitch. You like this? You love your Teddy bear? Watch it burn." Ex. 15 at 60.

Angie and Toni, another Pizzuto sister, recalled that the Pizzuto kids were forced to eat in the basement by themselves because they weren't Bud's kids. Exs. 1, 11. Sometimes, they had to sleep outside with the dogs in the dog house, and eat Gravy Train dog food. Ex. 1.

Violence was the rule, not the exception. "Just a day in the life," as Elsie described it. "I don't know that people can really understand that, you know, the daily, daily emotional torture, physical abuse, sexual abuse. [Bud] was just a horrible predator and a really evil man." Ex. 15 at 4. Elsie continued:

> "I just wish that I could convey how really terrible it was. We're not talking about, oh, my dad spanked me last night and maybe hit me once too many times. … It just was an onslaught. … Day after day, night after night. You could be asleep in your bed and be yanked out by your hair in the middle of the night and drug off

> and raped. … And maybe he had a friend there, okay? So then you have to get up the next day and go to school and act like everything is fine. … And you're just a kid trying to get a life, you know. Trying to live. … In particular, he [Jerry] and [our sister] Angelin[n]a." Ex. 15 at 67–68.

The tragedy of Jerry's life is that nobody was able to intervene and save him from the brutality that tortured and broke him as a child, not even his own mother. Ex. 15 at 3, 19. His step-father's ability to avoid punishment, by disappearing to a new town when he sensed trouble from the law, prevented the children from getting the help they desperately needed. As Elsie said, "somebody should have believed and somebody should have stepped up and helped us. … It's not like we didn't ask for it, because we did. … It's just nobody believed you when you were a child, you know." Ex. 15 at 52.

Elsie described the extent and effects of the abuse in her family as comparable to the trauma of war:

> You know, I watched this movie with Marlon Brando, and it was, you know, Vietnam. And they're going off this river, and he goes crazy. … in the end they find him, and he's just babbling to himself, and all he can say is, "The horror. The horror." … And so I look at my brothers and sisters, and I feel like they've been through horror that most people couldn't survive. Ex. 15 at 22.

Unlike veterans of war though, Elsie, Jerry, and their siblings were children. "You hear about veterans that go off to war. Well, we were veterans when we were ten years old." Ex. 15 at 28. While veterans now get help for their PTSD, Jerry received no help and was left to suffer alone with a monster.

III. Behind From The Start

Jerry was the odd kid a lot of adults remember from their own childhood. The one who soiled his pants and didn't seem to notice, or care. The kid who ate dirt, and bugs, was left to play by himself, and got left back in school more than once.

He was born five weeks prematurely, Exs. 14, 20, 21, and a series of brain injuries on top of all the child abuse and trauma helped to further stunt his development. And it stole his ability to fit in, make good decisions, interact with others, and control his behavior.

When Jerry was two and a half years old, he fell down a double flight of stairs into the basement, fractured his skull, and was hospitalized in a coma. Exs. 22, 20, 21. At 14, he was in a serious motorcycle accident. Exs. 21, 23. Paramedics found him unconscious and bleeding from his mouth, lips and nose. Ex. 23. His right frontal sinus region was fractured. Ex. 23. He was hospitalized for three days. Ex. 23.

That accident changed him. Exs. 22, 21. He became more prone to aggressive and violent outbursts, "it was like they took off the stoppers" and "the inhibitions were gone." Ex. 1.

Mr. Pizzuto's brain is damaged. It is smaller than normal, with a higher than usual amount of damaged tissue. Ex. 24. He has deficits in impulse control, language skills, verbal fluency, memory, reasoning and problem solving, and poor decision-making skills. Exs. 22, 25. Jerry has a long history of seizures and organic brain damage that significantly affected his mental capacity and ability to function in everyday life. Ex. 25.

> *My kids were smart enough to wipe their nose. He wasn't. At six, my kids always wiped their nose. And my kids didn't eat dirt and they didn't eat bugs.*
>
> * * *
>
> *Because -- because -- it stands out in my mind so clearly because he would sit and watch, and with the runny nose, stare at the hole. The ants would come out. And he would eat the dirt and it would stick to the snot on his face.*
>
> *Kismet Winslow – Jerry's Aunt.* Ex. 14.

He was slow to learn. He had very basic vocabulary and took a long time to get words out. He preferred to use gestures to get what he wanted and to indicate his needs. Exs. 26, 14. Jerry had difficulty listening, understanding others, and could not follow directions. Ex. 26.

Jerry did poorly in school. He repeated several grades, which was further isolating because he was maturing faster physically than his younger classmates. Ex. 26. In sixth grade, for example, he was growing a mustache. Ex. 27.

At the time, special education was not available. Exs. 26, 27, 28. Despite being older than other students, Jerry performed at the bottom of his class. Exs. 26, 27. Despite failing grades, Jerry was promoted from one grade to the next. Ex. 29. His siblings often had to do his homework for him. Exs. 26, 13.

Socially, Jerry was a quiet kid who had trouble bonding with other kids. Ex. 26. Jerry kept to himself and played by himself – always an outsider to the kids he grew up with, who often didn't want to play with him due to his strangeness. Exs. 26, 16. Jerry's aunt recalled that Jerry's level of play was much lower than that of her children - "[m]y children could not relate to Jerry, and he could not keep up with them. When the other children shunned him, Jerry would either sit alone or come crawl into my lap." Ex. 30.

Jerry could be easily tricked too. Ex. 26. For example, his sister Angie would goad Jerry into grabbing the electric fence on the farm, telling him it was off. Jerry would grab the wire, and get shocked. Then a day or two later, she would repeat the trick and Jerry would fall for it again. Ex. 17.

> *I remember vividly coming into a room and Jerry was standing on a chair in the middle of the room. We had a dangling light socket that came down, kind of on a cord. And I came into the room and he was standing on a chair. And he licked his thumb and stuck his finger in the light socket. It blew him clear across the room.*
>
> *~Elsie Pizzuto Rado, Jerry's sister.* Ex. 17.

Jerry also had problems taking care of his basic needs. Exs. 12, 13, 30. He relied on his younger sisters to groom and feed him. He wore his clothes inside out or backward, and he put his shoes on the wrong feet. Exs. 26, 17. He was always dirty, and he would not bathe unless he was told.

Exs. 26, 14, 16, 31, 17, 13. Sometimes he would forget to put on his shirt, a sock, or a shoe. Ex. 30. When his nose ran, "he did not even appear to be aware of the mucus that ran and caked down his face." Ex. 30. Jerry wet his pants at school and ate dog biscuits. Exs. 26, 14.

I just thought he was slow. He was -- he was slow to grasp things. He was dirty, no matter. I gave him a bath, but he -- if he was engaged in something outside, he would mess his pants and not say a word, and just walk around that way. And then I would catch him and see him, or one of the other kids would tattle that he has messed his pants. So he was just unkempt. He was not a child that you would want to hug a lot.

~Ruth A. Roath, Jerry's aunt. Ex. 31.

Conclusion

Mr. Pizzuto never had a chance in life. He was tortured in unimaginable ways throughout his childhood. Merciless beatings and savage rapes battered and scarred that little boy. No one was there to save Jerry from the unrelenting attacks of his own step-father, a man who should have loved and protected Jerry.

Mr. Pizzuto has been punished substantially for his own crimes, spending every day of the past 34 years —more than half his life— isolated in a tiny cell on death row. The ravages of terminal cancer and heart disease punish him more every day, binding him to a wheelchair, a prisoner of his own failing body. Once a battered and wounded little boy, Jerry is now a dying and broken old man.

While it is too late to save that little boy, it is not too late to show Jerry Pizzuto mercy. He asks that you please grant him a hearing, so he may have the chance to show why mercy and commutation of his death sentence to life without parole is warranted. Let his imminent death from natural causes take him, without going through an unnecessary, expensive, resource-consuming and trauma-inducing execution.

Exhibit 2

(Stipulation for Stay of Execution, filed May 18, 2021, *State v. Pizzuto*, Idaho Cty. Dist. Ct. No. CR-85-22075)

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff, vs. GERALD ROSS PIZZUTO, JR., Defendant.	)	CASE NO. CR-1985-22075 STIPULATION FOR STAY OF EXECUTION

Come Now, Plaintiff, State of Idaho, and the Defendant, Gerald Ross Pizzuto, Jr., by and through undersigned counsel and stipulate and jointly move the Court for its order staying the execution as ordered in the Death Warrant issued by the Court on May 6, 2021,

until completion of the proceedings on Pizzuto's pending commutation petition before the Idaho Commission of Pardons and Parole (Commission).

Today, the Commission held a hearing in executive decision to consider Pizzuto's request for a commutation hearing. Undersigned counsel for the State of Idaho has been informed by counsel for the Commission, Deputy Attorney General Mark A. Kubinski, that the Commission granted Pizzuto's request for a commutation hearing and will schedule that hearing for its November, 2021 hearing session.

Idaho Code § 19-2715(1), provides in pertinent part that "no further stays of execution shall be granted to persons sentenced to death except that a stay of execution shall be granted … as part of a commutation proceeding pursuant to section 20-240, Idaho Code." (emphasis added). Because the Commission has granted Mr. Pizzuto's request for a commutation hearing, the parties stipulate that, pursuant to I.C. § 19-2715(1), this Court must stay the Death Warrant until the conclusion of the commutation proceedings related to Mr. Pizzuto's current commutation petition. The state will obtain a new death warrant setting a new date if it seeks Mr. Pizzuto's execution in the future.

DATED this 18th day of May, 2021.

/s/ L. LaMont Anderson
L. LaMONT ANDERSON

/s/ Jonah. J. Horwitz
JONAH J. HORWITZ

Exhibit 3

(Public Notices of Commutation Hearing, Idaho Statesman)

Notice of Hearing

Published in Idaho Statesman on November 29, 2021

Location

Ada County, Idaho

Notice Text

LEGAL NOTICE
NOTICE OF COMMUTATION HEARING
GERALD R. PIZZUTO
The Idaho Commission of Pardons and Parole will meet as a board of pardons at 8:30 a.m., on Tuesday, November 30th 2021 to consider a request for commutation made by Gerald Pizzuto. Mr. Pizzuto was sentenced on 5/23/1986 for the felony crime of Murder in the First Degree (Two Counts), Case No. 22075, in the County of Idaho. Public access to this hearing will be provided by Idaho Public Television's Idaho in Session. Information to access the streamed proceedings will be available on the Parole Commission website at
www.parole.idaho.gov.
W00000000
Publication Dates

Notice of Hearing

Published in Idaho Statesman on November 22, 2021

Location

Ada County, Idaho

Notice Text

LEGAL NOTICE
NOTICE OF COMMUTATION HEARING
GERALD R. PIZZUTO
The Idaho Commission of Pardons and Parole will meet as a board of pardons at 8:30 a.m., on Tuesday, November 30th 2021 to consider a request for commutation made by Gerald Pizzuto. Mr. Pizzuto was sentenced on 5/23/1986 for the felony crime of Murder in the First Degree (Two Counts), Case No. 22075, in the County of Idaho. Public access to this hearing will be provided by Idaho Public Television's Idaho in Session. Information to access the streamed proceedings will be available on the Parole Commission website at
www.parole.idaho.gov.
W00000000
Publication Dates

Notice of Hearing

Published in Idaho Statesman on November 15, 2021

Location

Ada County, Idaho

Notice Text

LEGAL NOTICE
NOTICE OF COMMUTATION HEARING
GERALD R. PIZZUTO
The Idaho Commission of Pardons and Parole will meet as a board of pardons at 8:30 a.m., on Tuesday, November 30th 2021 to consider a request for commutation made by Gerald Pizzuto. Mr. Pizzuto was sentenced on 5/23/1986 for the felony crime of Murder in the First Degree (Two Counts), Case No. 22075, in the County of Idaho. Public access to this hearing will be provided by Idaho Public Television's Idaho in Session. Information to access the streamed proceedings will be available on the Parole Commission website at
www.parole.idaho.gov.
W00000000
Publication Dates

Notice of Hearing

Published in Idaho Statesman on November 8, 2021

Location

Ada County, Idaho

Notice Text

LEGAL NOTICE
NOTICE OF COMMUTATION HEARING
GERALD R. PIZZUTO
The Idaho Commission of Pardons and Parole will meet as a board of pardons at 8:30 a.m., on Tuesday, November 30th 2021 to consider a request for commutation made by Gerald Pizzuto. Mr. Pizzuto was sentenced on 5/23/1986 for the felony crime of Murder in the First Degree (Two Counts), Case No. 22075, in the County of Idaho. Public access to this hearing will be provided by Idaho Public Television's Idaho in Session. Information to access the streamed proceedings will be available on the Parole Commission website at
www.parole.idaho.gov.
W00000000
Publication Dates

Exhibit 4

(Commutation Decision, Issued December 30, 2021)

STATE OF IDAHO
COMMISSION OF PARDONS AND PAROLE

Brad Little
Governor
Ashley Dowell
Executive Director

IN THE MATTER OF GERALD ROSS PIZZUTO
PETITION FOR COMMUTATION
Idaho County Case No. CR-1985-22075

This matter came before the Commission on November 30, 2021, to consider the request by Mr. Pizzuto to commute his imposed sentences of death to life without possibility of parole. Mr. Pizzuto was convicted of two (2) counts of Murder I in 1986 for the murders of Berta and Del Herndon.

DECISION OF THE MAJORITY

The Commission is recommending by a majority decision that Governor Little grant the commutation of Gerald Ross Pizzuto's two (2) death sentences in Idaho County Case No. CR-1985-22075 to life in prison without the possibility of parole. This decision is not based on any doubt or question about Mr. Pizzuto's guilt or the horrific nature of his crimes. This recommendation is one of mercy due to Mr. Pizzuto's current medical condition and evidence of his decreased intellectual functioning. Mr. Pizzuto suffers from advanced terminal bladder cancer and other major medical conditions that leave him faced with impending death and confined to a wheelchair. The Commission also considered compelling evidence of Mr. Pizzuto's decreased intellectual functioning and deficits in adaptive functioning, identified through expert evaluations and brain scans. While his level of intelligence did not meet the legal threshold prohibiting the execution of individuals with mental retardation established by the U.S. Supreme Court in *Atkins v. Virginia,* 536 U.S. 304 (2002), the Commission is not bound by that threshold. Mr. Pizzuto has served 35 years in prison and his physical condition, as well as the fact that he will never be released from prison, leaves him as very little threat to others. The Commission understands the difficulty of this decision for the family of Berta and Del Herndon and expresses our deepest sympathies for their loss and continued emotional impact from this crime.

Issued this 30th day of December, 2021.

[redacted]

DISSENT OF THE MINORITY

The minority members of the Commission voted to deny the commutation of Gerald Ross Pizzuto's death sentence in Idaho County Case No. CR-1985-22075 to life in prison without the possibility of parole. The cruel and heinous nature of Mr. Pizzuto's crimes and his lack of responsibility, accountability, and credibility warrant imposition of the original sentence imposed and the execution of Mr. Pizzuto. Mr. Pizzuto's current medical condition does not outweigh or diminish the justification or value of the original sentence of death imposed in this case. That sentence was justified at the time of sentencing and is justified today. The dissenting Commissioners believe Mr. Pizzuto knew what he was doing when he committed these murders and fully understood the consequences of his actions. His actions were premeditated and void of any mercy for his victims. The victims of Mr. Pizzuto, and other victims of crime, must have confidence not only in the justice system, but in the original decision and imposition of the sentence.

Issued this 30th day of December, 2021.

[redacted]

[redacted]

[redacted]

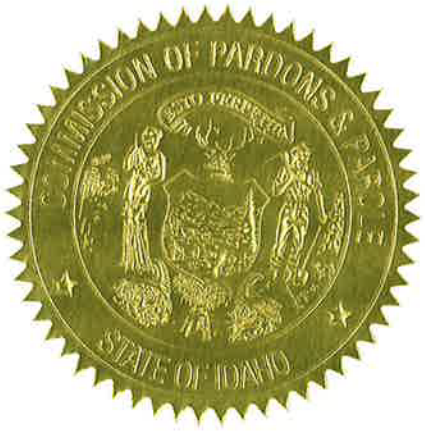

Exhibit 5

(Memorandum from Commission Executive Director Ashley Dowell to Governor Brad Little, December 30, 2021)

STATE OF IDAHO
COMMISSION OF PARDONS AND PAROLE

Brad Little
Governor
Ashley Dowell
Executive Director

MEMORANDUM

DATE: December 30, 2021

TO: Governor Brad Little

FROM: Ashley Dowell, Executive Director

SUBJECT: Commutation Decision for Gerald Ross Pizzuto

In accordance with Idaho Code § 20-1016(2), the Commission's majority decision recommending the commutation of Mr. Gerald Ross Pizzuto's death sentences to life in prison without the possibility of parole is enclosed for your review and consideration. A copy of all materials received by the Commission for this hearing, and the PowerPoint presentations made by the parties, have been previously provided to your office for your review. These materials contain sensitive and confidential information that is exempt from public disclosure. Any request for release of this information should be directed to the Commission office.

Exhibit 6

(Letter from Governor Brad Little to Commission Executive Director Ashley Dowell, December 30, 2021)

BRAD LITTLE
GOVERNOR

December 30, 2021

Ashley Dowell
Executive Director
Idaho Commission of Pardons and Parole
3056 Elder St.
Boise, ID 83705

Dear Director Dowell,

I hereby advise you that I return without my approval the recommendation to commute Gerald Pizzuto's death sentences for the cruel and calculated 1985 murders of Berta and Del Herndon in Idaho County.

The Idaho Commission of Pardons and Parole voted 4-3 to commute Pizzuto's death sentences. Pursuant to Article IV, Section 7 of the Idaho Constitution and Section 20-1016, Idaho Code, the Commission's written decision constitutes a recommendation to the Governor. After a thorough review of the voluminous records submitted during the November 30 public hearing, I conclude commuting Pizzuto's death sentences would be inappropriate.

Pizzuto was convicted of robbery and four grisly murders, all committed within a year after his release from prison in Michigan for rape. He killed Rita Drury, a grandmother, after binding her hands and feet, brutally assaulting her, and violating her in a disgusting and humiliating manner. He fatally shot John Ray Jones in the face at near point-blank range. At Ruby Meadows in Idaho, Pizzuto bound Berta and Del, gruesomely bludgeoned their heads repeatedly, and concealed their bodies in a shallow grave. But for a brave Idaho jury and devoted law enforcement, Pizzuto would have certainly left countless other victims in his wake.

The severity of Pizzuto's brutal, senseless, and indiscriminate killing spree strongly warrants against commutation. Therefore, I respectfully deny the Commission's recommendation so that the lawful and just sentences for the murders of Berta and Del can be fully carried out as ordered by the court.

Sincerely,

Brad Little
Governor of Idaho

EXHIBIT M

Idaho Department of Correction	**Standard Operating Procedure**	Title: **Inmates Under Sentence of Death**		Page: 1 of 6
		Control Number: **319.02.01.002**	Version: **4.0**	Adopted: 12/8/95

Ashley Dowell, chief of the division of prisons, approved this document on 06/05/2017.

Open to the public: ☒ Yes

SCOPE

This standard operating procedure applies to all inmates under the sentence of death committed to the department, all inmates previously under the sentence of death whose sentences have been rescinded and are awaiting a new sentence, staff at Idaho Maximum Security Institution (IMSI) and Pocatello Women's Correctional Center (PWCC), and the central office review committee.

Revision Summary
Revision date (06/05/2017) version 4.0: Reformatted, referenced the *Visiting* standard operating procedure regarding the definition of immediate family.

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BOARD OF CORRECTION IDAPA RULE NUMBER

None

POLICY CONTROL NUMBER 319

Restrictive Housing

PURPOSE

The purpose of this standard operating procedure (SOP) is to establish procedures and criteria for the housing and administrative review of inmates under sentence of death in accordance with Idaho Code Section 19-2706. All placement decisions must be in accordance with the provisions set forth in this SOP. Inmates under sentence of death cannot be classified or housed in any manner less than close custody at Idaho Maximum Security Institution (IMSI) or Pocatello Women's Correctional Center (PWCC).

RESPONSIBILITY

The facility heads at IMSI and PWCC are responsible to implement and follow this SOP.

STANDARD PROCEDURES

1. General Information

With the exception of the procedures annotated in this SOP, inmates under the sentence of death housed in restrictive housing will be subject to the standard conditions of confinement described in *Restrictive Housing,* SOP 319.02.01.001, Conditions of confinement for those inmates under sentence of death that are released to general population are found in *Classification: Inmate,* SOP 303.02.01.001, and *Property, State-Issued and Inmate Personal Property,* SOP 320.02.01.001.

2. Facility Restrictive Housing Committee for Inmates under the Sentence of Death

The facility head will designate the chairperson and restrictive housing committee members for inmates under sentence of death. This committee will be comprised of at least three people including a security staff member who has the rank of lieutenant or higher, a mental health professional, and a deputy warden.

3. New Admissions Placement Procedure, Including Release to Close Custody

Newly committed inmates under sentence of death will be placed directly into restrictive housing, men at IMSI) and women at PWCC. Such inmates are not housed in a receiving and diagnostic unit (RDU), but do receive initial medical and psychological screens similar to those completed in RDU.

The case management team (TCM) working in restrictive housing will record their observations and contacts with the inmate and make recommendations regarding the inmate's needs, as well as housing placement. Within 15 days of admittance, the TCM will submit a report to the facility's investigation staff.

Investigation staff will have 15 days to review the information provided by the TCM and complete a referral file that contains specific information regarding the inmate's current behavior, past behavior, disciplinary offense report history, and other pertinent information obtained through the investigation office. The facility head will ensure that the completed

referral file is forwarded to the restrictive housing committee for inmates under sentence of death.

The restrictive housing committee for inmates under sentence of death has two weeks to review the file submitted by the investigation staff, the inmate's central record, and other pertinent information.

Within 72 hours following the two 2-week review period, the chairperson will schedule a restrictive housing hearing. Forty-eight hours before the hearing, the chairperson will ensure that the inmate signs the *Acknowledgement of Receipt* and receives a copy of the *Restrictive Housing Referral Notice* form. (Refer to *Restrictive Housing,* SOP 319.02.01.001.)

At the conclusion of the hearing, a *Restrictive Housing Report of Hearing* form will be completed, noting the recommendations from each committee member. (Refer to 319.02.01.001, Restrictive Housing)

The committee chairperson will forward the investigation referral file, the *Restrictive Housing Referral Notice*, and the *Restrictive Housing Report of Hearing* to the facility head for review. The chairperson will ensure that the inmate's central file is returned to the facility records clerk.

The facility head will review the restrictive housing committee's findings and recommendations. If the facility head decides that the inmate should be housed in administrative segregation, he will indicate that information on the form.

The facility head will forward the original *Restrictive Housing Report of Hearing* form to the records clerk and a copy of the form to the chairperson of the restrictive housing committee.

The records staff will file the original form in the inmate's central file.

The committee chairperson will inform the inmate of the facility head's decision.

If facility head recommends release to general population as close-restricted custody, he will make his recommendation for placement and forward the information to the central office administrative review committee.

The central office administrative review committee will review the facility head's placement recommendations, and may requested additional information to include psychological testing.

The chief of the division of prisons will forward the central office administrative review committee's recommendations to the director.

The director will review all of the information and make a decision regarding the inmate's housing placement, then notify the administrator of operations of his decision.

The chief of the division of prisons will notify the facility head of the decision. If the release to close-restricted custody is not approved, the inmate will remain unclassified in administrative segregation.

If the release is approved, the inmate will be classified as close custody and released from administrative segregation.

4. Special Procedures for Inmates Admitted Prior to December 1, 2003

The following conditions affect inmates committed to the department before December 01, 2003, under sentence of death and inmates who have had their death sentences vacated or their convictions overturned and are now waiting re-sentencing or re-trial.

Inmates identified above who are placed or retained in administrative segregation will keep the same property that was previously approved for inmates under sentence of death. These privileges will be grandfathered until November 1, 2005. On November 2, 2005, grandfathered privileges will be revoked, and any such inmate remaining in administrative segregation will be subject to the standard conditions of confinement for restrictive housing as identified in 319.02.01.001 and 320.02.01.001.

Before November 2, 2005, these privileges will be revoked if the inmate is found guilty of a class A disciplinary offense report (DOR). Property levels and privileges will be reduced to the standard conditions of confinement for restrictive housing as identified in 319.02.01.001 and 320.02.01.001.

When property limits are reduced on November 2, 2005, or because of a conviction of a class A DOR, property items that are not allowed in administrative segregation will be handled in accordance with 320.02.01.001.

5. Procedures for Inmates Receiving a Death Warrant

Whenever an inmate receives a death warrant, the condemned person will be placed in solitary confinement until execution. No person will be allowed access to the condemned person except the following:

- Law enforcement personnel investigating matters within the scope of their duties
- Condemned person's attorneys of record
- Agents of the condemned person's attorneys of record
- Attending physicians
- Spiritual advisers of the condemned person's choosing
- Members of the condemned person's immediate family (see *Visiting,* SOP 604.02.01.001)

During the seven days immediately preceding the scheduled execution, the condemned person may have contact visits with the condemned person's attorneys of record, the agents of the condemned person's attorneys of record, spiritual advisers of the condemned person's choosing, and members of the condemned person's immediate family.

Not to exceed 72 hours, but at least 24 hours before a scheduled execution, the condemned person will be housed in a cell isolated from other inmates. Staff will be assigned to observe the inmate at all times and a separate log will be kept of that watch.

If a death warrant is stayed, the inmate will be reviewed using the procedure in section 2.

6. Administrative Segregation Review Process

Inmates under sentence of death housed in administrative segregation will be reviewed as follows:

- A mental health professional will review each inmate every 90 days. If the mental health professional has any concerns, he will contact the facility head. If the

concerns are of an emergent nature, the mental health professional will contact the shift commander.

- The facility restrictive housing committee for inmates under sentence of death will review such inmates at least annually, and the chairperson will forward status reports to the facility head (See Attachment B, *Status Report*).
- Recommendations for release to close custody will be handled in accordance with section 1 of this SOP.

7. Documentation

All documentation will be completed in compliance with *Restrictive Housing*, SOP 319.02.01.001. Inmate reviews will be documented in the weekly TCM meeting minutes.

8. Inmates Awaiting Re-Sentencing

If an inmate under sentence of death has said sentence revoked, commuted or repealed, the facility head must:

- Contact the deputy attorney general (DAG) assigned to the department to confirm the action.
- If the action is confirmed, convene the facility restrictive housing committee identified in this SOP to review the inmate's placement.
- Review the committee's recommendations and decide the inmate's placement.
- Notify the chief of the division of prisons and the director of the placement decision.

9. Death Sentence Vacated

If the death sentence is vacated, the facility head will confirm the action, then immediately contact the chief of the division of prisons or the administrative duty officer.

The chief of the division of prisons or the administrative duty officer will immediately convene department leadership to determine the legal status of the inmate.

If the inmate is to be transported back to the county of origin, the chief of the division of prisons, or designee, will contact the county sheriff to arrange for transport.

The chief of the division of prisons, or designee, will notify the facility head regarding the decision.

10. Access to Inmate by Court Appointed Professional Expert

If so ordered by the court, professional experts may have contact visits and may request removal of restraints. Before removal of restraints, the court ordered expert must sign a waiver of liability (See Attachment A, *Waiver of Liability*).

Court approved professional experts may be allowed to bring professional testing equipment and supplies. Only testing equipment and supplies specifically listed in the court order will be allowed.

At least 48 hours before the testing, the institution must receive by mail or facsimile, on the expert's professional letterhead, a list of the equipment, a written description of how the equipment will be used, a description of how the inmate will be in contact with the

equipment, the purpose of the equipment, and an estimate of the time needed for the procedure.

All testing equipment and supplies will be searched upon entering and exiting the facility.

All electronic equipment must be turned on and demonstrated briefly as requested by facility staff.

11. Inmate Conduct

Inmates under sentence of death, whether housed in close custody or administrative segregation, will be held to the same rules and standards of conduct as other inmates in the same housing unit.

12. Inmate Work Opportunities

Inmates under sentence of death assigned to close custody will have a 60-day waiting period before applying for any inmate worker position.

The hiring department's supervisor will review the TCM contact sheet information and request a referral from the TCM. To be considered for hire, the TCM must give a positive recommendation for the inmate. The appropriate deputy warden will make the final decision to hire.

DEFINITIONS

Approved Spiritual Advisor: An IDOC trained volunteer associated with a specific religion.

Central Office Review Committee: A committee comprised of the chief and deputy chiefs of the division of prisons.

Professional Expert: A person who possesses scientific, technical, or other specialized knowledge, education and credentials, and who has been retained by an attorney of record for an inmate, or by Idaho Department of Correction, to assist in an inmate's criminal case.

REFERENCES

Waiver of Liability

Attachment B, Status Report

Idaho Code Section 19-27

– End of Document –

EXHIBIT N

CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)

Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992

[Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment]

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

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

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

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

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

6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the most serious

crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.

7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

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

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

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

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

also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

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

13. States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

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

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

EXHIBIT O

Teresa Gomez de Voituret v. Uruguay, Communication No. 109/1981 (22 July 1983), U.N. Doc. Supp. No. 40 (A/39/40) at 164 (1984).

Submitted by: Maria Dolores Perez de Gomez
Alleged victim: Teresa Gomez de Voituret (author's daughter)
State party concerned: Uruguay
Date of communication: 17 August 1981
Date of decision on admissibility: 22 July 1983

The Human Rights Committee established under article 28 of ~he International Covenant on Civil and Political Rights:

- meeting on 10 April 1984;

- having concluded its consideration of communication No. R.25/109 submitted to the Committee by Maria Dolores Perez de Gomez under the Optional Protocol to the International Covenant on Civil and Political Rights;

- having taken into account all written information made available to it by the author of the communication and by the State party concerned;

adopts the following,

VIEWS UNDER ARTICLE 5 (4) OF THE OPTIONAL PROTOCOL

1. The author of the communication (initial letter dated 17 August 1981, further letters dated 20 November 1981 and 18 September 1982) is Maria Dolores Perez de Gomez, a Uruguayan national living in Montevideo, Uruguay, writing on behalf of her daughter, Teresa Gomez de Voituret, who is allegedly detained in Uruguay and is not in a position to present her case herself to the Human Rights Committee. Mrs. Perez de Gomez claims that her daughter is a victim of a breach by Uruguay of article 10 (1) of the International Covenant on Civil and Political Rights.

2.1 The author states that Teresa Gomez de Voituret, a medical doctor, was arrested on 27 November 1980 at the airport of Carrasco, Uruguay, upon her return from a medical seminar held in Buenos Aires, Argentina, from 24 to 27 November 1980.

2.2 The author submits that her daughter was arrested by plainclothes men without any warrant and taken to Military Unit No. 1 of the Artillery in the area of Cerro, where she allegedly was held in solitary confinement in a cell almost without natural. light and which she was not allowed to leave until she was brought to trial in June 1981. From then on she was allowed periods of recreation outside her cell, hooded and forced to walk without interruption during this time.

2.3 The author was allowed to visit her daughter in the Military Unit 30 days after the arrest occurred. The visit took place in the presence of three guards who listened to every word of the discussion between mother and daughter. The author states that these kinds of visits continued, once every two weeks, until Teresa Gomez de Voituret was transferred to the Punta de Rieles prison where she is still detained. In Punta de Rieles prison she is allowed one half-hour visit by close family members every two weeks.

2.4 Mrs. Perez de Gomez states that at her first visit in the Military Unit she could observe that her daughter's state of health had visibly deteriorated since the time before her arrest. She claims, based upon information she received from a person who had been detained for some time in the same place as Teresa Gomez de Voituret and who had later been released, that her daughter was subjected to torture during interrogation in order to extract confessions from her.

2.5 Thus, Teresa Gomez de Voituret falsely confessed that she was a member of a political group which kept close links with persons in and outside Libertad prison where her husband has been detained since 27 December 1974. Teresa Gomez de Voituret later revoked this statement in her written declarations before the court. She further admitted during interrogation that she had tried to mobilize international human rights bodies and related religious institutions, inside and outside Uruguay, drawing their attention to the critical situation of her husband and other prisoners in Libertad prison, claiming thereby that her husband's life was in grave danger because of death threats he allegedly had received from prison personnel.

2.6 The author claims that the Uruguayan authorities perceived her daughter's efforts before these human rights bodies as a threat to the country's image abroad.

2.7 In June 1981, Teresa Gomez de Voituret was charged with "subversive association and attempt against the Constitution followed by preparatory acts".

2.8 The author alleges that the proceedings in her daughter's case before the military court of first instance do not provide the necessary guarantees for a fair judicial process as they do not permit her daughter to be brought before the judge in person, but provide only for written statements by her daughter which are taken by a court clerk. The author further alleges in this connection that, although her daughter had been given the possibility to appoint a defence lawyer of her own choice, in reality she can expect only very little assistance from him because she is prevented from consulting him freely. The conversations have to take place by telephone, while the defence lawyer and her daughter are separated by a glass wall and continuously watched by guards Standing at their side.

2.9 The author maintains that there are no domestic remedies which could be effectively pursued in her daughter's case. The author also submits that to her knowledge the same matter has not been submitted to the Inter-American Commission for Human Rights.

2.10 Finally, the author states that she submits the case of her daughter to the Human Rights Committee with the request that the Committee take appropriate action to secure a fair trial for her daughter and her subsequent release.

3. By its decision of 16 March 1982 the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. The State party was also requested (a) to provide the Committee with copies of any court orders or decisions relevant to this case} and (b) to inform the Committee whether the alleged victim was brought before the military judge of first instance in person and what were the relevant laws and practices in this respect.

4.1 By a note dated 24 June 1982 the State party informed the Committee that Teresa Gomez de Voituret was tried on 23 March 1982, charged with the offence of "subversive association" under article 60 (V) of the Military Criminal Code. The State party adds that Teresa Gomez de Voituret had been accused of this offence "on the basis of evidence confirming her active participation in the subversive movement known as 'Seispuntismo', which sought to reactivate MLN and about which the Committee has already been informed". The State party stresses that

> "Teresa Gomez de Voituret was a member of the most active centre of agitation and propaganda and [that] her primary task was to try to recruit new members for this seditious organization".

4.2 The State party did not however submit copies of any court orders or decisions of relevance to the case or reply to the specific questions set out in paragraph 3 above.

5.1 On 18 September 1982, the author of the communication forwarded her comments in reply to the State party's submission of 24 June 1982. She rejects the State party's contention that her daughter ever was an active member of MLN. She claims, in this connection, that "the Military Government of Uruguay simply invented the subversive movement known as 'Seispuntismo' in order to bring to trial once again a group of prisoners who had completed or almost completed their sentences in Libertad prison'. .

5.2 Mrs. Perez de Gomez asserts that her daughter merely reported to the Red Cross and to the organization "Justicia y Par' in Buenos Aires the physical, psychological and moral pressure that was being exerted at that time in Libertad prison against her husband Jorge Voituret Pazos and other political prisoners. She maintains that acting thus in defence of her husband was the only offence her daughter committed.

6. In reply to the author's comments and observations on its submission of 24 June 1982, the State party, in a further note dated 28 December 1982, reaffirms its statement on the case as contained in its note of 24 June 1982.

7. On 3 May 1983 the State party was again requested to furnish additional information inter alia as to whether judgement of first instance had already been rendered in the case. The time-limit for the State party's response expired on 20 June 1983'. No such additional information had been received from the State party when the Committee decided on the admissibility of the communication in July 1983.

8. With regard to article 5 (2) (a), the author's assertion that the same matter had not been submitted to any other procedure of international investigation or settlement was not contested by the State party. As to the question of exhaustion of domestic remedies, the State party did not contest the author's statement concerning the absence of effective remedies in her daughter's case. The Committee noted in this regard that it would appear that the trial of Teresa Gomez de Voituret, although begun on 23 March 1982, might not yet have been concluded, since the Committee had no information that judgement had been given. However, the allegations of violations of the Covenant related to ill-treatment in Prison and the lack of guarantees of a fair trial, as required by the Covenant, in respect of which the State party did not claim that there was an effective domestic remedy which the alleged victim had failed to exhaust. The Committee therefore was unable to conclude that in the circumstances of this case there were domestic remedies which could have been effectively pursued. Accordingly, the Committee found that the communication was not inadmissible under article 5 (2) (a) and (b) of the Optional Protocol.

9. On 22 July 1983 the Human Rights Committee therefore decided:

1. That the communication was admissible;

2. That, in accordance with article 4 (2) of the Optional Protocol, the State party be requested to submit to the Committee, within six months of the date of transmittal to it of the decision, written explanations or statements clarifying the matter and the remedy, if any, that might have been taken by it;

3. That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was again requested (a) to enclose copies of any court orders or decisions of relevance to the matter under consideration, (b) to inform the Committee whether the alleged victim was brought before the military judge of first instance in person and what were the relevant laws and practices in that respect, and (c) to inform the Committee as to the outcome of the trial at first instance of Teresa Gomez de Voituret and whether the judgement of the court of first instance was subject to appeal.

10. By a note of 22 August 1983 in response to the Committee's request of 3 May 1983, the State party submitted the following additional information:

> "In the proceedings against Teresa Gomez de Voituret, the accused was sentenced at first instance on 28 September 1982 to five years' rigorous imprisonment on conviction of the offences of 'subversive association' and 'conspiracy to undermine the Constitution followed by criminal acts'.
>
> "On 15 June 1983 judgement was given at second instance confirming the sentence. The proceedings were conducted with all the guarantees provided for under the Uruguayan legal system, including that relating to the right of the accused to appropriate legal assistance."

11.1 In its submission under article 4 (2) of the Optional Protocol, dated 14 December 1983, the State party added:

> "In all cases the legally established trial procedures are observed, which includes appearance before the competent judge. With respect to the judgements of first and second instance there are remedies to which recourse may be had within the prescribed periods. Finally, it must be pointed out that in Uruguay maltreatment and threats are not methods employed, and the physical integrity of prisoners is fully protected."

The Committee notes with concern that, in spite of its repeated requests, it has not been furnished with any copies of court orders or decisions of relevance to the matter under consideration.

11.2 No further submission has been received from the author.

12.1 The Human Rights Committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides to base its views on the following facts, which appear uncontested.

12.2 Teresa Gomez de Voituret was arrested on 27 November 1980 by plainclothes men without any warrant and taken to Military Unit No. 1, where she was held in solitary confinement in a cell almost without natural light and which she was not allowed. to leave until she was brought to trial in June 1981. She was subsequently transferred to Punta de Rieles prison, where she is still detained. In June 1981 she was charged with "subversive association and attempt against the Constitution followed by preparatory acts". Her trial at first instance began on 23 March 1982 and she was sentenced on 28 September 1982 to five years' rigorous imprisonment. On 15 June 1983 judgement was given at second instance confirming the sentence.

13. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose a violation of article 10 (1) of the International Covenant on Civil and Political Rights, because Teresa Gomez de Voituret was kept in solitary confinement for several months in conditions which failed to respect the inherent dignity of the human person.

15. The Committee, accordingly, is of the view that the State party is under an obligation to ensure that Teresa Gomez de Voituret is treated with humanity and to transmit a copy of these views to her.

EXHIBIT P

Raul Sendic Antonaccio v. Uruguay, Communication No. R.14/63, U.N. Doc. Supp. No. 40 (A/37/40) at 114 (1982).

Submitted by: Violeta Setelich on behalf of her husband Rau1 Sendic Antonaccio
State party concerned: Uruguay
Date of communications 28 November 1979

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 1981,

Having concluded its consideration of communication No. R.14/63 submitted to the Committee by Violeta Setelich under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party concerned,

adopts the following:

VIEWS UNDER ARTICLE 5 (4) OF TEE OPTIONAL PROTOCOL

1. The author of this communication (initial letter dated 28 November 1979 and further letters dated 28 and 31 May, 23 June, 7 July and 3 October 1980, 9 February, 27 May and 22 July 1981) is Violeta Setelich, a Uruguayan national residing in France. She submitted the communication on behalf of her husband, Raul Sendic Antonaccio, a 54 year old Uruguayan citizen, detained in Uruguay.

2.1 The author stated in her submission on 28 November 1979 that her husband had been the main founder of the Movimiento de Liberacion Nacional (MLN-Tupamaros). She commented that the MLN(T) had been a political movement - not a terrorist one -aimed at establishing a better social system through the radical transformation of socio-economic structures and recourse to armed struggle. She further stated that, on 7 August 1970, after seven years of clandestine activity, her husband was arrested by the Uruguayan police; that on 6 September 1971 he escaped from Punta Carretas prison together with 105 other political detainees; that he was re-arrested on 1 September 1972 and taken, seriously wounded, to a military hospital; and that, after having been kidnapped by a military group, he finally appeared in Military Detention Establishment No. 1 (Libertad prison).

2.2 The author further stated that, between June and September 1973, eight women and nine men, including her husband, were transferred by the army to unknown places of detention, and that they were informed that they had become "hostages" and would be executed if their organization, MLN(T), took any action. She added that, in 1976, the eight women "hostages" were taken back to a military prison, but that the nine men continued to be held as "hostages". The author enclosed a statement, dzted February 1979, from Elena Curbelo de Mirza, one of

the eight women "hostages" who were released in March 1978. (In her statement, Mrs. Mirza confirmed that Raul Sendic and eight other men detaincos continued to be considered as "hostages". She listed the names of her fellow hostages, both the men and the women. She stated that a hostage lived in a tiny cell with only a mattress. The place was damp and cold and had no window. The door was always closed and the detainee was kept there alone 24 hours a day. On rare occasions he was taken out to the yard, blindfolded and with his arms tied. She further stated that hostages were often transferred to fresh prisons, that relatives had then to find where they were and that visits were authorized only at very irregular intervals.)

2.3 The author described five places of detention where her husband was kept between 1973 and 1976, and stated that in all of them he was subjected to mistreatment (solitary confinement, lack of food and harassment), while in one of them, as a result of a severe beating by the guards, he developed a hernia. She mentions that, in September 1976, he was transferred to the barracks of Ingenieros in the city of Paso de los Toros.

2.4 The author declared that, beginning in February 1978, her husband was once again subjected to inhuman treatment and torture: for three months, he was made to do the "planton" (stand upright' with his eyes blindfolded) throughout the day; he was only able to rest and sleep for a few hours at a time; he was beaten and given insufficient food and he was not allowed to receive visits. In May 1978, he received his first visit after this three months' sanction and his state of health was alarming.

2.5 At the end of August 1978, the authorities officially stated that, because of the danger he represented, her husband was not detained in Libertad Prison, but at Paso de los Toros. The author maintained that the fact that her husband was held as a hostage and the cruel and discriminatory treatment to which he was subjected constituted flagrant violations of both national and international law, particularly the Geneva Conventions of 1949.

2.6 The author stressed that her husband's situation had not changed with the coming into force of the International Covenant on Civil and Political Rights and the Optional Protocol on 23 March 1976. She requested the Human Rights Committee to take appropriate action with a view to securing her husband's right to submit a communication himself.

2.7 The author further alleged that her husband had needed an operation for his hernia since 1976; that, despite a medical order to perform such an operation, the military authorities had refused to take him to a hospital, and that his state of health continued to deteriorate. (Because of his hernia, he could take only liquids and was unable to walk without help; he also suffered from heart disease.) She feared for his life and even thought that it had been decided to kill him slowly, notwithstanding the official abolition of the death penalty in Uruguay in 1976. She therefore requested the Human Rights Committee to apply rule 86 of its provisional rules of procedure in order to avoid irreparable damage to his health.

2.8 The author stated that her husband had been denied all judicial guarantees. She further stated that, since December 1975, it had been compulsory for all cases relating to political offences to be heard by military courts. and that her husband's trial, which was still pending, would, therefore, be before such a body.

2.9 She added that in July 1977, the Government issued "Acts Institucional No. 8", which in effect subordinated the judicial power to the Executive, and that independent and impartial justice could not be expected from the military courts. She further alleged that domestic remedies such as habeas corpus, were not applicable, that civilians were deprived of the safeguards essential to a fair trial and of the right to appeal, that defence lawyers were systematically harassed by the military authorities and that her husband had not been allowed to choose his own counsel. She maintained that all domestic remedies had been exhausted.

2.10 She also stated that, at the time of writing (28 November 1979), she was unaware of her husband's whereabouts. She requested the Human Rights Committee to obtain information from the State party about his place of detention and conditions of imprisonment.

3. The author claimed that the following provisions of the International Covenant on Civil and Political Rights had been violated by the Uruguayan authorities: articles 2, 6, 7, 10 and 14.

4. On 26 March 1980, the Human Rights Committee decided to transmit the communication to the State party, under rule 91 of the provisional rules of procedure, requesting information and observations relevant to the question of admissibility of the communication. The Committee also requested the State party to furnish information on the state of health of Rau1 Sendic Antonaccio, the medical treatment given to him and his precise place of detention.

5. By a note dated 16 June 1980, the State party contested the admissibility of the communication on the ground that the same matter had been submitted to the Inter-American Commission on Human Rights (IACHR) as case No. 2937. In this connexion the Committee ascertained from the Secretariat of IACHR that the case referred to was submitted by a third party and opened before IACHR on 26 April 1978. The State party did not furnish any information concerning Rail Sendic's state of health, the medical treatment given to him or his whereabouts.

6. In her submission dated 23 June 1980, the author, commenting on the State party's submission, stated that she had never submitted her husband's case to the IACHR. She further stated that it had become known, thanks to strong international pressure on the military authorities, that her husband was detained in the Regimiento "Pablo Galarza" in the department of Durazno. She alleged that the State party had refrained from giving any information on her husband's state of health because he was kept on an inadequate diet in an underground cell with no fresh air or sunlight and his contacts with the outside world were restricted to a monthly visit that lasted 30 minutes and took place in the presence of armed guards.

7. In a further submission dated 7 July 1980, Violeta Setelich identified the author of the communication to IACHR concerning its case No. 2937 and enclosed a copy of his letter, dated 8 June 1980, addressed to the Executive Secretary of IACHR, requesting that consideration of case No. 2937 concerning Rail Sendic should be discontinued before that body, so as to remove any procedural uncertainties concerning the competence of the Human Rights Committee to consider the present communication under the Optional Protocol.

8. In the circumstances, the Committee found that it was not precluded by article 5(2)(a) of the Optional Protocol from considering the communication. The Committee was unable to conclude from the information at its disposal that there had been remedies available to the victim of the alleged violations which had not been invoked. Accordingly, the Committee found that the communication was not inadmissible under article 5(2)(b) of the Optional Protocol.

9. On 25 July 1980, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of the Committee's decision, written explanations or statements clarifying the matter and the measures, if any, that it had taken to remedy the situation;

(c) That the State party should be requested to furnish the Committee with information on the present state of health of Rau1 Sendic Antonaccio, the medical treatment given to him and his exact whereabouts;

(d) That the State party should be informed that the written explanations or statement submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to discharge its responsibilities, it required specific responses to the allegations which had been made by the author of the communication, and the State party's explanations of its actions. The State party was requested, in that connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

10. In a letter dated 3 October 1980, the author argued that her husband had the right to be informed of the Committee's decision of 25 July 1980, declaring the communication admissible, and that he should be given copies of the relevant documents and afforded an opportunity to supplement them as he saw fit.

11. On 24 October 1980, the Human Rights. Committee:

Noting that the author of the communication, in her submission of 28 November 1979, had expressed grave concern as to her husband's state of health and the fact that his whereabouts were kept secret by the Government of Uruguay,

Taking into account the fact that its previous requests for information about the present situation of Raul Sendic Antonaccio had gone unheeded,

Noting further the letter dated 3 October 1980 from the author of the communication,

Decided,

1. That the State party should be reminded of the decisions of 26 March and 25 July 1980 in which the Human Rights Committee requested information about the state of health of Raul Sendic Antonaccio, the medical treatment given to him and his exact whereabouts;

2. That the State party should be urged to provide the information sought without any further delay;

3. That, as requested by Violeta Setelich, the State party should be requested to transmit all written material pertaining to the proceedings (submissions of the parties, decisions of the Human Rights Committee) to Raul Sendic Antonaccio, and that he should be given the opportunity himself to communicate directly with the Committee.

12.1 In further letters dated 9 February, 27 May and 22 July 1981, the author restated her deep concern about her husband's state of health. She reiterated that after soldiers had struck him in the lower abdomen with gun butts at Colonial barracks in mid-1974, her husband had developed an inguinal hernia and that there was a risk that the hernia might become strangulated. She stated that Sendic's relatives had repeatedly requested that he should be operated on because of his extremely poor state of health, but to no avail.

12.2 She added that her husband's conditions of detention were slightly better at the Regimiento Pablo Galarza No. 2, since he was allowed to go out to the open air for one hour a day. She stressed, however, that he should be transferred to the Libertad Prison, where all other political prisoners were held.

12.3 Concerning her husband's legal situation, she added the following information:

(i) In July 1980, her husband was sentenced to the maximum penalty under the Uruguayan Penal Code: 30 years' imprisonment and 15 years of special security measures. He had not been informed of the charges against him before the trial, or allowed to present witnesses and the hearing had been held in camera and in his absence. He had been denied the right of defence as he had never been able to contact the. lawyer assigned to him, Mr. Almicar Perrea.

(ii) In September 1980 and in April and May 1981, the authorities announced that her husband's sentence was to be reviewed by the Supreme Military Tribunal, but this has not yet occurred.

(iii) Though Sendic's relatives had appointed Maitre Cheron to be his lawyer, Maitre Cheron was denied in September 1980 and in January 1981 the right to examine Sendic's dossier and to visit him.

13. The time-limit for the State party's submission under article 4(2) of the Optional Protocol expired on 27 February 1981. To date, no such submission has been received from the State party.

14. On 21 August 1981, the State party submitted the following comments on the Committee's decision of 24 October 1980 (see para. 11 above):

"The Committee's decision of 24 October 1980 adopted at its eleventh session on the case in question exceeds its authority. The competence granted to the Committee on Human Rights by the Optional Protocol to the

International Covenant on Civil and Political Rights is contained in article 5 (4) which states: 'The Committee shall forward its views to the State party concerned and to the individual.' The scope of this rule is quite clearly defined. The Committee has authority only to send its observations to the State party concerned.

"On the contrary, in the present decision, the Committee had arrogated to itself competence which exceeds its powers.

"The Committee on Human Rights is applying a rule which does not exist in the text of the Covenant and the Protocol, whereas the function of the .Committee is to fulfil and apply the provisions of those international instruments. It is inadmissible for a body such as the Committee to create rules flagrantly deviating from the texts emanating from the will of the ratifying States. Those were the circumstances in which the decision in question was taken. Paragraph 3 requests, with absolutely no legal basis, that a detainee under the jurisdiction of a State party - Uruguay - be given the opportunity to communicate directly with the Committee. The Government of Uruguay rejects that decision, since to accept it would be to create the dangerous precedent of receiving a decision which violates international instruments such as the Covenant and its Protocol. Moreover, the Uruguayan Government considers that the provisions in those international instruments extend to Stat~ parties as subjects of international law. Thus these international norms, like any agreement of such nature, are applicable to States and not directly to individuals. Consequently, the Committee can hardly claim that this decision extends to any particular individual. For the reasons given, the Government of Uruguay rejects the present decision of the Committee, which violates elementary norms and principles and thus indicates that the Committee is undermining its commitments in respect of the cause of promoting and defending human rights".

15. The Human Rights committee, having examined the present communication in the light of all the information made available to it by the parties as provided in article 5 (1) of the Optional Protocol, hereby decides, in the absence of comments by the State party, to base its views on the following facts as set out by the author:

16.1 Events prior to the entry into force of the Covenant: Rau1 Sendic Antonaccio, a main founder of the Movimiento de Liberacion Nacional (MLN) - Tupamaros, was arrested in Uruguay on 7 August 1970. On 6 September 1971, he escaped from prison, and on 1 September 1972 he was re-arrested after having been seriously wounded. Since 1973 he has been considered as a "hostage", meaning that he is liable to be killed at the first sign of action by his organization, MLN (T). Between 1973 and 1976, he was held in five penal institutions and subjected in all of them to mistreatment (solitary confinement, lack of food and harassment). In one of them, in 1974, as a result of a severe beating by the guards, he developed a hernia.

16.2 Events subsequent to the entry into force of the Covenantx In September 1976, he was transferred to the barracks of Ingenieros in the city of Paso de los Toros. There, from February to May 1978, or for the space of three months, he was subjected to torture ("plantones", beatings, lack of food). On 28 November 1979 (date of the author's initial communication), his whereabouts were unknown. He is now detained in the Regimiento-Pablo Galarza No. 2, Department of Durazno, in an underground cell. His present state of health is very poor (because of his hernia, he can take only liquids and is unable to walk without help) and he is not being given the medical attention it requires. In July 1980, he was sentenced to 30 years' imprisonment plus 15 years of special security measures. He was not informed of the charges brought against him. He was never able to contact the lawyer assigned to him, Mr. Almicar Perrea. His trial was held in camera and in his absence ant he was not allowed to present witnesses in support of his case. In September 1980 and in April and May 1981, it was publicly announced that his sentence was to be reviewed by the Supreme Military Tribunal.

17. The Human Rights Committee observes that, when it took its decision on admissibility on 25 July 1980, it had no information about Rau1 Sendic's trial before a court of first instance. The Committee further observes that, although his sentence is to be reviewed by the Supreme Military Tribunal (there has as yet been no indication that these final review proceedings have taken place), the Committee is not barred from considering the present communication, since the application of remedies has been unreasonably prolonged.

18. The Human Rights Committee cannot accept the State party's contention that it exceeded its mandate when in its decision of 24 October 1980, it requested the State party to affort to Rau1 Sendic Antonaccio the

opportunity to communicate directly with the Committee. The Committee rejects the State party's argument that a victim's right to contact the Committee directly is invalid in the case of persons imprisoned in Uruguay. If governments had the right to erect obstacles to contacts between victims and the Committee, the procedure established by the Optional Protocol would, in many instances, be rendered meaningless. It is a prerequisite for the effective application of the Optional Protocol that detainees should be able to communicate directly with the Committee. The contention that the International Covenant and the Protocol apply only to States, as subjects of international law, and that, in consequence, these instruments are not directly applicable to individuals is devoid of legal foundation in cases where a State has recognized the competence of the Committee to receive and consider communications from individuals under the Optional Protocol. That being so, denying individuals who are victims of an alleged violation their rights to bring the matter before the Committee is tantamount to denying the mandatory nature of the Optional Protocol.

19. The Human Rights Committee notes with deep concern that the State party has failed to fulfill its obligations under article 4 (2) of the Optional Protocol and has completely ignored the Committee's repeated requests for information concerning Rau1 Sendic's state of health, the medical treatment given to him and his exact whereabouts. The Committee is unable to fulfill the task conferred upon it by the Optional Protocol if States parties do not provide it with all the information relevant to the formation of the views referred to in article 5(4). Knowledge of the state of health of the person concerned is essential to the evaluation of an allegation of torture or ill-treatment.

20. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, particularly:

of article 7 and article 10 (1) because Raul Sendic is held in solitary confinement in an underground cell, was subjected to torture for three months in 1978 and is being denied the medical treatment his condition requires;

of article 9 (3) because his right to trial within reasonable time has not been respected;

of article 14 (3) (a) because he was not promptly informed of the charges against him;

of article 14 (3) (b) because he was unable either to choose his own counsel or communicate with his appointed counsel and was, therefore, unable to .prepare his defence;

of article 14 (3) (c) because he was not tried without undue delays

of article 14 (3) (d) because he was unable to attend the trial at first instances

of article 14 (3) (e) because he was denied the opportunity to obtain the attendance and examination of witnesses on his behalf.

21. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective measures to the victim, and in particular to extend Rau1 Sendic treatment laid down for detained persons in articles 7 and 10 of the Covenant and to g ire him a fresh trial with all the procedural guarantees prescribed by article 14 of the Covenant. The State party must also ensure that Rail Sendic receives promptly all necessary medical care.

EXHIBIT Q

PRESS RELEASES | SPECIAL PROCEDURES

US: “Four decades in solitary confinement can only be described as torture” – UN rights expert

Solitary confinement in the US

07 October 2013

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER

GENEVA (7 October 2013) – The United Nations Special Rapporteur on torture, Juan E. Méndez, today called on the United States to immediately end the indefinite solitary confinement imposed on Albert Woodfox since 1972.

Mr. Woodfox was convicted of murder together with Herman Wallace, who was released last week when his conviction was overturned on appeal. A day later, on 2 October, Mr. Wallace died after battling cancer, having spent 41 years in solitary confinement.

“This is a sad case and it is not over” stressed Mr. Méndez. “The co-accused, Mr. Woodfox, remains in solitary confinement pending an appeal to the federal court and has been kept in isolation in a 8-foot-by-12 foot (2.5 x 3.5 m. Approx.) cell for up to 23 hours per day, with just one hour of exercise or solitary recreation.”

“Keeping Albert Woodfox in solitary confinement for more than four decades clearly amounts to torture and it should be lifted immediately,” said Mr. Méndez, who has repeatedly urged the US Government to abolish the use of prolonged or indefinite solitary confinement. “I am deeply concerned about his physical and mental condition.”

“The circumstances of the incarceration of the so-called Angola Three clearly show that the use of solitary confinement in the US penitentiary system goes far beyond what is acceptable under international human rights law,” the independent investigator on torture and other cruel, inhuman or degrading treatment or punishment noted.

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER

¨Persons held in solitary confinement should always be allowed to challenge the reasons and the length of the regime, and should always have access to legal counsel and medical assistance,” Mr. Méndez said.

The human rights expert urged the US Government to adopt concrete measures to eliminate the use of prolonged or indefinite solitary confinement under all circumstances.

“I call for an absolute ban of solitary confinement of any duration for juveniles, persons with psychosocial disabilities or other disabilities or health conditions, pregnant women, women with infants and breastfeeding mothers as well as those serving a life sentence and prisoners on death row,” he said.

The Special Rapporteur addressed the issue of solitary confinement in the US in his 2011 report* to the UN General Assembly and in numerous communications to the Government. He has also repeatedly requested an invitation to carry out a visit to the country, including state prisons in California, but so far has not received a positive answer.

“It is about time to provide the opportunity for an *in situ* assessment of the conditions in US prisons and detention facilities,” Mr. Méndez reiterated.

Juan E. Méndez (Argentina) was appointed by the UN Human Rights Council as the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on 1 November 2010. He is independent from any government and serves in his individual capacity. Mr. Méndez has dedicated his legal career to the defense of human rights, and has a long and distinguished record of advocacy throughout the Americas. He is currently a Professor of Law at the American University – Washington College of Law and Co-Chair of the Human Rights Institute of the International Bar Association. Mr. Méndez has previously served as

and 2010. Learn more, log on to:
http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx

(*) Check the 2011 report on solitary confinement: **http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement** or **http://ap.ohchr.org/documents/dpage_e.aspx?m=103**

UN Human Rights Country Page – United States of America:
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Mr. Juan Mendez, Special Rapporteur on Torture, addressed the Human Rights Council on 10 March 2014 and outlined his thematic report on the "use of torture-tainted evidence and the exclusionary rule

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