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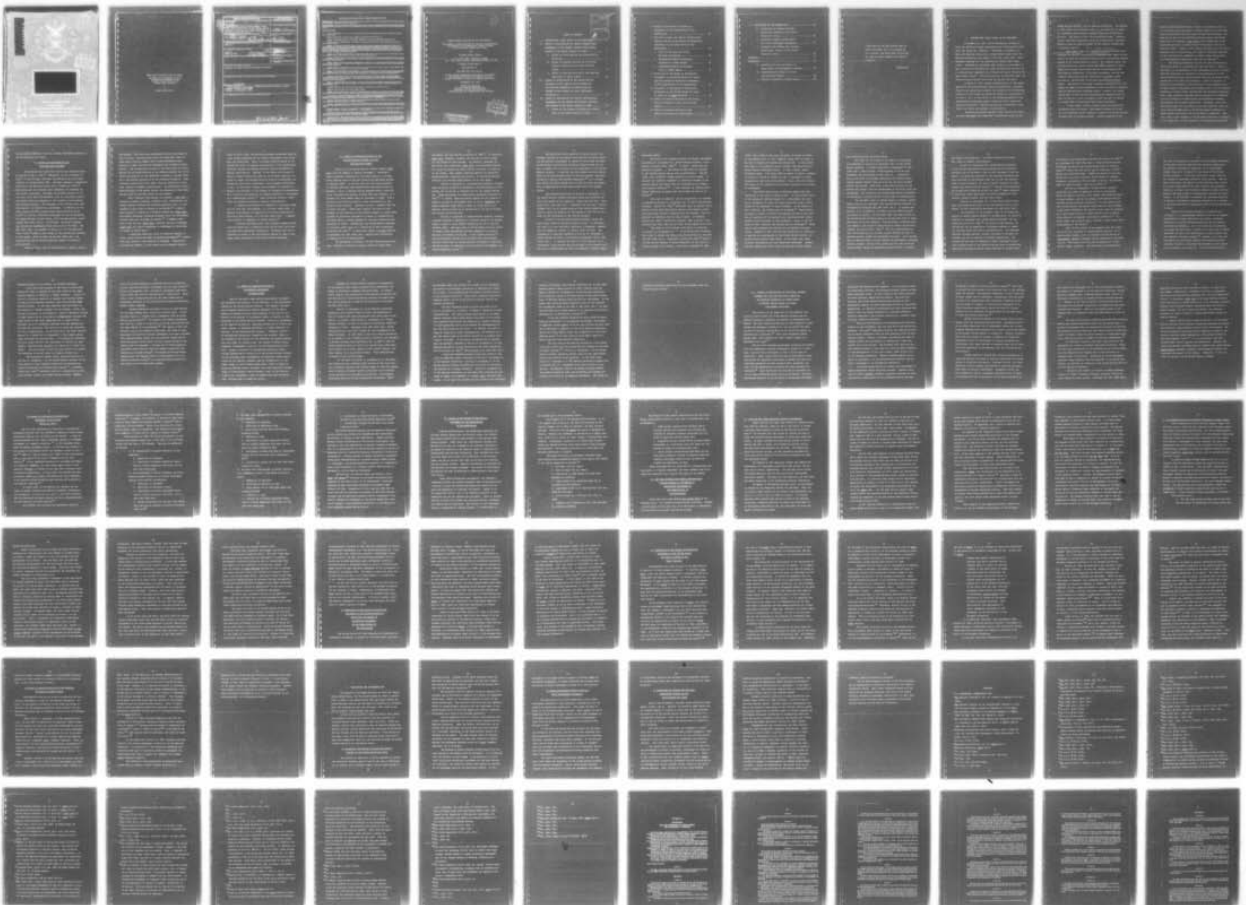
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HUMAN RIGHTS PROTECTIONS FOR THE AIRMAN:
THE EFFECT OF RATIFICATION OF CERTAIN
INTERNATIONAL AGREEMENTS ON THE
MILITARY JUSTICE SYSTEM OF THE
UNITED STATES AIR FORCE

By

Richard Albert Novak

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Human Rights Protections for the Airman:
The Effect of Ratification of Certain International
Agreements on the Military Justice System
Of the United States Air Force

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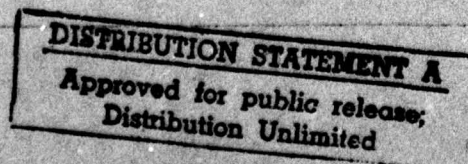
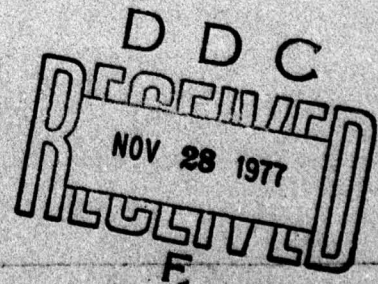
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"[H]e puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier."

Blackstone¹

I. INTRODUCTION: LEGAL ISSUES TO BE CONSIDERED

On December 16, 1966, the United Nations Covenant on Civil and Political Rights [hereinafter the United Nations Covenant] was opened for signature. Thereafter, on November 22, 1969, the American Convention on Human Rights [hereinafter the American Convention] was signed in San Jose, Costa Rica. Both agreements provide for the guarantee of certain basic human rights. The American Convention goes further in enforcement of that guarantee by providing the right of individual petition to an international commission for alleged state party violation of basic human rights.² Individual petition is permitted under the United Nations Covenant only under an optional protocol.³

On March 17, 1977, before representatives to the United Nations in the United Nations General Assembly Hall, President Jimmy Carter stated his intention to forward the United Nations Covenant to the Senate for advice and consent to ratification.⁴ On June 1, 1977, at the office of the Secretary-General of the Organization of American States, President Carter signed the American Convention.⁵ Neither has yet been transmitted to the Senate for advice and consent to ratification.

The State Department Assistant Legal Advisor for International Agreements has undertaken a preliminary study of the

United Nations Covenant and the American Convention. The purpose of that effort is to ascertain what, if any, portions of those two agreements might present problems regarding United States practice. The study is still in the drafting stage.⁶ Unfortunately, the State Department review of United States' judicial practice omits one entire segment of the judicial system--that of military justice.

This paper examines
 This paper, then, will examine *the United Nations Covenant* *on Civil and Political Rights* and *the American Convention* *on Human Rights* to determine what impact ratification of these two agreements would have on the military justice system in the United States Air Force. For simplification, the Air Force military justice system ^{is} ~~will be~~ considered in three parts: the criminal sanctioning process [courts-martial and court-martial procedure], confinement procedures, and the non-criminal sanctioning process [nonjudicial punishment under Article 15, Uniform Code of Military Justice, ^P (hereinafter UCMJ)]. The scope of this paper precludes consideration of the potential impact of the agreements on other nonjudicial measures, such as administrative discharge boards. However, the reader should bear in mind that all administrative measures which result in loss of a civil or property right may well be subject to review under international human rights agreements.

At the outset, several problem areas and possible deficiencies should be noted. The present examination of the Air Force military justice system in light of the United Nations Covenant will be largely academic. Without adoption of the

optional protocol guaranteeing a right of individual petition, it is unlikely that the subject of human rights in the military justice system would ever be raised in the United Nations. The same may be said of the American Convention should the United States fail to recognize, ipso facto, the jurisdiction of the Inter-American Court of Human Rights⁸ [hereinafter the Inter-American Court]. However, even without recognition of the Inter-American Court's jurisdiction, the right of individual petition to the Inter-American Commission on Human Rights [hereinafter the Inter-American Commission] would not be effected.⁹

The American Convention has not yet been ratified by a sufficient number of signatories to come into force. There is, therefore, no jurisprudence of the Inter-American Court or Inter-American Commission to contribute to the examination of the United States military justice system vis-a-vis the human rights guarantees of the American Convention. There is, however, a wealth of jurisprudence in the decisions of the European Court of Human Rights [hereinafter the European Court] and the European Commission of Human Rights [hereinafter the European Commission]. True, these decisions interpret the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter the European Convention]. Obviously, such interpretations would not be binding on the Inter-American Court and Inter-American Commission or the United Nations Committee on Human Rights [hereinafter the United Nations Committee]. However, much of the language of the European Convention is similar, if not identical, to the provisions of the American Convention

and the United Nations Covenant. Thus, the jurisprudence of the European Court and European Commission may prove exceedingly persuasive before the Inter-American Court, Inter-American Commission, and United Nations Committee. In areas, then, where the language of the United Nations Covenant and the American Convention is unclear or capable of multiple interpretations, reference will be made to the jurisprudence of the European Court and European Commission for interpretive assistance, realizing that such interpretation will not necessarily be controlling.

II. EFFECT OF RATIFICATION OF CERTAIN INTERNATIONAL AGREEMENTS ON THE PRESENT CRIMINAL SANCTIONING PROCESS IN THE UNITED STATES AIR FORCE

The American military court system has been criticized for past excesses, both real and imagined. Some shortcomings, such as undue command influence, have been properly pointed out and attempts have been made to remedy them. Many procedural changes, such as removal of defense counsel and military judges from the command structure, have strengthened the independence of the military judiciary. In the view of many observers, these changes have now enabled the American military court to take its rightful place as an equal within the federal judicial system. Unfortunately, a number of people not entirely familiar with the present system still consider the military court solely a disciplinary tribunal, as opposed to a judicial tribunal. Because of this regrettable classification, it is submitted that the military court system must assiduously guard against even the appearance of impropriety in the area of protection of basic human rights. Against this background, the court-martial and its procedure will be examined in light, first, of the United Nations Covenant and, then, in light of the American Convention. Before going further, however, an overview of the court-martial and its procedure may be helpful

to the reader unfamiliar with the criminal sanctioning process in the United States Air Force.

A. Survey of Courts-Martial and
Court-Martial Procedure

The Uniform Code of Military Justice was enacted as part of the Act of May 5, 1950.¹⁰ Thereafter, by Act of August 10, 1956,¹¹ it was revised, codified, and enacted into law as part of Title 10, United States Code. The UCMJ underwent a substantial revision by the Military Justice Act of October 24, 1968.¹²

There have also been several minor amendments not relevant to the present discussion. The UCMJ, as revised, consists of 140 articles, 58 of which are punitive; that is, violation of which may subject military personnel to the criminal or non-criminal sanctioning processes. The remainder of the articles may, with some caution, be classified as procedural. In addition to the UCMJ, former President Richard Nixon issued Executive Order 11476¹³ on June 19, 1969 which prescribed the use of the Manual for Courts-Martial, United States, 1969 (Revised Edition) [hereinafter MCM (1969, Rev.)]. It furnished additional guidance and information explanatory of the provisions of the UCMJ. The MCM (1969, Rev.) was amended on January 27, 1975 by Executive Order 11835,¹⁴ however, that change is not relevant for purposes of this paper. Both the UCMJ and the MCM (1969, Rev.) are authoritative for and binding upon the conduct of trials by court-martial.

There are three types of courts-martial: general, special

and summary. The latter has particularly fallen into disuse in the Air Force. Its surviving relics are found most often in cases where military members have refused punishment under Article 15, UCMJ, but have not demanded trial by special court-martial. The jurisdiction of each of the three types of courts-martial is not based directly on the offense charged, but on the nature and duration of the punishment provided in the MCM (1969, Rev.) and thought appropriate by the convening authority. Thus, a larceny under Article 121, UCMJ, could be referred to a general, special or summary court-martial. The determining factors would probably be the amount stolen, circumstances of the theft, and the rank and previous record of the accused.

Only a general court-martial can adjudge, inter alia, a sentence of death, dismissal (officers only), dishonorable discharge (warrant officers and enlisted personnel only), or confinement at hard labor in excess of six months.¹⁵ A special court-martial is limited to a maximum sentence of, inter alia, bad conduct discharge (enlisted personnel only) and confinement at hard labor not to exceed six months.¹⁶ A summary court-martial may not try, inter alia, officers, nor may it adjudge, inter alia, any type of discharge or confinement at hard labor in excess of thirty days.¹⁷

A convening authority, prior to referring charges to trial, would consult the table of maximum punishments¹⁸ to determine what sentence could possibly be adjudged. Referring to the previous example, if the larceny was of property having a

value of \$50 or less, the maximum punishment authorized would be a bad conduct discharge and six months confinement, plus attendant pay forfeitures. Thus, no purpose would be served in referring the case to a general court-martial if the accused were enlisted, because the maximum sentence could be adjudged by a special court-martial. However, if the theft was of property having a value of more than \$100, or of any motor vehicle, aircraft or vessel, the maximum sentence would be dishonorable discharge and five year's confinement, plus attendant forfeitures of pay. In that case, charges would probably be referred to a general court-martial, in the absence of mitigating circumstances. Only a general court-martial can adjudge dismissal or confinement of a commissioned officer.¹⁹ Cases involving officers, therefore, are normally referred to general courts-martial.

A general court-martial is composed of a military judge and not less than five members, or a military judge alone. A special court-martial is composed of a military judge and not less than three members, or a military judge alone. A summary court-martial is composed of a single officer.²⁰

Although admittedly brief, the foregoing summary should give the reader who is unfamiliar with the military court system some basic background information. Attention will now be directed to review of the court-martial system in light of the human rights guarantees of the United Nations Covenant.

B. Effect of Selected Articles of the
United Nations Covenant on Civil
and Political Rights

Article 6 of the United Nations Covenant deals, inter alia, with the subject of capital punishment. Paragraph 5 therein prohibits imposition of the death penalty on persons below eighteen years of age and carrying out the death penalty on pregnant women. It is true that the over-riding majority of military personnel have reached their majority and are not pregnant. Still, a scenario can be imagined where a young recruit, enlisted with parental consent under age eighteen, or a pregnant Air Force member might be sentenced to death. Such a sentence could not be carried out after ratification of the United Nations Covenant. Execution of such a sentence even now is highly unlikely. Among other reasons, the youth of the offender or the condition of the pregnant member in itself would probably be sufficient mitigation to result in commutation of the death penalty, except perhaps for the most heinous and premeditated of crimes. Nonetheless, the United Nations Covenant, if ratified, would result in a limitation of the jurisdiction of Article 18, UCMJ.²¹ It would also impose a de jure addition to paragraph 126, MCM (1969, Rev.), dealing with limitations on imposition of the death penalty.

The guarantees of Article 7 of the United Nations Covenant, relating to protection against torture or other cruel

punishment, are well stated in Article 55, UCMJ.²² It prohibits, inter alia, flogging, branding, and the use of irons, except for the purpose of safe custody. In addition, paragraph 125, MCM (1969, Rev.) prohibits, inter alia, such antiquated methods of torture as shaving the head, placing in stocks, or tying up by the thumbs. Some comment regarding medical and scientific experimentation, prohibited by Article 7 of the United Nations Covenant, will be made under Section III of this paper.

Article 9, paragraph 2, United Nations Covenant, dictates that any person arrested or detained be informed promptly of the reasons for his arrest or detention and of the charges against him. These guarantees are sufficiently protected by Article 10, UCMJ.²³ It states, "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate (emphasis supplied) steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him".

Article 9, paragraph 3, United Nations Covenant, requires a person arrested or detained on a criminal charge to be brought before a judge or other officer authorized by law to exercise judicial power. The usual role of United States District Courts in habeas corpus proceedings has been preempted in military pretrial confinement situations. In two recent decisions,²⁴ the United States Supreme Court has held that United States District Courts may not review pretrial confinement in military facilities prior to completion of court-martial proceedings, including appellate review.²⁵

The current Air Force practice of having initial confinement reviewed by the special court-martial convening authority and pretrial confinement in excess of thirty days reviewed by the general court-martial convening authority does not appear to comply with the spirit of the requirement of the United Nations Covenant. It may well not even comply with the requirements of the United States Court of Military Appeals regarding review by a neutral and detached magistrate.²⁶ At a minimum, the current Air Force system fails to give at least the appearance of impartiality by retaining review within the command system.

The remaining provisions of Article 9, paragraph 3, of the United Nations Covenant basically state that detention before trial should be the exception, rather than the rule. Paragraph 20(c), MCM (1969, Rev.), expresses the rule well: "[C]onfinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged".

Article 14 of the United Nations Covenant states the basic human rights of accused persons at trial. On the whole, the right to a fair and public hearing by a competent, independent and impartial tribunal is secured under the UCMJ. The presumption of innocence mandated by Article 14, paragraph 2, United Nations Covenant, is protected by paragraph 73b(1), MCM (1969, Rev.). It requires the jury in a court-martial to be instructed, "[T]he accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond

reasonable doubt".

The right to be informed promptly of charges, guaranteed in Article 14, paragraph 1(a), United Nations Covenant, is embodied in Article 30(b), UCMJ.²⁷ It states, "[U]pon the preferring of charges, ... the person accused shall be informed of the charges against him as soon as practicable." The MCM (1969, Rev.) provides a double protection in this regard. It requires the immediate commander to inform the accused of the charges against him before they are forwarded to the summary court-martial authority.²⁸ It then requires the summary court-martial authority to insure that the accused has been so informed.²⁹

The right to adequate time for preparation of a defense is imposed by Article 14, paragraph 3(b), of the United Nations Covenant. Article 35, UCMJ,³⁰ prohibits trial by special court-martial within three days and by general court-martial within five days after service of charges upon the accused. This restriction is effective only in time of peace. In addition, Article 40, UCMJ,³¹ permits the military judge to grant a continuance "for such time, and as often, as may appear to be just".

The right to trial without undue delay is contained in Article 14, paragraph 3(c), of the United Nations Covenant. This right is stated both negatively and positively in the UCMJ and MCM (1969, Rev.). Negatively, Article 98, UCMJ,³² makes it a court-martial offense to delay disposition of any case of a person accused of an offense. Positively, paragraph 25, MCM

(1969), Rev.) directs that when any person is placed in arrest or confinement prior to trial immediate steps shall be taken to try him or dismiss the charges and release him. It also states that when it is intended to prefer charges, they should be preferred without unnecessary delay. It does, however, permit reasonable delay. Such delay might be proper to permit a suspect to continue a course of conduct so that a ringleader or other conspirators might also be discovered. Still, even such reasonable delay is not permitted if the person concerned is in arrest or confinement.

The United States Court of Military Appeals has also legislated in this area by judicial fiat. It has declared that, in the absence of defense request for a continuance, any pre-trial confinement in excess of three months will place a heavy burden on the government to show diligence. In the absence of such a showing, the charges must be dismissed.³³ Additionally, any delay in excess of ninety days between the end of the trial and the execution of the sentence will similarly place a heavy burden on the government to show diligence. Again, in the absence of such a showing, the charges must be dismissed.³⁴ These strict time standards are enforced by the appellate military courts. Because of this, the military should have no difficulty in meeting the requirements of the United Nations Covenant regarding trial without undue delay. On the other hand, their civilian counterparts may find compliance burdensome. Crowded civilian dockets can often result in much more lengthy delays

than present military standards permit.

The right of the accused to be tried in his presence is established in Article 14, paragraph 3(d), of the United Nations Covenant. It finds fulfillment in paragraph 30, MCM (1969, Rev.), which states, "[T]he presence of the accused throughout the proceedings in open court is ... essential". Only in the event the accused voluntarily and without authorization absents himself from the trial may the trial proceed without the accused. Even then, it may only continue if the accused was present from the commencement of the trial until his arraignment. Any voluntary and unauthorized absence thereafter is considered a voluntary waiver of the right to confrontation.

The accused's right to defend himself in person, guaranteed by Article 14, paragraph 3(d), United Nations Covenant, is recognized by paragraph 48a, MCM (1969, Rev.). It permits the accused, if he so desires, to conduct his own defense without assistance of counsel. On the other hand, the same article of the United Nations Covenant grants an accused the right to legal assistance of his own choosing. That privilege is granted military members, with regard to both civilian counsel and military counsel, by Article 38(b), UCMJ.³⁵ The only requirements are that the accused pay for civilian counsel himself and that requested military counsel be reasonably available. If an accused does not desire either civilian counsel or individually requested military counsel, Article 38(b) grants him the right to be defended without charge by appointed military counsel in general

and special courts-martial. Air Force practice also grants that right in summary courts-martial.

Article 14, paragraph 3(e), United Nations Covenant, is the section guaranteeing cross-examination of prosecution witnesses and the accused's right to call witnesses in his own behalf. An identical provision in the European Convention has been construed by the European Court not to levy the absolute right to call witnesses, but only to insure "equality of arms" between the prosecution and defense.³⁶ Against this background, the protections offered by Article 46, UCMJ,³⁷ appear adequate. It guarantees equal opportunity to obtain witnesses to trial counsel, defense counsel, and the court itself.

Article 14, paragraph 3(f) of the United Nations Covenant, guaranteeing the right to the free services of an interpreter, is well protected by paragraph 53i, MCM (1969, Rev.).

The standards of the accused's right of not being compelled to testify against himself or confess guilt, as stated in Article 14, paragraph 3(g), United Nations Covenant, are exceeded by Article 31, UCMJ.³⁸ By virtue of that section, the accused may not be compelled to incriminate himself or answer any question which may tend to incriminate him. Any statement obtained through coercion, unlawful influence or unlawful inducement may not be received in evidence against him. The accused may not even be compelled to make a statement or produce evidence which is not material and may tend to degrade him. Additional protection against being compelled to confess guilt

is offered by the requirements set down by Article 45, UCMJ,³⁹ and paragraph 70a, MCM (1969, Rev.). Those sections and the guidelines set down by the United States Court of Military Appeals⁴⁰ insure that any guilty plea is knowingly, intelligently and voluntarily made. Should the accused at any time during the trial set up matters, either orally or through documents, inconsistent with his plea of guilty, the military judge is bound to enter a plea of not guilty.⁴¹

Article 14, paragraph 5, United Nations Covenant, guarantees the right to appellate review of convictions.

Under the American military court system, the record of trial of every summary, special and general court-martial must be reviewed by the convening authority.⁴² In the cases of general courts-martial and special courts-martial which adjudge a bad conduct discharge, the record of trial must be reviewed by a staff judge advocate or legal officer prior to action being taken by the general court-martial authority.⁴³ In other cases, the record of trial receives a legal review after promulgation of the action.⁴⁴

Even if this initial review complies with the letter of Article 14, paragraph 5, United Nations Covenant, it is questionable whether or not it complies with the spirit of independent (emphasis supplied) review contained in the cited section. The problem lies with the interpretation of the phrase "higher tribunal". The difficulty is heightened by

the lack of interpretive precedent of the European Convention. In the case of review either by the convening authority or the general court-martial authority, it is questionable whether they are a "tribunal" in the sense of the United Nations Covenant. In the vast majority of cases, they are not lawyers or specially trained in legal matters. Even in those cases where the record of trial receives prior review by a staff judge advocate or legal officer, the convening authority or general court-martial authority usually does not possess the legal acumen to independently evaluate the legal review. It is difficult to classify the convening authority or general court-martial authority, therefore, as a tribunal in the sense that word is apparently used in the United Nations Covenant.

Even if the initial reviewer is classified as a "tribunal", it is questionable whether or not he is "higher", particularly in those cases where the initial reviewing authority is both the convening authority and the general court-martial authority. It is true that he has authority to reverse any conviction, in whole or in part, and to modify sentences, so long as his modification is less arduous than the sentence originally imposed.⁴⁵ However, he is also the same person who originally ordered the accused tried and, impliedly therefore, considered the evidence of guilt sufficient to warrant court-martial. In the civilian setting,

the closest analogy would be review of a felony conviction by the grand jury which indicted the accused, or review of a misdemeanor conviction by the state's attorney who prosecuted on information. To label the review by the convening authority or general court-martial authority a review by a "higher tribunal" presents at least the appearance of lack of impartiality. As has been previously pointed out, such appearances ought to be guarded against even more strenuously in the military justice system than in the civilian justice system, because of the part real and part imagined past excesses of command influence. It is submitted, therefore, that initial review of a conviction and sentence by the convening authority or general court-martial authority ought not be considered review by a "higher tribunal".

Following that assumption, other sections of the UCMJ and MCM (1969, Rev.) must now be examined for protection of appellate review guarantees. Under Article 66, UCMJ,⁴⁶ every conviction involving a general or flag officer or extending to a sentence of death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more must be reviewed by a Court of Military Review. There appears no doubt that such review is sufficient to comply with the requirements of Article 14, paragraph 5, United Nations Covenant, for the particular cases brought before it. Article 67(b), UCMJ,⁴⁷ provides for review by the United

States Court of Military Appeals of convictions affecting general or flag officers or extending to death, cases referred to it by The Judge Advocate General after review by a Court of Military Review, and cases reviewed by a Court of Military Review in which petitioner's request for certiorari is granted. Such review is further evidence of compliance with the guarantees of Article 14, paragraph 5, of the United Nations Covenant.

Lastly, general court-martial cases which do not affect general or flag officers and do not result in a sentence of death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more are reviewed under Article 69, UCMJ,⁴⁸ by the office of The Judge Advocate General. If any part of the findings or sentence is found unsupported in law or if The Judge Advocate General otherwise so directs, the record is reviewed by a Court of Military Review.⁴⁹ In the case of any conviction not reviewed by a Court of Military Review, The Judge Advocate General himself may vacate or modify a conviction or lessen a sentence on the grounds of newly-discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.⁵⁰ Unfortunately, Article 69, UCMJ, does not give The Judge Advocate General authority to modify a sentence which is otherwise legally proper and within the limits of the Table of Maximum Punishments,⁵¹ but simply

disproportionate to the offense, all factors considered.

A much more basic problem in the area of review under Article 69, UCMJ, is whether or not such review by The Judge Advocate General is review by a "higher tribunal". Initial review by a convening authority or general court-martial authority must be distinguished, however, from review by The Judge Advocate General. It has been submitted that the former is not review by a "higher tribunal" for two reasons. First, the reviewing authority is not normally a lawyer or specially trained in legal matters so as to be able to independently evaluate the legal review of the staff judge advocate or legal officer.

Secondly, he is so intimately connected with the command system that his review may lend itself to at least the appearance of lack of impartiality. On the other hand, The Judge Advocate General is a lawyer and is independent of the command system which initiated the court-martial. It is submitted, therefore, that his review fulfills the requirement of Article 14, paragraph 5, United Nations Covenant, for review by a "higher tribunal". The only caveat is that he lacks authority to review the sentences in certain cases on clemency grounds only.

The prohibition against double jeopardy contained in Article 14, paragraph 7, of the United Nations Covenant is the last section of that agreement which will be considered as directly affecting the military court system.⁵² In general, Article 44, UCMJ,⁵³ prohibits trial for a second time for the same offense, without the consent of the accused. However,

trial for serious offenses is permitted after an accused has already received nonjudicial punishment for the same offense.⁵⁴ As will be discussed later, nonjudicial punishment under Article 15, UCMJ, may well be interpreted as a "conviction". Thus, a later trial by court-martial for the same offense may be considered violative of the United Nations Covenant prohibition against double jeopardy.

Another problem in this area is trial by court-martial for the same offense after trial by a civilian court. If the civilian court is a federal court, subsequent trial by court-martial is prohibited.⁵⁵ If, however, the former proceedings were held by a state or local court, trial by court-martial for the same offense is not prohibited.⁵⁶ The theory is that the criminal laws of two different sovereigns, the state or local government and the United States government, have been violated. This problem extends beyond the court-martial system and affects the entire United States judicial system because of our federal form of government. Because the Air Force restricts subsequent courts-martial after non-federal convictions for essentially the same offense⁵⁷ and because the United States Supreme Court has imposed limits on courts-martial for non-service connected crimes,⁵⁸ it is believed this problem will not arise in the military court system.

C. Effect of Selected Articles of
the American Convention
on Human Rights

Many of the basic human rights guaranteed by the American Convention are similar, if not identical, to the protections offered by the United Nations Covenant. For example, the American Convention prohibition against imposition of the death penalty on persons who were under eighteen at the time of commission of an offense, or on pregnant women, is similar to that contained in the United Nations Covenant. Article 5, paragraph 2, of the American Convention, regarding prohibition of torture and cruel, inhuman or degrading punishment, is almost identical to Article 7 of the United Nations Covenant. Likewise, Article 7 of the American Convention, respecting the accused's right to be informed of the reasons for his detention and charges against him, his right to a prompt trial, and access to habeas corpus remedies, corresponds to Article 9 of the United Nations Covenant. Finally, Article 8 of the American Convention grants similar protections to Article 14 of the United Nations Covenant in the following areas: presumption of innocence, prompt explanation of the charges, adequate time for preparation of a defense, right to trial without undue delay, right to defend in person or through counsel including free state-appointed counsel, right to cross-examine state witnesses, right to the free services of an interpreter, right to freedom from self-incrimination, and the right to plead not guilty.

Inasmuch as nothing would be gained by reexamination of the military court system regarding these guarantees, the reader is directed to comments previously made. In several cases, however, the protections of the American Convention differ from those of the United Nations Covenant and these cases will now be examined in light of the provisions of the UCMJ and MCM (1969, Rev.).

Article 8, paragraph 2f, of the American Convention guarantees the accused's right to obtain the appearance at trial of experts and other persons who "may throw light on the facts". It differs from Article 14, paragraph 3(e), United Nations Covenant, in that it contains no reservation regarding "equality of arms". Paragraph 115a, MCM (1969, Rev.) places responsibility on the trial counsel for the attendance of defense witnesses. It also vests in the trial counsel discretion as to whether or not a defense witness is material and necessary. It further provides that application may be made to the convening authority prior to trial or to the military judge after trial begins, or to both, should a trial counsel decline a defense request for a particular witness. Final determination is vested in the military judge.

If the terms of Article 8, paragraph 2f, of the American Convention were literally read, failure of the trial counsel, convening authority and military judge to order the appearance of defense witnesses could be construed to be violative of the provisions of the American Convention. The European experience does not provide interpretive assistance. While

the European Court did construe the "right to call witnesses" provisions of the European Convention as implying only "equality of arms", its interpretation was based on Article 6(3)(d) of the European Convention. That article contains restrictive language similar to the United Nations Covenant and not the American Convention.

One must therefore either construe the terms of Article 8, paragraph 2f, literally, or imply an "equality of arms" interpretation. The former process would result in an unmanageable procedure which could deprive the judge of all discretion regarding materiality and necessity of certain witnesses. It would apparently leave to the defense the determination of who "may throw light on the facts". If, however, one were to imply an "equality of arms" interpretation, the decision as to who "may throw light on the facts" reverts to its proper functionary, the judge. If the latter interpretation is applied, then the guarantee afforded by Article 8, paragraph 2f, of the American Convention is well protected by the equal opportunity rule of Article 46, UCMJ,⁵⁹ and paragraph 115a, MCM (1969, Rev.).

A much more pressing problem arises with regard to the right to appellate review, contained in Article 8, paragraph 3h, of the American Convention. Article 14, paragraph 5, of the United Nations Covenant provided only for review of conviction and sentence by a "higher tribunal". Article 8, paragraph 2h, of the American Convention, on the other hand, provides for the right to appeal the judgement to a higher court (emphasis supplied). It is clear that neither initial review by the convening

authority or general court-martial authority, nor by The Judge Advocate General under Article 69, UCMJ, complies with the terms of Article 8, paragraph 2h, of the American Convention. Only review by a Court of Military Review or the United States Court of Military Appeals would satisfy the requirement. To the extent that review by these appellate courts is not provided for in specific cases by the UCMJ or MCM (1969, Rev.), the American military court system appears to be violative of Article 8, paragraph 2h, of the American Convention.⁶⁰

Of all the possible difficulties which could be engendered by ratification of the American Convention, the problem of appellate review appears to be the most serious and most ripe for a serviceman's complaint to the Inter-American Commission. Should the United States accept the jurisdiction of the Inter-American Court,⁶¹ the case could be tried there, based on a petition by the Inter-American Commission.

The last area of the American Convention to be considered which differs from the United Nations Covenant is the area of double jeopardy.⁶² Article 14, paragraph 7, of the United Nations Covenant prohibits another trial for the same offense after either conviction or acquittal. On the other hand, Article 8, paragraph 4, of the American Convention extends that protection only to a subsequent trial after a person is acquitted. Nonetheless, some of the double jeopardy problems which were encountered under the United Nations Covenant are present with regard to the American Convention. The reader is

referred to previous examination of those problems under the United Nations Covenant.

III. EFFECT OF RATIFICATION OF THE UNITED NATIONS
COVENANT ON CIVIL AND POLITICAL RIGHTS AND
THE AMERICAN CONVENTION ON HUMAN RIGHTS
ON PRESENT UNITED STATES AIR FORCE
CONFINEMENT PROCEDURES

This section of the paper will be the shortest, for little is said in both the United Nations Covenant and the American Convention regarding the subject of confinement procedure. The only notable protections are that torture or cruel, inhuman and degrading treatment will not be used,⁶³ and that the aim of the penal system shall be the reform and social rehabilitation of prisoners.⁶⁴ While both agreements forbid forced labor, each excepts hard labor legally imposed as a punishment for crime.⁶⁵

The Air Force military confinement system may be divided into two categories: pretrial confinement, usually at a local base, and post-trial confinement at one of three types of facilities. These latter facilities may be described as local, centralized for apparently restorable prisoners and those non-restorable prisoners who have received short sentences, and long term for nonrestorable prisoners who have received long sentences.⁶⁶ Local facilities are utilized for prisoners receiving short sentences without punitive discharge. The major centralized facility of the Air Force is designated the 3320th

Correction and Rehabilitation Squadron. It is located at Lowry Air Force Base, Colorado, and maintains minimum, medium and maximum confinement areas. It also serves as the focal point for Air Force prisoner rehabilitation efforts. The long term facility, the United States Disciplinary Barracks at Fort Leavenworth, Kansas, is under operational control of the United States Army. It receives nonrestorable Air Force prisoners who have at least six months remaining on a sentence without a punitive discharge or four months remaining on a sentence which includes a punitive discharge.

There are few decisions of the European Court and Commission in the confinement area and only one of any direct consequence. The case⁶⁷ concerned a British law requiring prisoners to secure permission from the Home Secretary prior to consulting counsel. Golder, a prisoner, was denied the right to consult counsel for the purpose of instituting a libel suit against one of his jailers. The European Court held that denial deprived Golder of his right to a fair and public hearing in the determination of his civil rights, under Article 6(1) of the European Convention. Similar language appears in Article 14, paragraph 1, of the United Nations Covenant, and Article 8, paragraph 1, of the American Convention.

Air Force directives do not contain any requirement to obtain permission before consulting counsel. However, while they do permit civilian (emphasis supplied) attorneys to visit prisoners or rehabilitees at any reasonable hour of the day,

no mention is made of visits by military counsel.⁶⁸ The right to consult military counsel is so ingrained that it was probably taken for granted. The omission, therefore, is most likely one of form, rather than of substance. Nonetheless, from the point of view of an international body reviewing a complaint of denial of access to counsel, it would be more desirable if Air Force directives specifically stated the right of military counsel to visit prisoners and rehabilitees on the same basis at least as civilian attorneys.⁶⁹

Another potential problem in the counsel area is interference with the attorney-client privilege. Paragraph 4-4a(2) of Air Force Regulation 125-18 commendably states that correspondence emanating from prisoners to civilian or military counsel is privileged and not subject to inspection. However, incoming mail from such counsel is subject to opening and inspection, admittedly solely for the purpose of insuring authenticity. Nonetheless, this opens the door to possible abuse and at least gives the appearance of interference with the attorney-client relationship.

Another potential problem area involves segregation of convicted persons from those in pretrial confinement and segregation of juveniles from adults. Paragraph 2-11(a), Air Force Regulation 125-18, permits the housing of convicted prisoners with those in pretrial confinement. Paragraph 2-11(b), Air Force Regulation 125-18, recommends segregation only if space is available and the configuration of the facility permits it.

Both Article 10, paragraph 2(a) of the United Nations Covenant, and Article 5, paragraph 4, of the American Convention, contain identical language that, "[A]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons ...". Whether or not lack of space or detention facility design would be considered "exceptional circumstances" must await international decision. There are no reported cases of the European Court or Commission which furnish guidance in this regard.

The fact that pretrial confinees quartered with convicted persons may receive sentencing credit for the period spent in pretrial confinement does not necessarily alleviate the problem. The European Court has held that even those receiving sentencing credit for human rights violations relating to imprisonment are still entitled to pursue a remedy for monetary compensation.⁷⁰

No provision is made in Air Force regulations for the segregation of juvenile prisoners from adult prisoners. Usually, more than ten percent of the prisoners at the 3320th Correction and Rehabilitation Squadron are in the seventeen and eighteen year old age group. Unless the Air Force segregates prisoners under eighteen from the remainder of its prison population, it would be in violation of the United Nations Covenant and the American Convention.

Turning to the subject of torture or cruel punishment, Article 55, UCMJ,⁷¹ prohibits flogging, branding, and use of irons except for safe custody. Paragraph 125, MCM (1969, Rev.),

prohibits shaving the head, placing in stocks, or tying up by the thumbs. Additionally, confinees in Air Force confinement facilities are protected by paragraph 4-14, Air Force Regulation 125-18. It prohibits, inter alia, lock step, making prisoners hold their arms in a folded position or in an extended, strained position for prolonged periods, assigning tasks that serve no useful purpose, the use of balls and chains, and requiring prisoners to sleep on boards or without mattresses, except for medical reasons.

Lastly, mention must be made of Article 7 of the United Nations Covenant which prohibits subjecting prisoners to medical and scientific experimentation without their free consent. The 3320th Corrections and Rehabilitation Squadron, as part of its mission, provides higher headquarters with special studies in the human behavior field.⁷² It is inconceivable that such studies would involve physical experimentation. However, the 3320th Corrections and Rehabilitation Squadron must guard against psychological (emphasis supplied) experimentation without full knowledge and consent of its inmates. Otherwise, it will run afoul of Article 7 of the United Nations Covenant.

IV. EFFECT OF RATIFICATION OF CERTAIN INTERNATIONAL
AGREEMENTS ON THE PRESENT NON-CRIMINAL
SANCTIONING PROCESS IN THE
UNITED STATES AIR FORCE

The Air Force separates the non-criminal sanctioning process into non-punitive disciplinary measures⁷³ and nonjudicial punishment under Article 15, UCMJ.⁷⁴ The non-punitive disciplinary measures do not result in deprivation of liberty and are not imposed as punishment for an offense.⁷⁵ Hence, they do not fall within the scope of either the United Nations Covenant or the American Convention. Conversely, nonjudicial punishment may well result in restrictions on freedom of movement and must state an offense under the UCMJ.⁷⁶

An argument can be made that nonjudicial punishment also ought not be subject to the provisions of the United Nations Covenant and the American Convention. Such an opinion would be based, in part, on the fact that nonjudicial punishment does not result in a "conviction" under the domestic law of the United States. Another possible basis is that any nonjudicial punishment which might constitute deprivation of liberty is "voluntarily" accepted. The "voluntariness" proceeds from the fact that any accused, except one attached to or embarked on

a vessel,⁷⁷ can refuse nonjudicial punishment and demand trial by court-martial.⁷⁸ This latter justification would thus be in the nature of estoppel against the complainant.

As sound as these arguments may appear, it is submitted that they are not dispositive of the issue. In the Cases of Engel and Others, discussed infra, the European Court construed a determination under the nonjudicial punishment system of the Netherlands Armed Forces as a "conviction" for purposes of review under the European Convention. As in the American system, nonjudicial punishment was not considered a "conviction" under Dutch municipal law. With regard to the "voluntary" nature of nonjudicial punishment, it should be noted that demand for court-martial may result in far more serious penalties than acceptance of nonjudicial punishment. Thus, acceptance is not truly "voluntary", but is made to avoid more stringent punishment. More importantly, however, it is urged that the military disciplinary process must be viewed as an entity in itself, without reference to alternative criminal procedures. If military personnel are to be deprived of their liberty or property, through a system of nonjudicial punishment, that system ought to comply in every detail with fundamental human rights guarantees. This paper will proceed, therefore, on the assumption that the Air Force nonjudicial punishment system may be required to conform, or at least ought to conform, to the human rights guarantees of the United Nations Covenant and the American Convention.

A. Survey of the System of Nonjudicial
Punishment in the United
States Air Force

The Air Force procedure for imposition of nonjudicial punishment provides that the offender's commanding officer makes preliminary inquiry into the facts of the charges. He then determines whether he will impose punishment himself or recommend punishment to a superior commander.⁷⁹ If the commander determines to impose punishment himself, he notifies the offender of the nature of the offense and of the offender's right to counsel,⁸⁰ right to a hearing before him, right to have that hearing open to the public,⁸¹ and right to demand trial by court-martial.⁸² If the commander determines to recommend punishment to a superior commander, the same rights apply except if the superior commander is located so far away that a personal hearing would be impractical. In that case, the offender may have a hearing, public or private, held before the local commander. A non-verbatim record is made of that hearing and forwarded to the superior commander.⁸³

In either case, at the hearing the offender has the right to present evidence and matters in defense, extenuation and mitigation. He also has the right to call those witnesses who are reasonably available locally and can be presented without the necessity of legal process.⁸⁴

Any offender who considers his punishment unjust or

disproportionate to the offense may appeal to the next superior authority.⁸⁵ On appeal, the offender is entitled to the assistance of legal counsel in deciding whether to appeal⁸⁶ and in preparing a written appeal. There is no provision for a hearing on appeal, public or otherwise. The decision of the appellate commander is final and not subject to further review.⁸⁷

Under Article 15, UCMJ, the nature and severity of the available punishments depend both on the rank of the punishing officer and the rank of the offender. They may be enumerated as follows:

A. On commissioned or warrant officers, by any commander:

1. admonition or reprimand
2. restriction to certain specified limits, with or without suspension from duty, for not more than thirty days

B. On commissioned or warrant officers, by a commanding general officer or an officer exercising general court-martial jurisdiction:

1. admonition or reprimand
2. forfeiture or detention of pay
3. restriction to certain specified limits, with or without suspension from duty, for not more than sixty days
4. arrest in quarters for not more than thirty days (may not be required to perform full military duty)⁸⁸

C. On other than commissioned or warrant officers,
by any commander:

1. admonition or reprimand
2. forfeiture or detention of pay
3. extra duties for not more than fourteen consecutive days
4. reduction in rank
5. restriction to certain specified limits, with or without suspension from duty, for not more than seven consecutive days
6. confinement on bread and water or diminished rations for not more than three consecutive days⁸⁹
7. correctional custody for not more than seven consecutive days

D. On other than commissioned or warrant officers,
by a commanding officer of the grade of major or above:

1. admonition or reprimand
2. forfeiture or detention of pay
3. extra duties for not more than forty-five consecutive days
4. reduction in rank
5. restriction to certain specified limits, with or without suspension from duty, for not more than sixty days

6. confinement on bread and water or diminished rations for not more than three consecutive days⁹⁰
7. correctional custody for not more than thirty consecutive days

The United Nations Covenant and the American Convention do not provide any criteria for determining what constitutes deprivation of liberty in the armed forces. Indeed, military service itself, particularly in the form of conscription, constitutes a very real deprivation of personal freedom of movement. Yet, it is sanctioned by the United Nations Covenant in Article 8, paragraph 3(c)(ii), and by the American Convention in Article 6, paragraph 3b. Another problem is whether nonjudicial punishment constitutes "determination of a criminal charge" under Article 14, paragraph 1, of the United Nations Covenant, or "substantiation of any accusation of a criminal nature" under Article 8, paragraph 1, of the American Convention.

Fortunately, the European Court has decided a case, Engel and Others,⁹¹ reviewing non-criminal disciplinary proceedings in the armed forces of the Netherlands. Those proceedings closely approximate nonjudicial punishment under Article 15, UCMJ. Examination of this case may lend some insight into how the operative provisions of the United Nations Covenant and the American Convention may be interpreted in regard to nonjudicial punishment in the United States Air Force. First, however, some background information on the Dutch military discipline system may be helpful.

B. Survey of the System of Nonjudicial
Punishment in the Armed Forces
of the Netherlands

Like the United States, the Netherlands separates the military justice system into two distinct areas: the criminal sanctioning process and the non-criminal or disciplinary sanctioning process. Under Dutch law, disciplinary offenses are defined as all acts not included in any criminal legislation, but which are contrary to any official order or regulation or inconsistent with military discipline. Also included are criminal acts which fall within the jurisdiction of the military judge, but are so trivial that they can be dealt with through the non-criminal process. Separate proceedings are provided for disciplinary and criminal offenses. The nature of disciplinary proceedings can best be described as administrative with judicial review.

Under Dutch disciplinary proceedings, the offender's commanding officer may impose punishment after investigation and a hearing at which the accused serviceman may testify and request the appearance of witnesses and experts. Appeal is to the complaints officer, who is the immediate superior of the commanding officer who imposed the punishment. There is another hearing at which the accused, the punishing officer, witnesses and experts may be questioned. The decision of the complaints officer, accompanied by reasons therefor, is communicated to

the accused and to the punishing officer.

Final appeal is to the Supreme Military Court. It is a six member court sitting at the Hague and consists of two civilian judges, one of whom is President, and four military officers. The Court sits in camera and there is therefore no hearing. However, the judgement is pronounced at a public session. There is no "right" to legal counsel in disciplinary proceedings. Nonetheless, practice is to afford legal counsel before the Supreme Military Court where special legal problems are presented. This applies particularly to cases where the European Convention is invoked.

The types and nature of punishment available under Dutch disciplinary proceedings depend on the rank of the offender and may be enumerated as follows:⁹²

1. reprimand (for all ranks)
2. loss of wages (for all ranks)
3. restriction to camp during the night (not provided for officers)
4. light arrest up to twenty-one days (up to fourteen days for officers)
5. aggravated arrest up to fourteen days (not provided for officers)
6. strict arrest up to fourteen days (for all ranks)
7. committal to a disciplinary unit (not provided for officers and NCOs)

The nature of light arrest, aggravated arrest and strict arrest varies also according to rank, but as relevant here, may be defined as:

1. light arrest: served during non-duty hours--officers and NCOs who normally live off-base are confined to quarters--ordinary servicemen are confined to base--all perform normal duty
2. aggravated arrest: served during non-duty hours--confinement to a particular place set aside for the purpose on base--all perform normal duty
3. strict arrest: served during both duty and non-duty hours--officers confined to quarters--NCOs and ordinary servicemen locked in cell on base--excluded from performance of duty.

Those servicemen who are committed to a disciplinary unit are placed in a special detachment and their movement and privileges are restricted for a period from three to six months.

C. The Case of Engel and Others: International
Judicial Review of the System of
Nonjudicial Punishment in
the Armed Forces of
the Netherlands

There were five cases decided sub nomine Engel by the European Court. All involved enlisted Dutch conscripts. Perhaps a brief survey of the cases will be of assistance in understanding the Dutch non-criminal sanctioning process.

1. Facts of the cases and Dutch military proceedings

Engel received four days light arrest for absenting himself from his quarters, where he was on sick leave, to attend a military union meeting at which he was elected vice-president.⁹³ He violated the light arrest by leaving the base at night and received further punishment of three days aggravated arrest. He again violated the restrictions placed on him by leaving the base at night, was arrested by military police, and imprisoned provisionally for two days. The maximum permitted by law was one day. He was thereafter punished with three days strict arrest for the previous violations of light and aggravated arrest.

He appealed to the complaints officer who reduced the punishments to a reprimand, three days light arrest, and two days strict arrest, respectively. The two days strict arrest was deemed served by the two days provisional imprisonment previously imposed. The basis for this reduction was that Engel was under stress due to his forthcoming doctoral examination.

On appeal to the Supreme Military Court, the punishment as reduced by the complaints officer was affirmed. Engel did not receive legal counsel at any stage of the proceedings, but there is no record that he asked for counsel. The Supreme Military Court decided that Article 5(1)(b) of the European Convention, regarding detention to secure the fulfillment of an obligation prescribed by law, was applicable and held that Engel's detention was lawful.

Van der Wiel had trouble with his car on the way to work. He could have reported on time, but elected to have his car repaired immediately. He then reported to duty four hours late. He received punishment of four days light arrest. He appealed to the complaints officer, invoking Articles 5 [right to liberty], 6(1) [general right to a fair hearing], 6(3)(b) [right to adequate time and facility for preparation of defense], and 6(3)(c) [right to defend in person or through legal assistance of choice]. The complaints officer rejected his appeal under the European Convention.

Van der Wiel then appealed to the Supreme Military Court, which upheld the original punishment of four days light arrest. The Supreme Military Court held that the whole of Article 6 of the European Convention was inapplicable to disciplinary proceedings because they involved neither determination of a criminal charge nor determination of civil rights and obligations. As to Article 5, the Supreme Military Court reached an alternative decision. It held that light arrest did not constitute deprivation of liberty or, even if it did, that it was imposed to secure the fulfillment of an obligation prescribed by law, as in the Engel case. Van der Wiel did not receive legal counsel before the punishing officer or the complaints officer, although he requested it, but did receive legal counsel before the Supreme Military Court.

De Wit received committal to a disciplinary unit for three months for driving a jeep in an irresponsible manner over

uneven terrain at a speed of forty to fifty kilometers per hour. He was also charged with failure to immediately carry out his assigned mission. He apparently had a record of repeated misbehavior and failure to observe discipline.

He appealed to the complaints officer with legal counsel assisting and invoked unspecified provisions of the European Convention. One of the three witnesses he requested was examined by the complaints officer, as well as five witnesses against him. The complaints officer confirmed the adjudged penalty and rejected the allegations under the European Convention. De Wit then appealed to the Supreme Military Court, again with the assistance of legal counsel. Without addressing de Wit's previous record of misbehavior, the Supreme Military Court reduced the punishment to twelve days aggravated arrest.

Dona and Schul were both editors of a military union publication, ALARM, and collaborated in the preparation of an article critical of a general officer.⁹⁴ They were accused of undermining discipline and sentenced to a disciplinary unit for three and four months, respectively. Schul's punishment was more severe because of aggravating circumstances involving the publication of another prohibited bulletin. When they refused to refrain from further publication of that kind pending their appeals, they were placed under aggravated arrest (interim custody).

Their appeals to the complaints officer, based on Articles 5, 6, and 10 [freedom of expression] of the European

Convention, were rejected and they were retained in custody. They then appealed to the Supreme Military Court. It ordered their release pending decision on their appeal, provided they not participate in further publication in the interim. The Supreme Military Court eventually confirmed Dona's commitment for three months, but reduced Schul's commitment from four months to three.

With regard to the allegation of violation of Article 5, the Supreme Military Court held that committal to a disciplinary unit did not constitute deprivation of liberty or, in the alternative, that Article 5(1)(b) was applicable, as in Engel and van der Wiel. The Court rejected the argument regarding Article 6 on the same grounds as in the van der Wiel case. As to Article 10 regarding freedom of expression, the Supreme Military Court held that paragraph 2 of Article 10 applied, in that the restriction on Dona's and Schul's freedom of expression was necessary in a democratic society for the prevention of disorder in the military context. Finally, the Supreme Military Court held that it had no competence to decide if interim custody was consistent with Article 5(1)(c) of the European Convention. That article justifies detention for the purpose of bringing a person before a competent legal authority on reasonable suspicion of his having committed an offense or fleeing after having done so. The Supreme Military Court also held it had no competence to decide if Dona and Schul were entitled to compensation under Article 5(5) of the European Convention.

2. Proceedings before the European Commission of Human Rights

After exhaustion of their military appeals, Engel, van der Wiel, de Wit, Dona and Schul applied to the European Commission which joined their applications. All five claimed deprivation of liberty contrary to Article 5 of the European Convention. They also claimed that disciplinary proceedings did not comply with Article 6 [guarantee of a fair hearing], and that their punishments were discriminatory and in breach of Article 14 [guaranteeing enjoyment of rights and freedoms without discrimination based on, inter alia, status] read in conjunction with Articles 5 and 6.

In addition, Engel alleged breach of Article 5 in conjunction with his provisional arrest and breach of Article 11 [right to join a trade union]. Dona and Schul contended that their interim custody was in disregard of Article 5 and that punishment imposed for publishing and distributing articles deemed to undermine military discipline contravened Articles 10, 11 and 14 of the European Convention. All five demanded compensation. All applications were found admissible, except the allegation of Engel regarding breach of the right to join a trade union. It was rejected as being manifestly ill-founded.

The Commission held:

1. that the light arrest of Engel and van der Wiel did not amount to deprivation of liberty within the

meaning of Article 5 of the European Convention

2. that the other disciplinary punishments of Engel, de Wit, Dona and Schul infringed Article 5(1) and that their appeals violated Article 5(4) in that they were not decided speedily
3. that Engel's provisional arrest violated Article 5(1) since it exceeded the statutory arrest period of one day
4. that the interim custody of Dona and Schul did not violate Article 5
5. that with regard to Dona and Schul there had been no violation of Articles 10 or 11
6. that no violation of Article 14 had occurred
7. that Article 6 was inapplicable to disciplinary proceedings

3. Proceedings before the European Court of Human Rights

Both the Netherlands government and the European Commission applied to the European Court. The selected chamber yielded jurisdiction to the en banc Court. The basis for this action was the magnitude of the questions presented and the effect the interpretation of the Convention could have not only on the applicants, but on service personnel of the armed forces of all member states of the Council of Europe.

In first addressing the issues regarding Article 5 [right to liberty], the Court stated that determination of what

constitutes deprivation of liberty is not identical for service personnel and civilians. In determining what constitutes deprivation of liberty in the military context, the Court held that the penalty or measure must take the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. Thus, an action applied across the board by one state's military rules might not violate the European Convention. The same action, applied selectively as punishment for breach of disciplinary rules in another state, might be in violation of the Convention. The answer to what is deprivation of liberty in a particular military setting, therefore, is a multifactored analysis, taking into account items such as the nature, duration, effects and manner of execution of the penalty or measure in question.

The Court then applied these criteria to the various forms of restriction imposed on the applicants. With regard to the light arrest imposed on Engel and van der Wiel, the Court found no deprivation of liberty. Although they were confined during off-duty hours to dwellings or military buildings or premises, they were not locked up and continued to perform their duties. They remained, therefore, more or less within the ordinary framework of army life. Similarly, the aggravated arrest of de Wit, Dona and Schul did not constitute deprivation of liberty. Although they served arrest in a specifically designated place and could not visit the canteen, cinema or recreation rooms, they were not kept under lock and key and performed their

regular military duty.

Engel's provisional strict arrest and Dona's and Schul's committal to a disciplinary unit were deemed to be deprivation of liberty. Engel was locked in a cell and excluded from the performance of his duties. Dona and Schul were not entitled to leave the establishment for the first month and their overall restriction amounted to three months. They were also locked in a cell, although this was not necessarily the procedure for others assigned to a disciplinary unit.

The Court then proceeded to determine if the deprivation of liberty suffered by Engel, Dona and Schul was in violation of Article 5 of the European Convention. As regards Dona and Schul, the Court held their deprivation of liberty resulted from conviction by a competent court; viz., the Supreme Military Court. This is certainly reasoning by analogy since no "conviction" can result from disciplinary proceedings in the Dutch penal system. However, the Court construed the term "conviction" broadly and applied it to the final decision of either a criminal or disciplinary tribunal. As regards Engel, the Court found his provisional strict arrest to be violative of Article 5 in two particulars. First, it exceeded the statutorily permissible length of provisional arrest of twenty-four hours and was, therefore, not "lawful" under Dutch municipal law. Second, it could not be construed as designed to secure fulfillment in the future (emphasis supplied) of his obligations to the military. To be sure, the term "in the future" is not part of the European

Convention. The Court reasoned, however, that the sense of this provision of the European Convention was not to punish past misdeeds, but insure compliance with future obligations.

Turning to Article 6 of the Convention, the Court disagreed with the decision of the Commission that Article 6 was inapplicable to disciplinary proceedings. It held that whether such proceedings concerned "any criminal charge" did not depend on the status of such proceedings in municipal law. Rather, it depended on whether or not the punishment resulted in deprivation of liberty. Hence, in van der Wiel's case, his approved sentence amounted only to light arrest, which had been construed as not constituting deprivation of liberty. Thus, the Court held, his disciplinary proceedings did not amount to determination of a criminal charge. Likewise, the Court found Engel's approved punishment of two days strict arrest of too short a duration to belong to the criminal law. It appears, however, the Court was greatly influenced by the fact that the Supreme Military Court deemed his punishment to have been served by his provisional arrest. Thus, the question of additional imprisonment was mooted.

As to de Wit, Dona and Schul, the Court found the charges against them came within the criminal sphere since the potential punishments in all three cases amounted to serious deprivation of liberty. The Court then examined the proceedings against de Wit, Dona and Schul and determined that there had been a violation of Article 6(1) of the Convention in that there was no

public hearing before the Supreme Military Court.

The Court next considered the alleged violations of Article 10 put forth by Dona and Schul. The Court found that the military rules proscribing the publication of material detrimental to military discipline were an interference with free speech, but one justified in the military context. It held the concept of ordre publique applied not only to society as a whole, but also within the confines of a specific social group, such as the armed forces. The Court further stated that the peculiar characteristics of military life and the specific duties and responsibilities of members of the armed forces gave a somewhat greater "margin of appreciation" to the state in punishing the abusive exercise of freedom of expression.

The Court then considered Article 11 and found no evidence that Dona and Schul were actually punished for union activities, but for abuse of freedom of expression with a view toward undermining military discipline.

The Court next went on to discuss Article 14 as it relates to distinctions between service personnel and civilians and among service personnel of different ranks. As to the first dichotomy, the Court found no breach of Article 14, because the condition and demands of military life were by nature different from those of civilian life. As to the second dichotomy, the Court held that in theory a distinction in punishment based on rank might be violative of Article 14. However, it found the hierarchial structure inherent in the army, which entailed

differentiation according to rank, had been recognized in various international agreements; e.g., the Geneva POW Convention. Thus, the Court felt that states were allowed a considerable "margin of appreciation" and that the Netherlands government had not abused the latitude permitted under the European Convention. The distinctions in punishment based on rank in the Netherlands' armed forces had been abolished subsequent to the punishments inflicted in the present case. The extent to which the Court was influenced by that fact is not ascertainable in its decision. It was, however, probably significant.

At the time of its original decision, the Court did not discuss reparations under Article 50 of the European Convention for the breaches it found. Subsequently, it determined that Engel should receive a token award of one hundred Dutch guilders for his unlawful imprisonment. It did not, however, grant any monetary compensation to de Wit, Dona and Schul for their lack of a public hearing on appeal.

D. Comparison of the System of Nonjudicial
Punishment in the United States Air
Force with the System of
Nonjudicial Punishment
in the Armed Forces of
the Netherlands

The United States Air Force procedure for imposition of nonjudicial punishment is similar to the Dutch model, with the

exception of judicial review. Based on the decision of the European Court in Engel, it can be concluded that only the punishments of restriction, arrest in quarters, confinement on bread and water or diminished rations, and correctional custody under Article 15, UCMJ, could possibly be considered deprivation of liberty in the sense of Article 5 of the European Convention.

Restriction under Article 15, UCMJ, most closely approximates, in the Dutch model, restriction to camp during the night, and light or aggravated arrest. The sole distinguishing feature is that restriction under Article 15, UCMJ, may entail suspension from duty, as opposed to the Dutch system where those under restriction and light or aggravated arrest perform their normal duties. It does not appear that this distinction effects any greater deprivation of liberty on the part of United States service personnel than Dutch servicemen. Applying the criteria of Engel, it follows that restriction as a punishment under Article 15, UCMJ, would not constitute deprivation of liberty under Article 5 of the European Convention.

Arrest in quarters under Article 15, UCMJ, is an exact counterpart to strict arrest under Dutch law, except it is applied only to officers in the American setting. Under both systems, personnel are restricted from performing normal duties. Applying the criteria of Engel, it follows that arrest in quarters, as a punishment under Article 15, UCMJ, would constitute deprivation of liberty under Article 5 of the European Convention. Although there is no Dutch counterpart to confinement

on bread and water or diminished rations, the very nature of the punishment appears to leave no doubt that it meets the criteria of Engel and constitutes deprivation of liberty.

Lastly, correctional custody under Article 15, UCMJ, most closely approximates committal to a disciplinary unit in the Dutch system. True, the length of confinement is less under American law than under Dutch law. In addition, correctional custody under Article 15, UCMJ, does not necessarily entail removal from performance of normal duties⁹⁵ and is normally served at the base of assignment. In this regard, it has some of the features of Dutch aggravated arrest which was held by the Court in Engel not to constitute deprivation of liberty. Nonetheless, correctional custody is physical, not moral, restraint⁹⁶ and clearly deviates from the normal conditions of life in the Air Force, and, it may be forcefully argued, thus qualifies under the Engel criteria as deprivation of liberty. Inasmuch as correctional custody is not an exact counterpart to any punishment in the Dutch system, a determination that it would constitute deprivation of liberty under Article 5 of the European Convention is certainly not conclusive. Still, it is believed that it is more closely related both in purpose and attributes to committal to a disciplinary unit than to aggravated arrest. This paper, then, will proceed on the assumption that correctional custody would be construed as deprivation of liberty under Article 5 of the European Convention.

E. Evaluation of the System of Nonjudicial
Punishment in the United States
Air Force in Terms of the
Engel Decision

Consideration will next be given to the applicability of Article 6 of the European Convention. It requires, inter alia, a fair and public hearing within a reasonable time by an independent and impartial tribunal. It further requires the assistance of legal counsel and the right to call and examine witnesses. If the Engel criteria is to be used to determine the applicability of Article 6 of the European Convention, it must first be ascertained whether or not punishment under Article 15, UCMJ, constitutes the "determination of any criminal charge".

As the European Court indicated in Engel, the classification of punishment under municipal law is not controlling. Thus, for example, a statement in an Air Force directive that "correctional custody is not confinement"⁹⁷ is not binding in determining whether or not correctional custody meets the criteria for deprivation of liberty as set forth in Engel. The very basis for imposition of Article 15, UCMJ, punishment is the commission of one or more offenses made criminal by the UCMJ. It is for this reason that legal review by a judge advocate is required to insure that "an offense was properly alleged as a violation of the Uniform Code of Military Justice".⁹⁸

One part of the Engel Court's multifactored analysis of what constitutes "any criminal charge" is therefore met: the provision defining the offense belongs to the United States military criminal law.

The second part of that analysis is the seriousness of the punishment involving deprivation of liberty. It is possibly met in the American setting only in the cases of arrest in quarters, confinement on bread and water or diminished rations, and correctional custody. It should be remembered that the Court held Engel's strict arrest to be deprivation of liberty under Article 5 of the European Convention, but not reviewable under Article 6 of the European Convention because of its short duration. It appears, however, that there may have been unstated reason for not considering Engel's strict arrest as determination of "any criminal charge". It is submitted that the Court's real reason for its determination was the fact that Engel's punishment had been deemed served by his illegal provisional detention. There was, therefore, no further possibility of deprivation of liberty. If this is not the case, how can the lawfulness of the detention be determined under Article 5 if the procedure which imposed the detention is not reviewable under Article 6?

It should also be recalled that the Court found the offense for which Engel was punished to belong not to the Dutch criminal law, but to the Dutch disciplinary law. All offenses under Article 15, UCMJ, belong to the criminal law. Therefore,

on the bases of the principles enunciated by the Court in Engel, it is submitted that Article 6 of the European Convention would be applied to review of all punishments of arrest in quarters, confinement on bread and water or diminished rations, and correctional custody imposed under Article 15, UCMJ.

Attention will be given next to consideration of whether or not arrest in quarters, confinement on bread and water or diminished rations, and correctional custody conform to the requirements of Article 5 of the European Convention. There are two operative provisions to be considered in this determination. Article 5(1)(a) legitimizes "lawful detention of a person after conviction by a competent court." Article 5(1)(b) legitimizes "lawful ... detention of a person ... in order to secure the fulfillment of any obligation prescribed by law."

As to the former provision, there is no judicial review available within the strict confines of the American non-criminal sanctioning process.⁹⁹ Therefore, Article 5(1)(a) of the European Convention cannot be the basis for justification of deprivation of liberty as a result of Article 15, UCMJ, punishment. This is so because there is no conviction by a competent court, even in the very broad sense construed by the Engel decision.

With regard to Article 5(1)(b) of the European Convention, punishment under Article 15, UCMJ, is for the stated purpose of rehabilitation of the offender.¹⁰⁰ Nonetheless, it is also acknowledged as corrective in nature.¹⁰¹ Thus, as was

the case in Engel, it is not designed to secure the fulfillment in the future of an obligation prescribed by law. As was said in Engel:

Perhaps this measure [deprivation of liberty] also has on occasion the incidental object or effect of inducing a member of the armed forces to comply henceforth with his obligations, but only with great contrivance can it be brought under sub-paragraph (b) [of Article 5(1) of the European Convention].

If the latter were the case, this sub-paragraph could moreover be extended to punishments stricto sensu involving deprivation of liberty on the ground of their deterrent qualities. This would deprive such punishments of their fundamental guarantees of sub-paragraph (a) [of Article 5(1) of the European Convention].

It is submitted, therefore, that punishments under Article 15, UCMJ, involving arrest in quarters, confinement on bread and water or diminished rations, and correctional custody would constitute deprivation of liberty in violation of Article 5 of the European Convention.

It has been previously suggested that Article 6 of

the European Convention would be applied in reviewing all punishments under Article 15, UCMJ, resulting in deprivation of liberty. It is now necessary to review nonjudicial punishment procedures in the Air Force to determine if they would meet the standards imposed by Article 6 of the European Convention.

Article 15, UCMJ, provides for a fair and public hearing, at least initially. It does not, however, provide for that hearing by an independent and impartial tribunal, but rather by the officer imposing the punishment. There are also cases where a commander only recommends punishment to a superior commander, as opposed to imposing it himself. Where the superior commander who will impose punishment is located at such a distance as to make a personal appearance impractical, the hearing is held before the commander recommending punishment, not the commander imposing punishment.¹⁰² There is no provision for a hearing, public or otherwise, on appeal. Lack of review of Article 15, UCMJ, punishments by an independent and impartial tribunal, therefore, would constitute the most glaring breach of Article 6 of the European Convention.

Under Article 15, UCMJ, the offender has the right to submit matters in defense¹⁰³ which must be considered before imposition of punishment.¹⁰⁴ He is not, however, either by statute or regulation presumed to be innocent, although failure to demand trial by court-martial is not considered a plea of guilty to the described offense.¹⁰⁵ It appears that offenders are provided adequate time and facilities for preparation of a

defense. They are allowed three duty days, or longer on written justification, to reply to the letter of notification of intent to impose punishment.¹⁰⁶ They are also given a reasonable time to appeal.¹⁰⁷

The right to defend in person, guaranteed by Article 6(3)(c) of the European Convention, is not granted either where the punishing officer is located so far away as to make a personal appearance impractical, or on appeal. The right to consult legal counsel, free of charge, is granted prior to initial punishment and on appeal. However, counsel may be, but is not required to be, made available to actually participate in the hearing.¹⁰⁸ To the extent that counsel is not made available to represent the offender at the hearing, the requirements of Article 6(3)(c) of the European Convention would not be met.

Lastly, the offender is granted the right to call witnesses in his behalf, provided they are available locally and can be presented without legal process.¹⁰⁹ The commander is not required to present evidence to establish the commission of the offense.¹¹⁰ In fact, no live witnesses are usually presented against the offender at the hearing before the commander. Therefore, any restriction on the offender's right to produce witnesses in his own behalf would not appear violative of Article 6(3)(c) in that the basis for the article is to provide, in the words of the Engel Court, "equality of arms." However, the lack of ability for cross-examination of those whose statements are used against the offender would appear to

violate the spirit of Article 6(3)(c) of the European Convention.

F. Effect of Selected Articles of the United
Nations Covenant on Civil and
Political Rights

The operative provisions of the United Nations Covenant will now be examined to determine what effect, if any, they would have on nonjudicial punishment under Article 15, UCMJ. Article 9 of the United Nations Covenant is the corresponding provision to Article 5 of the European Convention. Article 5

(1)(a) of the European Convention permits deprivation of liberty after conviction by a competent court (emphasis supplied) only. On the other hand, Article 9, paragraph 1, United Nations Covenant, provides that deprivation of liberty is lawful on such grounds and in accordance with such procedure as are established by law. Thus, whereas deprivation of liberty resulting from Article 15, UCMJ, punishment would run afoul of the European Convention by virtue of lack of a court-imposed conviction, it does not necessarily contravene Article 9, paragraph 1, of the United Nations Covenant.

Article 14 of the United Nations Covenant reflects the essence of the rights guaranteed by Article 6 of the European Convention. Applying the interpretive criteria of the Engel decision, any nonjudicial punishment resulting in punishments of arrest in quarters, confinement on bread and water or diminished rations, or correctional custody would constitute

"determination of any criminal charge." Thus, the guarantees provided by Article 14 of the United Nations Covenant would be brought into effect. The rights to be promptly informed of the charge,¹¹¹ to have adequate time and facilities for preparation of defense,¹¹² to communicate with counsel of choice,¹¹³ to be tried without undue delay,¹¹⁴ to obtain the attendance and examination of witnesses under the same conditions as the state,¹¹⁵ and not to be compelled to testify in an incriminating manner or confess guilt¹¹⁶ appear to be adequately protected by Article 15, UCMJ, and Air Force Regulation 110-19.

Other guarantees of Article 14 of the United Nations Covenant are not so protected. For example, Article 14, paragraph 1, provides for determination of any criminal charge by a competent, independent and impartial tribunal. The Court in Engel found the Dutch Supreme Military Court met these criteria. The United States Air Force does not provide for judicial review of nonjudicial punishments. Neither the officer imposing the punishment nor the appellate authority seem to be able to meet the criteria of independent and impartial, or at least the appearance thereof, because they are so closely tied to the military command structure.

In those cases where a superior commander is located so far away as to make a personal appearance impractical, the military member would not be afforded the right to be tried and to defend in person. This would result in a breach of Article 14, paragraph 3(d) of the United Nations Covenant. Likewise,

failure to permit a military member to cross-examine witnesses against him could result in a breach of Article 14, paragraph 3(e), of the United Nations Covenant.

G. Effect of Selected Articles of the American
Convention on Human Rights

Consideration need now be given to examination of non-judicial punishment in light of the American Convention. Article 7 of the American Convention is the rough equivalent of Article 5 of the European Convention, while Article 8 of the American Convention may be compared to Article 6 of the European Convention.

Under Article 7, paragraph 2, of the American Convention, "No one shall be deprived of his physical liberty except for the reasons and under the condition established by the constitution of the State Party concerned or by a law established pursuant thereto." Again, unlike Article 5(1)(a) of the European Convention, deprivation of liberty need not be based on conviction by a competent court (emphasis supplied). Thus, as with Article 9 of the United Nations Covenant, punishments of arrest in quarters, confinement on bread and water or diminished rations, and correctional custody are not, per se, illegal.

However, Article 8 of the American Convention also contains a requirement for a hearing by an independent and impartial tribunal, which nonjudicial punishment under Article 15,

UCMJ, lacks. In the same area, the phrase "determination of any criminal charge" contained both in Article 6 of the European Convention and Article 14 of the United Nations Covenant is not used. Instead, it is replaced in Article 8, paragraph 1, of the American Convention by the phrase "substantiation of any accusation of a criminal nature," and in Article 8, paragraph 2, by the phrase "accused of a criminal offense." This language would appear even more broad than the wording of the European Convention and the United Nations Covenant. Thus, it would seem to make the American Convention applicable to review of nonjudicial punishment without even the interpretive assistance of the Engel decision.

Article 15, UCMJ, procedure appears to meet the requirements of the American Convention regarding prior notification of charges,¹¹⁷ adequate time and means for preparation of a defense,¹¹⁸ right to counsel of choice¹¹⁹ or provided by the state,¹²⁰ right against self-incrimination, and right to plead not guilty.¹²¹

On the other hand, Article 15, UCMJ, procedure may well conflict with certain paragraphs of Article 8 of the American Convention. In particular, it may contravene paragraph 2(d) concerning the right to personally defend and paragraph 2(h) guaranteeing the right to appeal the judgement to a higher court (emphasis supplied).

The problem of cross-examination of prosecution witnesses does not appear to arise inasmuch as Article 8,

paragraph 2(f), of the American Convention guarantees that right only as to those witnesses "present in court." As previously stated, in most cases of nonjudicial punishment, live witnesses do not appear before the commander imposing punishment. Whether that phrase would be construed to extend to those witnesses whose statements the commander uses in deciding whether to impose punishment is an unanswered question.

V. CONCLUSIONS AND RECOMMENDATIONS

The purpose of this paper has been to alert the United States Armed Forces, and the United States Air Force in particular, to some of the repercussions they may expect should the United Nations Covenant and the American Convention be ratified. While the problems are now only potential, they could in the not too distant future become very real.

Little would be gained by repeating herein every possible problem in the military justice area that would be encountered should these agreements come into force. There are, however, certain very significant areas of conflict between the present military justice system and the provisions of the United Nations Covenant and the American Convention. This section of the paper, then, will be used to highlight those areas and to make some suggestions about how the difficulties might be solved through executive or legislative action.

A. Concerning the Present Criminal Sanctioning Process in the United States Air Force

The problem of imposition of death sentences on persons who were below eighteen years of age at the time of commission of an offense, and on pregnant women, can be easily solved by

executive action. Inasmuch as all death sentences under the UCMJ must be approved by the President, he need only commute such sentences to avoid conflict with the United Nations Covenant and the American Convention.¹²²

The problem of lack of judicial review of pretrial confinement can be rectified by adoption of a system of independent magistrates, similar to the system currently in force in the United States Army. This solution would also have the immediate effect of unquestionably complying with the requirement of the United States Court of Military Appeals for review of pretrial confinement by a neutral and detached magistrate.

Lack of appellate review of certain courts-martial presents a problem under both the United Nations Covenant and the American Convention. Under the former, the difficulty can be solved, for the most part, by having each such case reviewed by a "tribunal" consisting of The Judge Advocate General or a designee in his office. The same problem under the American Convention is not amenable to other than legislative reform, because that agreement requires review by a court (emphasis supplied), not a "tribunal."

The problem of double jeopardy extends beyond the military because of our federal form of government. It is submitted that the solution to this dilemma in the military is to prohibit trial after nonjudicial punishment for the same offense. Put succinctly, the government should only subject an individual to punishment once for any particular offense. If the

government or its agent elects to punish a military member by nonjudicial punishment, it should thereafter be estopped from infliction of further punishment by means of a court-martial.

B. Concerning Present United States Air
Force Confinement Procedures

The provisions of Air Force Regulation 125-18 permit confinement personnel to open prisoners' incoming mail for the purpose of determining authenticity. This opens the door to abuse of the attorney-client privilege. There appears no way to completely solve this dilemma, except for the good judgement of confinement personnel in not tampering with correspondence which from the envelop appears to be from an attorney to his prisoner client.

In the event the United Nations Covenant and the American Convention are ratified, the Air Force must undertake complete segregation of convicted persons from pre-trial confinees and adult prisoners from those under eighteen. In the alternative, the Air Force must be prepared to sustain an argument that lack of space and configuration of its confinement facilities are exceptional circumstances warranting exemption from those requirements.

Air Force confinement procedures appear, for the most part, well within the guidelines of the United Nations Covenant and the American Convention. The Air Force should realize, however, that ratification of those two agreements will subject

its confinement policies and procedures to independent scrutiny by international bodies upon complaint by incarcerated Air Force personnel.

C. Concerning the Present Non-criminal
Sanctioning Process in the
United States Air Force

None of the punishments available under Article 15, UCMJ, appear illegal, per se. However, the procedure under which they are imposed appears to violate at least some of the provisions of Article 14 of the United Nations Covenant and Article 8 of the American Convention. There are several alternatives available to the Air Force to remedy the deficiencies in Article 15, UCMJ, procedure.

The first would be to change the procedure to comply fully with the requirements of the human rights agreements. This would prove difficult, particularly in the area of court review required to meet the criteria of an independent and impartial tribunal. This would most likely require legislative action.

The second means of compliance would be to do away with the punishments of arrest in quarters, confinement on bread and water or diminished rations, and correctional custody. Based on the interpretation of "any criminal charge" given in Engel, this would remove nonjudicial punishment from the classification of "determination of any criminal charge" stated in the United Nations Covenant. Thus, Article 14 of the United Nations

Covenant would be inapplicable to nonjudicial punishment. However, it would not necessarily remove nonjudicial punishment from consideration under Article 8, paragraph 1, of the American Convention. That provision requires only an "accusation of a criminal nature" and not "any criminal charge."

Another alternative would be to scrap nonjudicial punishment under Article 15, UCMJ, entirely, in favor of use of the court-martial system. Besides placing an unmanageable burden on the effective functioning of the military justice system, this avenue would also be grossly unfair to military members who are charged with minor infractions of disciplinary rules and would end up with a federal conviction and possibly more severe penalties than under the present Article 15, UCMJ, system.

Considering all the alternatives, the best solution might be a mix of previously suggested alternatives. First, abandon the use of arrest in quarters, confinement on bread and water or diminished rations, and correctional custody. Refer to court-martial those cases so severe as to warrant deprivation of liberty. Secondly, either abandon the referral of nonjudicial punishment to superior officers located so far away as to make a personal appearance of the accused impractical, or grant an accused TDY travel to make a personal appearance before the superior officer. Lastly, grant an accused his request to cross-examine an adverse witness whose statement is being used against him, and always allow an accused's counsel to represent him at the hearing before the

commander imposing nonjudicial punishment.

All of these suggested reforms in the last paragraph may be accomplished by regulatory reform and do not require legislative action. While these suggested reforms will not solve all the problems presented, they will go far toward bringing nonjudicial punishment under Article 15, UCMJ, into conformity with the human rights guarantees of the United Nations Covenant and the American Convention.

FOOTNOTES

¹I.W. BLACKSTONE, COMMENTARIES *408.

²See American Convention, Art. 44, located in Appendix C of this paper.

³See Optional Protocol to the International Covenant on Civil and Political Rights, located in Appendix B of this paper.

⁴The President's Address to the General Assembly, 13 WEEKLY COMP. OF PRES. DOC. 397, 401 (March 21, 1977).

⁵The President's Remarks Upon Signing the [American] Convention in a Ceremony at the Pan American Union, 13 WEEKLY COMP OF PRES. DOC. 838 (June 6, 1977).

⁶Telephone conversation with Arthur Rovine, Ass't. Legal Advisor for International Agreements, United States Dep't. of State, July 6, 1977.

⁷10 U.S.C. § 815 (1970).

⁸See American Convention, Art. 62, supra note 2.

⁹American Convention, supra note 2.

¹⁰64 Stat. 108 (1950).

¹¹70 Stat. 1126 (1956), printed as Vol. 70A, Stat.

¹²82 Stat. 1335.

¹³3 C.F.R. 802, 1966-1970 Comp.

¹⁴3A C.F.R. 1, 1975 Comp.

¹⁵See MCM (1969, Rev.), paras. 14b, 15b, 16b.

¹⁶See MCM (1969, Rev.), para. 15b.

¹⁷See MCM (1969, Rev.), para. 16b. Additional limitations on punishments are imposed if the accused is above the fourth enlisted grade.

¹⁸MCM (1969, Rev.), para. 127c.

¹⁹MCM (1969, Rev.), para. 126d.

²⁰MCM (1969, Rev.), para. 4a.

²¹10 U.S.C. § 818 (1970).

²²10 U.S.C. § 855 (1970).

²³10 U.S.C. § 810 (1970).

²⁴See *McLucas v. DeChamplain*, 421 U.S. 21 (1975); *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

²⁵An exception to this restriction would apparently permit federal habeas corpus proceedings when military jurisdiction itself was being challenged.

²⁶See *Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976).

²⁷10 U.S.C. § 830(b) (1970).

²⁸MCM (1969, Rev.), para. 32f(1).

²⁹MCM (1969, Rev.), para. 33c.

³⁰10 U.S.C. § 835 (1970).

³¹10 U.S.C. § 840 (1970).

³²10 U.S.C. § 898 (1970).

³³See *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

³⁴See Dunlap v. Convening Authority, 23 C.M.A. 135, 48 C.M.R. 751 (1974).

³⁵10 U.S.C. § 838(b) (1970).

³⁶See Cases of Engel and Others, European Court of Human Rights, Judgement of June 8, 1976.

³⁷10 U.S.C. § 846 (1970).

³⁸10 U.S.C. § 831 (1970).

³⁹10 U.S.C. § 845 (1970).

⁴⁰See United States v. Care, 18 C.M.A. 537, 40 C.M.R. 247 (1969).

⁴¹10 U.S.C. § 845(a) (1970); MCM (1969, Rev.), para. 70b.

⁴²MCM (1969, Rev.), para. 84a.

⁴³MCM (1969, Rev.), para. 85a.

⁴⁴Art. 65(c), UCMJ, 10 U.S.C. § 865(c) (1970); MCM (1969, Rev.), para. 94a(a).

⁴⁵Art. 64, UCMJ, 10 U.S.C. § 864 (1970).

⁴⁶10 U.S.C. § 866 (1970).

⁴⁷10 U.S.C. § 867(b) (1970).

⁴⁸10 U.S.C. § 869 (1970).

⁴⁹MCM (1969, Rev.), para. 103.

⁵⁰MCM (1969, Rev.), para. 110A.

⁵¹MCM (1969, Rev.), supra note 18.

⁵²While not directly effecting the operation of the military justice system, an interesting related topic is the right of compensation for those military personnel unlawfully arrested or detained by federal authority. Art. 9, para. 5, United Nations Covenant, which provides for such compensation, is

directly in conflict with the decision of the United States Supreme Court in Feres v. United States, 340 U.S. 135 (1950). That decision denied the right of military personnel to sue for compensation for injuries incurred incident to service and limited them to compensation provided by the Congress under appropriate laws relating to veterans' benefits. While suit under the Federal Tort Claims Act for false arrest and false imprisonment occasioned by federal officers is now permitted, the Air Force has taken the position that a military member who may be unlawfully detained or arrested by federal authorities may not recover compensation for such a violation of his rights by virtue of the Feres decision. See Novak, Tort Liability for Security Police Conduct, 1 SECURITY POLICE DIG. 15 (1976) [A.F. Recurring Pamphlet 125-2]. Without the ability to be compensated for arrest and detention violations under the laws on veterans' benefits, and prohibited from recovering therefor under the Federal Tort Claims Act, military members are presently denied an enforceable right to compensation. Congress may, however, waive the Feres prohibition in individual cases by special legislation in the form of a private relief bill. If the United Nations Covenant is ratified, such special legislation would be necessary should a military member substantiate an arrest or detention violation by federal authorities.

⁵³ 10 U.S.C. § 844 (1970).

⁵⁴ Art. 15(b), UCMJ, 10 U.S.C. § 815(b) (1970); MCM (1969, Rev.), para. 215c.

⁵⁵ MCM (1969, Rev.), para. 215b.

⁵⁶ Id.

⁵⁷ Air Force Manual 111-1, para. 2-5.

⁵⁸ See O'Callahan v. Parker, 395 U.S. 258 (1969).

⁵⁹ 10 U.S.C. § 846 (1970).

⁶⁰ Those specific cases are all summary courts-martial, those special courts-martial not affecting general or flag officers and not resulting in a sentence of bad conduct discharge, and those general courts-martial, not otherwise reviewed on appeal, which The Judge Advocate General does not refer to a Court of Military Review.

⁶¹ American Convention, Art. 62, supra note 2.

⁶² The American Convention contains a provision regarding the right of compensation. However, unlike the provision in the United Nations Covenant, the American Convention circumscribes the right "in accordance with the law [of the State Party]." There is, therefore, no conflict between the provisions of the American Convention and the Supreme Court's decision in Feres which enunciated the "incident to service" limitation. Accordingly, the problem discussed in note 52 supra is not raised by the American Convention.

⁶³ United Nations Covenant, Art. 7, located in Appendix B of this paper; and American Convention, Art. 5, para. 2, supra note 2.

- ⁶⁴United Nations Covenant, Art. 10, para. 3, supra note 63; and American Convention, Art. 5, para. 6, supra note 2.
- ⁶⁵United Nations Covenant, Art. 8, para 3(b), supra note 63; and American Convention, Art. 6, para. 3a, supra note 2.
- ⁶⁶See Air Force Regulation 125-18, para. 1-7.
- ⁶⁷Golder Case, [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS 290 (Eur. Ct. of Human Rights).
- ⁶⁸See Air Force Regulation 125-18, para. 4-5c; and 3320th Correction and Rehabilitation Squadron Regulation 125-2, para. 5b(2).
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- ⁶⁹Members of the Air Staff of the United States Air Force reviewed the initial draft of this thesis. Upon noting the discrepancy relating to military counsel, they initiated emergency changes to Air Force confinement regulations. As soon as the emergency changes are published, the regulations will reflect that military counsel may visit prisoners and rehabilitees on at least the same basis as civilian counsel.
- ⁷⁰Ringeisen Case, [1972] Y.B. EUR. CONV. ON HUMAN RIGHTS 678, 688 (Eur. Ct. of Human Rights).
- ⁷¹10 U.S.C. § 855 (1970).
- ⁷²Air Force Regulation 125-18, para. 8-1c(3).
- ⁷³MCM (1969, Rev.), para. 128c, and Air Force Regulation 111-9, para. 2, encourage commanders to take full advantage of non-punitive disciplinary measures, such as counselling, administrative admonitions and reprimands, and, where permitted by regulation, administrative withholding of privileges as

primary rehabilitative means before resorting to nonjudicial punishment.

⁷⁴ 10 U.S.C. § 815 (1970).

⁷⁵ MCM (1969, Rev.), para. 128c.

⁷⁶ MCM (1969, Rev.), para. 128b.

⁷⁷ This provision was designed primarily for the Navy, Coast Guard and Marine Corps and has little, if any, applicability to the Air Force.

⁷⁸ Art. 15(a), UCMJ, 10 U.S.C. § 815(a) (1970); and MCM (1969, Rev.), para. 132.

⁷⁹ Any commander has the right to impose punishment. The nature and severity of the punishment, however, depends on the rank both of the commander and the accused. Thus, a commander of relatively low rank, faced with a serious breach of discipline, might well refer the case to a higher ranking superior commander who could impose a more serious penalty.

⁸⁰ Right to counsel in this context has been interpreted to mean the right to consult military legal counsel, free of charge, on an attorney-client basis, to determine whether to accept nonjudicial punishment or demand trial by court-martial. If nonjudicial punishment is accepted, legal counsel may assist in the preparation of matters in defense, extenuation or mitigation. Military counsel may be, but are not required to be, made available for purpose of representation at the personal hearing before the commander.

⁸¹Air Force Regulation 111-9, para. 6a(1).

⁸²Id.

⁸³Id., para. 6a(3).

⁸⁴Id., para. 6e.

⁸⁵Art. 15(e), UCMJ, 10 U.S.C. § 815(e) (1970); MCM (1969, Rev.), para. 135; Air Force Regulation 111-9, para. 8a(1).

⁸⁶Air Force Regulation 111-9, para. 8c.

⁸⁷Art. 138, UCMJ, 10 U.S.C. § 938 (1970), provides for redress of wrongs and could be applied against both the punishing and appellate commanders. However, it furnishes merely another level of administrative review and is, strictly speaking, not within the non-criminal sanctioning process. In addition, as provided in 32 C.F.R. §§ 865.1 - 865.19 (1976), under certain circumstances, a serviceman may further appeal Art. 15, UCMJ, punishment to the Air Force Board for the Correction of Military Records. This Board, being established in the Office of the Secretary of the Air Force, does not appear to qualify as an independent and impartial tribunal.

⁸⁸Air Force Regulation 111-9, Table 1, rule 2, col. E.

⁸⁹Applies only if attached to or embarked on a vessel; hence is designed primarily for the Navy, Coast Guard and Marine Corps and has little, if any, application to the Air Force.

⁹⁰Id.

⁹¹Cases of Engel and Others, supra note 36.

⁹²Under a law enacted subsequent to the Engel decision, strict arrest and other punishments were made uniform for officers,

NCOs and ordinary servicemen.

⁹³At this point, perhaps a word is in order concerning the military union of the Netherlands. The V.V.D.M., which translates to Conscript Servicemen's Union, was created in 1966 and recognized by the government as the bargaining agent for conscripts. Approximately two-thirds of the conscripts of the Dutch army are members. Apart from the facts relating to Dona and Schul, there had been a pattern of conflict between the government and the union. This pattern of conflict is important as it may lend some insight into the nature and severity of the punishments afforded conscripts in general and union leaders in particular.

⁹⁴Shortly after the Dona and Schul cases, by ministerial decree all publication cases were to be submitted to the military criminal courts and not handled as disciplinary matters.

⁹⁵MCM (1969, Rev.), para. 131c(4).

⁹⁶Id.

⁹⁷Air Force Regulation 111-9, Table 1, note 4.

⁹⁸Id., para. 13e.

⁹⁹In theory, recourse may be had to United States District Court for issuance of a writ of habeas corpus. However, given the relatively short periods of deprivation of liberty provided for under Article 15, UCMJ, that relief is more theoretical than practical since the legal process would consume most, if not all, of the detention time. In many

cases, therefore, the issue would be rendered moot. The Navy and Marine Corps have experienced several court challenges to the imposition of disciplinary punishment, but such court review is not within the ordinary framework of the nonjudicial disciplinary process.

¹⁰⁰Air Force Regulation 111-9, Para. 2.

¹⁰¹Id.; MCM (1969, Rev.), para. 129b.

¹⁰²Air Force Regulation 111-9, para. 6a(3).

¹⁰³Id., para. 6e.

¹⁰⁴Id., para. 6h.

¹⁰⁵Id.

¹⁰⁶Air Force Regulation 111-9, para. 6f, encourages offenders to take full advantage of this time to consult with legal counsel, decide whether to accept nonjudicial punishment and, if so, prepare matters in defense, extenuation or mitigation.

¹⁰⁷Air Force Regulation 111-9, Para. 6f, states, "Unless there are special circumstances, an appeal must be submitted not later than 15 days after the punishment was imposed to be within a reasonable time."

¹⁰⁸Air Force Regulation 111-9, para. 6e.

¹⁰⁹Id.

¹¹⁰Id.

¹¹¹United Nations Covenant, Art. 14, para. 3(a), supra note 63.

¹¹²Id., para. 3(b).

¹¹³Id., para. 3(c).

114 *Id.*, para. 3(d).

115 *Id.*, para. 3(e).

116 *Id.*, para. 3(g).

117 American Convention, Art. 8, para. 2(b), supra note 2.

118 *Id.*, para. 2(c).

119 *Id.*, para. 2(d).

120 *Id.*, para. 2(e).

121 *Id.*, para. 2(g).

122 Art. 71(a), UCMJ, 10 U.S.C. § 871(a) (1970).

APPENDIX A

CONVENTION

FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

**The Governments signatory hereto, being Members of the Council of Europe,
Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;
Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;
Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;
Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;
Being resolved, as the Governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;**

Have agreed as follows:

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

Article 2

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;**
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;**
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.**

Article 3

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

Article 4

- (1) No one shall be held in slavery or servitude.
- (2) No one shall be required to perform forced or compulsory labour.
- (3) For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

Article 5

- (1) Everyone has the right to liberty and security of person.
No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

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

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

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

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall

be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention 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 set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II

Article 19

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

(1) A European Commission of Human Rights hereinafter referred to as "the Commission";

(2) A European Court of Human Rights, hereinafter referred to as "the Court".

SECTION III**Article 20**

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

Article 21

(1) The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

Article 22

(1) The members of the Commission shall be elected for a period of six years. They may be re-elected. However, the members elected at the first election, the terms of seven members shall expire at the end of three years.

(2) The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary-General of the Council of Europe immediately after the first election has been completed.

(3) A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 23

The members of the Commission shall sit on the Commission in their individual capacity.

Article 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

Article 25

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

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(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 27

(1) The Commission shall not deal with any petition submitted under Article 25 which

(a) is anonymous, or

(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

(2) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

(3) The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

Article 28

In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

Article 29

(1) The Commission shall perform the functions set out in Article 28 by means of a Sub-Commission consisting of seven members of the Commission.

(2) Each of the parties concerned may appoint as members of this Sub-Commission a person of its choice.

(3) The remaining members shall be chosen by lot in accordance with arrangements prescribed in the Rules of Procedure of the Commission.

Article 30

If the Sub-Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary-General of the

Council of Europe for publication. This report shall be confined to a brief statement of the facts and of the solution reached.

Article 31

(1) If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.

(2) The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.

(3) In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

Article 32

(1) If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

(2) In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

(3) If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph (1) above what effect shall be given to its original decision and shall publish the Report.

(4) The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

Article 33

The Commission shall meet in camera.

Article 34

The Commission shall take its decisions by a majority of the Members present and voting; the Sub-Commission shall take its decisions by a majority of its members.

Article 35

The Commission shall meet as the circumstances require. The meetings shall be convened by the Secretary-General of the Council of Europe.

Article 36

The Commission shall draw up its own rules of procedure.

Article 37

The secretariat of the Commission shall be provided by the Secretary-General of the Council of Europe.

SECTION IV

Article 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

Article 39

(1) The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the Council of Europe, and in filling casual vacancies.

(3) The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be juriconsults of recognised competence.

Article 40

(1) The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years, and the terms of four more members shall expire at the end of six years.

(2) The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.

(3) A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 41

The Court shall elect its President and Vice-President for a term of three years. They may be re-elected.

Article 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

Article 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an ex officio member of the Chamber the judge who is a national of any State party concerned, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be chosen by lot by the President before the opening of the case.

Article 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

Article 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

Article 46

(1) Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

(2) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

(3) These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

Article 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

Article 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged.

Article 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

- (1) Reasons shall be given for the judgment of the Court.
- (2) If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 52

The judgment of the Court shall be final.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

Article 55

The Court shall draw up its own rules and shall determine its own procedure.

Article 56

- (1) The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.
- (2) No case can be brought before the Court before this election.

SECTION V

Article 57

On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

Article 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

Article 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under

the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 62

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 63

(1) Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

(2) The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.

(3) The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

(4) Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, nongovernmental organisations or groups of individuals in accordance with Article 25 of the present Convention.

Article 64

(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.

Article 65

(1) A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a Party to it and after six month's notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.

(2) Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

(3) Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

(4) The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

Article 66

(1) This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary-General of the Council of Europe.

(2) The present Convention shall come into force after the deposit of ten instruments of ratification.

(3) As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

(4) The Secretary-General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950 in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatories.

PROTOCOL NO. 1

**to the Convention for the Protection of Human Rights
and Fundamental Freedoms**

The Governments signatory hereto, being Members of the Council of Europe,
Being resolved to take steps to ensure the collective enforcement of certain
rights and freedoms other than those already included in Section I of the Convention
for the Protection of Human Rights and Fundamental Freedoms signed at
Rome on 4th November, 1950 (hereinafter referred to as "the Convention"),
Have agreed as follows:

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his
possessions. No one shall be deprived of his possessions except in the public
interest and subject to the conditions provided for by law and by the general principles
of international law.

The preceding provisions shall not, however, in any way impair the right of a
State to enforce such laws as it deems necessary to control the use of property in
accordance with the general interest or to secure the payment of taxes or other
contributions or penalties.

Article 2

No person shall be denied the right to education. In the exercise of any functions
which it assumes in relation to education and to teaching, the State shall respect
the right of parents to ensure such education and teaching in conformity
with their own religious and philosophical convictions.

Article 3

The High Contracting Parties undertake to hold free elections at reasonable
intervals by secret ballot, under conditions which will ensure the free expression
of the opinion of the people in the choice of the legislature.

Article 4

Any High Contracting Party may at the time of signature or ratification or at
any time thereafter communicate to the Secretary-General of the Council of Europe
a declaration stating the extent to which it undertakes that the provisions of
the present Protocol shall apply to such of the territories for the international
relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue
of the preceding paragraph may from time to time communicate a further declaration
modifying the terms of any former declaration or terminating the application
of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this Article shall be deemed to have
been made in accordance with Paragraph (1) of Article 63 of the Convention.

Article 5

As between the High Contracting Parties the provisions of Articles 1, 2, 3, and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6

This Protocol shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory Governments.

PROTOCOL NO. 4

to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

Article 1

No one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation.

Article 2

- 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.**
- 2. Everyone shall be free to leave any country, including his own.**
- 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.**
- 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.**

Article 3

- 1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.**
- 2. No one shall be deprived of the right to enter the territory of the State of which he is a national.**

Article 4

Collective expulsion of aliens is prohibited.

Article 5

- 1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes**

that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

3. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

Article 6

1. As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

2. Nevertheless, the right of individual recourse recognised by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the High Contracting Party concerned has made a statement recognising such right, or accepting such jurisdiction, in respect of all or any of Articles 1 to 4 of the Protocol.

Article 7

1. This Protocol shall be open for signature by the Members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory States.

APPENDIX B

UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS

Opened for Signature on December 16, 1966.*

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.

*Annex to General Assembly Resolution 2200 (XXI).

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 legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his 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 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 origin.

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

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

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act

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

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

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of 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 Covenant.

Article 7

No one shall be subject 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 sub-paragraph (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), 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 offense 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 a lighter penalty, the offender shall benefit thereby.

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

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 Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

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 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 sub-paragraph (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 sub-paragraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (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 sub-paragraph (b), submit a report:

(i) If a solution within the terms of sub-paragraph (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 sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned.

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached.

(c) If a solution within the terms of sub-paragraph (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 sub-paragraph (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 any 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 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

**OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

THE STATES PARTIES TO THE PRESENT PROTOCOL,

Considering that in order to further achieve the purposes of the Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up on part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant,

Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 3

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

Article 4

1. Subject to the provisions of article 3, the Committee shall bring any Communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provisions of the Covenant.

2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

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

Article 6

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

Article 7

Pending the achievement of the objectives of resolution 1514 (XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

Article 8

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 10

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

Article 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

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

Article 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

Article 13

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under article 8;
- (b) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;
- (c) Denunciations under article 12.

Article 14

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all states referred to in article 48 of the Covenant.

APPENDIX-C

AMERICAN CONVENTION ON HUMAN RIGHTS

PREAMBLE

The American states signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

PART I - STATE OBLIGATIONS AND RIGHTS PROTECTED

CHAPTER I - GENERAL OBLIGATIONS

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

CHAPTER II – CIVIL AND POLITICAL RIGHTS

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- b. prior notification in detail to the accused of the charges against him;
- c. adequate time and means for the preparation of his defense;
- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his own counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g. the right not to be compelled to be a witness against himself or to plead guilty; and
- h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 10. Right to Compensation

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 14. Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication

has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

Article 15. Right of Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.

Article 16. Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

Article 17. Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 18. Right to a Name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

Article 20. Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 22. Freedom of Movement and Residence

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
9. The collective expulsion of aliens is prohibited.

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:
 - a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

CHAPTER III – ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

CHAPTER IV – SUSPENSION OF GUARANTEES, INTERPRETATION, AND APPLICATION

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

Article 28. Federal Clause

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 30. Scope of Restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

Article 31. Recognition of Other Rights

Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.

CHAPTER V – PERSONAL RESPONSIBILITIES**Article 32. Relationship between Duties and Rights**

1. Every person has responsibilities to his family, his community, and mankind.
2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

PART II – MEANS OF PROTECTION**CHAPTER VI – COMPETENT ORGANS****Article 33**

The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a. the Inter-American Commission on Human Rights, referred to as "The Commission"; and
- b. the Inter-American Court of Human Rights, referred to as "The Court."

CHAPTER VII – INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**Section 1. Organization****Article 34**

The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.

Article 35

The Commission shall represent all the member countries of the Organization of American States.

Article 36

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.
2. Each of those governments may propose up to three candidates, who may

be nationals of the states proposing them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

Article 37

1. The members of the Commission shall be elected for a term of four years and may be reelected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years. Immediately following that election the General Assembly shall determine the names of those three members by lot.

2. No two nationals of the same state may be members of the Commission.

Article 38

Vacancies that may occur on the Commission for reasons other than the normal expiration of a term shall be filled by the Permanent Council of the Organization in accordance with the provisions of the Statute of the Commission.

Article 39

The Commission shall prepare its Statute, which it shall submit to the General Assembly for approval. It shall establish its own Regulations.

Article 40

Secretariat services for the Commission shall be furnished by the appropriate specialized unit of the General Secretariat of the Organization. This unit shall be provided with the resources required to accomplish the tasks assigned to it by the Commission.

Section 2. Functions

Article 41

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

Article 42

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Article 43

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.

Section 3. Competence

Article 44

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Article 45

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

- a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
 - b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
 - c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
 - d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.
2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:
- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
 - b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
 - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Article 47

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

- a. any of the requirements indicated in Article 46 has not been met;
- b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
- c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
- d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

Section 4. Procedure

Article 48

- 1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:
 - a. If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.
 - b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or

communication still exist. If they do not, the Commission shall order the record to be closed.

- c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.
- d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.
- e. The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.
- f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.

Article 49

If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

Article 50

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.

2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Committee may make such proposals and recommendations as it sees fit.

Article 51

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute

majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

CHAPTER VIII — INTER-AMERICAN COURT OF HUMAN RIGHTS

Section 1. Organization

Article 52

1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.

2. No two judges may be nationals of the same state.

Article 53

1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states.

2. Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

Article 54

1. The judges of the Court shall be elected for a term of six years and may be reelected only once. The term of three of the judges chosen in the first election shall expire at the end of three years. Immediately after the election, the names of the three judges shall be determined by lot in the General Assembly.

2. A judge elected to replace a judge whose term has not expired shall complete the term of the latter.

3. The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly elected judges.

Article 55

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.

2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge.

3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge.

4. An *ad hoc* judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

Article 56

Five judges shall constitute a quorum for the transaction of business by the Court.

Article 57

The Commission shall appear in all cases before the Court.

Article 58

1. The Court shall have its seat at the place determined by the States Parties to the Convention in the General Assembly of the Organization; however, it may convene in the territory of any member state of the Organization of American States when a majority of the Court consider it desirable, and with the prior consent of the state concerned. The seat of the Court may be changed by the States Parties to the Convention in the General Assembly by a two-thirds vote.

2. The Court shall appoint its own Secretary.

3. The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat.

Article 59

The Court shall establish its Secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organization in all respect not incompatible with the independence of the Court. The staff of the Court's Secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court.

Article 60

The Court shall draw up its Statute which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure.

Section 2. Jurisdiction and Functions

Article 61

1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed.

Article 62

1. A State Party may, upon depositing its instrument of ratification or ad-

herence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Article 63

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Article 64

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Article 65

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

Section 3. Procedure

Article 66

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous

opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 67

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

Article 68

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

Article 69

The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention.

CHAPTER IX — COMMON PROVISIONS

Article 70

1. The judges of the Court and the members of the Commission shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. During the exercise of their official function they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.
2. At no time shall the judges of the Court or the members of the Commission be held liable for any decisions or opinions issued in the exercise of their functions.

Article 71

The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes.

Article 72

The judges of the Court and the members of the Commission shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, with due regard for the importance and independence of their office. Such emoluments and travel allowances shall be determined in the budget of the Organization of American States, which shall also include the expenses of the Court and its Secretariat. To this end, the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it.

Article 73

The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of a two-thirds majority of the member states of the Organization shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required.

PART III – GENERAL AND TRANSITORY PROVISIONS**CHAPTER X – SIGNATURE, RATIFICATION, RESERVATIONS,
AMENDMENTS, PROTOCOLS, AND DENUNCIATION****Article 74**

1. This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States.
2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.
3. The Secretary General shall inform all member states of the Organization of the entry into force of the Convention.

Article 75

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.

Article 76

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.
2. Amendments shall enter into force for the states ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

Article 77

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States

Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

Article 78

1. The States Parties may denounce this Convention at the expiration of a five-year period starting from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

CHAPTER XI — TRANSITORY PROVISIONS

Section 1. Inter-American Commission on Human Rights

Article 79

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each member state of the Organization to present, within ninety days, its candidates for membership on the Inter-American Commission on Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented, and transmit it to the member states of the Organization at least thirty days prior to the next session of the General Assembly.

Article 80

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 79. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the member states shall be declared elected. Should it become necessary to have several ballots in order to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

Section 2. Inter-American Court of Human Rights

Article 81

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each State Party to present, within ninety days, its candidates for membership on the Inter-American Court of Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented and transmit it to the States Parties at least thirty days prior to the next session of the General Assembly.

Article 82

The judges of the Court shall be elected from the list of candidates referred to in Article 81, by secret ballot of the States Parties to the Convention in the General Assembly. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties shall be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the Court, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

STATEMENTS AND RESERVATIONS**STATEMENT OF CHILE**

The Delegation of Chile signs this Convention, subject to its subsequent parliamentary approval and ratification, in accordance with the constitutional rules in force.

STATEMENT OF ECUADOR

The Delegation of Ecuador has the honor of signing the American Convention on Human Rights. It does not believe that it is necessary to make any specific reservation at this time, without prejudice to the general power set forth in the Convention itself that leaves the governments free to ratify it or not.

RESERVATION OF URUGUAY

Article 80.2 of the Constitution of Uruguay provides that citizenship is suspended for a person indicted according to law in a criminal prosecution that may result in a sentence of imprisonment in a penitentiary. This restriction on the exercise of the rights recognized in Article 23 of the Convention is not envisaged among the circumstances provided for in this respect by paragraph 2 of Article 23, for which reason the Delegation of Uruguay expresses a reservation on this matter.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, whose full powers were found in good and due form, sign this Convention, which shall be called "PACT OF SAN JOSÉ, COSTA RICA," (in the city of San José, Costa Rica, this twenty-second day of November, nineteen hundred and sixty-nine).