UNIVERSITÀ DI PADOVA
CENTRO DI STUDI E DI FORMAZIONE
SUI DIRITTI DELL'UOMO E DEI POPOLI

11

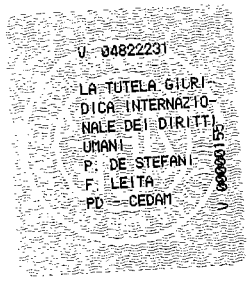
Paolo De Stefani *Francisco Leita*

LA TUTELA GIURIDICA INTERNAZIONALE DEI DIRITTI UMANI

Casi e materiali

STUDI E RICERCHE SUI DIRITTI UMANI

CEDAM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Casi e materiali

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PREFAZIONE

Gli individui e la tutela processuale internazionale dei loro diritti fondamentali. Delimitazione della materia

1. Il volume che presentiamo raccoglie atti emanati da organismi internazionali (nonché materiali prodotti da organi giurisdizionali interni agli stati) aventi compentenza in materia di applicazione giurisdizionale o "quasi giurisdizionale" delle norme internazionali sui diritti umani.

L'intento è quello di mostrare, per così dire, i "diritti umani all'opera", spostando l'attenzione di chi intende avvalersi del diritto internazionale di diritti umani, dal campo della formazione ed enunciazione delle norme, a quello della loro possibile "giustiziabilità", vista come un momento non esaustivo ma tuttavia irrinunciabile della loro attuazione. La quantità di materiali prodotti nel campo dell'applicazione per via giurisdizionale o quasi-giurisdizionale dei diritti umani obbliga infatti a familiarizzarsi, oltre che con le fonti normative, anche con le procedure e la giurisprudenza delle corti e degli altri organi internazionali e nazionali che le applicano.

2. Organismi di questo tipo esistono oramai da anni, in ambito regionale (particolarmente cospicuo è il ruolo della Commissione e Corte europea dei diritti dell'uomo del Consiglio d'Europa, operante dal 1958, e della struttura "gemella" dell'Organizzazione degli Stati americani, operante dal 1978), e su scala globale, benché, in questa area, la loro rilevanza propriamente giurisdizionale sia ancora lontana dall'essere acquisita. In casi per ora limitati si è assistito recentemente

al sorgere di corti internazionali speciali, chiamate a conoscere di eventi legati a particolari situazioni di sistematica violazione delle norme internazionali (i tribunali internazionali per l'ex Jugoslavia e il Rwanda), nelle cui sfere di compentenza *ratione materiae* rientrano fatti in gran parte collocabili nell'ambito della normativa internazionale sui diritti umani.

3. Questa complessa evoluzione in chiave applicativa, e non più solo normativa o declaratoria, del diritto internazionale dei diritti umani merita oggi una specifica attenzione, tesa sia a individuarne le potenzialità positive verso l'ampliamento delle garanzie di tutela dei diritti della persona umana, sia a metterne in evidenza i punti deboli. Il tutto orientato al fine di favorire un atteggiamento di impegno realistico verso lo sviluppo di tali strumenti attuativi dei valori affermati dalle norme sui diritti umani, in opposizione sia agli sterili trionfalismi, sia alle fin troppo facili dichiarazioni di impotenza.

4. Il presente lavoro si propone in particolare di ricostruire il panorama della *machinery* internazionale di protezione dei diritti umani riconosciuti dal diritto internazionale, assumendo il punto di vista degli individui e dei gruppi, ossia dei soggetti che sono riconosciuti titolari di quei diritti nonché dei relativi poteri di azione presso gli organismi internazionali (e nazionali) chiamati a dare applicazione alle norme sui diritti umani.

Ci proponiamo infatti di esaminare da vicino le possibilità di azione offerte all'individuo o ai gruppi di individui, vittime di una violazione dei propri diritti fondamentali, dall'attuale configurazione giuridica internazionale, nel suo innestarsi (non sempre agevole) con gli ordinamenti giuridici dei singoli paesi.

5. Si presenteranno dunque atti forniti delle due caratteristiche:

a) quella di essere emanati nell'ambito di un procedimento messo in moto da un individuo o da un gruppo posto sotto la giusridizione di uno Stato che lamenta la violazione di un diritto fondamentale riconosciuto dalle norme internazionali sui diritti umani da parte di un organo dello Stato stesso;
b) quella di essere emanati da organi giurisdizionali (o quasi-giurisdizionali) a conclusione di un procedimento di tipo contenzioso.

Questi due requisiti sono molto significativi, in quanto consentono di limitare in modo rilevante il campo della nostra ricognizione

rispetto all'enorme quantità di materiali che costituisce l'area di interesse del diritto internazionale dei diritti umani.

6. Anticipando considerazioni che saranno sviluppate nei brevi saggi che corredano la raccolta, è necessario ricordare infatti che, per quanto concerne la prima delle caratteristiche indicate, norme appartenenti al corpus del diritto internazionale dei diritti umani sono talvolta prese in cosiderazione e applicate nell'ambito di procedimenti di organi giurisdizionali internazionali anche in procedure che non vengono attivate da "petizioni" o "ricorsi" o "comunicazioni" delle persone vittime di una violazione delle norme che pongono quei diritti. È il caso della Corte Internazionale di Giustizia, la quale, come è ampiamente noto, non può essere adita che da Stati (art. 35 del suo Statuto) o, per quanto riguarda la sua competenza ad emettere pareri consultivi, da organi delle Nazioni Unite (art. 65). La stessa regola serve anche ad escludere dal nostro campo di indagine i casi in cui organi giurisdizionali o di controllo internazionali si volgono a considerare comportamenti di Stati o di individui alla stregua del diritto internazionale dei diritti umani operando *ex officio*, ovvero in forza di un mandato ricevuto da un organo a ciò legittimato. È il caso dei tribunali internazionali per l'ex Jugoslavia e il Rwanda.

7. Per quanto riguarda il secondo dei requisiti indicati, quello in forza del quale si richiede che tali atti siano emanati da organismi operanti in funzione latamente giurisdizionale, la sua finalità appare chiara. Scopo di questo lavoro è infatti fornire materiali e documentazione sulle forme giuridiche o, meglio, processuali, di tutela internazionale dei diritti umani offerte alla disponibilità degli individui, con esclusione sia delle modalità più dichiaratamente politico-diplomatiche di tale tutela, sia di quelle che, pur articolate in procedimenti strettamente regolati dal diritto, non prevedono la partecipazione in contraddittorio dei controinteressati quale momento essenziale e qualificante della loro azione di "monitoraggio" o "*fact finding*".

Ciò che caratterizza il procedimento giurisdizionale rispetto ai meri meccanismi di supervisione è, da un lato, il requisito della partecipazione al procedimento stesso dei diretti interessati nella forma del contraddittorio; dall'altro il carattere esecutivo o comunque obbligatorio dell'atto che conclude l'*iter* processuale.

Da quest'ultimo punto di vista si giustifica la distinzione più volte

richiamata tra procedimenti giurisdizionali e "quasi-giurisdizionali". Essa infatti non riguarda tanto il carattere contenzioso del procedimento, quanto il mettere capo a decisioni più o meno efficaci sul piano concreto. L'efficacia si misura alla stregua dell'esistenza di norme internazionali che vincolano gli Stati a dare seguito alla decisione di tali organi e dell'esistenza di organismi internazionali che sovrintendano all'esecuzione della decisione stessa.

8. Come risultato dell'applicazione dei vari e complessi criteri sopra ricordati, il campo dei possibili organismi di cui presentare gli atti si è potuto restringere a comprendere i seguenti: la Commissione e la Corte europea dei diritti dell'uomo; la Commissione e la corte interamericana dei diritti umani; il Comitato dei diritti umani (civili e politici); il Comitato contro la discriminazione razziale; il Comitato contro la tortura. Alla raccolta è stata infine aggiunta una sezione che riporta alcune sentenze di giudici costituzionali interni in cui appare trattata con particolare chiarezza la tematica dei rapporti tra ordinamento interno e ordinamento internazionale nell'applicazione giudiziale delle norme di quest'ultimo in materia di diritti umani, e che inoltre apre una "finestra" sul possibile ruolo, in questo contesto, della Corte di giustizia delle Comunità europee.

Il diritto alla vita

9. I procedimenti di cui in questo volume vengono presentati gli atti, pur con gli elementi di omogeneità sopra indicati, non sono affatto tutti uguali, ognuno essendo nato ed essendosi evoluto in funzione di particolarità strutturali, giuridiche e politiche ad esso peculiari, come è caratteristica di un ordinamento "decentrato" come quello internazionale. Pur in presenza di una generale e forte tendenza a far convergere verso un modello unitario tutti i vari tipi di procedimento a garanzia di norme in buona parte comuni, si deve constatare una forte varietà dei procedimenti considerati e una diversità soprattutto rispetto agli esiti che ad essi fanno capo. Per poter favorire una valutazione comparativa delle diverse procedure si è ritenuto di non prenderle in esame astrattamente, presentando dei casi scelti soltanto al fine di cogliere le fasi del loro svolgimento, ma di selezionare

dei casi che permettessero di verificare come un determinato diritto umano, internazionalmente garantito in forma pressoché identica dai vari strumenti pattizi, fosse applicato dai vari organismi considerati. A questo criterio tematico ci si è attenuti nella maggior misura possibile. Naturalmente non è stato possibile seguirlo con riguardo alle attività di organismi specializzati nell'intervenire su casi che coinvolgono diritti particolari diversi da quello prescelto a fare da filo conduttore.

10. La norma sostanziale che si è deciso di seguire nelle sue varie forme di applicazione giurisdizionale o quasi giurisdizionale è stata quella che tutela il fondamentale diritto alla vita. La scelta si giustifica sia per il modo simile in cui tale diritto è definito nei diversi atti normativi internazionali che lo pongono; sia per i caratteri di "limite" che lo rendono di particolare interesse dal punto di vista della dottrina giuridica. Tra i diritti umani "di prima generazione", quelli a tutela dei quali opera la generalità delle procedure che qui vengono presentate, il diritto alla vita occupa un posto, per certi versi, "estremo". Indipendentemente dai motivi per cui esso è stato preso in considerazione nell'ambito dei casi che qui sono raccolti, il diritto alla vita offre specifici motivi di interesse su cui sembrava opportuno svolgere alcune considerazioni generali.

I materiali della raccolta

11. Tutte queste considerazioni hanno condotto a definire un certo panorama di organismi e di procedimenti internazionali rilevanti ai nostri fini, quello che si rispecchia nel sommario della presente raccolta. Scorrendolo brevemente si potranno notare le seguenti caratteristiche:

a) Si è scelto di presentare i materiali dei diversi organismi internazionali seguendo l'ordine "classico" che va da quelli promananti da organi aventi riconosciuta funzione giursdizionale, sia pure nell'ambito regionale loro proprio, a quelli definibili "quasi-giurisdizionali", operanti su scala geografica universale e le cui attribuzioni giurisdizionali sono ancora allo stato embrionale.
b) Si è cercato di inserire documenti che dessero un'idea concreta delle varie fasi di un procedimento e soprattutto dei diversi esiti cui esso può far capo.

c) I materiali raccolti sono stati scelti prevalentemente per il loro valore didattico. Si sono preferiti, naturalmente, casi recenti, ma senza rincorrere l'attualità. La raccolta non ha pretese di esaustività né ambisce a fotografare una determinata fase dell'evoluzione procedurale di questi meccanismi di garanzia. L'intento è stato piuttosto quello di proporre degli strumenti per cominciare a seguire dal di dentro l'*iter* applicativo in ambito giurisdizionale delle norme internazionali sui diritti umani, collocandosi nel punto nevralgico di un processo evolutivo che investe non solo particolari regole di procedura o di garanzia, ma la natura stessa del diritto internazionale vigente e una dimensione essenziale del sistema delle relazioni internazionali.

d) È stata fatta la scelta di non tradurre i testi e di utilizzare la versione ufficiale in inglese. La decisione di non tradurre si giustifica perché tutti questi procedimenti e i lavori presso gli organismi internazionali considerati si svolgono in lingue ufficiali diverse dall'italiano. Si è pensato che la presentazione dei documenti nella lingua ufficiale possa offrire un'occasione, per chi voglia avvicinarsi alla conoscenza e all'utilizzo di tali meccanismi istituzionali, per acquisire una padronanza adeguata delle specifiche terminologie in almeno una delle lingue di lavoro. Tra queste ultime, la lingua inglese è stata preferita perché risulta quella più comunemente utilizzata, nonché quella in cui è reperibile praticamente tutto il materiale prodotto dagli organismi che ci interessano.

e) Per facilitare la lettura dei documenti si sono raccolti in appendice i testi, talvolta integrali, altre volte parziali, dei principali strumenti normativi internazionali cui viene fatto riferimento. Altre appendici forniscono informazioni di tipo pratico riguardanti la localizzazione e i modi di accesso agli organismi di controllo di cui il volume si occupa.

f) La lettura dei brevi saggi che introducono ai materiali può essere utile come guida all'individuazione dei principali nodi problematici delle materie affrontate negli atti, sia sul piano procedurale sia su quello sostanziale. Una Nota bibliografica posta alla fine della Prima parte del volume fornisce indicazioni per ulteriori approfondimenti.

Padova, estate 1996

P.D.S., F.L.

PARTE PRIMA

SAGGI INTRODUTTIVI

1

IL DIRITTO ALLA VITA E LA SUA TUTELA INTERNAZIONALE

di Paolo De Stefani

Introduzione

1. La tutela giurisdizionale del diritto alla vita è il filo rosso che collega, in forma più o meno diretta, quasi tutti i materiali presentati in questo volume. Il tema è peraltro uno dei più complessi da cogliere, dal momento che il valore della vita umana è per definizione luogo di incontro e manifestazione di molti altri valori e interessi, che sono già forniti di copertura giuridica o che aspirano ad esserlo. Che cosa si intende dunque per "diritto alla vita"?

In questo breve scritto cercheremo di evidenziare alcune delle problematiche giuridiche maggiormente rilevanti relative a questo diritto, privilegiando quelle che hanno avuto un certo riconoscimento nella attività giudiziaria degli organismi internazionali di tutela dei diritti umani che sono al centro dell'interesse di questo volume. Questo comporta che alcune tematiche molto importanti sul piano politico e culturale, e magari essenziali dal punto di vista dell'evoluzione giuridica degli ordinamenti interni degli Stati, resteranno in ombra, in quanto non ancora assurte alla considerazione degli organismi internazionali che qui prendiamo in esame.

2. Nei limiti di una trattazione di sintesi, cercheremo dunque di enucleare alcune questioni di fondo che si presentano a chi affronti sul piano del diritto internazionale il tema del diritto alla vita. Punto di partenza saranno le specifiche disposizioni contenute in alcuni strumenti giuridici internazionali; esse saranno lette tenendo conto dei casi di applicazione giudiziale o quasi giudiziale cui hanno dato luogo. In conclusione verranno offerti alcuni spunti circa l'evoluzione della nozione di diritto alla vita e il suo collegamento con la più ampia categoria dei diritti umani.

Riferimenti normativi internazionali e loro evoluzione

3. Di un diritto umano alla vita si parla, nel contesto del diritto internazionale, a partire dalla Dichiarazione universale dei diritti umani. L'articolo 3 della Dichiarazione universale stabilisce che "ogni individuo ha diritto alla vita, alla libertà ed alla sicurezza della propria persona". In questa norma, il diritto alla vita appare riferito all'ambito della sicurezza personale, come diritto a non subire violazioni della propria persona fisica suscettibili di condurlo alla morte. Viene in considerazione la classica dimensione penalistica della tutela della persona: quella dei reati contro la vita e l'integrità fisica degli individui. Come vedremo, questo approccio verrà man mano allargato, arricchendo la nozione legale di "vita" fino a considerare fenomeni sociali per i quali la sola tutela predisposta dai codici penali appare insufficiente e che pongono pertanto inediti problemi di "giustiziabilità".

4. L'art. 3 della Dichiarazione universale introduce tuttavia una terminologia destinata a sviluppi insospettabili. La genericità dell'evocazione di un diritto alla "vita" lasciava infatti aperta la possibilità, in seguito ampiamente sfruttata, di affrontare e regolamentare, sotto una rubrica unificante e riferibile a categorie giuridiche ampiamente accettate quali quelle riconducibili ai "diritti civili", una serie di questioni alle quali il diritto internazionale difficilmente avrebbe potuto avvicinarsi. Come vedremo, il campo d'azione di questo diritto non solo si specificherà progressivamente in norme riguardanti i limiti dell'azione repressiva degli Stati o l'abolizione della pena di morte, ma si al-

largherà fino a ricomprendere questioni di estrema attualità nelle società contemporanee come l'interruzione volontaria di gravidanza, le manipolazioni genetiche, l'eutanasia che, per questa strada, risultano quindi non estranee all'intervento delle istituzioni create dal diritto internazionale dei diritti umani.

Inoltre, il "diritto alla vita", seguendo un'altra linea di sviluppo, si traduce in "diritto di vivere", ovvero diritto a che si pongano in essere tutte quelle azioni positive che rendono possibile non solo la sopravvivenza degli individui, ma anche l'incremento della qualità della loro vita, il loro futuro come singoli e quello delle collettività umane.

5. La "fortuna" della nozione di diritto alla vita introdotta nel 1948 e la sua espansione si devono probabilmente anche al fatto che strumenti internazionali successivi alla Dichiarazione universale non contengono una norma-sintesi paragonabile a quella dell'articolo 28 della Dichiarazione stessa ("Ogni individuo ha diritto ad un ordine sociale e internazionale nel quale i diritti e le libertà enunciati in questa Dichiarazione possano essere pienamente realizzati"). Di qui la tendenza a ritrovare nelle disposizioni in materia di diritto alla vita il fondamento di diritti individuali e collettivi ad un "ordine internazionale" che mantenga la vita dell'umanità e ne promuova la qualità, operando a livello micro-, meso- e macro-sociale.

6. La Convenzione di salvaguardia dei diritti dell'uomo e delle libertà fondamentali adottata dal Consiglio d'Europa nel 1950 introduce, all'art. 2, specificazioni preziose rispetto al generico disposto della Dichiarazione dell'Onu di due anni precedente. Essa non rinuncia ad affermare in via di principio un generale diritto alla vita di ogni persona "protetto dalla legge" ([1]). La morte deliberata di un individuo può essere legittimamente causata solo in esecuzione di una sentenza capitale o a seguito del ricorso all'uso della forza quando

([1]) Sulla redazione dell'art. 2 si veda RAMCHARAN B.G. (ed.), *The Right to Life in International Law*, Dordrecht, Martinus Nijhoff, 1985, pp. 57-61. Si veda anche Opsahl T, "The Right to Life", in MACDONALD R.ST.J. - MATSCHER F. - PETZOLD H. (eds.), *The European System for the Protection of Human Rights*, Dordrecht, Martinus Nijhoff, 1992, pp. 207 ss. alle pp. 207-209.

questo risulti "assolutamente necessario" per raggiungere le finalità tassativamente indicate nel secondo comma dell'articolo 2 alle lettere a), b) e c) (su queste disposizioni v. oltre).

Il rispetto del diritto alla vita non è derogabile nemmeno quando ricorrano le condizioni di cui all'art. 15 della stessa Convenzione: guerra o altre calamità pubbliche che minaccino la vita della nazione ("salvo per il caso di morte derivante da atti di guerra conformi alle convenzioni", specifica peraltro il comma 2); inoltre, le limitazioni del diritto che lo stesso articolo 2 prefigura devono essere non solo previste per legge, ma apparire "assolutamente necessarie": in altri casi (artt. 8 – 11), il criterio è meno drastico e si parla di limitazioni necessarie "in una società democratica".

7. Da notare che l'inderogabilità delle disposizioni sul diritto alla vita non impedisce, in via ipotetica, l'esecuzione di una sentenza capitale, in tempo di guerra o in occasione di "pubbliche calamità", al termine di un processo meramente sommario, dal momento che il citato art. 15 non considera inderogabili alla stessa stregua dell'art. 2 le norme degli artt. 5 e 6 sulla libertà personale e il "giusto processo".

La situazione è migliorata in seguito all'entrata in vigore del sesto Protocollo aggiuntivo alla Convenzione europea, con il quale gli Stati si impegnano ad abrogare la pena di morte con la sola eccezione possibile delle condanne per fatti commessi in tempo di guerra o nella minaccia imminente di guerra.

8. Se sul punto della ammissibilità della pena di morte la Convenzione europea, nel suo testo del 1950, non offre argomenti al dubbio circa la sua legittimità ([2]), il disposto del secondo comma dell'articolo 2 appare invece apprezzabile per il tentativo di definire (e non meramente enunciare) il diritto umano alla vita, presentando una elencazione tassativa di casi in cui esso trova limitazioni. Si tratta di situazioni

([2]) Osserva De Salvia: "Affermare, da un lato, il diritto alla vita, costituisce una affermazione solenne del ripudio della violenza [...]. Ma, d'altro lato, occorre riconoscere le realtà, anche quando esse non sono pienamente giustificabili in termini morali, il che conduce ad ammettere la liceità di certi comportamenti, fino ad includere la violenza istituzionalizzata costituita dalla pena di morte" (De Salvia M., *Lineamenti di diritto europeo dei diritti dell'uomo*, Proxima Scientific Press, Trieste, 1994, p. 87).

sufficientemente chiare, almeno sul piano dell'enunciato, e idonee a fondare un diritto immediatamente esigibile.

Il secondo comma dell'art. 2, in effetti, non tanto disciplina il diritto alla vita, quanto si sforza di definire i casi in cui il ricorso alla violenza (che può avere come conseguenza la morte di qualcuno) va considerato legittimo. In questo senso trova scarso fondamento l'interrogativo circa la applicabilità del secondo comma alle uccisioni causate non intenzionalmente.

La seconda parte del primo comma, che fa riferimento ai casi in cui la morte è volontariamente inflitta, non può infatti essere estesa automaticamente al secondo comma, come se solo le uccisioni volontarie potessero essere suscettibili di violare il diritto alla vita sancito dalla Convenzione. Una simile interpretazione è stata seguita dalla Commissione europea dei diritti umani nel caso *X contro Belgio* ([3]), suscitando comprensibili e pesanti critiche. I motivi per cui l'art. 2 non può interpretarsi come limitato a sanzionare i soli casi di privazione volontaria della vita sono riassumibili in tre punti:

— la prima frase dell'art. 2 enuncia un dovere dello Stato di proteggere la vita e di promuoverne il godimento: la sanzione e la previsione di forme di risarcimento per i casi di omicidio involontario colposo sono la minimale conseguenza di un simile impegno;
— il principio di tutela della vita anche di fronte a fatti involontari e accidentali, almeno entro certi limiti, è un principio generale del diritto, a cui la Convenzione fa implicito rinvio;
— l'esclusione dei casi di uccisione accidentale svuoterebbe in gran parte il significato del secondo comma dell'art. 2, in quanto è da

([3]) Application 2758/66, *X v. Belgium*, *Yearbook of the Convention of H.R.*, vol. XII, 1969, p. 174. Il caso è quello di un poliziotto che, coivolto in disordini di piazza, sentendosi minacciato, spara per difesa uccidendo un dimostrante. Prescindendo dal considerare se ricorressero o meno le condizioni di cui alle lettere a), b) e c) dell'art. 2, la Commissione decise per l'involontarietà dell'azione (che in realtà non era messa in discussione da nessuno) e dichiarò manifestamente infondata la domanda presentata dai famigliari dell'ucciso e volta ad ottenere un risarcmento per la morte del congiunto. Su questa sentenza v. ROBERTSON A.H. - MERRILS J.G., *Human Rights in Europe*, Manchester University Press, Manchester and New York, 1993, p. 34; REITER-KORKMAZ A., *Droit à la vie et répression du terrorisme*, in "Revue Trimestrelle de Droits de l'Homme", 1996, pp. 252 ss., alle pp. 265-266.

ritenere che nella maggioranza dei casi le uccisioni prodotte nelle circostanze descritte da parte di appartenenti alle forze dell'ordine siano da imputare proprio a fattori accidentali o comunque non volontari.

9. Nel 1966 vengono adottati dall'Assemblea generale dell'Onu i due Patti internazionali sui diritti economici, sociali e culturali e sui diritti civili e politici. Quest'ultimo Patto contiene all'art. 6 una serie di norme che contribuiscono a sviluppare ulteriormente il profilo del diritto alla vita.

In primo luogo si approfondisce il carattere "assoluto" e autonomo, aperto alle evoluzioni interpretative che l'applicazione concreta della norma dovesse introdurre, di tale diritto. Esso viene infatti qualificato come "inerente alla persona umana", e tale qualificazione impone di interpretarlo nella forma più ampia possibile e senza limitarne le potenzialità espansive ([4]).

10. Quattro commi su sei dell'articolo considerato riguardano la pena di morte. Rispetto alle laconiche espressioni dell'art. 2 della Convenzione europea, nel Patto la preoccupazione di definire esattamente la portata del potere degli Stati di infliggere tale pena si presenta molto più marcata.

Anche per l'art. 6 tuttavia si pongono problemi analoghi a quelli sopra considerati con riguardo alla norma sul diritto alla vita della Convenzione europea. Il diritto è inderogabile (art. 4 del Patto), ma le procedure che possono condurre ad emettere una condanna a morte possono legittimamente essere ridotte in casi di emergenza nazionale ("pubblico pericolo eccezionale che minacci l'esistenza della nazione e venga proclamato con atto ufficiale": art. 4.1), poiché la norma sulle garanzie processuali (art. 14) non rientra tra quelle inderogabili. In altre parole, nelle circostanze eccezionali di cui all'art. 4, le cautele processuali fissate all'art. 6, comma 2, potrebbero essere considerate irrilevanti, e si aprirebbe la strada ad una legittimazione delle esecuzioni sommarie.

([4]) Il *General Comment* del Comitato sui diritti umani delle Nazioni Unite del 1982 dedicato all'art. 6 chiarisce che tale diritto non va interpretato restrittivamente e fornisce esempi di un uso espansivo della norma sui quali torneremo oltre nel testo.

Questa interpretazione è stata tuttavia contestata, sulla base del fatto che, in ogni caso, la parte comunque inderogabile dell'art. 6 (il primo comma) proibisce ogni privazione "arbitraria" della vita: le norme sulle garanzie processuali sarebbero pertanto rafforzate quando l'esito del processo sommario fosse quello di infliggere la pena capitale ([5]). Quando si tratta di pena di morte, insomma, il processo sommario potrebbe equivalere a uccisione arbitraria ([6]).

11. Le disposizioni del Patto in merito alla pena di morte vanno peraltro lette alla luce del Secondo Protocollo facoltativo sulla abolizione della pena di morte, entrato in vigore nel 1991 e ratificato da 29 paesi. Lo stesso art. 6 del Patto prefigurava l'abolizione della pena capitale come un evento auspicabile (si veda in particolare l'ultimo comma). Ora, l'art. 1 del Protocollo dispone che su nessun individuo sarà eseguita la pena di morte e che gli Stati si impegnano ad eliminare la pena capitale dal loro ordinamento. L'art. 2 chiarisce che non è ammessa nessuna riserva alla ratifica del Protocollo, salvo quella che consente l'applicazione della pena di morte in tempo di guerra per reati militari di estrema gravità commessi in tempo di guerra.

Da ricordare che la pena capitale è stata anche esclusa da quelle che possono essere comminate da parte del tribunale internazionale

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([5]) Il punto è stato chiaramente illustrato dal relatore speciale sulle esecuzioni sommarie della Sotto-Commissione contro la discriminazione e per la tutela delle minoranze delle Nazioni Unite, Amos Wako, in occasione si uno dei suoi primi rapporti (E.CN.4/Sub.2/1983/16, v. in particolare al numero 14). Il relatore fa notare che, nel caso si concludesse in maniera diversa, il Patto finirebbe per consentire, in casi di emergenza diversi dalla guerra, comportamenti meno garantiti di quelli prescritti in tempo di guerra dalle Convenzioni di Ginevra (cfr. Convenzione relativa al trattamento dei prigionieri di guerra, artt. 100-101; Covenzione relativa alla protezione dei civili in tempo di guerra, artt. 68 e 75). Si veda anche, sul punto, MERON T., *Human Rights Law-Making in the United Nations*, Clarendon Press, Oxford, 1986, pp. 94-95.

([6]) Altro elemento di insoddisfazione del dettato, pur scrupoloso, dell'art. 6 sulla pena di morte, riguarda il trattamento della donna: mentre nei confronti dei minori di 18 anni si esclude che vi possa essere pronuncia di una sentenza capitale, nei riguardi di una donna incinta la lettera del comma 5 dispone che la sentenza capitale non può essere eseguita. Se ne ricaverebbe che, dopo il parto, l'esecuzione può avere luogo senza ledere il Patto. Il Primo e il Secondo Protocollo addizionale del 1977 alle Convenzioni di Ginevra, riguardanti rispettivamente la protezione delle vittime di conflitti armati internazionali e la protezione delle vittime di conflitti armati non internazionali, escludono l'esecuzione di donne incinte o madri di bambini piccoli (artt. rispettivamente 76.3 e 6.4).

istituito dalle Nazioni Unite per giudicare gli autori dei crimini commessi in ex Jugoslavia e in Rwanda ([7]).

12. La maggiore carenza dell'art. 6 riguarda tuttavia la regolamentazione dell'uso legittimo della forza, proprio il punto su cui l'art. 2 della Convenzione europea ha invece focalizzato la propria attenzione.

In particolare, la "arbitrarietà" della privazione della vita non appare un criterio sufficientemente preciso per vincolare le autorità di pubblica sicurezza a condotte rispettose del diritto alla vita. Manca un riferimento espresso a quelle limitazioni legate alla assoluta necessità del ricorso alla violenza, alla proporzionalità rispetto al danno, alle circostanze di fatto in cui tale comportamento può essere attuato, ecc., su cui opportunamente si dilunga la norma della Convenzione europea.

Questa carenza normativa rende difficile la "giustiziabilità", presso il Comitato sui diritti umani, delle violazioni, purtroppo tutt'altro che infrequenti, del diritto alla vita riconducibili a interventi repressivi delle forze dell'ordine che mettono a repentaglio la vita altrui attraverso l'uso delle armi o il ricorso ad altre forme di violenza, come le sparizioni forzate. Da notare che proprio agli autori di questi crimini molti regimi garantiscono una situazione di sostanziale impunità, ed è quindi particolarmente grave il fatto che il possibile ruolo repressivo e preventivo del Comitato di Ginevra risulti scarsamente valorizzato. Sulle uccisioni causate dalla forza pubblica e sulle sparizioni forzate insiste, con giusta percezione, il *General Comment* 6 (16) emesso dal Comitato nel 1982 (v. soprattutto i paragrafi 3 e 4).

([7]) Sul tribunale ad hoc per ex Jugoslavia e Rwanda si vedano: Bollettino "Archivio Pace Diritti Umani", n. 1, 1994 (8); O'BRIEN J., *The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia*, in "American Journal of International Law", 87, 1993, pp. 639 ss.; MERON. T., *The Case for War Crimes Trials in Yugoslavia*, in "Foreign Affairs", 1993, pp. 122 ss.; MERON. T., *War Crimes in Yugoslavia and the Development of International Law*, in "American Journal of International Law", 88, 1994, pp. 78 ss. Si veda anche "The Monitor", newsletter della NGO Coalition for an International Criminal Court, n. 1, estate 1996. Per informazioni e documenti sui tribunali internazionali ad hoc, si rinvia al sito di Internet gestito dalla citata Coalition: <http://www.igc.apc.org/icc/>. Per materiale relativo all'attività del tribunale sul Rwanda si rinvia al sito dedicato alla crisi in Rwanda e Burundi dell'Archivio "Pace diritti umani" dell'Università di Padova - Regione del Veneto: <http://www.cepadu.unipd.it/RwandaBurundi/00.Sommario.html>.

Vale ricordare tuttavia che sulle pratiche riconducibili a violazioni arbitrarie del diritto alla vita poste in essere da membri delle forze di sicurezza è focalizzata l'attenzione di alcuni importanti organi di monitoraggio delle Nazioni Unite. Segnaliamo tra questi i relatori speciali e i gruppi di lavoro della Commissione sui diritti umani e della Sotto-Commissione relativi a: diritti dei detenuti; esecuzioni extragiudiziali, sommarie e arbitrarie; detenzione arbitraria; sparizioni forzate; mercenari. Su queste materie si concentrano gli strumenti "politici" di denuncia e tutela dei diritti umani di cui si accenna, in questo volume, nel testo dedicato alle procedure.

13. Rispetto al dettato della Convenzione europea e all'art. 6 del Patto internazionale, la Convenzione americana sui diritti umani, aperta alla firma dei paesi membri dell'Organizzazione degli Stati americani nel 1969, contiene alcune significative varianti ([8]).

In primo luogo, quanto alla pena di morte, l'art. 4 precisa che essa non può essere reinserita nei paesi in cui è stata abolita e che non può essere inflitta ai minori di 18 e ai maggiori di 70 anni, né può venire pronunciata per reati politici o per crimini comuni connessi a reati politici. Nel 1992 l'Organizzazione degli Stati americani ha adottato ed aperto alla ratifica un Protocollo alla Convenzione americana sui diritti umani mirante all'abolizione della pena di morte, che dispone in modo del tutto identico al Sesto Protocollo aggiuntivo della Convenzione europea. Il Protocollo americano non è ancora entrato in vigore.

Inoltre, alla enunciazione generale del diritto alla vita, che rispecchia fondamentalmente quella del Patto internazionale, si aggiunge una precisazione riguardante il fatto che la vita va protetta "in via generale, fin dal momento del concepimento". Questa norma è stata considerata compatibile con la legislazione in materia di aborto contenuta in vari ordinamenti nazionali: l'inciso "in via generale" è ritenuto idoneo a consentire l'interruzione volontaria di gravidanza motivata dalla conservazione della vita e della salute della madre. Ciò non

([8]) V. Gros Espiell H., *Le droit à la vie et le droit de vivre dans le système interaméricain*, in Premont D. - Montant F., *Actes du Symposium sur "Le droit à la vie"*, CID, Genéve, 1992, pp. 65 ss.; Despouy L., *Le doit à la vie: un droit intangible et non dérogable, ibidem*, pp. 71 ss.

esclude che legislazioni particolarmente libertarie in tema di aborto possano risultare comunque incompatibili con tale disposizione. Un tentativo di colpire le normative interne di alcuni Stati federati degli Stati Uniti invocando una interpretazione restrittiva dell'art. 1 della Dichiarazione americana sui diritti e i doveri dell'uomo, riconosciuta dagli Usa come fonte vincolante di diritto internazionale, traendo argomento dall'art. 4 della Convenzione di S. José di Costarica, è stato rigettato dalla Commissione americana dei diritti dell'uomo di Washington (gli Stati Uniti, membri dell'Organizzazione degli Stati americani e quindi aderenti alla Dichiarazione americana, non hanno infatti ratificato la Convenzione) (9).

14. La Convenzione americana è l'unico strumento internazionale che dia indicazioni cogenti in materia di diritto alla vita e aborto. Su questa problematica infatti la comunità internazionale è ben lontana dall'avere raggiunto un'omogeneità di opinioni. Si tratta comunque di una tematica destinata prima o poi ad approdare all'attenzione delle istituzioni internazionali di controllo, allo stesso modo di quella, per certi versi parallela, dell'eutanasia e, più in generale, di tutte le questioni riconducibili alla bioetica. La mancanza di direttive operanti a livello internazionale su materie di questo genere emerge da una sentenza del 1991 di una corte internazionale *sui generis* come è la Corte di Giustizia delle Comunità Europee del Lussemburgo, pubblicata nel presente volume. La Corte era stata adita in via pregiudiziale (art. 177 del Trattato CEE) dal giudice irlandese presso cui pendeva un procedimento aperto da una società per la protezione della vita del nascituro contro un'associazione studentesca che diffondeva informazioni sulle opportunità di praticare l'aborto in cliniche inglesi. Alla Corte di Giustizia si chiedeva sostanzialmente se questa attività informativa potesse essere legittimamente proibita dall'ordinamento irlandese, nel quale l'illiceità dell'aborto è principio costituzionale (art. 40, n. 3, comma terzo), alla luce da un lato del principio della libera circolazione dei servizi (art. 60 del Trattato CEE), dall'altro dei principi di tutela dei diritti fondamentali cui la Comunità europea si ispira. Poteva essere

(9) Sulla vicenda si rinvia a MERON T., *Human Rights Law Making...*, cit., p. 137 s.

un'occasione per la Corte del Lussemburgo di pronunciarsi su questioni come: la misura in cui l'interruzione volontaria di gravidanza confligge con il principio di tutela del diritto alla vita; l'estensione del diritto alla libera manifestazione del pensiero su temi di questa natura; i rapporti tra normative internazionali sui diritti umani e norme interne di rango costituzionale, ecc. Naturalmente questo genere di argomenti non rientrano nella sfera di interesse istituzionale della Corte che, nel caso in esame, non solo non prende in considerazione la pertinenza dell'art. 2 della Convenzione europea sui diritti dell'uomo, ma cita l'art. 10, comma 1 di tale Convenzione (libertà di espressione e di informazione) solo per negare che tali problematiche rientrino nella sfera di operatività del diritto comunitario. È curioso tuttavia osservare l'esito a cui il ragionamento della Corte conduce. La legittimità delle restrizioni previste dalla legge irlandese alla libera diffusione di informazioni sulle opportunità di praticare l'aborto all'estero, viene fatta poggiare sulla circostanza che, nel caso di specie, le informazioni erano date attraverso canali non commerciali, ossia non compresi tra le attività delle cliniche abortive che fornivano quel "servizio". Se fossero state tali cliniche a diffondere le informazioni, l'interesse alla promozione della libera circolazione dei servizi avrebbe prevalso sulla normativa interna antiabortista; che la proibizione venga a mettere in discussione il diritto fondamentale alla libertà di espressione e informazione sembra non interessare la Corte (e giustamente, dal suo punto di vista, dal momento che tale questione non rientra tra quelle di competenza del diritto comunitario ([10])).

15. Le norme citate del Patto e delle due convenzioni regionali sono le principali fonti normative del diritto alla vita in campo internazionalistico. Ad esse ne vanno aggiunte tuttavia altre, il cui impatto è meno generale ma non per questo meno rilevante sul piano giuridico.

In primo luogo, come abbiamo già avuto modo di notare, il diritto alla vita come elemento di limitazione dell'uso della forza nei conflitti

([10]) L'estraneità della materia dei diritti umani in quanto tale all'ambito del diritto comunitario è ribadita dalla Corte di Giustizia delle Comunità europee nel recente parere consultivo emesso sulla questione dell'adesione della Comunità alla Convenzione europea sui diritti dell'uomo: parere della Corte del 28 marzo 1996, n. 2/94.

armati e di ricorso alla pena capitale, è contenuto nelle Convenzioni di Ginevra del 1949 e relativi Protocolli di diritto umanitario ([11]).

La Convenzione sul genocidio del 1948 prefigura una estensione sul piano interindividuale del diritto alla vita: di tale diritto risultano titolari gli individui in quanto appartenenti ad un determinato gruppo (etnico, religioso, politico, ecc.) sul quale si concentra la violenza (artt. I e II). A queste norme si collegano quelle della Convenzione sulla soppressione e punizione del crimine di apartheid del 1976, in cui l'uccisione di membri di un gruppo razziale viene intesa quale strumento per negare il diritto alla vita del gruppo stesso, a sua volta elemento costitutivo della nozione del crimine di apartheid (art. II). Sulla dimensione collettiva del diritto alla vita torneremo nell'ultima parte di questo scritto.

La Carta Africana dei diritti dell'uomo e dei popoli del 1981 sancisce all'art. 4, con terminologia che riprende in parte l'art. 6 del Patto dell'Onu, la "inviolabilità" della persona umana. La tutela della vita si estende a quella dell'integrità fisica e morale della persona e non può essere arbitrariamente limitata.

Un ulteriore accenno al diritto alla vita in strumenti internazionali convenzionali è presente nella Convenzione del 1989 sui diritti dell'infanzia, art. 6: "Gli Stati parte riconoscono che ogni fanciullo [*child*] ha un diritto innato [*inherent*] alla vita. Gli stati membri si impegnano a garantire nella più ampia misura possibile la sopravvivenza e lo svi-

([11]) Si possono ricordare: art. 3 comune alle quattro Convenzioni di Ginevra (divieto di compiere atti violenti verso le persone che non hanno ruoli attivi nelle ostilità); artt. 12 e 50 della Convenzione sul miglioramento delle condizioni dei feriti e dei malati nelle forze armate terrestri e della Convenzione per il miglioramento delle condizioni di feriti, malati e naufraghi delle forze armate di mare (proibiscono le violenze contro i militari feriti ecc. e considerano tali atti gravi violazioni della Convenzione stessa); artt. 13, 100 e 101 della Convenzione sul trattamento dei prigionieri di guerra (il primo proibisce come grave violazione della Convenzione le violenze contro i prigionieri; gli altri fissano regole procedurali minime per la pronuncia della condanna a morte dei prigionieri); artt. 68 e 75 della Convenzione sulla protezione dei civili in pempo di guerra (limitano i casi in cui la Potenza occupante può infliggere la pena di morte nei confornti di cittadini del paese occupato, ponendo in particolare il limite dei 18 anni e il diritto di richiedere la grazia. L'art. 12 della stessa Convenzione è uguale al corrispondente articolo delle Convenzioni sui feriti nelle forze di terra e di mare); art. 4 del II Protocollo aggiuntivo del 1977 sulla protezione delle vittime di conflitti non internazionali (estende ai conflitti civili la proibizione di atti di violenza contro quanti non hanno parte attiva nelle ostilità).

luppo del fanciullo". L'impegno a promuovere con misure positive il diritto alla vita, e non solo a mantenerlo in essere con misure di mera repressione dei comportamenti dannosi, viene qui affermato in modo esplicito.

16. Un ultimo punto merita di essere trattato, e riguarda la possibilità per gli Stati di introdurre delle riserve in materia di diritto alla vita al momento della ratifica dei trattati che lo prevedono. Un esempio molto significativo relativo all'art. 6 del Patto sui diritti civili e politici è fornito dagli Stati Uniti, che hanno introdotto una riserva per mantenere in vigore la legislazione di alcuni degli Stati federati che consente l'esecuzione di minorenni ([12]). Un altro caso, esaminato da un parere della Corte interamericana dei diritti dell'uomo su domanda del Guatemala, concerneva una riserva fatta da questo paese la quale rendeva possibile in quell'ordinamento applicare la pena di morte per reati comuni connessi con delitti politici ([13]).

Nel secondo caso, la conclusione della Corte di S. José fu che una riserva fatta sulla norma di un articolo inderogabile della Convenzione era incompatibile con la Convenzione stessa. Successivamente a questo parere, il nuovo regime guatemalteco modificò la legislazione interna sul punto e ritirò la riserva.

Sulla riserva avanzata dagli Stati Uniti non vi sono stati pronunciamenti ufficiali diretti. Il Comitato dei diritti umani, tuttavia, in un suo recente e importante *General Comment* relativo appunto alle riserve ([14]), ha espresso una interpretazione coraggiosa e radicale della regola dell'art. 19 della Convenzione di Vienna sul diritto dei trattati ([15]), indicando quali sono i diritti fondamentali (oltre ad alcune

([12]) La ratifica, accompagnata dalle ricordate riserve, oltre che da altre dichiarazioni, risale al 2 aprile 1992. Su di essa si veda il commento del Lawyers Committee for Human Rights di New York in "Human Rights Law Journal", vol. 14, 1993, p. 125 s.

([13]) *Advisory Opinion* OC-3/83 del 24 settembre 1983, *Restrictions to the Death Penalty*, (1984).

([14]) *General Comment* n. 24 (52), adottato alla 52ª sessione, il 2 novembre 1994, doc. CCPR/C/21/Rev.1/Add.6, pubblicato anche in "Human Rights Law Journal", vol. 15, 1994, pp. 464 ss.

([15]) "A State may, when signing, ratifying, accepting, approving or acceding a treaty, formulate a reservation unless:

a) the reservation is prohibited by the treaty; b) the treaty provides that only

norme procedurali) su cui non possono essere fatte riserve. Tra tali diritti rientra il diritto a non essere arbitrariamente privato della vita e quello a non subire la pena di morte se si è minori o donne in gravidanza. Le norme che pongono questi diritti sono inoltre qualificate dal Comitato come norme obbligatorie di diritto internazionale consuetudinario: *ius cogens*, insomma ([16]).

La stessa osservazione generale attribuisce inoltre al Comitato sui diritti umani il compito di formulare il giudizio circa la compatibilità di una riserva con l'oggetto e lo scopo del Patto sui diritti civili e politici; nel caso tale incompatibilità sia oggettivamente dimostrata, la conseguenza sarà la completa operatività del Patto anche per lo Stato che aveva avanzato la riserva ([17]).

Il diritto alla vita nella interpretazione della giurisprudenza internazionale

17. Dopo aver tratteggiato il percorso evolutivo dell'elaborazione normativa internazionale del diritto alla vita, e prima di considerare i possibili sviluppi futuri di tale percorso, ci proponiamo ora di ripercorrere per sommi capi alcuni dei momenti rilevanti della attuazione concreta di tale diritto attraverso l'esame di atti prodotti dagli organismi internazionali che sovrintendono al controllo e all'applicazione delle norme che lo riconoscono.

Piuttosto che una disanima generale della giurisprudenza in materia di diritto alla vita, preferiamo tuttavia approfondire, sia pure

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specified reservations, which do not include the reservation in question, may be made; or c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty".

([16]) *General Comment* 24 (52), § 8.

([17]) Paragrafi 17 - 18. In questo il *General Comment* si discosta significativamente dalla disciplina della Convenzione di Vienna (art. 21), la quale prevede soltanto l'inopponibilità della riserva allo Stato che sollevi obiezione alla stessa. Questo trattamento particolare riservato al Patto e agli altri trattati in materia di diritti umani viene giustificato essenzialmente sulla base del fatto che "tali trattati [...] non costituiscono una rete inter-statuale di scambi e obbligazioni reciproche. Essi riguardano l'attribuzione di diritti a degli individui. Il principio di reciprocità inter-statuale non opera in questi casi" (par. 17).

entro certi limiti, alcuni aspetti rilevanti della problematica così come si sono presentati di fronte alle istanze, internazionali e non, che con essi hanno dovuto confrontarsi.

Il generale diritto alla vita sarà quindi trattato, nelle pagine che seguono, sotto due profili: a) limiti all'uso della violenza da parte delle forze dell'ordine e b) diritto alla vita ed estradizione verso paesi che praticano la pena di morte.

18. Il primo profilo da considerare riguarda la tutela del diritto alla vita attraverso la limitazione dell'uso legittimo della forza. Questa istanza di tutela della vita è espressa nella forma più precisa dall'art. 2, secondo comma, della Convenzione europea sui diritti umani. Le lettere a), b) e c) definiscono in modo tassativo ([18]) i casi in cui la legittimità del ricorso all'uso della forza esclude che l'eventuale uccisione di una persona possa comportare violazione della Convenzione europea e responsabilità dello Stato.

Benché l'articolo 2 della Convenzione di Roma sia stato più volte preso in considerazione dalla Commissione europea dei diritti dell'uomo, e proprio sotto il profilo della violazione del secondo comma, la Corte europea non era mai intervenuta sull'argomento ([19]) fino al caso *McCann, Farrell e Savage contro Regno Unito*, concluso con la sentenza riportata integralmente in questo volume. Tale sentenza costituisce un momento innovativo molto importante nella applicazione dell'art. 2 da parte degli organi di Strasburgo ([20]). I punti salienti di tale sentenza verranno presi come riferimento principale nella discussione che segue, pertanto daremo per acquisita nel lettore una suffi-

([18]) Commissione europea dei diritti dell'uomo, Ricorso n. 10044/82 *Steward v. United Kingdom* (1984), *Decisions and Reports*, Vol. 39, p. 169. Vedi anche, nella sentenza pubblicata in questo volume sul caso *McCann*, il paragrafo 148.

([19]) Vi è interventuto invece il Consiglio dei Ministri, nel ricorso Stato contro Stato presentato da Cipro contro la Turchia, deciso con risoluzione (79)1 del 20 gennaio 1979.

([20]) La sentenza di condanna apparve, nel 1995, così inaspettata da indurre preoccupazione e addirittura scandalo presso ambienti governativi britannici, che arrivarono a definire la Convenzione europea "Carta dei terroristi". Si veda complessivamente l'articolo di MARR A., *It is time to say sorry*, in "The Independent", 28 settembre 1995, p. 21. Altre fonti di stampa sono citate in JOSEPH S., *Denoument of the Deaths on the Rock: the Right to Life of Terrorists*, in "The Netherlands Quarterly of Human Rights", Vol. 14/1, 1996, pp. 5ss, p. 6, note 3 - 8 e *passim*.

ciente conoscenza dei fatti relativi al caso, ampiamente riassunti nella sentenza stessa (§§ 12 - 143).

19. La decisione della Corte opera una chiara distinzione tra quanto dispone il primo comma dell'art. 2 e le norme del secondo comma.

Per quanto concerne il primo comma, la Corte ribadisce il valore fondante che ha il diritto alla vita (collegato con il diritto a non essere oggetto di tortura di cui all'art. 3) per le società democratiche che compongono il Consiglio d'Europa ([21]). La particolare pregnanza di tale diritto, tuttavia, sembra riverberare i suoi effetti essenzialmente sull'interpretazione del secondo comma, imponendo una lettura particolarmente restrittiva dei casi in cui si possa giustificare la morte causata dall'uso della forza; in particolare, il dettato del primo comma richiede che, nel valutare l'assoluta necessità dell'impiego della violenza e la proporzionalità del danno causato rispetto alla minaccia, si tengano in considerazione tutte le circostanze di fatto in cui l'azione che ha cagionato la morte si è svolta. La Corte invece non fa derivare dal primo comma alcuna conseguenza diretta circa le caratteristiche procedurali dell'inchiesta che si proponga di indagare sui fatti di uccisione causati dall'uso della forza da parte di agenti dello Stato ([22]), limitandosi a richiedere semplicemente che un'inchiesta effettiva abbia luogo. Per eccepire su questa materia, osserva la Corte, non si do-

([21]) § 147: "In quanto norma che non solo tutela il diritto alla vita, ma descrive anche le circostanze in cui una privazione della vita può essere giustificata, l'art. 2 esprime una delle più fondamentali norme della Convenzione – per la quale, infatti, l'art. 15 non ammette, in tempo di pace, nessuna possibilità di deroga. Insieme all'art. 3 della Convenzione, tale articolo sancisce inoltre uno dei valori primari delle democrazie che danno vita al Consiglio d'Europa."

([22]) Critiche all'andamento della procedura d'inchiesta condotta dalle autorità di polizia e dal coroner a Gibilterra sono state sostenute, durante il procedimento presso la Commissione e la Corte, anche da organizzazioni nongovernative operanti come *amici curiae*, tra cui British-Irish Rights Watch e Amnesty International. Sia la Commissione sia la Corte escludono nel merito che censure di rilevante portata possano essere mosse all'azione delle autorità statali: "la Corte non ritiene che le varie presunte deficenze del procedimento di inchiesta su cui il ricorrente e gli intervenienti si sono soffermati, abbiano impedito in modo sostanziale che fosse condotta una indagine approfondita, imparziale e diligente delle circostanze in cui le uccisioni hanno avuto luogo" (§ 163).

vrebbe invocare il primo comma dell'art. 2, ma gli articoli 6 o 13 (processo equo e effettività dei rimedi) (§ 160).

Questo modo di disporre sembra quindi ridimensionare l'affermazione del valore autonomo della norma del primo comma che riconosce il diritto alla vita, dal momento che le dirette conseguenze pratiche di essa risultano abbastanza circoscritte ([23]).

20. La violazione, nel caso considerato, dell'art. 2, primo comma, è esclusa dalla Corte anche in riferimento al modo di disporre dell'ordinamento giuridico vigente a Gibilterra, che non prevede una tutela del diritto alla vita di fronte all'uso della forza da parte di agenti di sicurezza all'altezza delle norme della Convenzione europea. Questo argomento è rigettato dalla Corte sulla base di un esame della effettiva applicazione pratica delle norme interne vigenti, il quale porta a rilevare la mancanza di una sostanziale difformità degli standard applicati, nonostante l'ineguale livello di garanzia fissato dalla lettera delle norme. La Corte ricorda inoltre che suo compito non è quello di operare come una Corte Costituzionale, sindacando in via generale la conformità di una norma interna con le disposizioni della Convenzione, ma bensì quello di intervenire sui casi concreti in cui specifiche condotte determinano violazione delle garanzie previste dalla Convenzione. L'astratta inadeguatezza di una normativa interna, in altre parole, non rileva per la Corte finché non si traduce in sostanziale violazione del diritto in un caso concreto.

21. Le finalità che possono giustificare la privazione della vita, in

([23]) La Commissione è andata oltre. Nel caso n. 7154/75 *Associazione X contro Regno Unito* (1978, *Decisions and Reports*, Vol. 14, pp. 31 ss., riguardante un ricorso contro un programma di vaccinazioni volontarie ritenuto pericoloso) ha dichiarato che il primo comma, venuto in considerazione nel caso specifico, può coprire situazioni che vanno al di là di quelle su cui si sofferma il secondo comma dell'art. 2. Il dovere per gli Stati, in forza dell'art. 2, di prendere misure positive per prevenire attentati contro persone minacciate da terroristi o da altri soggetti, quando queste minacce siano sufficientemente specifiche, è implicitamente affermato nelle decisioni sui ricorsi 5207/71 *X contro Repubblica Federale Tedesca*; 6040/73 *X contro Irlanda* e 9348/81 *W contro Regno Unito*. In questo senso, la Commissione sembra aprire il "diritto alla vita" ad un'interpretazione che lo stacca dalla classica classificazione come diritto "civile" ("libertà da"), per avvicinarlo ad una nozione che lo avvicina al campo dei diritti "sociali", che richiedono un'azione promozionale da parte della collettività e delle istituzioni.

base al secondo comma dell'art. 2, comprendono in primo luogo lo scopo di difendere una persona (compreso l'agente stesso: legittima difesa) da una violenza illecita. La dottrina esclude che questa disposizione dell'art. 2, lettera a) copra anche i casi di ricorso alla forza per proteggere un diritto su un bene che non sia proprio della personalità; il caso non è stato affrontato dalla giurisprudenza di Strasburgo e pertanto non è del tutto chiaro il modo in cui si possa discriminare tra beni giuridici attinenti alla persona e non. Come vedremo subito, la difesa di altre persone può venire invocata insieme alla finalità di eseguire un arresto, quando quest'ultimo avvenga in funzione di prevenzione del reato.

22. Altra finalità che esclude la violazione dell'art. 2 è quella di eseguire l'arresto regolare di una persona o impedire l'evasione di un detenuto. La Commissione ha affrontato tale questione nel caso *Farrell contro Regno Unito* ([24]), pur senza giungere ad una statuizione nel merito, in quanto una composizione amichevole tra le parti pose tempestivamente fine al procedimento. Nel caso dell'arresto di un sospetto la valutazione della "assoluta necessità" di ricorrere alla forza dipende da un giudizio, estremamente delicato, da darsi circa il complesso delle operazioni svolte per porre in essere l'arresto. Si deve valutare se tutto è stato organizzato in modo tale da limitare al massimo il rischio di compromettere la vita altrui, tenuto conto della pericolosità del soggetto da catturare e del fatto che la sua reazione può coinvolgere persone estranee. Non è infatti pensabile che, come pure un giudice interno chiamato ad esprimersi su un punto simile ebbe a statuire, "l'uccisione del sospetto possa giustificarsi come modo di procedere al suo arresto".

Il problema di utilizzare il criterio della pericolosità futura di un sospetto per giustificare il ricorso alla violenza estrema nei suoi riguardi si presenta particolarmente ostico. In questi casi la finalità dell'art. 2, lettera b) si confonde con quella della lettera a): l'arresto serve infatti a proteggere la società dalle possibili future azioni criminali di un soggetto. Che un simile giudizio sul futuro possa giustificare al pre-

([24]) Ricorso n. 9013/80, in *Decisions and Reports*, 1984, Vol. 38, p. 44 ss.

sente l'uccisione del possibile o probabile autore di delitti è questione di ben difficile soluzione. Nel caso *Kelly contro Regno Unito* ([25]), la vittima, al volante di un'auto rubata, venne uccisa da militari britannici di stanza nell'Irlanda del Nord per non essersi fermata ad un posto di blocco, venendo scambiata per un terrorista. Secondo una fondata dottrina, la Commissione commise in questo caso un evidente errore nel dichiarare il ricorso manifestamente infondato, non tenendo conto che la legge allora vigente nell'Ulster non consentiva ai militari di eseguire arresti preventivi, ma solo di compierli in via repressiva e limitatamente ad alcuni gravi reati ([26]). Dal caso *Kelly* si è potuto tuttavia inferire che, di fronte a particolari categorie di soggetti, ritenuti particolarmente pericolosi per la collettività in quanto coinvolti, di fatto o solo ipoteticamente, in attività terroristiche, i rigorosi limiti all'uso della forza fissati dall'art. 2 potevano essere interpretati con minore rigidità.

Contro una simile interpretazione si poneva il Comitato dei diritti umani delle Nazioni Unite nella constatazione sul caso *Camargo e altri contro Colombia*, emanata nel 1982 ([27]), e in altri casi simili, in cui sospetti terroristi venivano uccisi nel corso di operazioni di polizia condotte senza dare loro quartiere, ossia possibilità di arrendersi. Legati a questi fenomeni sono anche i casi di sparizioni forzate, che la Corte interamericana di S. José ha affrontato in più occasioni ([28]).

23. Il caso *McCann* segna una parziale revisione, da parte della Corte europea, dell'indirizzo della Commissione emerso nel caso *Kelly*. La Corte infatti, dopo avere escluso che lo stato attuale delle prove possa dare adito all'ipotesi di un omicidio premeditato dei tre membri dell'IRA, passa ad esaminare con estremo scrupolo l'intera operazione delle forze di sicurezza britanniche a Gibilterra, rilevando in particolare come, nella pianificazione dell'intervento nel suo complesso, non si siano fatte le scelte che meglio avrebbero garantito la si-

([25]) Ricorso n. 17579/90, 13 gennaio 1993, *Decisions and Reports* Vol. 74, pp. 154 ss.

([26]) V. Joseph S., *Denoument of the Deaths...*, cit., p. 9.

([27]) Comunicazione n. 45/1979, UN Doc. A/37/40.

([28]) Riguarda un caso di sparizione forzata anche la vicenda di Saúl Godínez Cruz di cui presentiamo, in questo volume, la sentenza relativa al risarcimento del danno.

curezza della popolazione e degli stessi sospetti terroristi: invece di provvedere all'arresto dei sospetti prima del loro ingresso a Gibilterra, si è permesso loro di oltrepassare il confine spagnolo, esponendo loro stessi e la popolazione civile ad un rischio sproporzionato rispetto al vantaggio derivante dal poter raccogliere un maggior numero di informazioni sul progettato attentato (vedi §§ 202 - 205); inoltre, carenze sono state riscontrate nella veicolazione delle informazioni tra le componenti del gruppo antiterroristico (§§ 206 - 210) e, più a monte, nel tipo di addestramento cui gli agenti britannici erano stati sottoposti, non sufficientemente attento a proporre modi di fare uso delle armi diversi da quello di sparare per uccidere (§§ 211 - 212). È insomma l'insieme dell'organizzazione messa in campo dalle forze di sicurezza britanniche a non avere adempiuto i criteri di rigoroso rispetto della vita dell'art. 2, secondo comma, rimanendo fuori discussione la mancanza di colpa in capo agli agenti che hanno sparato. Su questo fondamento, la Corte ha ritenuto l'esistenza di violazione dell'art. 2 da parte del Regno Unito, che viene condannato ad un rimborso parziale delle spese per il procedimento presso gli organi della Convenzione europea.

24. Le finalità ricomprese alla lettera c) del secondo comma dell'art. 2 (reprimere sommosse o insurrezioni) si legano strettamente a quelle appena considerate. Si tratta dei casi in cui le forze dello Stato, sottoposte al massimo grado di tensione in presenza di una sfida che riguarda, in modo più o meno diretto, la sopravvivenza delle stesse istituzioni, sono maggiormente tentate a fare uso indiscriminato della violenza. La minaccia terroristica, organizzata in bande armate o gruppi paramilitari, può condurre a situazioni-limite in cui il rispetto dei diritti umani è messo a dura prova.

La Corte interamericana dei diritti umani è intervenuta in alcuni casi per statuire su situazioni che possono essere ricomprese nella prospettiva della lettera c) della Convenzione europea. In questo volume presentiamo la sentenza sul caso *Negra Alegría e altri contro Perù*, emessa il 19 gennaio 1995, in cui l'uccisione arbitraria di tre detenuti nel carcere peruviano di "El Frontón" appare inserita nell'ambito di un'operazione più vasta che si inquadrava nel confronto armato tra il governo peruviano e i guerriglieri di *Sendero Luminoso*, di cui la rivolta nel carcere era un aspetto. La rivolta, scoppiata nell'estate del

1986, fu stroncata dalle forze militari tra il 18 e il 19 giugno: il carcere fu bombardato e 111 detenuti persero la vita; solo sette poterono essere identificati; i tre presunti terroristi cui il ricorso si riferiva vengono ricompresi tra i dispersi. I fatti, nella ricostruzione della Corte, dimostrano l'estrema sproporzione della forza militare utilizzata rispetto all'obiettivo, perfettamente legittimo, di sopprimere la rivolta. Altre circostanze provano inoltre il sostanziale disprezzo per la vita dei rivoltosi in generale, e per quella dei tre presunti terroristi in particolare.

25. Veniamo ora ad un secondo importante aspetto della protezione del diritto alla vita. In vari casi, organi internazionali di controllo sui diritti umani sono dovuti intervenire per decidere su casi in cui la violazione del diritto alla vita veniva fatta dipendere dal fatto che dei governi concedono l'estradizione di responsabili di gravi reati verso paesi in cui è praticata la pena di morte. Il problema si pone nel caso in cui il paese che detiene l'autore del reato non applica la pena di morte o non la prevede per quel reato. La concessione dell'estradizione in questi casi si configurerebbe come un sostanziale aggiramento da parte degli Stati dell'obbligo, previsto in alcune convenzioni internazionali, di proteggere il diritto alla vita di individui sottoposti alla loro giurisdizione ([29]), e quindi un illecito internazionale.

Sul punto si sono pronunciate sia istanze internazionali (la Corte europea dei diritti dell'uomo e il Comitato dei diritti umani delle Nazioni Unite) sia giudici interni. Si possono individuare due fondamentali orientamenti: il primo fa leva sulla necessità di valutare caso per caso il grado di probabilità che una condanna a morte, nel paese dell'estradizione, sia effettivamente pronunciata ed eseguita; il secondo si sforza di determinare in via generale quale norma sia gerarchicamente prevalente, se quella che impegna ad estradare o quella che vincola al rispetto del diritto alla vita.

26. Un esempio del primo modo di procedere si trova nella constatazione del Comitato dei diritti umani dell'Onu nel caso *Kindler*

([29]) Che gli obblighi di protezione dei diritti della persona si estendano, sia pure entro entro certi limiti, anche agli stranieri presenti sul territorio dello Stato (e quindi anche agli estradandi) è criterio generalmente seguito in tutti gli strumenti normativi in materia di diritti umani: v. per es. l'art. 2.1 del Patto sui diritti civili e politici.

contro Canada, presentato in questo volume ([30]). Il Comitato ha ritenuto che l'estradizione del signor Kindler verso gli Stati Uniti, dove rischiava una condanna a morte, non fosse in violazione dell'art. 6 del Patto sui diritti civili e politici che, in effetti, non abolisce la pena di morte. Anche per uno Stato, come è il caso del Canada, che ha abolito al suo interno la pena capitale, il dovere di osservare i trattati internazionali in materia di estradizione prevale sull'obbligo di difesa della vita (cfr. §§ 14.3 - 14.4). L'adempimento di tali obblighi non è condizionato nemmeno alla richiesta, pure prevista nel trattato tra Canada e Stati Uniti, di avere garanzie circa la non esecuzione di una eventuale condanna a morte, poiché questa clausola può essere invoca in via puramente discrezionale dal governo estradante, quando vi siano fondati motivi di dubitare della rigorosità del processo che verrà intentato nel paese dell'estradizione, dubbi che nel caso di specie non si ponevano (cfr. §§ 14.5 - 14.6) ([31]). Il fatto stesso, comunque, che una simile comunicazione sia stata dichiarata ricevibile e abbia avuto un esame nel merito, dimostra che, in altre circostanze, l'estradizione verso un paese che adotta la pena capitale può comportare, per il paese estradante, violazione dell'art. 6 ([32]).

In un caso simile, benché non incentrato sul diritto alla vita ma su quello relativo alla tortura, anche la Corte europea dei diritti dell'uomo ha deliberato in modo analogo: nel caso *Soering contro Regno Unito*, in effetti, la legittimità dell'estradizione è stata valutata alla luce delle particolari condizioni psichiche dell'estradando, per il quale la prospettiva di affrontare il carcere nel "braccio della morte" si configurava come un trattamento crudele e inumano, e quindi la conces-

([30]) Per una lettura del caso v. DE MERIEUX M., *Extradition as the Violation of Human Rights. The Jurisprudence of the International Covenant on Civil and Political Rights*, in "The Netherlands Quarterly of Human Rights", Vol. 14/1, 1996, pp. 23 ss.

([31]) La decisione del Comitato non è stata assunta senza discussione e in questo volume sono riportate le opinioni dissenzienti di membri del Comitato che avrebbero preferito una soluzione contraria al riconoscimento della legittimità dell'estradizione concessa dal Canada.

([32]) La comunicazione di Kindler è stata seguita da altre, sempre avanzate verso il Canada da individui che rischiavano la pena di morte per reati commessi negli Stati Uniti: *Ng contro Canada* (Communication No. 469/1991) e *Cox contro Canada* (Communication No. 539/1993).

sione dell'estradizione avrebbe comportato violazione dell'art. 3 della Convenzione europea ([33]). Ciò non implicava peraltro l'automatica equiparazione della pena di morte ad un trattamento di tortura, ma solo la necessità di verificare caso per caso se tale fosse la conseguenza pratica del fatto.

27. Diverso appare viceversa il modo di procedere di alcune supreme corti nazionali.

Nel caso di Pietro Venezia, la nostra Corte costituzionale ha escluso la legittimità di una legge, esecutiva di un trattato internazionale bilaterale, che riconosceva un margine di discrezionalità all'autorità di governo nel decidere se estradare o meno un individuo che nel paese dell'estradizione rischi la pena di morte. Secondo il nostro giudice costituzionale, "Nel nostro ordinamento, in cui il divieto della pena di morte è sancito dalla Costituzione, la formula delle 'sufficienti assicurazioni' – ai fini della concessione dell'estradizione per fatti in ordine ai quali è stabilita la pena capitale dalla legge dello Stato estero – non è costituzionalmente ammissibile. Perché il divieto contenuto nell'art. 27, quarto comma, della Costituzione, e i valori ad esso sottostanti – primo fra tutti il bene essenziale della vita – impongono una garanzia assoluta. [...] L'assolutezza del principio costituzionale richiamato viene infirmata dalla presenza di una norma che demanda a valutazioni discrezionali, caso per caso, il giudizio sul grado di affidabilità e di effettività delle garanzie accordate dal Paese richiedente".

28. Nella decisione del giudice costituzionale italiano il valore prevalente della vita viene facilmente giustificato alla luce anche della prevalenza formale delle norme costituzionali su quelle della legge ordinaria che recepisce il trattato bilaterale di estradizione. Una sentenza della Corte Suprema dei Paesi Bassi, invece, risolve il problema su un fondamento diverso. Nel caso *C.D.S. contro Paesi Bassi*, presentato in questo volume, il giudice olandese, per decidere sull'estradizione verso gli Stati Uniti di un funzionario americano accusato di uxoricidio, mette a confronto due norme di origine internazionale dotate della stessa forza dal punto di vista formale: l'art. 2 della Convenzione

([33]) *European Human Rights Report*, Vol. 11.

europea sui diritti dell'uomo (unitamente, come è ovvio, all'art. 1 della stessa, sull'obbligo degli Stati di darvi effettiva esecuzione) e l'art. 1 del 6° Protocollo aggiuntivo alla Convenzione europea da un lato, e le norme dell'Accordo NATO sullo statuto del personale civile dell'organizzazione dall'altro, norme che prevedono appunto la concessione dell'estradizione senza condizioni. La Corte di cassazione olandese ritiene, in questa sentenza, che, non per ragioni di gerarchia delle fonti, ma per la prevalenza sostanziale del diritto alla vita degli individui rispetto agli impegni degli Stati nell'ambito dell'accordo NATO, il governo olandese deve far dipendere l'estradizione verso gli Stati Uniti all'impegno formale da parte delle autorità di questo paese di non applicare la pena di morte. L'interesse di questa sentenza, meno radicale di quella del giudice costituzionale italiano nel ritenere comunque legittima la clausola delle "sufficienti raccomandazioni", sta nel fatto che, nel confronto tra norme internazionali dello stesso rango, la precedenza è data a quella che incarna un diritto umano, preferita a quella che esprime gli interessi di un'alleanza politico-militare.

Diritto alla vita – diritto di vivere

29. Abbiamo già avuto modo di osservare che il diritto alla vita può avere una lettura in termini ristretti o in termini ampi, secondo venga riferito al tradizionale ambito della sicurezza personale come elemento fondamentale della tutela dei diritti civili della persona, oppure all'ambito più generale dell'evoluzione dei diritti umani, come una sorta di diritto-sintesi. Tutti i diritti umani, in effetti, dal momento che sono riferiti alle esigenze fondamentali della persona, possono essere intesi quali espressioni derivate di un primordiale diritto a vivere spettante ad ogni essere umano – e a vivere in condizioni che ne consentano lo sviluppo di tutte le potenzialità, condizioni che sono ecologiche, sociali, psicologiche, tecnologiche, ecc. Abbiamo già accennato alla possibilità di considerare la formulazione di norme sulla protezione del diritto alla vita in quanto tale come un modo di lasciare aperta la porta ai possibili sviluppi interpretativi che fossero necessari per adeguare la realtà normativa internazionale all'evoluzione delle società, e alla utilità quindi di considerare la norma sul diritto alla vita in collegamento con il diritto

ad un ordine sociale e mondiale in cui tutti i diritti umani siano rispettati sancito dall'art. 28 della Dichiarazione universale.

In questo senso si è mosso il Comitato sui diritti umani nei due *General Comments* dedicati alla lettura dell'art. 6 del Patto sui diritti civili e politici. Da queste osservazioni si ricava che il diritto alla vita copre, secondo l'interpretazione "ortodossa" datane dal Comitato, una serie di materie tra cui:

— riduzione della minaccia della guerra, disarmo e, in particolare, proscrizione, in quanto crimini contro l'umanità, di ogni atto di fabbricazione, sperimentazione, possesso, dispiegamento e utilizzazione di armi nucleari;
— prevenzione e repressione degli atti di omicidio, soprattutto impedendo l'uccisione arbitraria di individui da parte delle forze di sicurezza degli Stati;
— sparizioni forzate e lotta all'impunità dei colpevoli di tali atti;
— misure positive per diminuire la mortalità infantile, accrescere la speranza di vita, combattere la malnutrizione e le malattie epidemiche;
— limitare e abolire la pena capitale ([34]).

Non c'è dubbio che l'estensione di questa interpretazione supera ampiamente il tradizionale concetto di diritto alla vita quale diritto "civile" alla sicurezza personale tutelato dai nostri codici penali.

30. Diritto-sintesi di molte situazioni, il diritto alla vita (meglio definibile, a questo punto, come diritto a vivere), si affianca agli altri diritti-sintesi o diritti umani di "terza generazione": alla pace, allo sviluppo, all'ambiente. Esso anzi appare una sorta di "sintesi delle sintesi", in quanto posto "alla base di tutti i diritti umani" ([35]). L'utilità di una simile costruzione giuridica si può apprezzare su due livelli.

In primo luogo, una simile nozione fornisce una clausola generale con cui viene tenuta aperta la prospettiva evolutiva della materia dei

([34]) Su questi punti cfr. anche, oltre ai testi dei *General Comments* pubblicati in appendice al presente volume, il *Manuel relatif à l'établissement des rapports sur les droits de l'homme*, New York, Nations Unies, 1992 (doc. HR/PUB/91/1), pp. 70s (commento all'art. 6 a cura di Fausto Pocar).

([35]) *General Comment* 14 (23), § 1.

diritti umani. I diritti umani sono una categoria in continua espansione, in quanto si adatta ai cambiamenti sociali che avvengono su scala planetaria. Nuove istanze di tutela, legate all'avanzare delle frontiere della tecnologia e della scienza (bioingegneria, intelligenza artificiale, genetica, nuovi materiali, telecomunicazioni, ecc.), possono trovare nell'idea della protezione e promozione del diritto alla vita un punto di aggancio con la dimensione dei valori giuridici. In particolare, una concezione ampia del diritto alla vita potrà servire a connotare giuridicamente certe situazioni giuridicamente rilevanti che si vanno formando in capo a soggetti collettivi, gli stessi che risultano titolari degli altri diritti di terza generazione: i popoli, la comunità umane, le generazioni future, le comunità prive di rappresentanza istituzionale nel contesto internazionale, i gruppi vulnerabili. Da notare che già adesso titolari collettivi del diritto alla vita sono i gruppi contro cui si pongono in essere le azioni che ricadono sotto la nozione di genocidio; allo stesso modo, il diritto all'esistenza, all'autodeterminazione e alla utilizzazione delle risorse naturali esistente in capo ai popoli è anch'esso una articolazione del diritto a vivere di collettività umane.

In attesa che tutte queste situazioni vengano codificate in termini maggiormente efficaci e vincolanti nell'ambito dell'evoluzione del diritto internazionale dei diritti umani, il richiamo al "diritto di vivere" delle persone e delle collettività può servire a fornire una prima forma di tutela e una valida indicazione di politica del diritto.

31. In secondo luogo, e in una dimensione più interna all'evoluzione della dottrina internazionalistica dei diritti umani, la nozione estesa di diritto alla vita ("diritto di vivere") può aiutare a ricomprendere in una prospettiva unificante i molti fili in cui la materia dei diritti umani rischia di disperdersi. La più volte affermata interdipendenza e indivisibilità tra tutti i diritti umani, compresi quelli di terza generazione, può trovare una rappresentazione efficace, anche sul piano culturale e politico, nel "diritto di vivere" inteso quale affermazione della concreta esigenza di ricondurre le varie e diversificate forme di tutela ad un solido fondamento antropologico.

2.

PROCEDURE INTERNAZIONALI DI TUTELA DEI DIRITTI UMANI

di Paolo De Stefani

Introduzione

1. La protezione e la promozione dei diritti umani sono attività che per loro natura dovrebbero attuarsi secondo il principio di sussidiarietà: i diritti dei singoli, dei gruppi, delle minoranze, dei popoli, di tutti i soggetti tutelati dalle norme internazionali in materia, si svolgono infatti a vari livelli istituzionali e, di volta in volta, è il livello più vicino al soggetto interessato che deve essere attivato. In via sussidiaria si può ricorrere a forme superiori di protezione, che possono intervenire al di fuori del loro "naturale" ambito di competenza solo in casi straordinari. In questo quadro, i procedimenti che prevedono ricorsi in sedi internazionali per violazioni dei diritti umani vengono naturalmente a collocarsi come rimedi al mancato o insoddisfacente funzionamento dei normali meccanismi di garanzia giurisdizionale di tali diritti, quelli a cui provvedono gli Stati con le loro strutture giudiziarie.

2. I meccanismi internazionali di cui ci occuperemo si presentano tutti come procedure in cui soggetti diversi dagli Stati (singoli o gruppi, comprese talvolta le persone giuridiche) si rivolgono ad un organismo internazionale per lamentare la verificata impossibilità, nel-

l'ambito dell'ordinamento di un certo Stato, di avere un effettivo riconoscimento di un diritto umano che quello stesso Stato si è impegnato a rispettare e promuovere, con l'obiettivo di trarne un qualche beneficio concreto, materiale o meramente morale.

3. Le procedure di tipo giurisdizionale o quasi-giurisdizionale, che rispondono strettamente al principio di sussidiarietà e di autonomia degli ordinamenti giuridici, non sono naturalmente le uniche vie a disposizione di un individuo o di un gruppo per far valere i propri giusti interessi sul piano internazionale in una forma giuridicamente rilevante.

Le diverse procedure sono classificate secondo vari criteri; in generale, si attribuisce ad alcune un significato prevalentemente "giuridico", mentre altre operano più sul piano "politico". Alcuni evidenziano il fatto che talune procedure sono istituite da apposite Convenzioni allo scopo di sorvegliare l'adempimento da parte degli Stati-parte degli obblighi contratti con la ratifica (e in questo contesto si giustificano i poteri giurisdizionali o quasi-giurisdizionali attribuiti agli organi di controllo), mentre altri procedimenti si inquadrano nell'ambito più sfumato degli obblighi derivanti agli Stati dall'appartenere a determinate organizzazioni intergovernative (Onu, Consiglio d'Europa, ecc.). Forme "politiche" e forme "giuridiche" di attuazione (*implementation*) internazionale dei diritti umani non si dovrebbero sovrapporre, ma piuttosto coordinare per offrire maggiori opportunità di garanzia effettiva dei diritti in questione alla luce delle diverse situazioni concrete ([1]).

4. Senza pretesa di esaustività e in forma necessariamente sintetica ci proponiamo dunque di vedere quali sono le possibilità di azione, sul fronte "politico" e su quello "giudiziario" che si offrono alle persone che, vittime di una violazione dei loro diritti umani, non riescono ad ottenere dalle istituzioni del loro paese un soddisfacimento adeguato. Particolare attenzione sarà riservata alle procedure giurisdizionali o quasi-giurisdizionali, dedicando solo brevi cenni alle altre. Dove pos-

([1]) Sulla problematica del coordinamento tra rimedi, procedure e organi di attuazione dei diritti umani si veda la chiara esposizione di OPSAHL T., *Instruments of Implementation of Human Rights*, in "Human Rights Law Journal", 1989, pp. 13 ss.

sibile, sarà fatto riferimento ai testi presentati nella seconda parte di questo volume, che si riferiscono infatti esclusivamente a tale genere di procedura.

5. Per evitare un'esposizione troppo astratta della materia, che è invece di bruciante concretezza, riguardando situazioni di estrema gravità dal punto di vista umano e sociale, proponiamo di prendere come filo rosso un caso, di pura fantasia, di violazione di un diritto internazionalmente garantito che si assuma essere avvenuta in Italia. A partire da questa situazione di scuola, cercheremo di illustrare alcuni dei nodi problematici legati alle forme di attuazione per via giurisdizionale dei diritti umani predisposte dal vigente ordinamento internazionale.

Il caso. La scelta della procedura

6. Non abbiamo bisogno di descrivere nei dettagli il caso ipotetico di violazione dei diritti umani che intendiamo prendere in considerazione. Ci basti immaginare che un individuo, la signora X, per esempio, dopo aver cercato in tutti i modi, nell'ambito dei meccanismi dell'ordinamento italiano, di ottenere giustizia per la sparizione e probabile uccisione di un famigliare, legata ad uno dei purtroppo non infrequenti "misteri irrisolti" che contrappuntano tristemente la storia recente del nostro paese, decida di percorrere anche la via dei procedimenti internazionali.

7. Il primo nodo da sciogliere per la signora X riguarda la scelta tra "via politica" all'attuazione del diritto alla vita (violato, in ipotesi, nella persona del marito della signora) o "via giudiziaria". L'Italia è membro delle Nazioni Unite, del Consiglio d'Europa, dell'Unione Europea, ecc. e, nell'ambito di queste organizzazioni, operano alcuni organismi e sono previste alcune procedure che, attivabili in certa misura anche da individui, possono servire allo scopo di stimolare gli organi di un certo Stato ad intensificare la loro azione per la concreta ed efficace attuazione dei diritti umani, mobilitando la comunità degli Stati e l'opinione pubblica internazionale. Tralasciando i riferimenti a quanto potrebbe essere fatto interessando il Parlamento europeo o altri organismi comunitari (si può trovare l'opportunità, ad esempio, di sollecitare un intervento dell'Ombudsman delle Comunità europee, per

quanto nel caso di specie la sua competenza risulti improbabile), è nell'ambito delle Nazioni Unite che si delineano maggiori spazi istituzionali di azione ([2]).

8. La storia dell'evoluzione delle procedure e degli organi di monitoraggio sul rispetto dei diritti umani all'interno dell'Onu è particolarmente complessa e travagliata, ma rispecchia comunque la crescente attenzione dell'Organizzazione nei riguardi del momento applicativo delle norme internazionali sui diritti umani, riconosciute quali basi essenziali della stessa esistenza dell'Onu ([3]). L'organo-chiave, da questo punto di vista, è la Commissione sui diritti dell'uomo, organo ausiliare del Consiglio economico e sociale, che opera con l'ausilio della Sottocommissione della lotta contro la discriminazione e per la tutela delle minoranze ([4]).

Le Nazioni Unite hanno sviluppato, a partire soprattutto dalla fine degli anni 60, procedure che, limitate all'inizio ai soli casi di violazioni flagranti e sistematiche dei diritti umani (le cosiddette *gross violations*), si sono man mano estese fino a costituire una rete abbastanza fitta di meccanismi di monitoraggio, gestiti attualmente con criteri di apprezzabile trasparenza: indipendenza degli osservatori internazionali (*Special Rapporteurs*) incaricati di operare il monitoraggio; possibilità di re-

([2]) Naturalmente, una persona in condizioni paragonabili a quelle dell'esempio da noi proposto che vivesse in un paese diverso dall'Italia, potrebbe attivare procedimenti presso organismi regionali diversi: la Commissione interamericana dei diritti umani (operante nell'ambito dell'Organizzazione degli Stati Americani - OSA e istituita dalla Convenzione interamericana sui diritti umani del 1969) o la Commissione Africana dei diritti dell'uomo e dei popoli (operante nel quadro dell'Organizzazione per l'Unità Africana e creata in base alla Convenzione africana dei diritti dell'uomo e dei popoli del 1981). Dei procedienti di tipo politico che possono essere attivati presso questi organismi non abbiamo possibilità di accennare in questa sede. Sul sistema africano si veda OUGUERGOUZ F., *La Charte africaine des droits de l'homme et des peuples - Une approche juridique des droits de l'homme entre tradition et modernité*, PUF, Paris, 1993. Sul sistema interamericano si rinvia a DAVIDSON S., *The Inter-American Court of Human Rights*, Dartmouth, Aldershot (UK), 1992.

([3]) Per la ricostruzione di queste complesse vicende si rinvia ai volumi, pubblicati dal Centro per i diritti umani di Ginevra e aggiornati periodicamente, *United Nations Action in the Field of Human Rights.*

([4]) Su questi organismi, l'introduzione più completa è offerta da ALSTON P. (ed.), *The United Nations and Human Rights. A Critical Appraisal*, Clarendon Press, Oxford, 1992.

carsi in loco, con il consenso dello stato interessato, per l'accertamento diretto dei fatti denunciati (*fact-finding*); facilità per le organizzazioni nongovernative, le associazioni umanitarie, i singoli individui, di segnalare casi e situazioni all'esperto incaricato del monitoraggio; pubblicità e riproducibilità dei rapporti periodici e finali ([5]).

I rapporti redatti annualmente dai relatori speciali e dai gruppi di lavoro della Commissione e della Sottocommissione che si occupano del monitoraggio sono presi in esame della Commissione sui diritti umani e comunicati quindi agli organi superiori dell'Onu. La Commissione, il Consiglio economico e sociale, l'Assemblea Generale votano quindi, pronunciandosi con crescente grado di autorevolezza, delle risoluzioni che, rivolgendosi alla comunità internazionale nel suo insieme e allo Stato o agli Stati interessati dal rapporto, contengono raccomandazioni tese a mettere in evidenza le carenze nella protezione dei diritti umani e a stimolare l'azione per il superamento dei problemi.

Un ulteriore canale di accesso agli organi dell'Onu specializzati in diritti umani è consentito dallo status consultivo presso il Consiglio economico e sociale di cui godono molte organizzazioni nongovernative internazionali (da Amnesty international alla Commissione internazionale dei giuristi, ecc.) ([6]). Queste organizzazioni, informate del caso, possono presentarlo oralmente alle riunioni degli organismi considerati o inserirlo in una comunicazione scritta. Il problema sollevato può fare oggetto di uno specifico dibattito che può condurre all'istituzione di un procedimento di monitoraggio, all'adozione di una risoluzione o ad una dichiarazione del presidente della Commissione, ecc.

L'esito di questi procedimenti di monitoraggio e di comunica-

([5]) La trasparenza costituisce il maggior punto di differenziazione delle procedure oggi esistenti, imperniate sui relatori speciali di Commissione e Sottocommissione, rispetto ai meccanismi, ancora comunque validi, di esame in via riservato delle informazioni su massicce e sistematiche violazioni dei diritti umani fissati nella Procedura introdotta con Ris 1503(XLVIII) del 1970 del Consiglio economico e sociale.

([6]) Sulle organizzazioni nongovernative nel sistema Onu si veda MASCIA M., *L'associazionismo internazionale di promozione umana*, Cedam, Padova, 1991; OTTO D., *Nongovernmental Organizations in the United System: The Emerging Role of Civil Society*, in "Human Rights Quarterly", 1996, pp. 107 ss.

zione è dunque una presa di posizione da parte di un organo politico (la Commissione, l'Assemblea Generale), formato da rappresentanti di governi, al cui interno la logica diplomatica è generalmente prevalente. Da ciò derivano, quanto agli effetti complessivi del procedimento, tre conseguenze:

— le procedure considerate, pur basandosi in gran parte sulla raccolta di informazioni relativa a singoli casi di violazione, sono strutturalmente orientate a dare rilevanza a fenomeni di portata macrosociale e riguardano le situazioni più estreme, quelle che maggiormente attirano le preoccupazioni della comunità internazionale;
— In queste procedure fatalmente l'interesse delle persone coinvolte passa in secondo piano, rispetto all'obiettivo politico di influire sui comportamenti dei governi. Ciò comporta anche l'eventualità che, pur in presenza di fondati motivi di censura, nessuna risoluzione venga approvata, per la resistenza dei governi coinvolti;
— procedure di questo tipo servono a sollevare problematiche di rilevanza mondiale in tempi rapidi e con vasta eco internazionale (dovuta soprattutto all'azione delle organizzazioni nongovernative, che partecipano attivamente ai lavori degli organi considerati) ([7]). Con questi mezzi si può intervenire tempestivamente, dunque, ma secondo logiche "politiche", più che "giudiziali", e attente più ai bisogni degli Stati che alle esigenze delle persone.

9. Dobbiamo ora domandarci se il caso è suscettibile di essere trattato per via politica.

In particolare: il caso X rientra tra quelli che sono attualmente oggetto delle attività di monitoraggio di questi *Special Rapporteurs*? E

([7]) Non sono propriamente procedimenti d'urgenza, considerato che l'Onu dispone di organismi operativi, facenti capo al al Consiglio di Sicurezza, al Segretariato generale, a strutture specializzate (gli Alti Commissari per i rifugiati o per i diritti umani) o ad Agenzie specializzate che hanno speciale competenza in questo settore. Tuttavia non è infrequente che attraverso l'azione diretta dei rapporteur speciali o anche attraverso la possibilità, recentemente introdotta per la Commissione, di tenere delle sessioni straordinarie, questi organi di monitoraggio siano stati abilitati ad intervenire per ottenere, anche attraverso statuizioni di valore politico, l'immediata cessazione di determinate situazioni che minacciano il soddisfacimento dei diritti umani. La Commissione ha tenuto tre sessioni straordinarie: due nel 1992 sulla situazione dei diritti umani nei territori dell'ex Jugoslavia; una nel 1994, sul genocidio in Rwanda.

quali benefici potrebbero derivare alla signora X dall'avanzare una eventuale comunicazione a tali organi?

a) L'insoddisfacente tutela del diritto alla vita potrebbe astrattamente rientrare nel campo di indagine del gruppo di lavoro della Commissione sulle sparizioni involontarie o forzate. Potrebbe inoltre essere presentato come riguardante la competenza del relatore speciale sulle esecuzioni sommarie o arbitrarie. Se esistesse un relatore speciale sulla violazione dei diritti umani in Italia, a lui potrebbe essere inviata la documentazione necessaria ([8]). Queste procedure, comportando la comunicazione di semplici informazioni, possono essere intraprese senza attendere che la questione sia definita sul piano processuale italiano. Meglio ancora se dietro l'iniziativa della signora X si potesse sviluppare un movimento di opinione pubblica, guidato da qualche associazione o organizzazione nongovernativa, capace di dare spessore politico al caso, legandolo magari ad analoghe vicende di impunità. Si tratta insomma di dare vita ad una campagna politica che si estenda oltre i confini nazionali.
b) I benefici di un'iniziativa di questo genere dipendono dal modo in cui il paese interessato, l'Italia nel nostro caso, reagisce alle richieste di informazioni che, poniamo, il gruppo di lavoro sulle sparizioni forzate dovesse inoltrare nei suoi confronti. Ci potrebbe essere l'assunzione, di fronte agli esperti dell'Onu, di un impegno a riprendere le indagini sul caso; oppure potrebbe prospettarsi un irrigidimento delle autorità governative e un inasprimento dello scontro politico in atto sul caso specifico.

10. Al di là di queste opportunità fondate sui meccanismi di funzionamento degli organi delle Nazioni Unite, vi sono anche altri percorsi di tutela "politica" del diritto alla vita che possono essere intrapresi sulla base di quanto previsto da specifici trattati internazionali in materia di diritti umani.

Il diritto alla vita è contemplato all'articolo 6 del Patto internazionale sui diritti civili e politici. Gli articoli 28 ss. dello stesso Patto istituiscono il Comitato sui diritti umani e impongono agli Stati parte del

([8]) V. in Appendice III un parziale elenco dei relatori speciali della Commissione e della Sottocommissione dell'Onu attualmente operanti.

trattato l'obbligo di sottoporre ad esso dei rapporti periodici (ogni 5 anni) e, a richiesta del Comitato, dei rapporti supplementari, addizionali o, anche, speciali ([9]). L'iniziativa dei singoli (meglio se supportati da gruppi di pressione) può servire, sotto questo rispetto, a far inserire riferimenti al caso in questione nella parte del rapporto dello Stato italiano relativo all'applicazione nel nostro paese dell'articolo 6 del Patto. Può inoltre metter capo alla stesura di una comunicazione da inviare al Comitato per il tramite di organizzazioni nongovernative con status consultivo: la prassi del Comitato consente l'uso di queste informazioni in sede di discussione con il rappresentante dello Stato del rapporto. Riferimenti al caso possono essere inseriti nelle osservazioni generali che concludono l'esame del rapporto ed essere oggetto di speciali raccomandazioni rivolte al governo interessato.

Anche questa ulteriore serie di possibilità, resa possibile da meccanismi di supervisione dei diritti umani introdotti dai principali trattati in materia (procedure analoghe di *reporting* sono previste anche nel Patto sui diritti economici, sociali e culturali, nella Convenzione sulla condizione delle donne, nella Convenzione contro la discriminazione razziale, in quella contro la tortura e in quella sui diritti dell'infanzia), benché incentrata su organi non politici (i Comitati di supervisione sono organi tecnici formati da esperti indipendenti dai governi), costituisce un mezzo indiretto di ottenere giustizia da parte della vittima di una violazione, traducendosi in una forma di pressione internazionale sul paese interessato.

Rispetto ai meccanismi francamente politici sopra considerati, queste ulteriori procedure di supervisione o monitoraggio offrono il vantaggio di avere come punto di riferimento norme convenzionali esattamente identificate e di richiamare quindi la responsabilità dei governi su precisi obblighi da loro assunti. D'altro canto, tuttavia, il meccanismo di *reporting* è generalmente inadatto ad affrontare situazioni di emergenza e soffre della scarsa collaborazione dei go-

([9]) Sul *reporting* presso il Comitato sui diritti umani si veda BOERFIJN I., *Toward a Strong System of Supervision: The Human Rights Committee's Role in Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights*, in "Human Rights Quarterly", 1995, pp. 766 ss.

verni, molti dei quali presentano i loro rapporti con grave ritardo e incompleti ([10]).

La panoramica delle procedure internazionali *di tipo politico* previste in ambito Onu per sovrintendere all'attuazione dei diritti umani alle quali un individuo o un organismo nongovernativo può avere interesse a contribuire sono riassunte nella *Tab. 1* (pagina seguente).

La via giurisdizionale o quasi giurisdizionale

11. Ammettiamo tuttavia che non siano tanto degli obiettivi generalmente politici quelli perseguiti dalla signora X, quanto piuttosto l'esigenza di vedere affermata la verità e la giustizia nel caso concreto che la riguarda. In questo senso è piuttosto un ulteriore rimedio di tipo giudiziario che la persona in questione richiede, supplementare rispetto a quelli esperiti, senza successo, a livello nazionale.

Ciò che caratterizza un procedimento giurisdizionale rispetto ai meccanismi "politici" di supervisione sopra considerati è, da un lato, il requisito della partecipazione al procedimento stesso dei diretti interessati nella forma del contraddittorio; dall'altro, il carattere esecutivo o comunque obbligatorio dell'atto che conclude l'*iter* processuale. Da quest'ultimo punto di vista si giustifica la distinzione più volte richiamata tra procedimenti giurisdizionali e "quasi-giurisdizionali". Essa infatti non riguarda tanto il carattere contenzioso del procedimento (ossìa il suo costituire un "processo" ([11])), quanto il mettere capo a decisioni più o meno efficaci sul piano concreto. L'efficacia si misura alla

([10]) Si vedano le considerazioni critiche relative in particolare al funzionamento del procedimento di *reporting* presso il Comitato sui diritti economici, sociali e culturali e le relative proposte di riforma in CHAPMAN A.R., *A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights*, in "Human Rights Quarterly", 1996, pp. 23 ss. Sulle competenze del Comitato ad operare in casi di urgenza si veda JOSEPH S., *New Procedures Concerning the Human Rights Committe's Examination of State Reports*, in "Netherlands Quarterly of Human Rights", 1995, pp. 5 ss.

([11]) "C'è 'processo' quando in una o più fasi dell'*iter* di formazione di un atto è contemplata la partecipazione non solo – ed ovviamente – del suo autore, ma anche dei destinatari dei suoi effetti, *in contraddittorio*, in modo che costoro possano svolgere attività di cui l'autore dell'atto deve tener conto, i cui risultati, cioè, egli può disattendere, ma non

Tab. 1 – PROCEDURE POLITICHE A CUI POSSONO CONTRIBUIRE INDIVIDUI E ORGANISMI NONGOVERNATIVI

Soggetti attivi	Procedure		Ruolo del soggetto non governativo
Individui, Associazioni, Organizzazioni non governative	Procedure basate sulla Carta dell'Onu e gli strumenti adottati dall'Onu in materia di diritti umani	Procedura Ris. 1503 (XLVIII) (Riservata)	Informazioni
		Sessioni della Commissione dei diritti dell'uomo; della Sottocommissione; della Commissione sulla condizione delle donne; dell'Ecosoc	Informazioni; comunicazioni scritte*; partecipazione alle sedute con diritto di parola*; *lobbying* sui rappresentanti governativi
		Monitoring & Fact finding (missioni di relatori speciali di Commissione o Sottocommissione: rapporteurs tematici o su singoli paesi)	Informazioni; audizioni; supporto tecnico alle rilevazioni
	Procedure basate sui trattati in materia di diritti umani	*Reporting*	Collaborazione alla stesura del rapporto dello Stato; invio al Comitato di comunicazioni scritte o "controrapporti"*
		*Fact finding***	Informazioni; audizioni; supporto tecnico alle rilevazioni

* Possibilità riservata alle Organizzazioni internazionali nongovernative con status consultivo presso il Consiglio economico e sociale dell'Onu.

** Il *fact finding* nell'ambito dell'attività dei Comitati istituiti dalle Convenzioni sui diritti umani è una pratica ancora solo agli inizi. Essa è inquadrabile nell'ambito dell'art. 20 della convenzione contro la tortura ed è inoltre recentemente stata attuata dal Comitato sui diritti economici, sociali e culturali, che nel 1995 ha inviato due suoi rappresentanti a Panama (v. relazione in Comité des droits économiques, sociaux et culturels, *Rapport sur les XII et XIII session*, UN Doc. E/1996/22 - E(C.12/1995/18, pp. 108 ss.).

stregua dell'esistenza di norme internazionali che vincolano gli Stati a dare seguito alla decisione di tali organi e dell'esistenza di organismi internazionali che sovrintendano all'esecuzione della decisione stessa. Mentre le decisioni della Corte europea dei diritti umani sono esplicitamente definite quali "sentenze" e la Convenzione istitutiva prevede un organo particolare al quale è demandata la sorveglianza sull'esecuzione della sentenza, il Comitato dei Ministri del Consiglio d'Europa, il Patto sui diritti civili e politici, a proposito delle decisioni sul merito delle comunicazioni individuali, parla di mere "constatazioni" ("*views*") e non attribuisce che per via implicita al Comitato poteri di supervisione sugli atti esecutivi. Su questi temi vedi oltre (in particolare al n. 27), e soprattutto, in questo volume, il saggio dedicato al valore giuridico delle decisioni degli organi internazionali di controllo sui diritti umani.

12. Il diritto internazionale prevede varie forme di procedura giurisdizionale. Quella tipica di questa branca del diritto ha tuttavia la caratteristica di essere riservata alla partecipazione degli Stati e preclusa a ogni coinvolgimento di individui o soggetti extrastatali. Tali rimedi quindi sono generalmente al di fuori della portata della signora X.

Norme appartenenti al corpus del diritto internazionale dei diritti umani sono comunemente prese in considerazione e applicate nell'ambito di procedimenti internazionali di tipo giurisdizionale che non vengono attivati da "petizioni" o "ricorsi" o "comunicazioni" delle persone vittime di una violazione delle norme che pongono quei diritti. La Corte di Giustizia Internazionale, ad esempio, è stata frequentemente chiamata a pronunciarsi su casi che riguardavano l'applicazione di norme sui diritti umani: si ricorda, recentemente, il procedimento sollevato dalla Bosnia-Erzegovina contro la repubblica federale di Jugoslavia (Serbia e Montenegro) per violazione della Convenzione del 1948 sul genocidio nonché di una serie di disposizioni della Dichiarazione universale dei diritti umani ([12]). Tuttavia, come è ampiamente noto, la CIG non può essere adita che da Stati (art. 35 del suo Statuto) o, per quanto riguarda la sua competenza ad emettere *ad-*

([12]) CIG, Judgement, July 11, 1996, G.L. No. 91.

visory opinións, da organi delle Nazioni Unite (art. 65). Nessun diritto di iniziativa processuale o di *locus standi* è previsto a favore di individui ([13]). Ciò non esclude, naturalmente, che la Corte possa trattare casi di diretto interesse di singoli cittadini di un qualche Stato ([14]); ma in tali circostanze non sono questi cittadini ad agire, bensì il loro Stato, che opera, almeno formalmente, esercitando il diritto di protezione diplomatica dei propri nazionali ([15]). Dal punto di vista della signora X, le procedure della Corte internazionale di giustizia interessano in quanto, teoricamente, uno Stato potrebbe denunciare presso i giudici dell'Aja il nostro paese invocando la violazione di un principio generale del diritto che impone agli Stati il rispetto della vita umana ([16]).

Al di fuori di questa possibilità estrema, prospettive di denuncia Stato - contro - Stato sono delineate nelle già più volte citate Convenzioni sui diritti umani, che istituiscono anche organismi e procedure

([13]) Anche certi organi operanti all'interno delle Nazioni Unite devono sottostare a complesse procedure di autorizzazione per poter sottoporre alla Corte richieste di opinioni in materia giuridica. Perplessità sulla possibilità di adire a questi fini la Corte erano state sollevate con riguardo, in particolare, alla Sotto-Commissione della lotta contro la discriminazione e per la tutela delle minoranze: le si contestava il diritto di chiedere alla Corte, attraverso l'interposizione dell'Ecosoc, un parere legale sullo status internazionale di un proprio relatore speciale, adducendo il carattere non strettamente intergovernativo della Sotto-commissione stessa, formata da esperti indipendenti e non da rappresentanti di Stati. (ICJ, Adv. Op. 1988, 1).

([14]) Si vedano, ad esempio, i casi Ambatielos, Anglo-Iranian Oil Co., Nottebohm, Norwegian Loans, Interhandel, Guardianship convention, Barcelona Traction, Elettronica Sicula...

([15]) Una situazione tutta particolare si dovrebbe ipotizzare se il caso rientrasse nella giurisdizione dei Tribunali internazionali per l'ex Jugoslavia e per il Rwanda. Questi tribunali, riprendendo e rinnovando in modo considerevole e comunque positivo, la tradizione del tribunale militare di Norimberga, costituiscono un esempio di giurisdizione internazionale in materia penale, segnata dalla regola per cui l'esercizio dell'azione è strettamente nelle mani di un organo internazionale *ad hoc*: il rappresentante dell'accusa presso gli stessi tribunali internazionali (artt. 16 e 15 rispettivamente dello Statuto del tribunale internazionale per l'ex Jugoslavia e di quello per il Rwanda). Anche in questo caso dunque sembrerebbe esclusa l'iniziativa processuale dell'individuo in quanto tale.

([16]) L'appartenenza del principio di rispetto del diritto alla vita al campo del diritto internazionale consuetudinario è stato recentemente e autorevolmente affermato dal Comitao dell'Onu sui diritti umani nella sua Osservazione generale 24(52) del 2 novembre 1994 (UN Doc. CCPR/C/21/Rev.1/Add.6, pubblicata in "Human Rights Law Journal", 1994, pp. 464 ss.).

speciali per l'esame (procedura a porte chiuse, missione di buoni uffici di una Commissione di conciliazione ad hoc... ([17])). È vero tuttavia che non si è dato finora nessun caso di attivazione di questa procedura da parte di Stati-parte dei trattati realizzati dall'Onu, mentre alcuni casi di notevole rilevanza si sono presentati per le convenzioni regionali, risolti peraltro spesso al di fuori delle procedure giudiziarie in via diplomatica o di composizione extragiudiziale ([18]).

13. Le procedure direttamente attivabili sul piano internazionale da individui (e, in alcuni casi, anche da persone giuridiche) per l'esame di un caso come quello proposto nell'esempio sono le seguenti:

a) ricorso individuale alla Commissione europea dei diritti dell'uomo, istituita dalla Convenzione europea di salvaguardia dei diritti dell'uomo e delle libertà fondamentali, firmata a Roma il 4 novembre 1950, e successivi protocolli addizionali;
b) comunicazione individuale al Comitato delle Nazioni Unite sui diritti umani, secondo la procedura istituita dal Primo Protocollo facoltativo al Patto internazionale sui diritti civili e politici, approvato dall'Assemblea generale dell'Onu il 16 dicembre 1966.

La competenza della Commissione e della Corte interamericana dei diritti umani è esclusa, dal momento che l'Italia non aderisce, per ovvi motivi geografici, alla Convenzione interamericana.

Vedremo qui di seguito, in chiave comparatistica, alcune delle questioni fondamentali relativi ai principali momenti che compongono le procedure considerate. Nella ricostruzione sarà dato particolare rilevo ai seguenti punti:

— criteri di competenza
— criteri di legittimazione all'azione
— posizione processuale dell'autore della petizione
— regole del contraddittorio.

([17]) Patto internazionale sui diritti civili e politici, artt. 41 - 42; Convenzione contro la discriminazione razziale, artt. 11 - 13; Convenzione contro la tortura, art. 21; Convenzione europea sui diritti dell'uomo, art. 24; Convenzione interamericana, art. 45.

([18]) Il riferimento è ad alcuni casi trattati dagli organi della Convenzione europea: Grecia v. Regno Unito, Austria v. Italia, Paesi Bassi e altri v. Grecia, Irlanda v. Regno Unito, ecc.

L'introduzione della causa. Criteri di competenza

14. Quali sono i fondamenti giuridici per ricorrere a simili procedure? Quali sono i criteri di ammissibilità di una petizione? Una prima questione riguarda l'esistenza o meno della competenza di tali organi a conoscere del caso della signora X.

L'esistenza di tale competenza dipende in primo luogo da due fattori:

a) la previsione, nello strumento internazionale che li istituisce e che ne definisce l'ambito sostanziale di operatività, di una norma a tutela del diritto alla vita;
b) l'adesione dello Stato contro cui è proposta l'azione allo strumento internazionale e il riconoscimento da parte sua della competenza dell'organo internazionale a ricevere la petizione e a procedere nel merito.

15. Per poter presentare ricorso o avanzare una comunicazione individuale all'uno o all'altro degli organi considerati occorre individuare esattamente la norma o le norme che sarebbero state violate dal comportamento delle autorità di un paese. Sia nella Convenzione europea sia nel Patto sui diritti civili e politici è contenuta una norma che sancisce il diritto alla vita, sia pure in termini parzialmente diversi: rispettivamente, gli articoli 2 e 6. Dal dettato delle diverse disposizioni internazionali è possibile discriminare già in partenza quale dei due procedimenti è il più utile ai fini dell'ottenimento di un rimedio, in quanto vi possono essere aspetti di un determinato diritto espressamente contemplati da una norma della Convenzione europea che possono non essere oggetto di una analoga tutela da parte del Patto, o viceversa. Oppure può risultare che precedenti statuizioni di uno dei due organi offrano interpretazioni più favorevoli rispetto a quelle seguite dall'altro. La conoscenza approfondita della giurisprudenza della Corte e del Comitato può far emergere elementi decisivi in ordine alla scelta di quale procedura adire.

16. Nel caso dell'Italia, come è noto, la competenza a giudicare sulla petizione individuale avanzata ai sensi del Primo Protocollo facoltativo al Patto sui diritti civili e politici e dell'art. 25 della Convenzione europea sui diritti umani sussiste ininterrottamente rispettivamente dal

1973 e dal 1978 ([19]). Il nostro paese inoltre non risulta avere fatto riserve o dichiarazioni relativamente alle disposizioni sostanziali che ci interessano. Come è noto, molti paesi, ponendo delle riserve al momento della ratifica, introducono limitazioni considerevoli al campo di applicazione delle norme internazionali ([20]). Quelle introdotte dall'Italia al patto sui diritti civili e politici sono abbastanza marginali e non riguardano comunque la norma sul diritto alla vita (art. 6). A questo proposito, l'Italia ha inoltre ratificato il Protocollo aggiuntivo n. 6 della Convenzione europea, che vincola gli Stati all'abolizione della pena di morte in tempo di pace ([21]), e il secondo Protocollo del Patto sui diritti civili e politici ([22]), di analogo contenuto.

17. Gli organismi internazionali considerati sono dunque ambedue competenti a ricevere una petizione da parte della persona dell'esempio. Come si regolano i rapporti di competenza tra di loro? Più precisamente: può la stessa questione essere sottoposta prima alla Commissione – Corte europea e poi al Comitato dell'Onu?

In linea teorica, nulla, nei due strumenti internazionali, impedisce questa possibilità. Infatti, mentre l'art. 27.1.(b) della Convenzione europea esclude che possa essere ricevuta una petizione individuale che sia già in via di esame nell'ambito di un procedimento internazionale di controllo o che sia già stata decisa in altra sede internazionale ([23]),

([19]) L'Italia ha riconosciuto la competenza della Commissione europea a ricevere comunicazioni individuali a partire dal 19....; ha accettato la giurisdizione obbligatoria della Corte europea dal 1mo agosto 1973. La ratifica del Protocollo facoltativo al Patto sui diritti civili e politici è stata data con legge n. 881 del 2 ottobre 1977 e le sue norme sono entrate in vigore per il nostro paese il 15 dicembre 1978.

([20]) Al tema delle riserve ai trattati, con intenti critici rispetto alla prassi egli Stati, è dedicato il già citato general comment 24(52) del Comitato sui diritti umani dell'Onu. Gli Stati Uniti, in particolare, hanno posto significative riserve anche all'articolo 6, con riguardo, in particolare, all'applicabilità della pena di morte a minori di 18 anni. Altre sostanziali riserve sono state introdotte con la formula delle "dichiarazioni" all'atto della ratifica: è il caso, ad esempio, della dichiarazione della Repubblica francese relativa all'inapplicabilità nei suoi riguardi della norma di cui all'art. 27 del Patto (diritti degli appartenenti a minoranze). Sul punto il Comitato si è espresso nel caso *C.L.D. v. France*, Doc. A/43/40, pp. 252 ss.

([21]) Legge 2 gennaio 1989, n. 8.

([22]) Legge 9 dicembre 1994, n. 734.

([23]) In questi termini si esprime anche l'art. 22.5.(a) della Convenzione contro la tortura.

l'art. 5.2 del Patto sui diritti civili e politici esclude la ricevibilità solo delle comunicazioni che siano in corso di esame (*being examined*) presso altre istanze internazionali: se ne ricava che, dopo la decisione di una di queste istanze, la competenza del Comitato per lo stesso caso sussiste inalterata ([24]).

In realtà, quasi tutti i paesi europei hanno introdotto una dichiarazione all'atto della ratifica del Protocollo facoltativo al Patto sui diritti civili e politici in cui la disposizione dell'art. 5.2 viene interpretata come avesse la stessa portata di quella dell'art. 27 della Convenzione europea ([25]). Viene quindi a cadere la possibilità di considerare la comunicazione individuale al Comitato come una sorta di "appello" alle sentenze della Corte europea; ma viene soprattutto ad imporsi all'individuo la necessità di scegliere tra le due procedure, sapendo che l'una esclude l'altra. La scelta sarà fatta in base alla considerazioni esposte sopra (n. 15), ma anche tenendo presenti argomenti quali: la lunghezza del procedimento; il costo; la flessibilità della procedura; la parte riservata al ricorrente; la vicinanza culturale al ricorrente dei diversi organismi (uno regionale, l'altro universale); il diverso peso che si attribuisce all'impatto della decisione dell'uno o dell'altro organo sui poteri pubblici o sulla società civile del proprio paese.

18. Altri criteri di giurisdizione sono legati al tempo in cui si collocano i fatti lesivi (non devono essersi verificati precedentemente al momento dell'entrata in vigore nello Stato interessato delle norme internazionali invocate ([26])) e al momento in cui la petizione è introdotta.

([24]) Naturalmente, problemi di sovrapposizione e *ne bis in idem* non si pongono con riguardo ai procedimenti di tipo "politico" sopra ricordati: così potrà ben darsi il caso di vicende esaminate da uno degli organi giurisdizionali che siano anche oggetto di comunicazioni secondo la "procedura 1503" o oggetto di investigazione da parte di esperti indipendenti della Commissione dei diritti dell'uomo, ecc.

([25]) La dichiarazione fatta dall'Italia all'atto della ratifica suona così: "La République italienne ratifie le Protocole facultatif au Pacte international relatif aux droits civils et politiques, étant entendu que les dispositions du paragraphe 2 de l'article 5 du Protocole signifient que le comité prévu par l'article 28 dudit Pacte ne devra examiner aucune communication émanant d'un particulier sans s'être assuré que la même question n'est pas en cours d'examen ou n'a pas déjà été examinée devant une autre instance internationale d'enquête ou de règlement". Tra i paesi del Consiglio d'Europa parti della Convenzione europea sui diritti dell'uomo, non ha avanzato questo genere di riserva la sola Olanda.

([26]) Più precisamente, nel caso di una comunicazione presentata in virtù del Proto-

L'art. 26 della Convenzione europea sui diritti dell'uomo, infatti, statuisce come presupposto dell'azione il non esaurimento del termine di sei mesi dalla decisione che conclude ogni possibile *iter* processuale nell'ordinamento interno. Nessun limite temporale è presente nel Patto sui diritti civili e politici: ne consegue che la persona legittimata ad agire presso la Commissione europea che abbia fatto scadere il termine dell'art. 26, può in ogni momento presentare, per la stessa questione, una comunicazione al Comitato.

La regola per cui i rimedi internazionali non sono applicabili a presunte violazioni che si siano realizzate prima dell'entrata in vigore del trattato nello Stato considerato è ampiamente discussa nella decisione di inammissibilità emanata dal Comitato contro la tortura presentata in questo volume. I tre casi di tortura verificatisi in Argentina della seconda metà degli anni '70 sono portati davanti al Comitato che però non può conoscerli in quanto verificatisi molti anni prima dell'entrata in vigore della Convenzione contro la tortura e le altre forme di trattamento o di punizione crudeli, inumane o degradanti. Il Comitato comunque non rinuncia alla possibilità di chiedere informazioni al governo argentino circa le forme di risarcimento attribuite alle vittime dei regimi dittatoriali degli anni 70 e sottolinea il "dovere morale" del paese di evitare l'impunità dei torturatori (paragrafi 9 e 10).

Legittimazione attiva e passiva

19. Per quanto riguarda la legittimazione a presentare petizioni presso i due organi considerati, si deve tenere presente che, mentre solo le comunicazioni concernenti uno Stato parte del Patto e del Protocollo facoltativo o della Convenzione europea possono essere ricevute, la cittadinanza del soggetto che avanza la petizione non è rilevante: può trattarsi di un cittadino di uno Stato diverso da quello posto sotto accusa e anche di un cittadino di un paese che non è parte

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collo facoltativo, è necessario che lo Stato accusato sia parte del Protocollo al momento della comunicazione e fosse parte del Patto sui diritti civili e politici (non necessariamente anche del Protocollo) al momento della presunta violazione.

degli strumenti internazionali invocati o di un apolide. In altre parole, è la posizione dello Stato "accusato" a decidere della competenza o meno dell'organo internazionale a conoscere del caso.

20. Chi può avanzare il ricorso o la comunicazione? Il Protocollo al Patto sui diritti civili e politici parla esclusivamente dell'individuo che si pretende vittima della violazione. Con dizione più ampia, la Convenzione europea cita, oltre all'individuo, le organizzazioni nongovernative e i gruppi di individui (art. 25.1). Nell'un caso e nell'altro è comunque escluso che il procedimento possa essere utilizzato per far valere interessi altrui o interessi generali, legati al semplice sussistere di una certa legislazione astrattamente in contrasto con gli strumenti internazionali. È interessante notare che la possibilità di *actio popularis* è invece lasciata sussistere nella Convenzione interamericana dei diritti umani, nella quale vengono pertanto evitati i problemi legati alla determinazione di un soggetto come "vittima" di violazioni della Convenzione ([27]).

21. La nozione di "vittima" va desunta dalla giurisprudenza dei diversi organi. Vi rientra colui che subisce direttamente le conseguenze negative di un certo comportamento, ma anche la vittima indiretta nonché, naturalmente, i familiari della vittima defunta e i legali rappresentanti della vittima minore o comunque incapace di stare personalmente in giudizio. In ambito europeo si è riconosciuta la legittimazione ad agire anche in capo alla vittima futura o solo potenziale. Le posizioni finora espresse dal Comitato sembrano suggerire interpretazioni più ristrettive. È ammesso, sia presso il Comitato sia presso la Commissione europea, farsi rappresentare da un legale o comunque da un terzo.

22. Sia la Convenzione europea sia il Protocollo al Patto internazionale sui diritti civili e politici richiedono che la comunicazione non sia anonima.

Per quanto riguarda la lingua in cui l'atto introduttivo viene re-

([27]) Art. 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 Comission containing denunciations or complaints of violation of this Convention by a State Party".

datto, essa può essere una qualunque delle lingue ufficiali del Consiglio d'Europa (vale a dire una qualunque delle lingue ufficiali degli Stati membri), per quanto riguarda il ricorso alla Commissione; nelle regole di procedura del Comitato dell'Onu non è detto nulla in materia e si intende pertanto che ogni individuo possa utilizzare la propria lingua nazionale.

Vi sono dei formulari standard che possono essere seguiti per la presentazione dei ricorsi e delle comunicazioni (v. in appendice a questo volume il formulario per le comunicazioni al Comitato dei diritti umani). Nel caso in cui non sia chiaro l'indirizzo alla Commissione o al Comitato della comunicazione, sono gli organi rispettivamente del Consiglio d'Europa e del Segretariato generale dell'Onu a smistare nel modo opportuno la missiva, tenendo conto della sostanza delle informazioni in essa contenute.

Le procedure di esame delle petizioni.

23. I procedimenti di esame delle petizioni provenienti dai privati davanti agli organismi di controllo creati dalla Convenzione europea e dal Patto sui diritti civili e politici dell'Onu presentano caratteri piuttosto diversi e non possono in questa sede essere riassunti in modo adeguato. Essi inoltre stanno attraversando, proprio in questi anni, una fase di forte trasformazione: in particolare, l'intera struttura del sistema di controllo della Convenzione europea è stata profondamente riformata dal Protocollo aggiuntivo n. 11, firmato da 27 dei 28 Stati parte della Convenzione l'11 maggio 1994 ma non ancora entrato in vigore per mancanza del sufficiente numero di ratifiche ([28]). Nel riper-

([28]) Degli allora 28 Stati parte della Convenzione europea, solo l'Italia non ha firmato il Protocollo n. 11. Solo alcuni paesi che di recente sono entrati nel Consiglio d'Europa e hanno aderito alla Convenzione hanno già ratificato anche il Protocollo. I testi del Protocollo n. 11 e della Convenzione così come risulterà modificata all'entrata in vigore dello stesso, unitamente alla relazione sul Protocollo, ad altri interventi di commento e ad un apparato con lo stato delle ratifiche e il punto sull'attività della Corte di Strasburgo, si possono vedere in "Human Rights Law Journal", vol. 15, n. 3 (1994).

correre sommariamente le varie fasi procedurali nei diversi organismi, cercheremo di evidenziare i momenti più importanti dal punto di vista del ricorrente, soffermandoci sui problemi della posizione processuale dell'individuo e delle regole del contraddittorio. Oltre ai due organi indicati, riferimenti verranno fatti agli altri sistemi di controllo giurisdizionali o quasi giurisdizionali presenti a livello internazionale: quelli introdotti dalla Convenzione interamericana dei diritti umani, dalla Convenzione contro la discriminazione razziale e dalla Convenzione contro la tortura e le altre pratiche o punizioni crudeli, inumane o degradanti.

24. La petizione della signora X rivolta agli organi di controllo della Convenzione europea viene definita "ricorso"; essa è rivolta al segretariato della Commissione, un organo che svolge un primo esame sulla ricevibilità del ricorso e prende i primi contatti con il ricorrente. Molti ricorsi non superano questa fase preliminare, in quanto il ricorrente è convinto dai funzionari a non proseguire un ricorso manifestamente privo dei requisiti di ammissibilità. Comunque, se questa azione di convincimento non ha successo, la cancelleria è in ogni caso tenuta a inserire la domanda nel registro ufficiale, attribuendole un numero progressivo. Nel caso *Huseyin and Devrim Berktay v. Turkey*, pubblicato in questo volume, ad esempio, il ricorso, pervenuto alla segreteria il 30 luglio 1993, è stato inserito a registro il 4 agosto successivo. Dopo circa due mesi è iniziato l'esame sull'ammissibilità presso la Commissione ([29]). Tale esame è generalmente svolto da un relatore della Commissione che, secondo la prassi normale, informa dell'avvenuto inizio del procedimento lo Stato interessato dal ricorso e chiede al governo di far conoscere il proprio parere in ordine all'ammissibilità (in particolare si chiede un parere circa l'esaurimento dei ricorsi interni) e al merito della questione. Nel caso che abbiamo citato, al governo turco venne dato un termine di 12 settimane per sottoporre alla Comissione le proprie osservazioni. Il giorno prima della scadenza di tale termine, il governo fa sapere di avere bisogno di un proroga, accordata dal Pre-

([29]) La Commissione è composta da un membro per ogni Stato parte alla Convenzione (al gennaio 1996 sono 31). Non vi deve essere più di un componente della stessa nazionalità (non necessariamente devono essere cittadini di Stati parte).

sidente della Commissione fino al 21 marzo e poi al 22 aprile 1994, ma alla scadenza nessuna comunicazione fu fatta pervenire dal governo turco. Nel frattempo, l'inizio della sessione in cui si sarebbe deciso sull'ammissibilità del caso era stato fissato dalla cancelleria per il 10 ottobre 1994. Un fax del governo turco del 10 ottobre contenente argomenti contrari alla ammissibilità del ricorso non è stato ritenuto suscettibile di essere preso in considerazione, vista l'impossibilità in così poco tempo di sentire il parere della controparte sugli argomenti avanzati e l'inopportunità di dilazionare ulteriormente la decisione. Questa statuisce quindi l'ammissibilità del ricorso sulla base delle valutazioni del relatore e degli argomenti addotti dal ricorrente.

In alcuni casi l'esame sull'ammissibilità viene svolto non semplicemente sulla base di documenti o memorie scritte, ma ascoltando direttamente un rappresentante dello Stato e il ricorrente (o un legale che lo rappresenta). L'udienza, come tutto il lavoro della Commissione, non è pubblica; si può svolgere nelle lingue ufficiali della Commissione (inglese e francese) oppure, con l'aiuto di interpreti, nella lingua del ricorrente. Da ricordare che, nella maggior parte dei casi, la decisione sulla ricevibilità del ricorso è svolta non dalla Commissione al completo, ma da appositi comitati, istituiti in base all'8° Protocollo addizionale. Un'alta percentuale dei ricorsi è considerata inammissibile per "manifesta infondatezza", il che significa, nella più parte dei casi, insufficiente motivazione del ricorso in fatto e in diritto.

Una volta dichiarata ammissibile, la domanda viene esaminata nel merito dalla Commissione, in plenaria o in una delle sue sessioni. La Commissione tuttavia è sempre tenuta a indirizzare le parti verso una soluzione amichevole della controversia (art. 28.1.(b) e 28.2). Se un accordo è raggiunto, la Commissione inoltra un rapporto al Comitato dei Ministri del Consiglio d'Europa che, con una decisione, archivia il ricorso e, eventualmente, autorizza la pubblicazione del rapporto. Nel presente volume è riportata una decisione del Comitato dei Ministri che, riconosciuta la composizione amichevole della controversia tra i ricorrenti Sargin e Yagci e la Turchia e ottenute dal governo turco informazioni circa l'esecuzione delle misure cui quest'ultimo s'era impegnato, dichiara chiuso il caso e decide, su istanza motivata del governo, di non rendere pubblico il rapporto della Commissione.

L'esame nel merito del caso, generalmente istruito da un relatore, avviene principalmente sulla base della documentazione che le parti inviano alla Commissione; le parti sono inoltre invitate a svolgere i loro argomenti in un'udienza che si volge a porte chiuse e in cui possono essere escussi testimoni e introdotti elementi di prova. La Commissione ha anche poteri propri di indagine che gli Stati si impegnano a non intralciare (art. 28.1(a)).

Alla fine dell'indagine la Commissione approva a maggioranza un rapporto in cui esprime il proprio parere sulla pretesa violazione delle norme della convenzione europea. Il rapporto è trasmesso al Comitato dei Ministri e, entro tre mesi, i soggetti indicati all'art. 48 della Convenzione (la Commissione, lo Stato del ricorrente, lo Stato accusato e lo Stato cui il caso si riferisce) possono decidere di sottoporlo alla Corte ([30]) per il giudizio ([31]). Il Protocollo addizionale n. 9 del 6 novembre 1990, entrato in vigore il 1° ottobre 1994 e al quale ha aderito anche l'Italia ([32]), riconosce anche alla persona, all'organizzazione nongovernativa o al gruppo di persone che hanno presentato il ricorso alla Commissione il diritto di adire la Corte, non direttamente però: la richiesta è vagliata da un comitato di membri della Corte che decide sulla ricevibilità (art. 5, che modifica in questo senso l'art. 48 della Convenzione). Se la Corte non viene adita, generalmente perché il caso è sufficientemente chiaro e non necessità di ulteriori approfondimenti, il Comitato dei Ministri decide ([33]) sulla violazione e fissa le misure di riparazione necessarie (art. 32). Il rapporto viene inviato anche allo Stato e al ricorrente, per i cittadini di quei paesi che hanno aderito al citato Protocollo 9, i quali hanno comunque l'obbligo di non divulgarlo.

([30]) Anche la Corte è composta da un membro per ogni Stato parte alla Convenzione e non vi deve essere più di un componente della stessa nazionalità.

([31]) Nel caso *Soering v. the United Kingdom*, per es., la questione è stata portata presso la Corte su iniziativa dello Stato del ricorrente, cittadino tedesco. Su questo particolare caso v. anche poco oltre nel testo.

([32]) L'Italia lo ha ratificato con legge n. 257 del 14 luglio 1993, insieme, finora, a Austria, Repubblica Ceca, Finlandia, Germania, Irlanda, Lussemburgo, Norvegia, Paaesi Bassi, Romania, Slovacchia, Slovenia e Ungheria.

([33]) La decisione è a maggioranza di 2/3, non essendo ancora entrato in vigore il Protocollo addizionale n.10 che richiede la maggioranza semplice.

L'opinione sull'ammissibilità o il merito fatta propria dalla Commissione non vincola la Corte. Nella sentenza *McCann and Others v. the United Kingdom* pubblicata in questo volume, per esempio, la Corte decide ribaltando l'opinione votata dalla maggioranza della Commissione. Anche in questa fase della procedura gli atti sono principalmente scritti, benché vi possa essere la possibilità di disporre un'udienza alla presenza delle parti. Il ricorrente è formalmente rappresentato da un componente della Commissione, ma può generalmente prendere parte alle udienze direttamente o tramite un legale. Vi è un'ampia possibilità di sottoporre alla Corte documenti e memorie, sulle quali deve comunque essere data alla controparte la possibilità di prendere posizione. Alle Organizzazioni nongovernative è riconosciuto un ruolo di *amici curiae*, che si rivela talvolta molto importante ai fini della decisione (v. nel caso *McCann* il paragrafo 158). Sono previsti poteri di investigazione e di *fact finding*, dei quali la Corte dispone in modo abbastanza limitato. In qualunque momento il caso può essere rimesso per intervenuta composizione amichevole.

Le sentenze sono decise a maggioranza; in caso di parità vale il voto del Presidente. Esse contengono la decisione sul caso (dispositivo), che accerta l'esistenza o meno della violazione della Convenzione, e la relativa motivazione, in fatto e in diritto. Possono essere allegate opinioni dei singoli giudici, concorrenti o dissenzienti rispetto alla decisione adottata e alla sua motivazione. Nel caso *McCann*, la decisione è stata presa a stretta maggioranza (10 voti contro 9); i nove giudici dissenzienti hanno allegato un'opinione che occupa ben 25 paragrafi.

La sentenza della Corte, oltre a statuire sull'esistenza o meno di una violazione della Convenzione ([34]), può stabilire, nella stessa deci-

([34]) È utile osservare su questo punto che la Corte non è formalmente vincolata, nell'esaminare il merito della causa, dalla caratterizzazione giuridica dei fatti avanzata dal ricorrente: come stabilito nel caso *Guzzanti v. Italia* (Series A, n. 139, 1981, § 63), la Corte ha di fronte a sé la Convenzione nella sua totalità e può qualificare diversamente i fatti allegati o anche ritenere di considerarli alla luce di disposizioni non citate nel ricorso. Vero è tuttavia che in alcuni casi, quando ciò è ritenuto scarsamente influente, la Corte si trincera dietro la mancata invocazione di una particolare norma da parte del ricorrente per evitare di esaminare i fatti sotto un determinato profilo giuridico. Tra i casi riprodotti

sione o a seguito di una procedura successiva, un risarcimento o un equo indennizzo a favore della vittima della violazione (art. 50). Nella sentenza *McCann* la questione dell'indennizzo è trattata nei paragrafi 215 ss. La Corte respinge la possibilità di riconoscere un risarcimento danni; respinge anche la richiesta di equo indennizzo; impone al Regno Unito il rimborso delle spese processuali sostenute dal ricorrente per il procedimento svoltosi presso gli organismi del Consiglio d'Europa.

Sul tema del risarcimento dei danni per violazione dei diritti umani è di grande rilevanza la giurisprudenza della Corte interamericana di S. José, che ha ampiamente utilizzato la norma sul risarcimento contenuta nell'art. 63 della Convenzione. Un caso particolarmente interessante da questo punto di vista è quello *Godínez Cruz*, riprodotto in questo volume.

Il Comitato dei Ministri del Consiglio d'Europa ha il compito, in base all'art. 54 della Convenzione, di sovrintendere all'esecuzione delle sentenze della Corte, ossia di sorvegliare e verificare l'adempimento da parte degli Stati di tutti quei comportamenti necessari a porre termine, nel caso considerato, alla violazione del diritto umano sancito dalla Convenzione. Attraverso l'adeguamento alla sentenza che riguarda un caso concreto e ben specifico, sono spesso disposizioni normative a dover essere emendate alla luce della Convenzione. Con risoluzione, il Comitato chiude definitivamente il caso, prendendo atto delle misure adottate dallo Stato in ottemperanza alla sentenza della Corte. In questo volume pubblichiamo la risoluzione riguardante il caso *Soering*, che include anche la citazione della nota informativa inviata dal governo britannico riguardo la denegata estradizione dell'imputato verso gli Stati Uniti per il reato di *capital murder* (reato implicante la prospettiva della pena di morte).

Il Comitato dei Ministri è, ovviamente, un organo politico: spesso il suo modo di "chiudere" il caso risponde più all'esigenza politica di non incrinare i rapporti interni al Consiglio d'Europa che a quella di dare completa ed effettiva esecuzione alla sentenza della Corte. Per

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in questo volume, un ragionamento di questo tenore compare in *McCann and Others v. the United Kingdom*, § 160.

lo Stato che si sottrae all'adempimento non sono previsti nella Convenzione mezzi di pressione particolari. L'art. 2(b) del regolamento interno del Comitato dispone che, in caso di mancato adempimento spontaneo, la questione viene automaticamente iscritta all'ordine del giorno della riunione del Comitato del successivo semestre. Il ripetersi della discussione dovrebbe essere sufficiente a indurre il governo recalcitrante ad ottemperare alla sentenza, per evitare l'imbarazzo politico derivante dalla periodica discussione del caso. Ciò non ha tuttavia impedito al Belgio, per esempio, di attendere ben 8 anni e mezzo prima di adottare le riforme normative richieste dalla sentenza nel caso *Marckx* ([35]).

25. Come anticipato, la procedura attualmente seguita presso la Commissione e la Corte europea dei diritti dell'uomo è stata profondamente modificata dal Protocollo addizionale n. 11 che, per entrare in vigore, necessita tuttavia della ratifica da parte di tutti gli Stati parte della Convenzione.

La riforma elimina la distinzione tra Commissione e Corte, istituendo un'unica Corte europea permanente dei diritti umani. Le udienze della Corte sono, in linea di principio, pubbliche. Il procedimento si svolge su due gradi: presso le Sezioni (*Chambers*) (composte di sette giudici) e, in via di appello, presso le Sezioni Unite (*Grand Chamber*), di 17 giudici. Dei Comitati dichiarano in via preliminare l'ammissibilità o irricevibilità del ricorso. Il ricorrente ha pienamente riconosciuto il ruolo di parte processuale. Resta confermata la competenza del Comitato dei Ministri a sovrintendere all'esecuzione delle sentenze ([36]).

26. Molto più semplice appare la procedura presso il Comitato dei diritti umani delle Nazioni Unite secondo il Primo Protocollo facoltativo del Patto sui diritti civili e politici.

Il procedimento in questo caso è interamente scritto e si svolge in

([35]) Per un commento critico alla prassi "politica" del Comitato dei Ministri, si veda Tomkins A., The Committee of Ministers: Its Roles under the European Convention on Human Rights, in "European Human Rights Review", 1995, pp. 49ss.

([36]) Per prime valutazioni critiche sul nuovo procedimento si veda TRESCHEL S., *Sulla riforma del sistema europeao di protezione dei diritti dell'uomo*, in "Rivista internazionale dei diritti dell'uomo", 1994, pp. 640 ss.

via confidenziale. Solo le constatazioni finali del Comitato e, in tempi più recenti, le decisioni motivate sulla ammissibilità sono rese pubbliche.

L'ammissibilità della comunicazione è decisa sulla base dell'esame iniziale condotto da un relatore. A differenza di quanto dispone la Convenzione europea, non sono previste procedure particolari per favorire il raggiungimento di una composizione pacifica della controversia.

Se vi sono le condizioni per procedere nel merito, viene accordato allo Stato un termine di sei mesi per far pervenire le proprie osservazioni; queste sono quindi trasmesse all'autore della comunicazione, cui è assegnato un termine per inviare nuove osservazioni o informazioni. Ogni altra informazione può essere comunicata al Comitato, di propria iniziatva o su richiesta del Comitato.

Durante tutte queste fasi è possibile per il Comitato chiedere che lo Stato adotti provvedimenti cautelari per impedire che la conclusione del procedimento porti a risultati irrilevanti: in particolare, viene chiesta la sospensione del procedimento di cui si contesta la legittimità secondo il Patto sui diritti civili e politici.

Oltre ai mezzi di prova scritti che le parti gli sottopongono, il Comitato non ha mai provveduto ad ampliare a mezzi orali o a indagini sul terreno le sue procedure di raccolta della prove. Nel trattamento delle prova, tuttavia, il Comitato ha condotto una vittoriosa battaglia per far riconoscere la parità di posizione tra il ricorrente e lo Stato sotto accusa, rigettando le condotte di quei governi che si limitavano a negare i fatti, sostenuti dal ricorrente con dovizia di documentazione, senza produrre elementi validi di prova ([37]).

La conclusione dell'esame nel merito è data dalle constatazioni finali (*views*) del Comitato contenenti la decisione del caso e la relativa motivazione, adottate a maggioranza, notificate allo Stato e all'autore della comunicazione e quindi rese pubbliche (in particolare, con l'in-

([37]) Si veda in particolare il caso *Bleir v. Uruguay*, in UN Doc A/37/40. Per una efficace ricostruzione: McGoldrick D., *The Human Rights Committee. Its Role in the Development of the International Covenant of Civil and Political Rights*, Clarendon Press, Oxford, 1991, pp. 145 - 150.

serimento nel rapporto annuale del Comitato all'Assemblea Generale dell'Onu). Se viene accertata una violazione, il Comitato invita lo Stato a porvi rimedio e ad accordare eventualmente forme di garanzia o di compensazione a favore dell'individuo. Il caso presentato in questa raccolta deciso in sede di Comitato dei diritti umani (*Kindler v. Canada*) è un esempio di constatazione che esclude la avvenuta violazione del Patto da parte dello Stato. Alla decisione sono allegate tuttavia varie opinioni dissenzienti o concorrenti di membri del Comitato che criticano in misura più o meno ampia la decisione della maggioranza.

Il Patto, come è noto, non prevede forme di controllo dell'esecuzione dei comportamenti raccomandati agli Stati. Una recente evoluzione ha portato tuttavia il Comitato ad inserire nel proprio regolamento interno una disposizione riguardante la nomina di un relatore speciale con il compito di prendere contatti con lo Stato interessato, seguire le attività poste in essere per dare seguito alla constatazione e farne rapporto al Comitato. Le osservazioni in merito vengono inserite nel rapporto annuale all'Assemblea generale ([38]).

27. Le due procedure fin qui illustrate in via principale sono, come abbiamo detto, quelle che la signora X del nostro esempio può alternativamente seguire per ottenere una pronuncia giurisdizionale sulla questione di violazione del diritto alla vita ipotizzata. Si tratta di procedimenti aventi carattere processuale, cioè caratterizzati dal contraddittorio (partecipazione alla formazione dell'atto da parte dei soggetti nella cui sfera giuridica gli effetti dell'atto stesso vanno a incidere) e, più precisamente, di natura giurisdizionale: nascono infatti da un illecito; sono decisi da un organo indipendente rispetto alle parti; sono attivati su iniziativa di soggetti diversi da quello cui spetta giudicare ([39]). Le caratteristiche attuali dell'ordina-

([38]) Per il testo recentemente emendato del regolamento interno riguardante il relatore speciale sui seguiti dati alle constatazioni, v. UN Doc. A/ 49/40, pp. 115-117, nuovi artt. 95 - 99 del Regolamento interno.

([39]) Non è possibile naturalmente dilungarci sulla nozione di procedimento giurisdizionale. Si rinvia alla voce già citata di Fazzalari "Procedimento e processo (teoria generale)" e, più in generale, a FAZZALARI E., *Introduzione alla giurisprudenza*, Cedam, Padova, 1984.

mento internazionale impongono tuttavia un'attenuazione della qualificazione che, rapportata al suo significato nel diritto statale di paesi come il nostro, rischia di non essere adeguata. Infatti, in mancanza di diretti rinvii alla competenza immediata di organi internazionali preposti all'esecuzione delle decisioni divenute definitive, l'effettività delle pronunce delle Corti e dei Comitati internazionali resta affidata solamente alla buona volontà dei governi interessati e a meccanismi di sanzione guidati ancora, in buona parte, da considerazioni politico-diplomatiche, più che dal diritto positivo. Non che l'attuale ordinamento internazionale sia inidoneo a predisporre rimedi a questa situazione (si pensi ad organi di istituzioni internazionali quali il Consiglio di Sicurezza delle Nazioni Unite, con i vasti poteri di intervento e sanzionatori attribuitigli dai capitoli VI e VII della Carta dell'Onu), ma le resistenze dei governi a sottoporsi a questo genere di limitazione di sovranità permangono ancora insuperate. Solo la Convenzione europea sui diritti dell'uomo affida esplicitamente ad un organismo di vertice del Consiglio d'Europa (l'Organizzazione internazionale a cui aderiscono i paesi firmatari della Convenzione stessa) precisi compiti di supervisione dell'esecuzione dei giudizi della Corte (art. 54), pur senza attribuirgli poteri sanzionatori particolari rispetto a quelli, piuttosto blandi, previsti dalle norme istitutive del Consiglio d'Europa. Il ruolo degli organi dell'Onu o dell'Organizzazione degli Stati Americani nell'ambito delle altre procedure internazionali qui considerate risulta molto più sfumato.

Questo carattere di non immediata esecutività dei giudizi resi in via definitiva dagli organismi internazionali di controllo, giustifica il ricorso alla categoria dei procedimenti quasi-giurisdizionali per descrivere le procedure considerate, essendo il carattere di giurisdizionalità accertato con sufficiente grado di coincidenza con quanto avviene negli ordinamenti interni solo limitatamente alla procedura della Convenzione europea.

La Tabella 2 richiama in estrema sintesi alcune delle caratteristiche dei procedimenti internazionali di natura giurisdizionale di cui si è parlato in questi paragrafi, avendo come punto di partenza i soggetti che le possono adire e evidenziando alcuni caratteri peculiari del contraddittorio che esse instaurano.

Tab. 2. – Caratteristiche delle procedure internazionali giurisdizionali e quasi-giurisdizionali

Ricorrente	*Diritti*	*Organo*	*Actio popularis*	*Posizione di parte*	*Pubblicità* *	*Oralità* **	*Controllo sulla esecuzione* ***
Individui, Ong	Civili e politici - Conv. europea	Commissione e Corte europea	No	Sì (Commissione)	No. Pubblicazione delle sentenze	Sì	Sì: Comitato dei Ministri del CdE
Individui, Ong	Civili e politici - Conv. interamericana	Commissione e Corte interamericana	Sì	Sì (Commissione)	No. Pubblicazione delle sentenze	Sì	No (rapporto della Corte all'OSA)
Individui	Civili e politici - Patto internazionale e I° Protocollo facoltativo	Comitato dei diritti umani	No	Sì	No. Pubblicazione delle constatazioni	No	No (rapporteur speciale sui seguiti e rapporto all'AG dell'Onu)
Individui	Discriminazione razziale	Comitato contro la discriminazione razziale	No	Sì	No. Pubblicazione delle constatazioni	No	No (rapporto annuale all'AG dell'Onu)
Individui	Tortura o altri trattamenti o punizioni crudeli, inumani o degradanti	Comitato contro la tortura	No	Sì	No. Pubblicazione delle constatazioni	No	No (rapporto annuale all'AG dell'Onu)
Individui Ong	*Civili e politici - Conv. europea*	*Corte europea dei diritti umani*	*No*	*Sì (Commissione e Corte)*	*Sì*	*Sì*	*Sì: Comitato dei Ministri del CdE*

* Per pubblicità del procedimento si intende il fatto che si svolga o meno a porte chiuse con il coinvolgimento delle sole parti in causa, ovvero in udienze pubbliche o attraverso atti di cui sia consentita la divulgazione una volta che si siano formati.

** Oralità: sono previste o si sono svolte nella prassi udienze in cui le parti hanno esposto oralmente i loro argomenti, o il procedimento è esclusivamente basato sulla scrittura?

*** Indica l'esistenza o meno di organismi preposti a sorvegliare l'adempimento da parte degli Stati del comportamento loro prescritto nella sentenza o constatazione che riconosce l'avvenuta violazione della norma sui diritti umani.

L'ultima riga, in corsivo, si riferisce al procedimento secondo la Convenzione europea dei diritti dell'uomo come emendata dal Protocollo n. 11, non in vigore.

Conclusioni

28. Come considerare il valore di una decisione resa da questi organismi dal punto di vista dell'ipotetica ricorrente signora X?

Una sentenza o constatazione di accertamento della violazione del diritto alla vita potrebbe avere degli effetti processuali notevoli, sul piano per esempio della apertura di un nuovo procedimento o della revisione del processo.

Conseguenze di portata politica possono essere l'abrogazione di una disposizione di legge o l'adozione di una norma legislativa idonea a consentire di rendere giustizia nel caso X così come in una serie di casi analoghi.

L'efficacia dell'azione del governo nel dare seguito concreto alla pronuncia potrà essere quindi valutata a livello internazionale e dare luogo ad azioni di tipo diplomatico o politico, a loro volta sostenute con interventi di organismi nongovernativi o azioni di "diplomazia popolare".

Viene confermata pertanto l'idea che vede procedure politiche e procedure giurisdizionali di controllo quali strumenti integrati di attuazione a livello internazionale dei diritti umani. Una precisa conoscenza di tutte queste pur limitate opportunità di azione internazionale è oggi elemento indispensabili della preparazione di qualunque individuo o istituzione che voglia promuovere e difendere i diritti umani ([40]).

([40]) Sullo status internazionale degli "human rights defenders" si veda la bozza di dichiarazione in corso di elaborazione presso la Commissione dei diritti dell'uomo, UN Doc. E/CN.4/1993/64; sulle *istituzioni nazionali per i diritti umani* si veda la Risoluzione dell'Assemblea generale dell'Onu del 20 dicembre 1993.

3.

IL VALORE GIURIDICO DELLE DECISIONI DEGLI ORGANISMI DI TUTELA INTERNAZIONALE DEI DIRITTI UMANI

di Francisco Leita

1. Ai fini della valutazione dell'effettività della garanzia dei diritti umani che offrono le decisioni qui riportate, riguardanti il diritto alla vita e rese a seguito di iniziative individuali, ciò che importa segnalare in primo luogo è l'idoneità degli organi istituiti dalle convenzioni di volta in volta considerate a pronunciarsi in proposito.

Diviene così evidente, in termini generali, in che cosa si concretino i meccanismi internazionali di tutela dei diritti umani. Dal presupposto sostanziale dell'obbligo di rispettare i diritti proclamati in una determinata convenzione deriva anche l'eventualità per gli Stati che l'accettino di essere sottoposti a un procedimento, attivato anche da individui che si ritengano vittime di una violazione di uno di tali diritti da parte dello Stato nella cui giurisidzione si trovino. Tale procedimento – la cui esperibilità in ogni caso dipende da un'apposita dichiarazione di accettazione della competenza di organi all'uopo istituiti – esita in definitiva in una pronuncia sulla fondatezza o meno del ricorso.

Può dirsi pertanto, sinteticamente, che gli impegni assunti da ogni Stato in questa direzione, consistono nell'ammettere l'ingerenza di

enti, per così dire esterni al suo stesso apparato organizzativo, nei rapporti con gli individui ad esso sottoposti. Per l'appunto la garanzia dei diritti fondamentali risiede nel fatto che lo Stato non è libero di violarli senza subire tale conseguenza.

2. La possibilità per un individuo di ottenere una pronuncia da un organo internazionale che accerti la lesione di un diritto convenzionalmente proclamato, dipende dal fatto che lo Stato autore della lesione e gli altri Stati parti della convenzione abbiano predisposto all'uopo l'apparato organizzativo e determinato le relative procedure.

L'esigenza di provvedere in tal senso deriva dallo stesso carattere decentrato dell'ordinamento internazionale, ed in particolare dalla carenza storica di un ente sovraordinato agli Stati che provveda in modo autoritativo a detta funzione. In questa situazione, in cui è lasciato alla libertà degli stessi destinatari delle norme di garanzia dei diritti umani non solo d'istituire adeguati mezzi di controllo, ma anche di sottostarvi, si riscontra una marcata diversificazione dei livelli di tutela convenzionalmente istituiti. In effetti, mentre nel momento enunciativo dei diritti tutelati, le convenzioni dimostrano fra di esse una certa omogeneità di contenuti, altrettanto non può dirsi in relazione agli strumenti di tutela e di controllo da esse stesse predisposti.

Ogni stumento fra quelli qui considerati appare quindi fornito di un proprio sistema di garanzie, più o meno articolato in fasi procedurali, alle quali per di più gli Stati possono decidere di sottostare con apposite dichiarazioni di accettazione, di modo che il grado di effettività del sistema di tutela contenuto in ogni convenzione risulterà diverso a seconda dello Stato parte considerato. Così, mentre un individuo, trovantesi sotto la giurisdizione di uno Stato che abbia accettato la competenza di organi internazionali a decidere della liceità internazionale della propria condotta, potrà ottenere una pronuncia in relazione alla violazione di un suo diritto fondamentale, l'individuo che pretenda di trovarsi in circostanze analoghe nei riguardi di un altro Stato, che pur essendo parte della medesima convenzione, non abbia fatto tale dichiarazione, risulterà sprovvisto di una tutela internazionale paragonabile.

3. Dalla lettura delle decisioni riportate sarà possibile individuare il presupposto per l'esperimento della procedura che, come si è

detto, è una determinata attività da parte di uno Stato, o più precisamente un comportamento degli organi statali ritenuto da un singolo lesivo di un diritto proprio che egli ritrova sancito in una convenzione internazionale obbligatoria per lo Stato nel cui ambito territoriale si trova.

Oggetto della valutazione sarà quindi un comportamento dello Stato, di cui essa accerta la conformità o meno con gli impegni assunti alla stregua di una data convenzione.

4. Occorre però aggiungere che deve trattarsi di condotta definitiva, che non è cioè passibile di modificazioni nell'ambito dell'ordinamento dello Stato. Ciò non solo e non tanto in considerazione dell'impegno degli Stati, generalmente contenuto nelle convenzioni di salvaguardia dei diritti umani, a predisporre, nell'ambito dei propri ordinamenti, mezzi giurisdizionali appositamente orientati a pronunciarsi sull'avvenuta violazione o meno di uno dei diritti internazionalmente garantiti, quanto piuttosto per effetto della regola secondo la quale il ricorso alle procedure qualificabili come internazionali si ammette subordinatamente all'esperimento di questo e di ogni altro mezzo interno di ricorso, purché effettivo.

Inoltre, quand'anche si sia avviata, da parte dell'individuo, la procedura innanzi agli organi internazionali, la fase contenziosa che esita nella pronuncia definitiva, è preceduta dallo svolgimento di una vera e propria azione conciliativa di organi internazionali, mirante ad un componimento amichevole della questione, purché avvenga nel rispetto dei diritti umani.

Può dunque conclusivamente ritenersi che le pronunce che qui s'intende valutare risultano essere mezzi sussidiari rispetto ad altri (interni) che, per parafrasare un'espressione ormai ricorrente, sono più vicini all'individuo da tutelare, o comunque a strumenti (internazionali) che si ritiene possano condurre ad un risultato maggiormente soddisfacente dal punto di vista della difesa dei diritti umani: quasi che essi offrano una protezione preferibile in quanto più adeguata.

5. Orientata a finalità diverse sono invece le norme che nelle convenzioni in questione rispettivamente escludono la competenza degli organi internazionali da esse predisposti a pronunciarsi su questioni che siano state già oggetto di una decisione da parte di qual-

siasi altra istanza internazionale di accertamento della liceità della condotta dello Stato. Lungi dal porsi come dirette a garantire una certa economia processuale internazionale, ovvero a determinare una sorta di distribuzione della competenza a pronunciarsi sulle varie istanze offerte all'individuo, simili disposizioni mirano in realtà a limitare le possibilità d'ingerenza degli organi internazionali di garanzia dei diritti umani. Tale risultato interessa allo Stato soprattutto quando l'azione intentata da un'individuo sulla base di una data convenzione si sia risolta in una decisione che neghi la fondatezza del ricorso, o addirittura la sua stessa ricevibilità. Potrebbe quasi dirsi che in tal modo gli effetti di una qualsiasi pronuncia relativa alla condotta di uno Stato si espandono oltre i limiti previsti dalla convenzione sulla base della quale è stato pronunciata, dato che essa finisce per neutralizzare l'azionabilità di qualsiasi altro sistema di garanzie internazionali dei diritti umani per lo stesso caso. Occorre qui insistere su alcuni altri argomenti che si ricollegano alla conclusione ora raggiunta.

In primo luogo, a rafforzare il ragionamento svolto va sottolineato quanto già accennato circa il fatto che la decisione raggiunta sulla base di una data convenzione non necessariamente deve essere stata di accertamento dell'avvenuta violazione di uno dei diritti garantiti: valgono quindi a effetti preclusivi di altre procedure internazionali, anche le pronunce di *assoluzione* dello Stato, così come quelle di irricevibilità del ricorso.

Quanto alla prima ipotesi, andrebbe considerato che in una data convenzione, un certo diritto fondamentale di cui si chiede la sanzione internazionale può essere riconosciuto con un'ampiezza più ridotta che in un'altra, sicché l'impossibilità di ulteriormente ricorrere in questo secondo ambito potrebbe tradursi in una limitazione sostanziale della maggiore protezione per questo verso riconosciuta.

In relazione alle pronunce di mera irricevibilità, invece, verrebbe da pensare che già tale pronuncia contenga un apprezzamento della infondatezza del ricorso. Tuttavia, in alcuni casi, per effetto delle dichiarazioni interpretative con cui gli Stati talvolta restringono la portata delle disposizioni che ora si considerano, l'azionabilità di un'ulteriore procedura internazionale è addirittura negata quando la stessa *questione* sia stata non solo *esaminata* da un'altra istanza inter-

nazionale, ma addirittura quando sia stata ad essa soltanto *sottoposta* [1].

Per altro verso va sottolineato che la prescritta impraticabilità di una procedura internazionale ove si dia la circostanza dello stesso ricorrente, nell'ipotesi lo stesso individuo, ma anche nei riguardi di ogni altro soggetto (Stato o individuo) che voglia ricorrere in relazione allo stesso caso, di modo che si avrebbe anche una limitazione che coinvolge altri soggetti rispetto a quelli che sono stati *parti* del procedimento per primo svoltosi, e in definitiva una negazione del loro diritto di accesso alle vie internazionali di ricorso

6. Caratteristico delle procedure a cui hanno dato luogo i casi qui riportati, e, in generale delle procedure contenziose, è che la loro azionabilità dipende dall' accettazione preventiva da parte dello Stato. Si tratta ora di stabilire se, oltre allo svolgimento della procedura, anche gli effetti che ad essa si riconnettono dipendono dalla volontà degli Stati. In termini più espliciti, si tratta di accertare se l'atto con cui essa si conclude sia o no obbligatorio per lo Stato, avendo presente che eventualmente esso avrà tale carattere solo in forza delle stesse norme convenzionali istitutive.

Una ricognizione delle norme convenzionali rilevanti mostra come già nella stessa terminologia con la quale si designa l'atto conclusivo delle varie procedure, gli Stati si preoccupano di utilizzare termini che neppure alludano ad effetti obbligatori, quando s'intenda non assegnare questa efficacia allo stesso atto. Ad esempio, l'anodina espressione "*views*", ovvero "constatazione", con cui si designa l'esito che sortisce la procedura innanzi al Comitato dei diritti umani, sembra escludere l'esistenza di una specifica norma che attribuisca effetti obbligatori. Infatti, com'è noto, sia il Patto sui diritti civili e politici, che il relativo Protocollo facoltativo, laddove prevedono la procedura a cui danno luogo le comunicazioni (designate tali, e non "domande", o "ricorsi") rispettivamente statuali o individuali, si limitano a prevederne l'adozione e l'invio allo Stato e all'individuo interessati.

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[1] Cfr. in questo senso più restrittivo la decisione del Comitato dei diritti umani del 16 luglio 1993, d'inammissibilità della com. n. 467/1991, in *Human Rights Law Journal*, 1996, p. 105.

La carenza dell'elemento dell'obbligatorietà nella pronuncia di accertamento dell'avvenuta violazione comporterà pure il carattere esortativo, e non vincolante, di eventuali ulteriori atti a cui le singole procedure possano poi condurre, come l'adozione di osservazioni e raccomandazioni da parte del Comitato per l'eliminazione della discriminazione razziale, o l'invito a riparare del Comitato istituito dalla Convenzione contro la tortura.

Viceversa, l'espressione "sentenza" ("*judgment*", "*arrêt*"), adoperato sia dalla Convenzione europea che dalla Convenzione americana sui diritti umani, paiono rivolti ad atti che si vogliono vincolanti, talché, in entrambi gli strumenti, si ritrova poi un'apposita norma con cui gli Stati s'impegnano a conformarvisi ([2]).

7. In termini generali, siano le pronunce vincolanti o no, è opportuno valorizzare la funzione di accertamento di un'avvenuta violazione che esse contengono. Si è già fatto cenno dell'elemento di novità che risulta da simili atti, specie in considerazione della tendenza passata degli Stati di sottrarre all'ingerenza altrui la materia del trattamento degli individui, salvo che tale ingerenza non si concretasse in una rivendicazione del diritto di uno Stato estero al rispetto di uno *standard* minimo di protezione dei propri cittadini.

Conviene quindi ora da un lato apprezzare la possibilità che lo Stato, per effetto di una pronuncia internazionale che lo riguardi, e indipendentemente dal fatto che essa abbia valore vincolante, adotti misure interne per così dire di riparazione del diritto violato.

D'altro lato non va sottaciuta la possibilità che l'accertamento di una violazione a carico di uno Stato, o addirittura la persistente violazione di un diritto fondamentale che si desuma da più pronunce univocamente indirizzategli, provochi non solo la riprovazione dell'opi-

([2]) Cfr., rispettivamente, gli artt. 53 e 68.1. Peraltro alle sentenze della Corte europea dei diritti umani andrebbero aggiunte le decisioni del Comitato dei Ministri del Consiglio d'Europa. Tale organo, ove la questione per la quale non sia stata possibile raggiungere un componimento amichevole fra Stato e vittima non venga deferita alla Corte nel periodo di tre mesi dalla trasmissione del relativo rapporto della Commissione al Comitato stesso, prende una decisione sulla questione se si sia avuta o meno una violazione della Convenzione (art. 32, par. 1), che gli Stati sono tenuti a considerare come obbligatoria (par. 4).

nione pubblica interna e internazionale nei suoi confronti, ma dia l'avvio ad altre procedure, cosiddette non giurisdizionali, od attività di controllo e di censura della sua condotta.

8. Venendo ora alle decisioni che si definiscono vincolanti, le considerazioni svolte, ma soprattutto già la rilevata circostanza che le valutazioni in cui si concretano le procedure in esame siano circoscritte alla condotta dello Stato in un caso determinato, portano ad escludere nettamente qualsiasi altro effetto che si possa ricollegare al diritto interno dello Stato autore del comportamento considerato. In particolare si deve escludere che la decisione dell'organo internazionale possa interferire con atti dell'ordinamento interno, i quali abbiano determinato la condotta lesiva, provocandone l'annullamento o comunque la neutralizzazione. La rimozione di atti, o l'eliminazione delle conseguenze di decisioni o misure di un'autorità dello Stato, dovrà quindi, ove possibile, essere l'effetto di ulteriori atti, decisioni o misure adottate alla stregua dell'ordinamento dello Stato stesso. E, per l'appunto, l'emanazione di tali atti o decisioni, o l'adozione di tali misure, costituiscono il contenuto dell'obbligo di conformarsi alle decisioni che abbiano un qualche effetto vincolante.

9. Alle pronunce vincolanti può riconnettersi, oltre all'obbligo di riconoscere un diritto che sia stato negato e quindi di adottare le misure a tale fine necessarie, anche quello di adottare misure riparatorie *nell'ambito dell'ordinamento dello Stato* ritenuto responsabile della violazione.

In realtà, l'art. 50 della Convenzione europea parla di "equa soddisfazione", che per di più viene prevista solo "se il diritto interno di detta Parte non permette che in modo incompleto di eliminare le conseguenze" della decisione o della misura che ha causato la violazione. Certo, per questa via potrebbe dirsi che si ricerca una soluzione maggiormente rispettosa delle finalità della Convenzione, che è per l'appunto la realizzazione dei diritti umani fondamentali. Tuttavia, proprio in relazione al diritto alla vita, risalta più marcatamente l'inadeguatezza della disposizione ad assicurare alla vittima della violazione un più stretto legame tra la misura prevista e l'entità del danno arrecato.

Più chiaramente questo legame si riscontra nell'art. 63, par. 2 della Convenzione americana, soprattutto se interpretato nella maniera

piena che si ricava dalla sentenza relativa al caso *Godinez Cruz* qui riportato, il quale, oltretutto, vede la Corte assegnarsi il potere di sovrintendere al compimento dell'obbligo di riparare in tutti i suoi aspetti.

10. Difficilmente invece si riesce a ricostruire un obbligo di riparare a carico dello Stato ritenuto responsabile di una violazione nei confronti di ogni altro Stato parte di una delle convenzioni qui considerate, e neppure a favore dello Stato che abbia iniziato il procedimento, per lo meno in base alle convenzioni stesse.

A questo proposito va segnalato come in esse si parli di misure riparatorie o soddisfattive nei confronti della *parte lesa*, intendendosi con ciò la vittima della violazione. Ciò d'altronde rafforza l'idea che i sistemi convenzionali qui in commento siano orientati sostanzialmente e, potrebbe dirsi, prima di tutto, a ottenere una soluzione rispettosa dei diritti umani. Non vi sarebbe posto in tale contesto per un vero e proprio diritto al risarcimento di un preteso danno per essersi violato il diritto di uno Stato al rispetto della convenzione.

In termini più rigorosi vi sarebbe poi da considerare che, sia nell'una che nell'altra delle convenzioni in parola, le rispettive Corti possono essere chiamate a pronunciarsi non sulla base di una domanda statuale, ma ad impulso della vittima e per il tramite delle rispettive Commissioni. Non vi sarebbe, dunque, neppure una vera e propria controversia internazionale, cioè a dire fra Stati, vertente sull'esistenza o meno di un illecito, dall'accertamento del quale, semmai, sortirebbe poi l'obbligo di riparare.

Certo, il problema, potrebbe ancora riproporsi per i casi interstatuali, ma rispetto a questi deve concludersi per l'incompetenza della Corte a statuire in ordine a qualsiasi domanda di riparazione che lo Stato ricorrente intendesse proporre nei confronti dello Stato autore della violazione, dati gli effetti puramente interni che, a questo riguardo, le singole Convenzioni assegnano alle sentenze da esse stesse previste.

11. Dalle decisioni in commento vanno infine tenuti distinti eventuali altri atti internazionali che, in relazione ad esse possano adottarsi, quale la risoluzione che emani il Comitato dei ministri del Consiglio d'Europa in forza dell'art. 54 della Convenzione europea dei diritti umani, che lo chiama a sorvegliare l'esecuzione della decisione della

Corte. Il significato di tale articolo va peraltro sostanzialmente nel senso di escludere – data la laconicità della disposizione – che l'organo a cui è affidato il controllo possa anche adottare misure esecutive o sanzionatorie nei confronti dello Stato che non abbia preso le misure interne di adeguamento alla sentenza, o non abbia corrisposto la somma decisa dalla Corte ai sensi dell'art. 50 ([3]).

([3]) Una conferma della carenza di poteri ad agire in simili circostanza si ricava anche dalle "Regole relative all'applicazione dell'art. 54" adottate nel 1976 nel corso della 254a. riunione di delegati dei Ministri. Invero il Comitato dei Ministri potrebbe pur sempre equiparare la reiterata inosservanza delle sentenze ad una grave violazione dei diritti dell'uomo, e procedere alla sospensione o all'espulsione dello Stato inadempiente dal Consiglio d'Europa, sulla base dell'art. 8 dello Statuto.

4.

NORME INTERNAZIONALI DI GARANZIA DEI DIRITTI UMANI E ORDINAMENTI INTERNI

di Francisco Leita

1. La garanzia internazionale dei diritti umani si concreta nell'assunzione, da parte degli Stati, dell'obbligo di rispettare i diritti enunciati in una data convenzione. Oltre a ciò gli Stati possono anche accettare di essere sottoposti a procedure internazionali dirette a stabilire se, in un determinato caso, la loro condotta sia stata o meno conforme agli impegni assunti.

Può certo accadere che uno Stato, al momento dell'accettazione di simili impegni, rilevi un possibile contrasto fra date statuizioni, e alcune disposizioni del proprio ordinamento, e quindi eviti il conflitto formulando apposita riserva in relazione alle norme convenzionali.

Viceversa è nell'interesse di ogni Stato che abbia assunto senza riserva obblighi di tale portata, approntare nell'ambito del suo ordinamento tutti i mezzi giuridici necessari ad evitare comportamenti dei suoi organi che, in quanto contrastanti con tali impegni, possano dare adito ai relativi procedimenti di controllo, ed eventualmente a una pronuncia di censura nei suoi riguardi.

Evidentemente, a questo fine, si tratta di imporre agli organi stessi criteri di comportamento che siano confacenti a quanto internazionalmente stabilito, cioè a dire, occorre dotare l'ordinamento di norme che

dispongano in maniera conforme con quelle internazionali. Come ben si vede, l'esistenza di norme aventi tale contenuto non è l'oggetto dell'obbligo internazionale, ma costituisce il presupposto perché non si diano i comportamenti internazionalmente vietati.

D'altronde il solo fatto dell'esistenza di norme adattate alla convenzione internazionale che impone il rispetto di determinati diritti umani, non è sufficiente ad evitare condotte lesive di tali diritti, le quali potranno invece verificarsi ogniqualvolta un'autorità di cui lo Stato risponda internazionalmente emani un atto illegittimo o adotti una misura anch'essa contraria alle norme interne in questione.

Sorge quindi l'ulteriore esigenza di rendere possibile il controllo degli atti, o delle misure illegittime già nell'ambito dell'ordinamento dello Stato: a quest'esigenza provvedono le norme processuali che ammettono il singolo ad agire per la rimozione degli atti o la cessazione di misure che ritiene lesivi dei propri diritti. Ed in effetti, per evitare di dover rispondere internazionalmente per atti o misure non definitivi, gli Stati, mentre prevedono di sottoporsi a meccanismi internazionali di controllo, rendono esplicito con la regola del previo esaurimento dei ricorsi interni il carattere sussidiario che, rispetto a questi, intendono assegnare a dette istanze internazionali.

In definitiva, l'individuo ritrova efficace tutela dei propri diritti fondamentali più che nella disponibilità di mezzi internazionali di ricorso, in quella di norme sostanziali e procedurali conformi nell'ordinamento al quale è sottoposto. I casi della prassi giurisprudenziale interna qui riportati vogliono per l'appunto dimostrare come la partecipazione a convenzioni internazionali sui diritti umani imponga tale costante ricerca di conformità con il paradigma internazionale

2. La rilevata (eventuale) esistenza nell'ordinamento di uno Stato di norme conformi alle norme internazionali sui diritti umani, dettate allo scopo di uniformare la condotta dei suoi organi agli impegni derivanti da queste ultime, non comporta che non possano esistere nello stesso ordinamento norme aventi uguale finalità, ma emanate indipendentemente da questa esigenza di conformità ([1]). Specialmente le

([1]) Così, l'ordinamento inglese, essendosi reputato sufficientemente attrezzato per garantire i diritti sanciti nella Convenzione europea dei diritti umani, non è stato oggetto

norme costituzionali di ogni ordinamento sono in parte dedicate ad affermare l'esigenza che le attività normativa, giurisdizionale ed amministrativa si svolga nel rispetto dei diritti e delle libertà fondamentali dell'uomo.

In questa situazione, nessun riferimento al diritto internazionale occorrre operare per sancire una tutela di determinati diritti umani che già si considera adeguata. Ad esempio, proprio in relazione al diritto alla vita il caso *Venezia*, al quale si riferisce la sentenza della Corte cost. italiana n. 223 del 1996, qui riportata, dimostra come in assenza di una normativa internazionale sviluppata al punto da garantire tale diritto, in rapporto ad un obbligo internazionale di estradizione verso un paese che prevede la pena di morte, nonostante, questo dia sufficienti garanzie di non eseguirla, un'adeguata valorizzazione del principio costituzionale del divieto della pena di morte abbia consentito un livello più elevato di tutela del valore messo in causa.

3. I principi costituzionali sembrano pertanto porsi come un limite per così dire permanente all'esercizio del potere (del governo) di concludere accordi. Più in generale, gli stessi principi, ove si ritrovino in maniera ricorrente sanciti nelle costituzioni, vuoi per effetto di concezioni garantistiche autonomamente manifestatesi nei vari Stati, vuoi per effetto della recezione degli stessi strumenti internazionali di salvaguardia dei diritti umani, potrebbero utilizzarsi per ricostruire una sorta di ordine pubblico internazionale, o di criterio di individuazione di quei contenuti che possano sostanziare l'idea dell'esistenza, nello stesso ordinamento internazionale, di norme o principi inderogabili ad opera dei trattati.

4. Diversa è la problematica che si pone ove in relazione ad un dato ordinamento si sia giudicato necessario procedere agli adattamenti necessari a determinare la sua conformità con una data convenzione di tutela dei diritti umani. Premesso che tale risultato si otterrà con i mezzi di produzione giuridica di cui tale ordinamento dispone, si può ipotizzare che l'adattamento si realizzi a livello delle norme fonda-

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di modifiche a seguito dell'accettazione fattane dal Regno Unito, peraltro limitata da riserve.

mentali ([2]). Ove si scelga questa alternativa si istituisce un parametro di legittimità delle norme (c.d. ordinarie) ad esso subordinate, desunto dalle stesse norme convenzionali, e pertanto sarà dato di eliminare il contrasto eventualmente insorgente fra una di queste ed il parametro convenzionale, attivando i meccanismi di controllo della legittimità costituzionale delle leggi, con conseguente annullamento o, a seconda dei casi, disapplicazione della norma di rango inferiore contrastante.

Nell'ambito dell'ordinamento italiano, come si sa, l'esecuzione delle Convenzioni internazionali di tutela dei diritti umani è solitamente avvenuto attraverso la legge ([3]), di modo che non sarebbe ammesso invocare le stesse norme convenzionali per l'annullamento delle leggi contrastanti, eventualmente argomentando una loro ricezione (anche) ad opera dell'art. 10, 1° co. cost. ([4]).

Tuttavia, allorché un diritto fondamentale sia più pienamente tutelato nell'ambito convenzionale che non in una norma costituzionale, quest'ultima potrebbe interpretarsi non già isolatamente, ma nel contesto evolutivo che si desume dalle convenzioni internazionali accettate dallo Stato, e quindi dotarsi di una portata comparabile. A ciò autorizzano le significative pronunce della corte cost. italiana, che hanno ritenuto di dovere leggere taluni parametri costituzionali "anche alla luce degli obblighi enunciati nelle ... convenzioni internazionali" di protezione dei diritti umani ([5]).

5. La giurisprudenza della Corte di giustizia delle Comunità europee è di notevole interesse nella ricerca di parametri di legittimità degli atti di un dato ordinamento, fondati sui principi di salvaguardia dei diritti fondamentali. Ciò attiene dunque anche al diritto comunitario, laddove anch'esso, quando le norme che lo compongono ab-

([2]) Ed è il caso di vari paesi sudamericani che recentemente hanno provveduto a rivestire di rango costituzionale le norme ricettizie delle Convenzioni sui diritti umani alle quali partecipano.

([3]) V., in relazione ad ogni singola convenzione, i riferimenti nell'appendice I.

([4]) Si veda in proprosito la tagliente decisione sulla manifesta infondatezza di una simile questione d'incostituzionalità contenuta nell'ordinanza 26 febbraio 1993, n. 75 (in *Riv. dir. internaz.*, 1993, p. 447 ss.).

([5]) Ne è un esempio la sent. 28 aprile 1994 n. 168, in *Riv. dir. internaz.*, 1994, p. 519.

biano effetti diretti è idoneo a incidere nella sfera dei diritti inviolabili dei singoli.

La Corte tende a ricostruire simili principi desumendoli dalle tradizioni costituzionali comuni degli Stati membri, nonché dalle convenzioni internazionali di tutela dei diritti umani alle quali questi partecipano ([6]). Per questa via, pur nel silenzio dei Trattati istitutivi, essa è giunta ad assicurare l'intangibilità dei diritti umani fondamentali, e, in definitiva ha contribuito, per quanto di sua competenza, ad individuare un denominatore comune di garanzie individuali che costituiscono il patrimonio di ogni stato di diritto ([7]).

6. Nel caso che la recezione delle norme convenzionali avvenga nell'ambito della legislazione ordinaria, o comunque subordinata alla costituzione, anche a volere escludere che possa instaurarsi un contrasto fra norme di rinvio al diritto convenzionale in materia di diritti umani e principi costituzionali ([8]) – contrasto che andrebbe sanato con l'annullamento della legge di rinvio ad opera della corte cost. – si pone il problema della loro derogabilità ad opera di altre norme dello stesso rango (successive) contrastanti, e in definitiva della possibile adozione di misure da queste ultime previste o addirittura imposte che concretino violazione degli obblighi internazionalmente assunti.

([6]) Della ormai copiosa giurisprudenza in proposito, basterà qui menzionare la sentenza del 14 maggio 1974, causa 4/73, *Nold*, in *Raccolta della giurisprudenza della Corte di giustizia delle Comunità europee*, 1974, p. 491.

([7]) Significativa della possibilità che anche il diritto fondamentale alla vita possa essere oggetto di tutela in ambito comunitario è il caso *Grogan* del 1991 (riportato oltre). La Corte, tuttavia, per quanto l'Avvocato generale Van Gerven pure intravvedeva nelle sue conclusioni la rilevanza della questione della tutela dei diritti fondamentali (in *Raccolta*, cit., 1991, I, p. 4723 ss.), ha finito per racchiudere i problemi posti dalla *High Court* di Dublino nell'ambito delle norme comunitarie che assicurano la libera prestazione dei servizi, come del resto prospettava lo stesso giudice del rinvio.

([8]) Invero contrasti del genere, tutt'altro che ipotetici, sono stati evitati vuoi provvedendo a modificare il precetto costituzionale contrastante con la normativa internazionale che s'intende accettare (com'è avvenuto con la l. cost. 21 giugno 1967 n.1 che sancendo l'inapplicabilità del co. 4° dell'art. 10 cost. ai delitti di genocidio, rende possibilile l'estradizione per tali delitti ai termini della Convenzione di Ginevra del 1948 relativa alla prevenzione e alla punizione del delitto di genocidio), vuoi operando con lo strumento della riserva, di cui si è detto *supra*: sub 1 (com' è avvenuto per l'art. 12, par. 4, del Patto sui diritti civili e politici, che avrebbe contrastato per l'interposizione della legge di esecuzione con l'art. XIII, co. 2, delle disposizioni transitorie e finali cost.).

Proprio in questa seconda possibile prospettazione il problema si è dato nell'ambito dell'ordinamento italiano, data la prassi univoca di dare attuazione alle convenzioni in questione, con lo strumento della legge ordinaria.

Escluso dalla corte cost., come s'è visto, che le convenzioni sui diritti umani (assieme alla Dichiarazione universale sui diritti umani del 1948) fossero riguardate (oltre che dalle rispettive leggi di esecuzione) dall'art. 10 cost. in quanto declaratorie di principi consuetudinari, e per questa via vigenti nel nostro ordinamento come parametri della legittimità delle leggi, va segnalata la tendenza a considerare le norme di origine convenzionale in questione come dotate di "particolare forza di resistenza" rispetto alla normativa ordinaria successiva ([9]). Da qui la rilevantissima conseguenza della neutralizzazione delle disposizioni di norme (meramente interne) successive ogniqualvolta la loro applicazione si risolva immotivamente nella violazione dei principi sanciti convenzionalmente ([10]).

D'altra parte, la conclusione nel senso della resistenza della normativa interna di adattamento alle convenzioni internazionali sui diritti umani rispetto alle norme incompatibili di pari grado successive, presuppone il riconoscimento dell'applicabilità diretta dei precetti convenzionali: la loro idoneità, cioè, ad essere invocati dall'individuo già nei confronti dei giudici nazionali, a tutela dei diritti in essi proclamati. Viene così definitivamente sanzionato il superamento della concezione che voleva le convenzioni stesse vigenti soltanto nei rapporti fra Stati.

7. Un'ulteriore prospettiva di analisi del problema dell'interazione fra l'ordinamento interno di uno Stato e le convenzioni internazionali da esso accettate è infine suggerita dalla sentenza della Corte suprema dei Paesi bassi del 30 marzo 1990, riportata oltre, che conviene brevemente richiamare.

Dovendosi far fronte alla richiesta statunitense di estradizione di

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([9]) Cfr. Cass. sez. un. 23 novembre 1989, *Polo Castro* (in *Riv. dir. internaz.*, 1990, p. 1038), nella quale, peraltro, alla norma convenzionale invocata più propriamente si attribuiva l'effetto di escludere una possibile interpretazione, con essa confliggente, della norma interna.

([10]) A questa più precisa conclusione perviene Cass. pen. 10 luglio 1993, *Medrano*, in *Riv. dir. internaz.*, 1994, p. 531.

un individuo per avere commesso un reato punibile (negli Stati Uniti) con la pena di morte, in forza della Convenzione sullo *status* dei componenti delle forze NATO del 1951, si trattava di decidere se garantire all'estradando il diritto a non essere sottoposto a tale pena secondo l'obbligo convenzionalmente assunto dall'Olanda in forza del Sesto Protocollo alla Convenzione europea sui diritti umani, in relazione all'art. 2, par. 1 della Convezione medesima. Constatata l'impossibilità di risolvere la questione sulla base di un criterio di gerarchia delle fonti internazionali rilevanti, la Corte scelse di considerare prevalente l'interesse individuale alla salvaguardia del diritto alla vita, anziché l'interesse dello Stato ad adempiere ad un obbligo assunto nei confronti di un altro Stato. In altri termini, la prevalenza di una norma nei riguardi di un'altra, si risolve nell'ambito dell'ordinamento di uno Stato sulla base dell'importanza dei valori ad esse rispettivamente sottesi.

Per questa via non è difficile ricavare un ulteriore contributo alla ricostruzione del convincimento degli Stati, e forse anche delle società umane in essi racchiuse, circa l'esistenza, nell'ordinamento internazionale, di norme prevalenti su altre in ragione del valore che sono chiamate a tutelare.

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Lo stato delle ratifiche degli strumenti internazionali sui diritti umani è pubblicato due volte l'anno nel fascicolo *Human Rights International Instruments. Chart of Ratifications as at June / December 19...*, UN Doc. ST/HR/4/Rev.(numero progressivo).

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Traduzioni italiane sono fornite nella Rivista "Pace, diritti dell'Uomo, Diritti dei Popoli".

Una fornita raccolta di testi internazionali sui diritti umani in formato elettronico si trova nel sito Internet della Fletcher School of Law & Diplomacy, Tufts University, Medford, Massachusetts; indirizzo Internet: <http://www.tufts.edu/fletcher/multilaterals.html>. Gli stessi documenti e i testi in italiano delle principali convenzioni si trovano nel sito Internet dell'Archivio Pace Diritti Umani della Regione Veneto, gestito dal Centro di studi e di formazione sui diritti dell'uomo e dei popoli dell'Università di Padova: <http://www.cepadu.unipd.it>.

II. Giurisprudenza

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1. *Commissione e Corte Europea dei Diritti dell'Uomo, Consiglio d'Europa, Strasburgo*

La raccolta ufficiale egli atti della Corte è pubblicata a cura del Segretariato della Corte stessa in due serie, entrambe pubblicate da Carl Heymanns Verlag KG, Köln - Berlin - Bonn - München:

— Serie A: *Judgments and Decisions / Arrêts et décisions*, in inglese e francese
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Indici e riferimenti fondamentali si trovano nello

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dati di indici analitici e sistematici e da numeri che pubblicano estratti e sintesi dei rapporti della Commissione, si segnala la rivista

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— Serie A (Advisory Opinions);
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3. *Comitati delle Nazioni Unite*

L'Onu pubblica gli atti dei vari Comitati sotto forma di rapporti annuali sottoposti all'Assemblea Generale. I rapporti contengono, tra l'altro, le osservazioni generali dei Comitati, le osservazioni relative ai rapporti degli Stati, le decisioni e constatazioni adottate in merito alle comunicazioni individuali.

Gli atti integrali delle attività dei Comitati sono pubblicati a cura del Centro per i diritti umani di Ginevra. I documenti dei Comitati sono identificati dalle seguenti sigle:

Comitato sui diritti umani (civili e politici): CCPR

I rapporti periodici degli Stati-parte sono siglati: CCPR/C /(numero progressivo).

I documenti relativi alle comunicazioni individuali hanno la sigla CCPR/(anno)/com./(numero progressivo).

I verbali delle sedute sono siglati nel seguente modo: CCPR/(anno)/SR/(numero progressivo, senza indicazione della sessione).

Le constatazioni del Comitato sono raccolte anche nel suo Rapporto all'Assemblea Generale dell'Onu: Annual Report of the Human Rights Committee to the UN General Assembly, UN Doc. A/(numero della sessione dell'Assemblea generale)/40.

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III. Monografie

Segnaliamo, senza pretesa di esaustività, alcuni lavori che possono servire per l'approfondimento della materia estremamente ampia del diritto internazionale dei diritti umani, con particolare riguardo ai volumi che si occupano delle problematiche di implementazione processuale di tale diritto.

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PARTE SECONDA

ATTI DI APPLICAZIONE GIURISDIZIONALE O QUASI GIURISDIZIONALE DELLE NORME INTERNAZIONALI SUI DIRITTI UMANI

A.

SISTEMA DELLA CONVENZIONE EUROPEA DI SALVAGUARDIA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI

1. European Commission of Human Rights, Strasbourg
   Decision of 11 October 1994 - Admissibility of application No. 22493/93 - *Huseyin and Devrim Berktay v. Turkey.*

2. Committee of Ministers of the Council of Europe, Strasbourg
   Resolution of 14 December 1993 – DH (93) 59.
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3. European Court of Human Rights, Strasbourg
   Judgment of 27 September 1995 – No. 17/1994/464/545 – *McCann and Others v. the United Kingdom.*

4. Committee of Ministers of the Council of Europe, Strasbourg
   Resolution DH (90) 8 – Concerning the judgment of the European Court of Human Rights of 7 July 1989 in the *Soering case*, adopted on 12 March 1990 at the 435th meeting of the Ministers' Deputies.

European Commission of Human Rights, Strasbourg

Decision on admissibility

Decision of 11 October 1994 – Admissibility of application No. 22493/93 – *Huseyin and Devrim Berktay v. Turkey*

Life-threatening conduct by police officers / Application of a Kurdish father and his son declared admissible

THE FACTS

The first applicant, Huseyin Berktay, a Turkish national, of Kurdish origin, born in 1949, is self-employed. He lives in Diyarbakir.

The second applicant, Devrim Berktay, is the son of the first applicant. He is aged 17 (age at the time of introduction of the application) and lives in Diyarbakir.

On 3 February 1993, at about 5.30 p.m., the first applicant's wife called the first applicant at his work. She informed him that his son Devrim had been arrested in town having forgotten to take with him his identification card. Police had arrived at their house and were conducting a search.

The first applicant immediately closed his premises and came to his home by taxi. When he arrived at his home he found three police officers engaged in the search.

At about 7 p.m. a member of the police party searching the house used the telephone to report to his superiors that the search had disclosed nothing incriminating.

After the telephone conversation between the police officer and his superior, other policemen (about six or seven the first applicant estimates) arrived at the house with his son Devrim, the second applicant.

The first applicant told his son: "Look my son if there is anything bring it out and don't be afraid". He did not believe that his son had committed a crime. Then, the police drove the first applicant and his wife out of the living room and shut the door on them. A few minutes later, the first applicant heard the screams of his son and forced the door. The policeman tried to stop him from opening the door. As the first applicant and his wife were trying to open the door the policeman opened it and said that their son had jumped off the balcony. The balcony was four floors up.

The applicant ran down the stairs to ground level and found his son unconscious on the asphalt road. He put his son on his back and took him by taxi to the State Hospital.

After the duty doctor had intervened as necessary, he said he would have to take a tomography. Because the tomography was to be taken at Giinsag Health Centre the first applicant wanted to take his son there but police officers insisted that he should first go to the Yenişehir police station and make a statement. De-

spite his appeals as to the need for him to bring his son to receive urgent medical care at the Health Centre, the police insisted he should first accompany them to the police station.

At Yenişehir station the police told him to sign a report which they had prepared themselves. The text of this report accused his son of being a militant. He refused to sign the report without having the incriminating parts removed. But he was told he could not leave the police station until he signed. The first applicant signed the report unwillingly and left the police station.

The tomography was taken at the Gunsag Health Centre and the first applicant took his son to the State Hospital. After the doctor had seen the tomography, stating that the second applicant would have to be under constant observation, he referred him to the Medical Faculty Hospital. There the second applicant was under intensive care for four days and was in a coma for at least 26 days.

Following the incident, the first applicant complained in person to the Public Prosecutor and asked that the necessary enquiry and investigation be conducted. He is awaiting action by him.

COMPLAINTS

The applicants complain of violations of Articles 2, 3 and 5 of the Convention and Article 1.1 of the First Protocol.

As to Article 2 the second applicant refers to the assault which resulted in his being thrown over a balcony, four floors from ground level, by a group of police officers. The second applicant also maintains that the same evening he was subject to a second life-threatening episode at the hands of the police, when his father was deliberately delayed from bringing him to the health centre for his tomography.

As to Article 3 the second applicant refers to the police actions in throwing him from the balcony. The first applicant complains that he was forced by the police to sign a report incriminating his son; he was told that until he did so he would be unable to bring his son to receive the emergency medical treatment.

As to Article 5 the second applicant complains that his liberty and security of person were denied arbitrarily through the behaviour of the police in detaining him with violence within his own home.

As to Article 1 of the First Protocol the first applicant complains that his property and possessions were arbitrarily interfered with by the police during the search of his house.

As to the exhaustion of domestic remedies the first applicant states that he complained to the Public Prosecutor and awaits action by him and that no further action or remedy on his part is possible without the Prosecutor making a decision. In the alternative he argues that there is an administrative practice of frustration of remedies in south-east Turkey which is approved or tolerated by those in authority, including at high levels of the police.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 30 July 1993 and registered on 4 August 1993.

On 11 October 1993 the Commission decided to communicate the application to the Turkish Government and to invite them to submit their observation, both on the admissibility and merits and to deal, in particular the following questions:

"1. Could the applicants be considered to have exhausted domestic remedies or, alternatively, to be dispensed from the obligation to exhaust such remedies (Article 26 of the Convention)?

2. Have there been violations of any of the Articles invoked by the applicants?"

The Government were requested to submit these observations within a time-limit of 12 weeks, which expired on 18 January 1994.

By letter of 17 January 1994 the Government asked for an extension of the time-limit for two months. On 9 February 1994 the Government were informed that the President of the Commission had granted the requests for extension of time-limits in the present case and in a number of other cases and decided that the observations in all these cases should be submitted, in half of the cases not later than 21 February 1994 and in the other half of the cases not later than 21 March 1994.

By letter of 11 March 1994 the Government asked for a further extension of the time-limit for one month as from 21 March 1994. On 13 April 1994 the Government were informed that the President had agreed to extend the time-limit until 22 April 1994.

No further communication having been received from the Government, the Secretary to the Commission informed the Government, by letter of 18 July 1994, that the Commission was expected to again examine the admissibility of the application at its session beginning on 10 October 1994 and that, if the Government submitted any observations before 18 August 1994, it would be possible for the Commission to take them into account together with any observations in reply received from the applicants.

No observations were received from the Government before 18 August 1994. However, by telefax of 10 October 1994, the Government submitted "preliminary observations" regarding the present case.

THE LAW

The applicants complain of violations of Articles 2, 3 and 5 of the Convention and Article 1 of the First Protocol.

As to Article 2 the second applicant complains of an assault which resulted in his being thrown over a balcony by police officers and of delay in bringing him to a health centre, both constituting life-threatening treatment.

As to Article 3 the second applicant again complains of the assault to which

he was subjected, whereas the first applicant complains of having been forced by the police to sign a report incriminating his son under the threat that his son would not otherwise receive the necessary medical treatment.

As to Article 5 the second applicant complains of having been detained with violence by the police in his own home.

As to Article 1.1 the first applicant complains that his property and possessions were arbitrarily interfered with by the police during the search of his house.

Article 2 of the Convention protects everyone's right to life, and Article 3 of the Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. According to Article 5 of the Convention, everyone has the right to liberty and security of person. Article 1 of the First Protocol provides that every person is entitled to the peaceful enjoyment of his possessions.

The Commission recalls that the application was communicated to the Turkish Government on 11 October 1993, that the Government were requested to submit their observations on the admissibility and merits not later than 18 January 1994, that the time-limit for the submission of observations in this case and in a number of other cases was subsequently extended, in half of the cases until 21 February 1994 and in the other half of the cases until 21 March 1994, and that the time-limit for the submission of observations in the present case was again extended until 22 April 1994.

The Commission further notes that no observations were submitted before 22 April 1994, nor was any further extension of the time-limit requested before that date. Furthermore, the Government were informed, by letter of 18 July 1994, that the Commission was expected to examine the admissibility of the case at its session beginning on 10 October 1994 and that, if the Government submitted any observations before 18 August 1994, it would still be possible for the Commission to take them into account together with any observations in reply received from the applicants.

However, no observations were submitted by the Government before 18 August 1994.

By telefax of 10 October 1994, the Government presented "preliminary observations", in which they indicated that a preliminary investigation against the security officers concerned was still going on and that, for that reason, the domestic remedies had not yet been exhausted. Moreover, the Government declared that observations on the facts of the case could only be submitted after the investigation had been completed. Consequently, the Government asked for the examination of the case to be adjourned until the investigation had been concluded.

The Commission recalls that, despite two extensions of the time-limit originally fixed, the Government did not submit any observations within the final time-limit which was 22 April 1994. Nor did the Government present any observations before 18 August 1994, this being the date indicated in the Commis-

sion's communication to the Government of 18 July 1994. The observations which were received on 10 October 1994 arrived so late that it was not possible for the Commission to obtain a reply from the applicants before examining the case during its session beginning on that same date.

The Commission further notes that the events which are the subject of the present application occurred in February 1993, i.e. one year and eight months ago, and that the application was communicated to the Government in October 1993, i.e. one year ago. In these circumstances, the Commission, having regard to the serious character of the complaints, does not consider it justified further to postpone its examination of the admissibility of the application. The Government's request for an adjournment of this examination cannot therefore be granted.

Moreover, as the Government's objection relating to the exhaustion of domestic remedies was raised long after the expiry of the time-limits fixed by the Commission in the present case and at such a late stage that it was not possible to obtain the applicants' comments on this objection, the Commission is of the opinion that the application cannot be rejected on that ground.

The Commission further finds that this application raises important questions of fact and law which cannot be resolved at the stage of the admissibility but require an examination on the merits. Consequently, the application cannot be considered manifestly ill-founded.

No other ground of inadmissibility is applicable to the present case.

For these reasons, the Commission, unanimously,
Declares the application admissible.

The Commission was composed of the following members:

MM. C.A. Nørgaard *President, S.* Trechsel, A. Weitzel, F. Ermacora, E. Susuttil, G. Jorundsson, A.S. Gozubuyuk. J.-C. Soyer, H.G. Schermers, H. Danelius, Mrs G.H. Thune, MM. F Martinez, C.L. Rozakis, Mrs J. Liddy, MM. L. Loucaides, J.-C. Geus, M.P. Pellonpaa, G.B. Reffi, M.A. Nowicki, L. Cabral Barreto, B. Conforti, N. Bratza, 1. Békés, J. Mucha, E. Konstantinov, D. Sváby, G. Ress, and Mr H.C. Kruger, *Secretary to the Commission*

Committee of Ministers of the Council of Europe, Strasbourg

Friendly settlement

Resolution of 14 December 1993 – DH (93) 59

Friendly settlement in a case of alleged torture in Turkey / Sargin and Yagci v. Turkey

The Committee of Ministers, under the terms of Article 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"),

Having regard to the report drawn up by the European Commission of Human Rights in accordance with Article 31 of the Convention relating to the applications lodged on 3 July 1988 by Mr Nihat Sargin and Nabi Yagci against Turkey (Applications Nos. 14116/88 and 14117/88);

Whereas on 8 April 1991 the Commission transmitted the said report to the Committee of Ministers and whereas the period of three months provided for in Article 32, paragraph 1, of the Convention has elapsed without the case having been brought before the European Court of Human Rights in pursuance of Article 48 of the Convention;

Whereas in their applications the applicants complained of the conditions of their detention between 16 November and 5 December 1987, including treatment contrary to Article 3 of the Convention, of having been deprived of their freedom unlawfully, in violation of the provisions of Article 5 of the Convention, of infringements of the rights of the defence guaranteed by Article 6 of the Convention and of being subjected to prosecution in violation of Articles 9 and 10, taken together with Article 14 of the Convention;

Whereas the Commission declared the application admissible on 11 May 1989 and in its report adopted on 17 January 1991 expressed unanimously the opinion that there had violations of Articles 3 and 5, paragraphs 1, 3 and 4 of the Convention;

Whereas during the examination of the case the Committee of Ministers was informed that a friendly settlement had been reached between the applicants and the Government of Turkey on 15 September 1993. The settlement recalls the case's procedural history and states:

"The parties have agreed on the terms set out below with a view to conforming to the report of the Commission and to reaching a friendly settlement on the basis of respect for human rights as defined in the Convention:

1. It has been established that "...the legislative improvements which have already been put into effect by the Government and the draft amendments which are either in the process or have been submitted to the Grand National Assembly....", as stated in the letter dated 18 February 1993 (no. 131) of the Ministry

of Foreign Affairs which is a supplement to this Protocol, are in conformity with the requests of the applicants and that they meet the claims of the applicants to a great extent.

2. With reference to the applications (Nos. 14116/88 and 14117/88), the decision of admissibility dated 11 May 1989 and the report of the Commission dated 17 January 1991, the Government will pay for "just satisfaction", the sums of

a) 1,316,700,000 TL [Turkish pounds, about US $ 96,000] (includes all expenses) to Mr Nihat Sargin,

b) 1,316,700,000 TL [Turkish pounds] (includes all expenses) to Mr Nabi Yagci.

3. The applicants reserve all their rights concerning the applications they have made other than the ones mentioned in the text of the present settlement. Subject to the above-mentioned conditions, the applicants declare that they have no other claims from the Government.";

Having invited the Government of Turkey to inform it of the measures taken for the execution of the undertakings attached to the solution of the case;

Having received from the Government of Turkey, in the course of the Committee of Ministers' examination of the case, the information, as regards the measures taken in consequence of the friendly settlement, which appears in the Appendix of this Resolution;

Having satisfied itself that the Government of Turkey has paid to each applicant on 10 December 1993 the sum of 1,316,700,000 Turkish pounds;

Having noted the Government of Turkey's reasoned request that there be no publication of the report of the Commission in this case;

Finds, after having taken note of the information supplied by the Government of Turkey, that the solution reached is based on respect for human rights as defined in the Convention;

Decides therefore, under Rule 6 bis of the Rules adopted by the Committee of Ministers for the application of Article 32 of the Convention, to discontinue its examination of the present case and not to authorise the publication of the report adopted by the Commission in this case.

Appendix to Resolution DH (93) 59

Information provided by the Government of Turkey during the examination of the Sargin and Yagci by the Committee of Ministers

The Law of 12 April 1991 on Combat against Terrorism and Attacks on the Security of the State has abrogated Articles 140 and 141 of the Turkish Criminal Code. Such Articles were at the basis of the charges brought to the applicants in the predict case. This law also has defined the crime of terrorism with greater precision. On 1 December 1992, Law No. 3842 made important amendments to the Code of Criminal Procedure, the Law on State Security Courts, the Law regarding the Combat against Terrorism and Attacks on the Security of the State, the Law on the State of Emergency and the Law on the

Powers and Duties of the Police. The most important elements of these reforms are that:

— the jurisdiction of the State Security Courts has been subjected to further limitations;
— the period of police custody has been reduced for those crimes which earlier fell within the Security Courts' jurisdiction;
— this reduction has also been made applicable in regions in a state of emergency;
— the interested person has obtained the right to challenge the police custody before a judge;
— the person concerned has been given a right to have access to a lawyer already from the very beginning of the police custody;
— efficient safeguards have been introduced in order to prevent methods of interrogation which might raise questions under Article 3 of the European Convention on Human Rights – thus Article 13 of the Law No. 3842, which amends Article 135a of the Code of Criminal Procedure, states:

> "The free declaration of the person giving the statement or of the accused shall prevail. No impediments to this shall be imposed by way of maltreatment, torture, the administration of drugs by force, exhausting, deceiving, physical force or violence, using certain devices, or other similar methods or physically or mentally demeaning procedures.
>
> No promise of advantage shall be made which is contrary to the law. Any statements made as a consequence of any of the forbidden procedures as described in the preceding paragraphs being imposed shall be deemed not to have the value of evidence even with the person's consent.";

— Article 13 of Law No. 3842 applies also, in accordance with Article 31 of the same Law, in the proceedings before the State Security Courts.

European Court of Human Rights, Strasbourg

Judgment

Judgment of 27 September 1995 – No. 17/1994/464/545 – *McCann and Others v. the United Kingdom*

Killing by members of the security forces of three members of the IRA suspected of involvement in a bombing mission declared, by ten votes to nine, contrary to Article 2 ECHR / McCann and Others v. the United Kingdom

1. Background to the case

This case originated in an application lodged with the Commission in August 1991 by three Irish and United Kingdom nationals, Margaret McCann, Daniel Farrell and John Savage. The applicants are parents of Daniel McCann, Mairead Farrell and Sean Savage, who were shot dead on 6 March 1988 in Gibraltar by members of the Special Air Service (the "SAS"), which is a regiment of the British Army.

Prior to 4 March 1988, the United Kingdom, Spanish and Gibraltar authorities were aware that the Provisional IRA were planning a terrorist attack on Gibraltar. On that date it was reported that an IRA "active service unit" had been sighted in Malaga in Spain. By 5 March the intelligence assessment of the British and Gibraltar authorities was that the IRA unit (which had been identified) would carry out an attack by means of a car bomb which would probably be detonated by a remote control device. It was planned to arrest the members of the unit after they had brought the car into Gibraltar, which would enable evidence to be secured for use at a subsequent trial. However, the members of the unit were considered by the authorities to be dangerous terrorists who would almost certainly be armed and who would be likely, if confronted by security forces, to use their weapons or detonate the bomb.

Sean Savage was seen in the afternoon of 6 March 1988 parking a car in Gibraltar. He was later seen, together with Daniel McCann and Mairead Farrell, staring towards the spot where the car was parked. After all three had moved away from the car, a bomb disposal expert reported after cursory visual examination that he regarded it as a possible car bomb.

It was decided at this point that the three should be arrested. Soldiers of the SAS in plain clothes were standing by for that purpose. Control of the operation was handed over by the Gibraltar Police Commissioner to their commanding officer.

McCann and Farrell separated from Savage. They were followed by two of the soldiers. When McCann looked round, one of the soldiers drew a pistol and shouted a command to stop. McCann moved his hand across his body; Farrell

made a sudden movement towards her handbag. Thinking that they were both going for remote control devices to set off the car bomb, the soldiers fired several shots at close range killing both of them.

Savage was followed by two other soldiers. When gunfire from the shooting of McCann and Farrell rang out, he spun round and faced the soldiers following him. One of the soldiers shouted a command to stop and drew his pistol. Savage moved his right hand towards his hip. Fearing that he was reaching for a remote control device, the soldiers fired shots at close range killing him.

According to pathologists' evidence, Farrell was hit by eight bullets, McCann by five and Savage by sixteen.

No weapons or detonator devices were found on the bodies of the three suspects. The car which had been parked by Savage was revealed on inspection not to contain any explosive device or bomb. However, another car, subsequently discovered by the Spanish police in Marbella in Spain, was found to contain an explosive device consisting of 64 kilograms of Semtex explosive, around which were packed 200 rounds of ammunition, with two timer devices. This car had been hired by Farrell under a false name.

An inquest by the Gibraltar Coroner into the killings was opened on 6 September 1988. It was presided over by the Coroner who sat with a jury chosen from the local population. Evidence was heard from 79 witnesses, including the soldiers, police officers and surveillance personnel involved in the operation as well as pathologists, forensic scientists and experts on explosive devices. Pursuant to certificates issued by the Government, certain information, such as the identities, training, equipment and activities of the military and security-service witnesses, was not disclosed. On 30 September 1988 the jury returned verdicts of lawful killing.

Dissatisfied with these verdicts, the applicants commenced actions against the Ministry of Defence in the High Court of Justice in Northern Ireland on 1 March 1990. The Secretary of State for Foreign Affairs, however, issued certificates excluding proceedings against the Crown. The applicants unsuccessfully sought leave to apply for judicial review to challenge the legality of the certificates. The actions were finally struck off the list on 4 October 1991.

In their application to the Commission, the applicants complained that the killings of Daniel McCann, Mairead Farrell and Sean Savage constituted a violation of Article 2 of the Convention, which protects the right to life.

The application (No. 18984/91) was lodged with the Commission on 14 August 1991; it was declared admissible on 3 September 1993.

The Commission drew up a report on 4 March 1994 in which it established the facts of the case and expressed the opinion that there had been no violation of Article 2 (eleven votes to six).

The Commission referred the case to the Court on 20 May 1994.

2. Decision arrived at The judgment (Grand Chamber of the Court)

The European Court of Human Rights held, by ten votes to nine, that there had been a violation of Article 2 of the Convention. The Court, sitting in a Grand Chamber, held unanimously that the respondent State is to pay to the applicants £38,700 under Article 50 in respect of costs and expenses – less 37,731 French francs received by way of legal aid – but rejected the applicants' claim for damages.

Separate opinions: one, see below.

3. Summary*

United Kingdom – the killing by members of the security forces of three members of the IRA (Irish Republican Army) suspected of involvement in a bombing mission

I. Article 2 of the Convention

A. Interpretation of Article 2

1. General approach

Provision is one of the most fundamental in the Convention and must be strictly construed – paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes situations where it is permitted to "use force" which may result, as an unintended outcome, in the loss of life – the use of force must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c).

In assessing the actions under examination Court must consider not only the actions themselves but also such matters as their planning and control.

2. The obligation to protect life

(a) Compatibility of national law and practice with Article 2 standards

Not the role of Convention institutions to examine *in abstracto* compatibility of national law with the Convention – in present case, the differences between the national and Convention standards not sufficiently great that a violation could be found on this ground alone.

(b) Adequacy of Inquest proceedings as an investigative mechanism

A general legal prohibition of arbitrary killing would be ineffective if no procedure for reviewing lawfulness of the use of lethal force by State authorities existed – in present case, lawyers were able to examine and cross-examine key witnesses during the Inquest proceedings – alleged shortcomings in the proceedings did not hamper a thorough, impartial and careful examination.

B. Application of Article 2 to facts of the case

1. General approach to evaluation of the evidence

Primarily for Commission to establish and verify facts – Court takes its findings in instant case to be accurate and reliable; however, Court must make its own as-

* This summary by the registry does not bind the Court

sessment whether facts disclose violation of Article 2 – it is not assessing the criminal responsibility of those directly or indirectly concerned.

2. Applicants' allegation that killings were premeditated

Allegation rejected as unsubstantiated: not established that there was an execution plot at highest level of command in the Ministry of Defence or in Government, or that Soldiers A, B, C and D had been so encouraged or instructed by superior officers or that they had decided on their own initiative to kill the suspects – nor is there evidence of implicit encouragement by authorities or hints and innuendoes to execute suspects – the fact that the SAS (Special Air Services) was involved did not amount to evidence that the killings were intended.

3. Conduct and planning of operation

(a) Preliminary considerations

Court must have regard to dilemma confronting the authorities – on one hand, duty to protect the lives of people in Gibraltar and, on the other, to have minimum resort to use of lethal force – also to be borne in mind that (1) authorities confronted by members of IRA convicted of bombing offences and by a known explosives expert and (2) that authorities had ample opportunity to plan their reaction – nevertheless, they were obliged to formulate their policies on basis of incomplete hypotheses.

Court must scrutinise not only whether force used was strictly proportionate to aim of protecting lives but whether operation was planned and controlled so as to minimise, to greatest extent possible, recourse to lethal force.

(b) Actions of the soldiers

Court accepts that soldiers honestly believed that necessary to shoot the suspects to prevent them from detonating a bomb and causing serious loss of life.

Use of force under Article 2 may be justified where based on honest belief which, for good reasons, is perceived to be valid but which subsequently turns out to be mistaken.

Having regard to the dilemma confronting authorities, the soldiers' actions did not, in themselves, give rise to violation of this provision.

(c) Control and organisation of the operation

Court questioned why the suspects were not arrested at the border and why decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission.

Insufficient allowances made for possibility that intelligence assessments erroneous – for example, suspects might have been on reconnaissance mission; or were unlikely to have been prepared to explode the bomb as two of them strolled towards border area, or to have set up transmitter in advance to enable them to detonate supposed bomb – in addition, description of detonation device as a "button job" oversimplified true nature of such devices.

The above and the definite reporting of the car-bomb which could be detonated at press of button, meant that a series of working hypotheses were conveyed to soldiers A, B, C and D as certainties, thereby making use of lethal force almost unavoidable.

In addition, soldiers trained to continue shooting until suspect dead – against this background, authorities bound by obligation to respect life to exercise the greatest of care in evaluating information before transmitting it to soldiers whose use of firearms automatically involved shooting to kill – such reflex action lacked the degree of caution in use of firearms to be expected from law enforcement per-

sonnel in democratic society, even when dealing with dangerous terrorist subjects – it suggests lack of appropriate care in the control and organisation of arrest operation.

In light of above, Court not persuaded that killings constituted use of force which was no more than absolutely necessary in defence of persons from unlawful violence.

Conclusion: violation (ten votes to nine).

II. Article 50 of the Convention

A. Pecuniary and non-pecuniary damage: Not appropriate to make award since terrorist suspects had been intending to plant bomb in Gibraltar – claim dismissed.

B. Costs and expenses: partial reimbursement awarded.

Commission: respondent State to pay specified sums to applicants (unanimously).

Court's case-law referred to

18. 1.1978, Ireland v. the United Kingdom
6. 9.1978, Klass and Others v. Germany
21. 2.1986, James and Others v. the United Kingdom
7. 7.1989, Soering v. the United Kingdom
20. 3.1991, Cruz Varas and Others v. Sweden
22. 9.1993, Klaas v. Germany
9.12.1994, Holy Monasteries v. Greece
23. 3.1995, Loizidou v. Turkey (Preliminary objections)

As to the facts

12. The facts set out below, established by the Commission in its report of 4 March 1994 (see paragraphs 132 and 142 below), are drawn mainly from the transcript of evidence given at the Gibraltar Inquest (see paragraph 103 below).

I. *Particular circumstances of the case*

13. Before 4 March 1988, and probably from at least the beginning of the year, the United Kingdom, Spanish and Gibraltar authorities were aware that the Provisional IRA (Irish Republican Army – "IRA") were planning a terrorist attack on Gibraltar. It appeared from the intelligence received and from observations made by the Gibraltar police, that the target was to be the assembly area south of Ince's Hall where the Royal Anglian Regiment usually assembled to carry out the changing of of the guard every Tuesday at 11.00 hours.

14. Prior to 4 March 1988, an advisory group was formed to advise and assist Mr Joseph Canepa, the Gibraltar Commissioner of Police ("the Commissioner"). It consisted of Soldier F (senior military adviser and officer in the Special Air Service or "SAS"), Soldier E (SAS attack commander), Soldier G (bomb disposal adviser), Mr Colombo (Acting Deputy Commissioner of Police), Detective Chief Inspector Ullger, attached to Special Branch, and Security Service of-

ficers. The Commissioner issued instructions for an operational order to be prepared to deal with the situation.

A. *Military rules of engagement*

15. Soldier F and his group, including Soldier E and a number of other SAS soldiers, had arrived in Gibraltar prior to 4 March 1988. Preliminary briefings had been conducted by the Ministry of Defence in London. According to the Military Rules of Engagement (entitled "Rules of Engagement for the Military Commander in Operation Flavius") issued to Soldier F by the Ministry of Defence, the purpose of the military forces being in Gibraltar was to assist the Gibraltar police to arrest the IRA active service unit ("ASU") should the police request such military intervention. The Rules also instructed F to operate as directed by the Commissioner.

16. The Rules also specified the circumstances in which the use of force by the soldiers would be permissible as follows:

> "Use of force
>
> 4. You and your men will not use force unless requested to do so by the senior police officer(s) designated by the Gibraltar Police Commissioner; or unless it is necessary to do so in order to protect life. You and your men are not then to use more force than is necessary in order to protect life...
>
> Opening fire
>
> 5. You and your men may only open fire against a person if you or they have reasonable grounds for believing that he/she is currently committing, or is about to commit, an action which is likely to endanger your or their lives, or the life of any other person, and if there is no other way to prevent this.
>
> Firing without warning
>
> 6. You and your men may fire without warning if the giving of a warning or any delay in firing could lead to death or injury to you or them or any other person, or if the giving of a warning is clearly impracticable.
>
> Warning before firing
>
> 7. If the circumstances in paragraph 6 do not apply, a warning is necessary before firing. The warning is to be as clear as possible and is to include a direction to surrender and a clear warning that fire will be opened if the direction is not obeyed."

B. *Operational Order of the Commissioner*

17. The Operational Order of the Commissioner, which was drawn up on 5 March 1988, stated that it was suspected that a terrorist attack was planned in Gibraltar and that the target was highly probably the band and guard of the First Battalion of the Royal Anglian Regiment during a ceremonial changing of the guard at Ince's Hall on 8 March 1988. It stated that there were "indications that the method to be used is by means of explosives, probably using a car bomb". The intention of the operation was then stated to be

> "a. To protect life
> b. To foil the attempt

c. To arrest the offenders
d. The securing and safe custody of the prisoners".

18. The methods to be employed were listed as police surveillance and having sufficient personnel suitably equipped to deal with any contingency. It was also stated that the suspects were to be arrested by using minimum force, that they were to be disarmed and that evidence was to be gathered for a court trial. Annexed to the order were, *inter alia*, lists of attribution of police personnel, firearms rules of engagement and a guide to firearms use by police (see paragraphs 136 and 137 below).

C. *Evacuation plan*

19. A plan for evacuation of the expected area of attack was drawn up on 5 March 1988 by Chief Inspector Lopez. It was to be put into effect on Monday or Tuesday (7-8 March). It included arrangements to evacuate and cordon off the area around Ince's Hall to a radius of 200 metres, identified the approach roads to be closed, detailed the necessary traffic diversions and listed the personnel to implement the plan. The plan was not, however, distributed to other officers.

D. *Joint operation room*

20. The operation in Gibraltar to counter the expected terrorist attack was run from a joint operations room in the centre of Gibraltar. In the operations room there were three distinct groups – the army or military group (comprising the SAS and bomb disposal personnel), a police group and the surveillance or security service group. Each had its own means of communication with personnel on the ground operated from a separate control station. The two principal means of communication in use were, however, the two radio-communication networks known as the surveillance net and the tactical or military net. There was a bomb disposal net which was not busy and while the police had a net, it was not considered secure and a telephone appears to have been used for necessary communications with the Central Police Station.

E. *First sighting of the suspects in Spain on 4 March 1988*

21. On 4 March 1988, there was a reported sighting of the ASU in Malaga in Spain. As the Commissioner was not sure how or when they would come to Gibraltar surveillance was mounted.

F. *Operational briefing on 5 March 1988*

22. At midnight between 5 and 6 March 1988, the Commissioner held a briefing which was attended by officers from the Security Services (including from the surveillance team Witnesses H, I, J, K, L, M and N), military personnel (including Soldiers A, B, C, D, E, F and G) and members of the Gibraltar Police (Officers P, Q and R and Detective Chief Inspector Ullger, Head of Special

Branch, and Detective Constable Viagas). The Commissioner conducted the police aspect of the briefing, the members of the Security Services briefed on the intelligence aspects of the operation, the head of the surveillance team covered the surveillance operation and Soldier E explained the role of the military if they were called on for assistance. It then appears that the briefing split into smaller groups, E continuing to brief the soldiers under his command but in the same location. The Commissioner also explained the rules of engagement and firearms procedures and expressed the importance to the police of gathering evidence for a subsequent trial of the terrorists.

23. The briefing by the representative of the Security Services included *inter alia* the following assessments:

> a. The IRA intended to attack the changing of the guard ceremony in the assembly area outside Ince's Hall on the morning of Tuesday 8 March 1988;
>
> b. An ASU of 3 would be sent to carry out the attack, consisting of Daniel McCann, Sean Savage and a third member, later positively identified as Mairead Farrell. McCann had been previously convicted and sentenced to 2 years' imprisonment for possession of explosives. Farrell had previously been convicted and sentenced to 14 years' imprisonment for causing explosions. She was known during her time in prison to have been the acknowledged leader of the IRA wing of prisoners. Savage was described as an expert bomb-maker. Photographs were shown of the three suspects;
>
> c. The three individuals were believed to be dangerous terrorists who would almost certainly be armed and who, if confronted by security forces, would be likely to use their weapons;
>
> d. The attack would be by way of a car bomb. It was believed that the bomb would be brought across the border in a vehicle and that it would remain hidden inside the vehicle;
>
> e. The possibility that a "blocking" car- i.e. a car not containing a bomb but parked in the assembly area in order to reserve a space for the car containing the bomb – would be used had been considered, but was thought unlikely.

This possibility was discounted, according to Senior Security Services Officer O in his evidence to the Inquest, since (1) it would involve two trips; (2) it would be unnecessary since parking spaces would be available on the night before or on a Tuesday morning; (3) there was the possibility that the blocking car would itself get blocked by careless parking.

The assessment was that the ASU would drive in at the last moment on Monday night or on Tuesday. On the other hand Chief Inspector Lopez, who was not present at the briefing, stated that he would not have brought in a bomb on Tuesday since it would be busy and difficult to find a parking space.

1. *Mode of detonation of bomb*

24. Various methods of detonation of the bomb were mentioned at the briefing: by timing device, by RCIED (radio-controlled improvised explosive device) and by command wire. This last option which required placing a bomb connected to a detonator by a wire was discounted as impractical in the circum-

stances. The use of a timer was, according to O, considered highly unlikely in light of the recent IRA explosion of a bomb by timer device at Enniskillen which had resulted in a high number of civilian casualties. Use of a remote-control device was considered to be far more likely since it was safer from the point of view of the terrorist who could get away from the bomb before it exploded and was more controllable than a timer which once activated was virtually impossible to stop.

25. The recollection of the others present at the briefing differs on this point. The police witnesses remembered both a timer and a remote-control device being discussed. The Commissioner and his Deputy expected either type of device. Chief Inspector Ullger recalled specific mention of the remote-control device as being more likely. The surveillance officers also thought that an emphasis was placed on the use of a remote-control device.

26. The military witnesses in contrast appear to have been convinced that it would certainly be a remote-control device. Soldier F made no mention of a timer but stated that they were briefed that it was to be a "button job", that is, radio-controlled so that the bomb could be detonated at the press of a button. He believed that there had been an IRA directive not to repeat the carnage of a recent bomb in Enniskillen and to keep to a minimum the loss of life to innocent civilians. It was thought that the terrorists knew that if it rained the parade would be cancelled and in that event, if a timer was used, they would be left with a bomb that would go off indiscriminately.

Soldier E also stated that at the briefing they were informed that the bomb would be initiated by a "button job". In answer to a question by a juror, he stated that there had been discussion with the soldiers that there was more chance that they would have to shoot to kill in view of the very short time factor which a "button job" would impose.

27. Soldiers A, B, C and D stated that they were told at the briefing that the device would be radio-controlled. Soldier C said that E stressed to them that it would be a "button job".

2. *Possibility that the terrorists would detonate the bomb if confronted*

28. Soldier O stated that it was considered that, if the means of detonation was by radio control, it was possible that the suspects might, if confronted, seek to detonate the device.

Soldier F also recalled that the assessment was that any one of the three could be carrying a device. In answer to a question pointing out the inconsistency of this proposition with the assessment that the IRA wished to minimise civilian casualties, F stated that the terrorists would detonate in order nonetheless to achieve some degree of propaganda success. He stated that the briefing by the intelligence people was that it was likely if the terrorists were cornered they would try to explode the bomb.

Soldier E confirmed that they had been told that the three suspects were ruthless and if confronted would resort to whatever weapons or "button jobs"

they carried. He had particularly emphasised to his soldiers that there was a strong likelihood that at least one of the suspects would be carrying a "button job".

29. This was recalled, in substance, by Soldiers C and D. Soldier B did not remember being told that they would attempt to detonate if arrested but was aware of that possibility in his own mind. They were warned that the suspects were highly dangerous, dedicated and fanatical.

30. It does not appear that there was any discussion at the briefing as to the likely size, mode of activation or range of a remote-control device that might be expected. The soldiers appear to have received information at their own briefings. Soldier F did not know the precise size a radio detonator might be, but had been told that the device would be small enough to conceal on the person. Soldier D was told that the device could come in a small size and that it could be detonated by the pressing of just one button.

31. As regarded the range of the device, Soldier F said that the military were told that the equipment which the IRA had was capable of detonating a radio-controlled bomb over a distance of a mile and a half.

G. *Events on 6 March 1988*

1. *Deployment of Soldiers A, B, C and D*

32. The operations room opened at 8.00 hours. The Commissioner was on duty there from 10.30 to 12.30 hours. When he left, Deputy Commissioner Colombo took his place. Members of the surveillance teams were on duty in the streets of Gibraltar as were Soldiers A, B, C and D and members of the police force involved in the operation. Soldiers A, B, C and D were in civilian clothing and were each armed with a 9mm Browning pistol which was carried in the rear waistband of their trousers. Each also carried a radio concealed on their person. They were working in pairs. In each pair, one was in radio communication on the tactical net and the other on the surveillance net. Police officers P, Q and R, who were on duty to support the soldiers in any arrest, were also in plain clothes and armed.

2. *Surveillance at the border*

33. On 6 March 1988, at 8.00 hours, Detective Constable Huart went to the frontier to keep observation for the three suspects from the computer room at the Spanish immigration post. He was aware of the real names of the three suspects and had been shown photographs. The Spanish officers had photographs. The computer room was at some distance from the frontier crossing point itself. The Spanish officers at the immigration post showed him passports by means of a visual aid unit. It appears that they only showed him the passports of those cars containing two men and one woman. Several pictures were flashed up for him during the course of the day but he did not recognise them. At the Inquest, under cross examination, he at first did not recall that he had been given any of the aliases that the three suspects might be employing. Then, how-

ever, he thought that he remembered the name of Coyne being mentioned in relation to Savage and that at the time he must have known the aliases of all three, as must the Spanish officers. Chief Inspector Ullger, who had briefed Huart however, had no recollection of the name of Coyne being mentioned before 6 March and he only recalled the name of Reilly in respect of McCann. However, if Huart recalled it, he did not doubt that it was so.

34. On the Gibraltar side of the border. the customs officers and police normally on duty were not informed or involved in the surveillance on the basis that this would involve information being provided to an excessive number of people. No steps were taken to slow down the line of cars as they entered or to scrutinise all passports since it was felt that this might put the suspects on guard. There was however a separate surveillance team at the border and, in the area of the airfield nearby, an arrest group. Witness M who led a surveillance team at the frontier expressed disappointment at the apparent lack of co-operation between the various groups involved in Gibraltar but he understood that matters were arranged that way as a matter of security.

35. At the Inquest, Chief Inspector Ullger stated, when pressed about the failure to take more scrupulous measures on the Gibraltar side,

> "In this particular case, we are talking about dangerous terrorists. We were talking about a very, very major and delicate operation – an operation that had to succeed. I think the only way it could have succeeded is to allow the terrorists to come in and for the terrorists to have been dealt with in the way they were dealt with as far as the surveillance is concerned."

36. While Soldiers E and F made reference to the preferred military option as being to intercept and arrest the suspects in the frontier area, it appears not to have been pursued with any conviction, on the assumption that identification would not be possible in light of the brief time available for identification to be made (10 to 15 seconds per car) and the lack of prior warning from the Spanish side.

3. *Arrest options: Advisory Group policy*

37. Soldier F stated that the military option had been refined down to the preferred option of arresting the suspects when they were on foot in the assembly area, to disarm them and then to defuse the bomb. He referred also to four key indicators formulated by the Advisory Group with a view to guiding the Commissioner:

> 1. if a car was driven into Gibraltar and parked in the assembly area by an identified member of the active service unit;
> 2. if a car was driven into the Assembly area by an ASU member without prior warning;
> 3. the presence in Gibraltar of the other members of the ASU;
> 4. if there was clear indication that terrorists having parked their car bomb intended to leave Gibraltar, that is to say, they were heading for the border.

The plan was for an arrest to be carried out once all the members of the

ASU were present and identified and they had parked a car which they intended to leave. Any earlier action was considered premature as likely to raise suspicion in any unapprehended members of the ASU with possible risk resulting and as leaving no evidence for the police to use in court.

4. *Sighting of Mr Savage*

38. Detective Constable Viagas was on surveillance duty in a bank which had a view over the area in which the car driven in by the terrorists was expected to be parked. At about 12.30 hours, he heard a report over the surveillance net that a car had parked in a parking space in the assembly area under observation. A member of the Security Service commented that the driver had taken time to get out and fiddled with something between the seats. D.C. Viagas saw the man lock the car door and walk away towards the Southport Gate. One of the Security Service officers present consulted a colleague as to possible identification but neither was sure. A field officer was requested to confirm the identity. D.C. Viagas could not himself identify the man from his position.

39. Witness N of the Security Service team on surveillance in the car park in the assembly area recalled that at 12.45 hours a white Renault car drove up and parked, the driver getting out after two to three minutes and walking away.

A young man resembling the suspect was spotted next at about 14.00 hours in the area. Witness H, who was sent to verify his identification, saw the suspect at about that time and recognised him as Savage without difficulty. Witness N also saw the suspect at the rear of John Mackintosh Hall and at 14.10 hours reported over the radio to the operations room that he identified him as Savage and also as the man who had earlier parked the car in the assembly area.

Officer Q who was on duty on the street recalled hearing over the surveillance net at about 14.30 hours that Savage had been identified.

40. The Commissioner however did not recollect being notified about the identification of Savage until he arrived in the operations room at 15.00 hours. Colombo did not recall hearing anything about Savage either until it was reported that he had met up with two other suspects at about 14.50 hours. Soldiers E and F recalled however that a possible sighting of Savage was reported at about 14.30 hours. Soldier G also refers to the later sighting at 14.50 hours as the first identification of Savage.

41. There appears to have been a certain time-lag between information on the ground either being received in the operations room or being passed on. Soldiers E and F may have been more aware than the Commissioner of events since they were monitoring closely the information coming in over the nets, which apparently was not audible to the Commissioner where he sat at a table away from the control stations.

42. The suspect was followed for approximately an hour by Witness H who recalled that the suspect was using anti-surveillance techniques such as employing devious routes through the side streets. Witness N was also following

him, for an estimated 45 minutes, and considered that he was alert and taking precautions, for example, stopping round the corner at the end of alleyways to see who followed.

5. Sighting of Mr McCann and Ms Farrell

43. Witness M who was leading the surveillance at the border stated that two suspects passed the frontier at about 14.30 hours though apparently they were initially not clearly identified. They were on foot and reportedly taking counter-surveillance measures (Farrell looking back frequently). Their progress into Gibraltar was followed.

44. At 14.30 hours, Soldiers E and F recalled a message being received that there was a possible sighting of McCann and Farrell entering on foot. The Commissioner was immediately informed.

6. Sighting of three suspects in assembly area

45. At about 14.50 hours, it was reported to the operations room that the suspects McCann and Farrell had met with a second man identified as the suspect Savage and that the three were looking at a white Renault car in the car park in the assembly area.

Witness H stated that the three suspects spent some considerable time staring across to where a car had been parked, as if, in his assessment, they were studying it to make sure it was absolutely right for the effect of the bomb. D.C. Viagas also witnessed the three suspects meeting in the area of the car park, stating that all three turned and stared towards where the car was parked. He gave the time as about 14.55 hours. He stated that the Security Services made identification of all three at this moment.

At this moment, the possibility of effecting an arrest was considered. There were different recollections. Mr Colombo stated that he was asked whether he would hand over control to the military for the arrest but that he asked whether the suspects had been positively identified; he was told that there was 80 per cent identification. Almost immediately the three suspects moved away from the car through the Southport Gate. He recalled that the movement of the three suspects towards the south gave rise to some discussion as to whether this indicated that the three suspects were on reconnaissance and might return for the car. It was for this reason that the decision was taken not to arrest at this point.

46. At 15.00 hours, Mr Colombo rang the Commissioner to inform him that it was more and more likely to be McCann and Farrell. When the Commissioner arrived shortly afterwards, Mr Colombo informed him that the suspects McCann and Farrell had met up with a third person thought to be Savage and that an arrest had almost been made.

47. The Commissioner asked for positive identification of the three suspects. Identification was confirmed by 15.25 hours when it was reported to the operations room that the three suspects had returned to the assembly area and gone past looking at the car again. The three suspects continued north and away from the car. Soldiers E and F recalled that control was passed to the mili-

tary but immediately taken back as the Commissioner requested further verification of the identities of the suspects. The confirmation of identity which the Commissioner had requested was received almost immediately.

7. *Examination of the suspect car in the assembly area*

48. After the three suspects' identities had been confirmed and they had moved away from the assembly area, Soldier G examined the suspect car. He conducted an examination from the exterior without touching the car. He described it as a newish-looking white Renault. He detected nothing untoward inside the car or anything visibly out of place or concealed under the seats. He noted that the aerial of the car, which was rusty, was out of place with the age of the car. He was in the area for less than two minutes. He returned to the operations room and reported to the Commissioner that he regarded the car as a "suspect car bomb". At the Inquest, he explained that this was a term of art for a car parked in suspicious circumstances where there is every reason to believe that it is a car bomb and that it could not be said that it was not car bomb.

49. The Commissioner recalled that G had reported that it was a suspect bomb since there was an old aerial situated centrally of a relatively new car. He stated that as a result they treated it as a "possible car bomb".

50. Soldier F referred to the aerial as rendering the car suspicious and stated that this information was passed on to all the parties on the ground.

51. Soldier E was more categorical and stated that as far as G could tell "from a cursory visual examination he was able to confirm our suspicion that they were dealing with a car bomb".

52. Soldier A stated that he believed 100 per cent that there was a bomb in the debussing area, that the suspects had remote-control devices and were probably armed. This was what he had been told over the radio. Soldier C recalled that it had been confirmed by Soldier E that there was a device in Ince's Hall area which could be detonated by one of three suspects who was more likely to be Savage because he had been seen "fiddling" with something in the car earlier. He had also been told of the indication of an old aerial on a new car.

Soldier D said that it had been confirmed to him by Soldier E that there was a bomb there. To his recollection, no-one told them that there was a possibility that the three suspects might not be carrying the remote-control devices with them on the Sunday or that possibly they had not brought a bomb in. He had been told by Soldier E – whom he fully trusted – that there was a bomb in the car.

53. At the Inquest Soldier G was described as being the bomb disposal adviser. He had experience of dealing with car bombs in Northern Ireland but at the Inquest he stated in reply to various questions that he was neither a radio communications expert nor an explosives expert. He had not thought of de-activating the suspect bomb by unscrewing the aerial from the car. When it was

put to him in cross-examination, he agreed that to have attempted to unscrew the aerial would have been potentially dangerous.

8. *Passing of control to the military for arrest*

54. After receiving the report from Soldier G and in view of the fact that the three suspects were continuing northwards leaving the car behind, the Commissioner decided that the three suspects should be arrested on suspicion of conspiracy to murder. At 15.40 hours, he signed a form requesting the military to intercept and apprehend the suspects. The form, which had been provided in advance by the military, stated:

> "I, Joseph Luis Canepa, Commissioner of Police, having considered the terrorist situation in Gibraltar and having been fully briefed on the military plan with firearms, request that you proceed with the military option which may include the use of lethal force for the preservation of life."

After the form was signed, Soldier F walked across to the tactical net and issued instructions that the military should intervene.

Soldier E ascertained the positions of the soldiers by radio. Soldiers C and D had been visually monitoring the movement of the three suspects in Line Wall Road and Smith Dorrien Avenue. Soldiers A and B were making their way north through Casemates Square and into the Landport tunnel. The soldiers were informed that control had passed to them to make an arrest.

55. The evidence at the Inquest given by the soldiers and Police Officer R and D.C. Ullger was that the soldiers had practised arrest procedures on several occasions with the police before 6 March 1988. According to these rehearsals, the soldiers were to approach the suspects to within a close distance, cover the suspects with their pistols and shout "Stop. Police. Hands up." or words to that effect. They would then make the suspects lie on the ground with their arms away from their bodies until the police moved in to carry out a formal arrest. Further, D.C. Ullger stated that special efforts had been made to identify a suitable place in Gibraltar for the terrorists to be held in custody following their arrest.

56. On reaching the junction of Smith Dorrien Avenue with Winston Churchill Avenue, the three suspects crossed the road and stopped on the other side talking. Officer R, observing, saw them appear to exchange newspapers. At this point, Soldiers C and D were approaching the junction from Smith Dorrien Avenue. Soldiers A and B emerging from Landport tunnel also saw the three suspects at the junction from their position where the pathway to the tunnel joined Corral Road.

57. As the soldiers converged on the junction however, Savage split away from suspects McCann and Farrell turning south towards the Landport tunnel. McCann and Farrell continued north up the righthand pavement of Winston Churchill Avenue.

58. Savage passed Soldiers A and B, brushing against the shoulder of B. Soldier B was about to turn to effect the arrest but A told him that they should

continue towards suspects McCann and Farrell, knowing that C and D were in the area and that they would arrest Savage. Soldiers C and D, aware that A and B were following suspects McCann and Farrell, crossed over from Smith Dorrien Avenue and followed Savage.

9. *McCann and Farrell shootings*

59. The evidence of Soldiers A and B at the Inquest was to the following effect.

60. Soldiers A and B continued north up Winston Churchill Avenue after McCann and Farrell, walking at a brisk pace to close the distance. McCann was walking on the right of Farrell on the inside of the pavement. He was wearing white trousers and a white shirt, without any jacket. Farrell was dressed in a skirt and jacket and was carrying a large handbag.

61. When Soldier A was approximately ten metres (though maybe closer) behind McCann on the inside of the pavement, McCann looked back over his left shoulder. McCann appeared to look directly at A and the smile left his face, as if he had a realisation of who A was and that he was a threat.

Soldier A drew his pistol, intending to shout a warning to stop at the same time, though he was uncertain if the words actually came out. McCann's hand moved suddenly and aggressively across the front of his body. A thought that he was going for the button to detonate the bomb and opened fire. He shot one round into McCann's back from a distance of three metres (though maybe it may have been closer). Out of the corner of his eye, A saw a movement by Farrell. Farrell had been walking on the left of McCann on the side of the pavement next to the road. A saw her make a half turn to the right towards McCann, grabbing for her handbag which was under her left arm. A thought that she was also going for a button and shot one round into her back. He did not disagree when it was put to him that the forensic evidence suggested that he may have shot from a distance of three feet (see paragraph 1 II below). Then A turned back to McCann and shot him once more in the body and twice in the head. A was not aware of B opening fire as this was happening. He fired a total of five shots.

62. Soldier B was approaching directly behind Farrell on the roadside of the pavement. He was watching her. When they were three to four metres away and closing, he saw in his peripheral vision that McCann turned his head to look over his shoulder. He heard what he presumed was a shout from A which he thought was the start of the arrest process. At almost the same instant, there was firing to his right. Simultaneously, Farrell made a sharp movement to her right, drawing the bag which she had under left arm across her body. He could not see her hands or the bag and feared that she was going for the button. He opened fire on Farrell. He deemed that McCann was in a threatening position and was unable to see his hands and switched fire to McCann. Then he turned back to Farrell and continued firing until he was certain that she was no longer a threat, namely, her hands away from her body. He fired a total of seven shots.

63. Both soldiers denied that Farrell or McCann made any attempt to surrender with their hands up in the air or that they fired at the two suspects when they were lying on the ground. At the Inquest, Soldier A stated expressly that his intention had been to kill McCann "to stop him becoming a threat and detonating that bomb".

64. The shooting took place on the pavement in front of a Shell petrol station in Winston Churchill Avenue.

After the shooting, the soldiers put on berets so they would be recognised by the police. They noticed a police car, with its siren going, coming south from the sundial down the far side of Winston Churchill Ave. A number of policemen jumped out of the car and leapt the central barrier. Soldier A still had his pistol in his hand. He put his hands up in air and shouted "Police". A recalled hearing shooting from behind as the police car was approaching.

While neither of the soldiers was aware of the police car or siren until after the shooting, the majority of witnesses, including the police officers P, Q and R who were in the vicinity to support the soldiers in the arrest and a number of the surveillance team as well as civilian witnesses, recalled that the sound of the police siren preceded, if only by a very short time, the sound of the gunfire. Officers P and Q, who were watching from a relatively close distance, considered that Farrell and McCann reacted to the sound of the siren: Q was of the opinion that it was the siren that caused Farrell and McCann to stop and turn.

65. The arrival of the police car at the scene was an unintended occurrence. After the Commissioner had handed over control to the military at 15.40 hours, he instructed Mr Colombo to ensure that there was police transport available. Mr Colombo telephoned Chief Inspector Lopez at the Central Police Station, who in turn instructed the Controller Police Constable Goodman to recall the duty police car. The Controller recorded the call at 15.41 hours. He radioed the patrol car informing the officers that they were to return immediately. He did not know where the car was at the time or what the reason for the recall was. When Inspector Revagliatte who was in the car asked if it was urgent, the Controller told him it was a priority message and further instructions would be given on arrival.

66. At the time of the message, the police car was waiting in a queue of traffic in Smith Dorrien Avenue. Revagliatte told the driver to put on siren and beacons. The car pulled out into the opposite lane to overtake the queue of traffic. They cut back into the proper lane at the lights at the junction with Winston Churchill Avenue and continued north along Winston Churchill Avenue in the outer lane. As they passed the Shell garage, the four policemen in the car heard shots. Revagliatte instructed the driver to continue. When he looked back, he saw two persons lying on the pavement. The car went round the sundial roundabout and returned to stop on the other side of the road opposite the Shell garage. The police siren was on during this time. When the car stopped, the four policemen got out, three of them jumping the central barrier and Revagliatte walking round to arrive at the scene.

67. Officers P, Q and R were in the vicinity of the Shell petrol station and also arrived quickly on the scene of the McCann and Farrell shootings. Officers P and R placed their jackets over the bodies. Officer P dropped his gun while crouched and had to replace it in his holster. Officer Q and Revagliatte carried out a search of the bodies.

10. *Eye-witness accounts of the McCann and Farrell shootings*

68. The shooting took place on a fine Sunday afternoon, when there were many people out on the streets and the roads were busy with traffic. The Shell garage was also overlooked by a number of apartment buildings. The shooting consequently was witnessed by a considerable number of people, including police officers involved in the operation, police officers who happened to pass the area on other duties, members of the surveillance team and a number of civilians and off-duty policemen.

69. Almost all the witnesses who gave evidence at the Inquest recalled that Farrell had carried her bag under her right arm, not as stated by Soldiers A and B under her left arm. The Coroner commented in his summing-up to the jury that this might have had significance with regard to the alleged justification of the soldiers for opening fire, namely, the alleged movement of the bag across the front of her body.

70. More significantly, three witnesses, two of whom gave an interview on the controversial television documentary concerning the events "Death on the Rock", gave evidence which suggested that McCann and Farrell had been shot while lying on the ground. They stated that they had witnessed the shooting from apartment buildings overlooking the Shell petrol station (see paragraph 125 below).

71. Mrs Celecia saw a man lying on a pavement with another nearby with his hands outstretched: while she did not see a gun she heard shots which she thought came from that direction. After the noise, the man whom she had thought was shooting appeared to put something inside his jacket. When shown a photograph of the aftermath of the scene, Mrs Celecia failed to identify either Soldier A or B as the man whom she thought that she had seen shooting.

72. Mr Proetta saw a girl put her hands up though he thought it was more in shock than in surrender. After she had been shot and fallen to the ground, he heard another fusillade of shots. He assumed that the men nearby were continuing to fire but agreed that there was an echo in the area and that the sound could have come from the Landport tunnel area.

Mrs Proetta saw a man and a woman raise their hands over their shoulders with open palms. They were shot, according to her recollection, by men who jumped the barrier. When the bodies were on the ground, she heard further shots and saw a gun in the hand of a man crouching nearby, though she did not see any smoke or cartridges ejecting from the gun. She assumed since she saw a gun that the shots came from it. It also appears that once the bodies fell

they were obscured from her view by a low wall and all she saw was a man pointing in their direction.

73. Mr Bullock recalled seeing a man reeling backwards under fire with his hands thrown back. None of the other witnesses saw McCann or Farrell put their hands up or the soldiers shoot at the bodies on the ground.

74. Witness I, a member of the surveillance team, stated that he saw McCann and Farrell shot when they were almost on the ground, but not on the ground.

75. While the soldiers were not sure that any words of warning were uttered by Soldier A, four witnesses (Officers P and Q, Witness K and Police Constable Parody) had a clear recollection of hearing words "Police, stop" or words to that effect.

76. Officer P, who was approaching from the north and had reached the perimeter wall of the Shell garage, states that he saw McCann make a move as if going for a gun and that Farrell made a move towards her handbag which made him think that she was going for a detonator. Officer Q, who was watching from the other side of the road, also saw Farrell make a move towards her handbag, as did Police Constable Parody, an off-duty policeman watching from an overlooking apartment.

11. *The shooting of Savage*

77. At the Inquest the evidence of Soldiers C and D was to the following effect.

78. After the three suspects had split up at the junction, Soldier D crossed the road and followed Savage who was heading towards the Landport tunnel. Savage was wearing jeans, shirt and a jacket. Soldier C was briefly held up on the other side of the road by traffic on the busy road but was catching up as D closed in on Savage. D intended to arrest by getting slightly closer, drawing his pistol and shouting "Stop. Police. Hands up". When D was about three metres away, he felt that he needed to get closer because there were too many people about and there was a lady directly in line. Before D could get closer however, he heard gunfire to the rear. At the same time, C shouted "Stop". Savage span round and his arm went down towards his right hand hip area. D believed that Savage was going for a detonator. He used one hand to push the lady out of line and opened fire from about two to three metres away. D fired nine rounds at rapid rate, initially aiming into the centre of Savage's body, with the last two at his head. Savage corkscrewed as he fell. D acknowledged that it was possible that Savage's head was inches away from the ground as he finished firing. He kept firing until Savage was motionless on the ground and his hands were away from his body.

79. Soldier C recalled following after Savage, slightly behind D. Savage was about eight feet from the entrance to the tunnel but maybe more. C's intention was to move forward to make arrest when he heard shots to his left rear from the direction in which Farrell and McCann had headed. Savage span round. C

shouted "Stop" and drew his pistol. Savage moved his right arm down to the area of his jacket pocket and adopted a threatening and aggressive stance. C opened fire since he feared Savage was about to detonate the bomb. He saw something bulky in Savage's right hand pocket which he believed to be a detonator button. He was about five to six feet from Savage. He fired six times as Savage spiralled down, aiming at the mass of his body. One shot went into his neck an ;l another into his head as he fell. C continued firing until he was sure that Savage had gone down and was no longer in a position to initiate a device.

80. At the Inquest, both soldiers stated under cross examination that once it became necessary to open fire they would continue shooting until the person was no longer a threat. C agreed that the best way to ensure this result was to kill. D stated that he was firing at Savage to kill him and that this was the way that all soldiers were trained. Both soldiers, however, denied that they had shot Savage while he was on the ground.

Soldier E (the attack commander) stated that the intention at the moment of opening fire was to kill since this was the only way to remove the threat. He added that this was the standard followed by any soldier in the army who opens fire.

81. The soldiers put on berets after the incident to identify themselves to the police.

12. *Eye-witness accounts of the Savage shooting*

82. Witnesses H, I and J had been involved in surveillance of the three suspects in or about the Smith Dorrien/Winston Churchill area.

83. Witness H had observed Soldiers A and B moving after McCann and Farrell up Winston Churchill Avenue. He moved to follow Savage whom he noticed on the corner about to turn into the alleyway leading to the Landport tunnel. He indicated Savage to Soldiers C and D who were accompanying him at this point. While he was moving to follow Savage, H saw the McCann and Farrell shooting from a distance. He continued to follow after Savage who had gone into the alleyway. He heard a siren, a shout of "stop" and saw Savage spin round. The soldiers were five feet away from Savage. H then turned away and did not witness the shooting itself.

84. Witness I had met with Witness H and Soldier D and had confirmed that Savage had gone towards the Landport tunnel. Witness I entered the alleyway after the shooting had begun. He saw one or two shots being fired at Savage who was on the ground. He saw only one soldier firing from a distance of five, six or seven feet. He did not see the soldier put his foot on Savage's chest while shooting.

85. Witness J had followed after Savage when he had separated from McCann and Farrell. When Savage was twenty feet into the alleyway near a large tree, she heard noise of gunfire from behind and at that same time a police siren in fairly close proximity. Savage span round very quickly at the sound of gunfire,

looking very stunned. J turned away and did not see the shooting. When she turned round again, she saw Savage on his back and a soldier standing over him saying, "Call the police."

86. Mr Robin Mordue witnessed part of the shooting but as he fell to the ground himself and later took cover behind a car he saw only part of the incident. He did not recall Savage running. When he saw the soldier standing over Savage, there were no more shots.

87. The evidence of Mr Kenneth Asquez was surrounded by the most controversy. A handwritten statement made by him appears to have been used by Thames Television in its documentary "Death on the Rock" (see paragraph 125 below). The draft of an affidavit, prepared by a lawyer acting for Thames Television who interviewed Mr Asquez, but not approved by him, was also used for the script of the programme. In them, he alleged that while in a friend's car on the way to the frontier via Corral Road, he passed the Landport tunnel. He heard "crackers" and saw a man bleeding on the floor. He saw another man showing an ID card and wearing a black beret who had his foot on the dying man's throat and was shouting "Stop. It's OK. It's the police." At that instant, the man fired a further three to four shots. At the Inquest, he stated that the part of the statement relating to the shooting was a lie that he had made up. He appeared considerably confused and contradicted himself frequently. When it was pointed out to him that until the Inquest it had not become known that the soldiers wore berets (no newspaper report had mentioned the detail), he supposed that he must have heard it in the street. When asked at the Inquest why he had made up the statement, he referred to previous illness, pressure at work and the desire to stop being telephoned by a person who was asking him to give an interview to the media.

88. Miss Treacy claimed that she was in the path leading from the tunnel and that she was between Savage and the first of the soldiers as the firing began, though not in the line of fire. She recalled that Savage was running and thought that he was shot in the back as he faced towards the tunnel. She did not see him shot on the ground. Her account contained a number of apparent discrepancies with the evidence of other witnesses; she said the soldier shot with his left hand whereas he was in fact righthanded; no-one else described Savage as running; and she described the body as falling with feet towards the nearby tree rather than his head which was the way all the other witnesses on the scene described it. The Coroner in his summing-up thought that it might be possible to reconcile her account by the fact that Miss Treacy may have not been looking at Savage as he spun round to face the soldiers and that by the time she did look he was spinning round towards the tunnel in reaction to the firing.

89. Mr Bullock and his wife stated that a man pushed past them as they walked up Smith Dorrien Avenue to the junction and that they saw that he had a gun down the back of his trousers. They saw him meet up with another man, also with a gun in his trousers, on the corner of the alleyway to the Landport tunnel. The men were watching the shooting outside the Shell garage and

when the shooting stopped, they turned and ran out of sight. After that there was another long burst of shooting.

90. Another witness, Mr Jerome Cruz, however, who was in a car in the traffic queue in Smith Dorrien Avenue and who remembered seeing Mr Bullock dive for cover, cast doubts on his version. In particular, he stated that Mr Bullock was not near the end of Smith Dorrien Avenue but further away from the Shell garage (more than 100 yards away) and that he had dived for cover as soon as there was the sound of shooting. He agreed that he had also seen persons crouching looking from behind a wall at the entrance to the pathway leading to the tunnel.

13. *Events following the shootings*

91. At 15.47-15.48 hours, E received a message in the operations room that apprehension of the three suspects had taken place. It was not clear at that stage whether they had been arrested or shot. By 16.00 to 16.05 hours, the report was received in the operations room that the three suspects had been shot.

92. At 16.05-16.06 hours, Soldier F handed a form to the Commissioner returning control. According to the transcript of the evidence given by the Commissioner at the Inquest, this form addressed to him by Soldier F stated that "at 16.06 hours on 6 March a military assault force was completed at the military option in respect of the terrorist bombing ASU in Gibraltar. Control is hereby handed back to the Civil Power". Deputy Commissioner Colombo telephoned to Central Station for the evacuation plans to be put into effect. Instructions were also given with a view to taking charge of the scenes of the incidents. Soldier G was also instructed to commence the clearance of the car.

93. After the shooting, the bodies of the three suspects and Farrell's handbag were searched. No weapons or detonating devices were discovered.

94. At the Shell garage scene, the shell cases and cartridges were picked up without marking their location or otherwise recording their position. The positions of the bodies were not marked.

95. At the scene of the Savage shooting, only some of the cartridge positions were marked. No police photographs were taken of the bodies' positions. Inspector Revagliatte had made a chalk outline of the position of Savage's body. Within that outline, there were 5 strike marks, three in the area of the head.

96. Chief Inspector Lopez ordered a general recall of personnel and went directly to the assembly area to begin cordoning it off. The fire brigade also arrived at the assembly area.

The bomb disposal team opened the suspect white Renault car but found no explosive device or bomb. The area was declared safe between 19.00 and 20.00 hours.

H. *Police investigation following the shootings*

97. Chief Inspector Correa was appointed in charge of the investigation.

98. Inside Farrell's handbag was found a key ring with two keys and a tag

bearing a registration number MA9317AF. This information was passed at about 17.00 hours to the Spanish police who commenced a search for the car on the suspicion that it might contain explosives. During the night of 6 to 7 March, the Spanish police found a red Ford Fiesta with that registration number in La Linea. Inside the car were found keys for another car registration number MA2732AJ, with a rental agreement indicating that the car had been rented at 10.00 hours on 6 March by Katharine Smith, the name on the passport carried in Farrell's handbag.

99. At about 18.00 hours on 8 March, a Ford Fiesta car with registration number MA2732AJ was discovered in a basement car park in Marbella. It was opened by the Malaga bomb disposal squad and found to contain an explosive device in the boot concealed in the spare wheel compartment. The device consisted of 5 packages of Semtex explosive (altogether 64 kg) to which were attached 4 detonators and around which were packed 200 rounds of ammunition. There were two timers marked 10 hrs 45 mins and 11 hrs 15 mins respectively. The device was not primed or connected.

100. In the report compiled by the Spanish police on the device dated Madrid 27 March 1988, it was concluded that there was a double activating system to ensure explosion even if one of the timers failed; the explosive was hidden in the spare wheel space to avoid detection on passing the Spanish/Gibraltarian customs; the quantity of explosive and use of cartridges as shrapnel indicated the terrorists were aiming for greatest effect; and that it was believed that the device was set to explode at the time of the military parade on 8 March 1988.

101. Chief Inspector Correa, who acted also as Coroner's Officer, traced and interviewed witnesses of the shooting of the three suspects. Police officers visited residences in the area knocking on doors and returning a second time when persons were absent. The Attorney General made two or three appeals to the public to come forward. At the Inquest, Inspector Correa commented that the public appeared more than usually reluctant to come forward to give statements to the police.

102. A postmortem was conducted in respect of the three deceased suspects on 7 March 1988. Professor Watson, a highly qualified pathologist from the United Kingdom, carried out the procedure. His report was provided to a pathologist, Professor Pounder, instructed by the applicants. Comment was later made at the Inquest by both pathologists with regard to defects in the postmortem procedures. In particular, the bodies had been stripped before Professor Watson saw them, depriving him of possible aid in establishing entry and exit wounds, there had been no X-ray facilities and Professor Watson had not later been provided either with a full set of photographs for reference, or the forensic and ballistics reports.

1. *The Gibraltar Inquest*

103. An Inquest by the Gibraltar Coroner into the killings was opened on 6 September 1988. The families of the deceased (which included the applicants)

were represented, as were the SAS soldiers and the United Kingdom Government. The Inquest was presided over by the Coroner who sat with a jury chosen from the local population.

104. Prior to the Inquest, three certificates to the effect that certain information should not, in the public interest, be disclosed, were issued by the Secretary of State for the Home Department, the Secretary of State for Defence and the Deputy Governor of Gibraltar, dated respectively 26 August, 30 August and 2 September 1988. These stated that the public interest required that the following categories of information be protected from disclosure:

> 1. In the case of the seven military witnesses, the objection was to the disclosure of any information or documents which would reveal:
>
> (i) their identity;
>
> (ii) the identity, location, chains of command, method of operation and the capabilities of the units with which the soldiers were serving on 6 March 1988;
>
> (iii) the nature of their specialist training or equipment;
>
> (iv) the nature of any previous operational activities of the soldiers, or of any units with which any of them might at any time have served;
>
> (v) in the case of Soldier G (the Ammunition Technical Officer), any defence intelligence information, activities or operations (and the sources of intelligence), including those on the basis of which his assessments were made and details of security forces counter-measures capabilities, including methods of operation, specialist training and equipment.
>
> 2. In the case of Security Service witnesses, the objection was to the disclosure of information which would reveal:
>
> (a) the identities of members of the Security Service, and details of their deployment, training and equipment;
>
> (b) all sources of intelligence information;
>
> (c) all details of the activities and operations of the Security Service.

105. As was, however, expressly made clear in the certificates, no objection was taken to the giving of evidence by either military or Security Service witnesses as

> (i) the nature of the information relating to the feared IRA plot, which was transmitted to the Commissioner of Police and others concerned (including general evidence as to the nature of a Provisional IRA active service unit);
>
> (ii) the assessments made by Soldier G as to the likelihood of, and the risks associated with, an explosive device and as to the protective measures which might have to be taken;
>
> (iii) the events leading up to the shootings on 6 March 1988 and the circumstances surrounding them, including evidence relating to the transfer of control to the military power.

106. The Inquest lasted until 30 September and during the nineteen days it sat, evidence was heard from seventy-nine witnesses, including the soldiers, police officers and surveillance personnel involved in the operation. Evidence was also heard from pathologists, forensic scientists and experts in relation to the detonation of explosive devices.

1. *Pathologists' evidence at the Inquest*

107. Evidence was given by Professor Watson, the pathologist who had conducted the postmortem on the deceased on 7 March 1988 and also by Professor Pounder called on behalf of the applicants (see paragraph 102 above).

108. Concerning Farrell, it was found that she had been shot three times in the back, from a distance of some three feet according to Professor Pounder. She had five wounds to the head and neck. The facial injuries suggested that either the entire body or at least the upper part of the body was turned towards the shooter. A reasonable scenario consistent with the wounds was that she received the shots to the face while facing the shooter, then fell away and received the shots to the back. Professor Watson agreed that the upward trajectory of the bullets that hit Farreli indicated that she was going down or was down when she received them. Altogether she had been shot eight times.

109. Concerning McCann, he had been shot in the back twice and had three wounds in the head. The wound on the top of the head suggested that the chest wounds came before the head wound and that he was down or very far down when it was inflicted. The shots to the body were at about a 45 degree angle. He had been hit by five bullets.

110. Concerning Savage, he had been hit by sixteen bullets. He had seven wounds to the head and neck, five on the front of the chest, five on the back of the chest, one on the top of each shoulder, three in the abdomen, two in the left leg, two in the right arm and two on the left hand. The position of the entry wounds suggested that some of the wounds were received facing the shooter. But the wounds in the chest had entered at the back of the chest. Professor Watson agreed that Savage was "riddled with bullets" and that "it was like a frenzied attack". He agreed that it would be reasonable to suppose from the strike marks on the pavement that bullets were fired into Savage's head as he lay on the ground. Professor Pounder also agreed that the evidence from strike marks on the ground and the angle and state of wounds indicated that Savage was struck by bullets when lying on his back on the ground by a person shooting standing towards his feet. He insisted under examination by counsel for the soldiers that the three strike marks on the ground within the chalk outline corresponded with wounds to the head. In his view "those wounds must have been inflicted when either the head was on the ground or very close to the ground indeed" and when pressed "within inches of the ground".

2. *Forensic evidence at the Inquest*

111. A forensic scientist specialising in firearms had examined the clothing of the three deceased for, *inter alia*, powder deposits which would indicate that shots had been fired at close range. He found signs of partly burnt propellant powder on the upper right back of Farrell's jacket and upper left front of Savage's shirt which suggested close range firing. He conducted tests which indicated that such a result was only obtained with a Browning pistol at a range

of up to six feet. The density on Farrell's jacket indicated a muzzle to target range of three feet and on Savage's shirt of four to six feet.

3. *Evidence relating to detonation devices*

112. Issues arose at the Inquest as to whether, even if the three suspects had been carrying remote-control devices, they would have been able to detonate the suspected bomb which was approximately 1.4 km from the place where they were shot. Also it was questioned whether the soldiers could reasonably have expected that the applicants could have concealed the devices on their persons without it being apparent and whether in fact the device could have been detonated by pressing only one button.

113. Mr Feraday gave evidence for the Crown. He was a forensic scientist employed at Explosives Forensic Laboratory at Royal Armament Research and Development Establishment, with thirty-three years experience of explosives. He produced an ICOM IC2 transmitter, as an example of a device used in Northern Ireland, which was the size of a standard commercial walkie-talkie. It was also produced in evidence by the Government to both the Commission and Court in the Strasbourg proceedings (see paragraph 130 below).

While referring to the factors which could effect the range (for example, terrain, weather conditions)* Mr Feraday stated that the equipment could, in optimum conditions, operate up to a thirty mile range. In his opinion, the aerial on the suspect car could have received a signal though its efficiency would have been fairly poor as it was not the right length for the frequency. He considered that one would have to assume that from the distance of about a mile a bomb could be detonated by remote control using that aerial.

114. The applicants called Dr Scott, who held a masters degree and doctorate in engineering and was a licensed radio operator. He had been involved in two IRA trials in England. He had conducted tests with similar receivers along the route taken by the three suspects. He referred to the fact that there was rising ground between the sites of the shootings and the assembly area as well as a thick wall and a considerable number of buildings. The IRA used encoders and decoders on their devices to prevent spurious signals detonating their bombs: this required that a good clean signal be received. Having regard to the facts that the aerial, which "was a joke" from the point of view of effectiveness, the wrong length for the expected frequency and pointing along the roof rather than standing vertically, he stated that in his professional opinion the purported receiver could not have been detonated by a transmitter in the circumstances of the case. He also stated that the bomb could have been neutralised by removing the car aerial and that such a manoeuvre would not have destabilised the explosive device.

115. Dr Scott also explained how the transmitter would operate. Assuming the dial setting the frequency was already set, it would be necessary to activate the on/off power switch, followed by the on/off switch on the encoder and then a third button would have to be pressed in order to transmit. While it would be

possible to set the device so that it would be necessary to press one button (the transmit button) in order to detonate a bomb, this would require leaving the power switches on for both the transmitter and the encoder with the risk that the batteries would run down. There would also be the risk that the device might be set off accidentally by being bumped in the street or being hit by a bullet or by a person falling awkwardly so as to hit the edge of a pavement or bench.

116. Captain Edwards was called by the lawyer representing the soldiers to rebut this evidence. He was a member of the Royal Corps of Signals and had experience in VHF/HF radio in combat net radio spectrum. He carried out tests to see if voice communications were possible on an ICOM type radio in the area of or from the Shell garage to Ince's Hall. The equipment used was not identical to that of Dr Scott. He stated that it was possible to receive both voice communication and a single audio tone at the site of the shootings from the assembly area. He did not however use an encoder and his equipment was matched and compatible. Mr Feraday was also recalled. He gave the opinion that if a weak voice communication could be received then the signal would be sufficient to set off a bomb.

117. It appears to have been accepted by all that the IRA have developed the use of high-frequency devices, which require shorter aerials and have a surer line-of-sight effect. These are stated to have the characteristics suitable for detonation when the operator of the device has line of sight of the bomb and carry with them less possibility of interference from other radio sources or countermeasures. No examples were known or at least given as to this type of remote-control detonation being used other than in line-of-sight conditions.

4. *Submissions made in the course of the Inquest*

118. At the Inquest, the representative of the applicants, Mr P.J. McGrory, questioned the witnesses and made submissions to the effect, *inter alia*, that either the decision to shoot to kill the suspects had been made by the United Kingdom Government prior to the incident and the soldiers were ordered to carry out the shootings, or that the operation was planned and implemented in such a way that the killing of the suspects by the soldiers was the inevitable result. In any event, in light of the circumstances, the use of lethal force by the soldiers was not necessary or, if it was necessary, the force used was excessive and therefore not justified. He maintained throughout, however, that he did not challenge that the Commissioner of Police and his officers had acted properly and in good faith.

119. Soldier F (the senior military commander) and Soldier E (the tactical commander) denied that there had been a plan, express or tacit, to execute the suspects. When it was put to Soldiers A, B, C and D, they also denied that they had been sent out either expressly or on the basis of "a nod or a wink" to kill the suspects.

5. The Coroner's address to the jury

120. At the conclusion of the Inquest, the Coroner addressed the jury in respect of the applicable law, in particular, Article 2 of the Gibraltar Constitution (see paragraph 132 below). As Inquest proceedings did not allow for the parties to make submissions to the jury, he summed up the respective propositions of the applicants' representatives and the representatives of the soldiers and the Crown referring to the evidence. He concluded from the evidence given by the soldiers that when they opened fire they shot intending to kill and directed the jury as to the range of possible verdicts:

> "... If the soldiers set out that day with the express intent to kill that would be murder and it would be right to return a verdict of unlawfully killed. Example two: were you to find in the case of Savage (or any of the other two for that matter) that he was shot on the ground in the head after effectively being put out of action, that would be murder if you come to the conclusion that the soldiers continued to finish him off. In both cases they intended to kill not in self defence or in the defence of others or in the course of arrest... so it is murder and you will return a verdict of unlawfully killed. If in this second example you were to conclude that it is killing in pursuance of force used which was more than reasonably necessary, then the verdict should also be killed unlawfully but it would not have been murder. The third example I offer is precisely of that situation. If you accept that the account that the soldiers' intention was genuinely to arrest (in the sense that they were to apprehend the three suspects and hand them over live to the Gibraltar Police force) and that the execution of the arrest went wrong and resulted in the three deaths because either (a) force was used when it was not necessary or (b) the force that was used was more than reasonably necessary, then that would not be murder... and the verdict would be, as I say, unlawfully killed. Example four: If you are satisfied that the soldiers were acting properly but nevertheless the operation was mounted to encompass the deaths of the three suspects to the ignorance of the soldiers, then you would also bring in a verdict of unlawfully killed.
>
> So there are only three verdicts reasonably open to you and these are:
>
> (a) Killed unlawfully, that is unlawful homicide. '
>
> (b) Killed lawfully, that is justifiable, reasonable homicide.
>
> (c) Open verdict.
>
> Remembering that you must be satisfied beyond reasonable doubt where the verdict of unlawfully killed is concerned, there are two situations to consider. The first concerning the soldiers themselves, the second if they have been the unwitting tools of a plot to dispose of the three suspects.
>
> As to the first concerning the soldiers themselves, I must tell you that if you are not satisfied beyond a reasonable doubt that they have killed unlawfully, you have then to decide whether your verdict should be an open verdict or one of justifiable homicide. My direction to you is that you should bring a verdict of justifiable homicide, i.e. killed lawfully, because in the nature of the circumstances of this incident that is what you will have resolved if you do not return a verdict of unlawful homicide in respect of the soldiers themselves. That is the logic of the situation. You may reach a situation in which you cannot resolve either way, in which case the only alternative is to bring in an open verdict, but I must urge you, in the exercise of your

duty, to avoid this open verdict. As to the second situation where they are unwitting tools, the same applies..."

121. The jury returned verdicts of lawful killing by a majority of nine to two.

J. *Proceedings in Northern Ireland*

122. The applicants were dissatisfied with these verdicts and commenced actions in the High Court of Justice in Northern Ireland against the Ministry of Defence for the loss and damage suffered by the estate of each deceased as a result of their death. The statements of claim were served on 1 March 1990.

123. On 15 March 1990 the Secretary of State for Foreign and Commonwealth Affairs issued certificates under section 40(3)a of the Crown Proceedings Act 1947, as amended by the Crown Proceedings (Northern Ireland) Order 1981. Section 40(2)b of the same Act excludes proceedings in Northern Ireland against the Crown in respect of liability arising otherwise than "in respect of Her Majesty's Government in the United Kingdom". A similar exemption applies to the Crown in Northern Ireland pursuant to the 1981 Order. A certificate by the Secretary of State to that effect is conclusive. The certificates stated in this case that any alleged liability of the Crown arose neither in respect of Her Majesty's Government in the United Kingdom, nor in respect of Her Majesty's Government in Northern Ireland.

124. The Ministry of Defence then moved to have the actions struck out. The applicants challenged the legality of the certificates in judicial review proceedings. Leave to apply for judicial review was granted *ex parte* on 6 July 1990, but withdrawn on 31 May 1991, after a full hearing, on the basis that the application had no reasonable prospects of success. Senior Counsel advised that an appeal against this decision would be futile.

The applicants' High Court actions were struck off on 4 October 1991.

K. *The television documentary - "Death on the Rock"*

125. On 28 April 1988 Thames Television broadcast its documentary entitled "Death on the Rock" (see paragraph 70 above), during which a reconstruction was made of the alleged surveillance of the terrorists' car by the Spanish police and witnesses to the shootings described what they had seen, including allegations that McCann and Farrell had been shot while on the ground. A statement by an anonymous witness was read out to the effect that Savage had been shot by a man who had his foot on his chest. The Independent Broadcasting Authority had rejected a request made by the Foreign and Commonwealth Secretary to postpone the programme until after the holding of the Inquest into the deaths.

L. *Other evidence produced before the Commission and Court*

1. *Statement of Chief Inspector Valenzuela*

126. While an invitation had been made by the Gibraltar police for a Spanish police officer to attend the Inquest to give evidence relating to the role of the Spanish police, he did not attend, apparently since he did not receive permission from his superiors.

127. The Government provided the Commission with a copy of a statement made by Chief Inspector Rayo Valenzuela, a police officer in Malaga, dated 8 August 1988. According to this statement, the United Kingdom police had at the beginning of March provided the Spanish police with photographs of the possible members of the ASU, named as Daniel McCann, Mairead Farrell and Sean Savage. The three individuals were observed arriving at Malaga airport on 4 March 1988 but trace of them was lost as they left. There was then a search to locate the three suspects during 5 to 6 March 1988.

This statement provided by the Government was not included in the evidence submitted at the Inquest, as the Coroner declined to admit it following the objection by Mr P.J. McGrory who considered that it constituted hearsay in the absence of any police officer from Spain giving evidence in person.

2. *Statement of Mr Harry Debelius*

128. This statement, dated 21 September 1988 and supplied on behalf of the applicants, was made by a journalist who acted as consultant to the makers of the Thames Television programme "Death on the Rock". He stated that the white Renault car used by the ASU was under surveillance by the Spanish authorities as it proceeded down the coast towards Gibraltar. Surveillance is alleged to have been conducted by four to five police cars which "leapfrogged" to avoid suspicion, by helicopter and by agents at fixed observation points. The details of the car's movements were transmitted to the authorities in Gibraltar who were aware of the car's arrival at the border. He refers to the source of this information as being Mr Augustín Valladolid, a spokesman for the Spanish security services in Madrid, with whom he and Mr Julian Manyon, a reporter for Thames Television, had an interview lasting from 18.00 to 19.20 hours on 21 March 1988.

129. The applicants intended submitting this statement as evidence before the Inquest. The Coroner decided however that it should also be excluded as hearsay on the same basis as the statement relied upon by the Government (see paragraph 127 above).

3. *Exhibits provided by the parties*

130. An ICOM transmitter device was provided to the Commission and Court by the Government with an improvised encoder attached. The dimensions of the transmitter are 18 cm x 6.5 cm x 3.7 cm- the encoder (which is usually taped to the transmitter and which can be contained in a small flat Strepsil tin) is 8 cm x 9 cm x 3 cm. The aerial from the transmitter is 18 cm long.

4. *Further material submitted by the applicants*

131. The applicants also submitted a further opinion of Dr Scott, dated 22 October 1993, in which he reiterated his view that it would have been impossible for the three suspects to have detonated a bomb in the target area from the location where they were shot using an ICOM or any other conceivable concealable transmitter/aerial combination, which he maintains must have been well-known to the authorities. He also drew attention to the factor that the strength of a hand held transmitter is severely attenuated when held close to the human body; when transmitting it should be held well clear of the body with the aerial as high as possible.

5. *Findings of fact by the Commission*

132. In its report of 4 March 1994, the Commission made the following findings on questions of fact:

— that the suspects were effectively allowed to enter Gibraltar to be picked up by the surveillance operatives in place in strategic locations for that purpose (at paragraph 213);
— that there was no evidence to support the applicants' contention of a premeditated design to kill Mr McCann, Ms Farrell and Mr Savage (at paragraph 216);
— that there was no convincing support for any allegation that the soldiers shot Mr McCann and Ms Farrell when they were attempting to surrender or when they were lying on the ground. However the soldiers carried out the shooting from close proximity. The forensic evidence indicated a distance of as little as three feet in the case of Ms Farrell (at paragraphs 222 and 223); – Ms Farrell and Mr McCann were shot by Soldiers A and B at close range after the two suspects had made what appeared to the soldiers to be threatening movements. They were shot as they fell to the ground but not when they were lying on the ground (at paragraph 224);
— it was probably either the sound of the police siren or the sound of the shooting of Mr McCann and Ms Farrell at the Shell garage, or indeed both, which caused Mr Savage to turn round to face the soldiers who were behind him. It was not likely that Soldiers C and D witnessed the shooting of Mr McCann and Ms Farrell before proceeding in pursuit of Savage (at paragraph 228);
— there was insufficient material to rebut the version of the shooting given by Soldiers C and D. Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he hit the ground. This conclusion was supported by the pathologists' evidence at the subsequent inquest (at paragraphs 229 and 230);
— Soldiers A to D opened fire with the purpose of preventing the threat of detonation of a car bomb in the centre of Gibraltar by suspects who were known to them to be terrorists with a history of previous involvement with explosives (at paragraph 231);
— a timer must in all probability have been mentioned at the Commissioner's operational briefing. For whatever reason, however, it was not a factor which was taken into account in the soldiers' view of the operation (at paragraph 241).

II. *Relevant domestic law and practice*

133. Article 2 of the Gibraltar Constitution provides:

"(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable:

a. for the defence of any person from violence or for the defence of property;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(...)

d. in order to prevent the commission by that person of a criminal offence."

134. The relevant domestic case-law establishes that the reasonableness of the use of force has to be decided on the basis of the facts which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief. Given that honest and reasonable belief, it must then be determined whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest (see, for example, *Lynch v. Ministry of Defence* [1983] Northern Ireland Law Reports 216, R v. *Gladstone Williams* (1983) 78 Criminal Appeal Reports 276, at p. 281, and *R v. Thain* (1985) Northern Ireland Law Reports 457, at p. 462).

135. The test of whether the use of force is reasonable, whether in self-defence or to prevent crime or effect an arrest is a strict one. It was described in the following terms in the Report of the Royal Commission appointed to consider the law relating to indictable offences ((1879) 36 House of Lords Papers 117, at p. 167):

"We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes to preserve the public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by or which might reasonably be anticipated from the force used is not disproportionate to the injury or mischief, which it is intended to prevent."

Lord Justice McGonigal in *Attorney General for Northern Ireland's Reference* ([1976] Northern Ireland Law Reports 169 (Court of Appeal)) stated his understanding of this approach as follows (at p. 187):

"... it appears to me that, when one is considering whether force used in any particular circumstances was reasonable, the test of reasonableness should be determined in the manner set out in that paragraph. It raises two questions:

(a) Could the mischief sought to be prevented have been prevented by less violent means?

(b) Was the mischief done or which could reasonably be anticipated from the force used disproportionate to the injury or mischief which it was intended to prevent?

These are questions to be determined objectively but based on the actions of reasonable men who act in the circumstances and in the light of the beliefs which the accused honestly believed existed and held. Force is not reasonable if

(a) greater than that necessary, or

(b) if the injury it causes is disproportionately greater than the evil to be prevented."

136. The document annexed to the Operational Order of the Commissioner of Police entitled "Firearms – rules of engagement" provided in so far as relevant:

"General Rules

1. Do not use more force than necessary to achieve your objective.

2. If you use firearms you should do so with care for the safety of persons in the vicinity.

3. Warning before firing

(a) A warning should, if practicable, be given before opening fire. It should be as loud as possible and must include an order to stop attacking and a statement that fire will be opened if the orders are not obeyed.

(b) You may fire without warning in circumstances where the giving of a warning or any delay in firing could lead to death or serious injury to a person whom it is your duty to protect, or to yourself, or to another member in your operation.

4. Opening fire

You may open fire against a hostage taker

(a) If he is using a firearm or any other weapon or exploding a device and there is a danger that you or any member involved in the operation, or a person whom it is your duty to protect, may be killed or seriously injured.

(b) If he is about to use a firearm or any other weapon or about to explode an explosive device and his action is likely to endanger life or cause serious injury to you or another member involved in the operation, or any person whom it is your duty to protect...

5. If he is in the course of placing an explosive charge in or near any vehicle, ship, building or installation which, if exploded, would endanger life or cause serious injury to you or another member involved in the operation or to any person whom it is your duty to protect and there is no other way to protect those in danger..."

137. Also attached to the operational order was a guide to police officers in the use of firearms which read:

"Firearms: Use by Police.

The object of any police firearms operation is that the armed criminal is arrested with the least possible danger to all concerned. It is the first duty of the police to protect the general public, but the police should not endanger their lives or the lives

of their colleagues for the sake of attempting to make an early arrest. The physical welfare of a criminal armed with a firearm should not be given greater consideration than that of a police officer, and unnecessary risks must not be taken by the police. In their full use of firearms, as in the use of any force, the police are controlled by the restrictions imposed by the law. The most important point which emerges from any study of the law on this subject is that the responsibility is an individual one. Any police officer who uses a firearm may be answerable to the courts or to a coroner's inquest and, if his actions were unlawful (or improper), then he as an individual may be charged with murder, manslaughter or unlawful wounding. Similarly, if his use of a firearm was unlawful or negligent the individual could find himself defending a civil case in which substantial damages were being claimed against him. That a similar claim could be made against the Commissioner of Police will not relieve the individual of his liabilities.

The fact that a police officer used his firearms under the orders of a superior does not, of itself, exempt him from criminal liability. When a police officer is issued with a firearm he is not thereby given any form of authority to use it otherwise than strictly in accordance with the law. Similarly, when an officer is briefed about an operation, information about a criminal may indicate that he is desperate and dangerous. Whilst this will be one of the factors to consider it does not of itself justify shooting at him.

The final responsibility for his actions rests on the individual and therefore the final decision about whether a shot will or will not be fired at a particular moment can only be made by the individual. That decision must be made with a clear knowledge of the law on the subject and in the light of the conditions prevailing at the time."

III. *United Nations Instruments*

138. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("UN Force and Firearms Principles") were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

139. Article 9 of the UN Force and Firearms Principles provides, *inter alia*, that "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

Other relevant provisions provide as follows:

Article 10

"... Law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

Article 22

"... Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report

shall be sent promptly to the competent authorities responsible for administrative review and judicial control."

Article 23

"Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly."

140. Article 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by Economic and Social Council Resolution 1989/65 ("UN Principles on Extra-Legal Executions"), provides, *inter alia*, that:

"There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances..."

Articles 9 to 17 contain a series of detailed requirements that should be observed by investigative procedures into such deaths.

Proceedings before the commission

141. The applicants lodged their application (No. 18984/91) with the Commission on 14 August 1991. They complained that the killings of Daniel McCann, Mairead Farrell and Sean Savage by members of the SAS (Special Air Service) constituted a violation of Article 2 of the Convention.

142. On 3 September 1993 the Commission declared the applicants' complaint admissible.

In its report of 4 March 1994 (Article 31), it expressed the opinion that there had been no violation of Article 2 (eleven votes to six).

Final submissions to the Court

143. The Government submitted that the deprivations of life to which the applications relate was justified under Article 2 § 2 (a) as resulting from the use of force which was no more than absolutely necessary in defence of the people of Gibraltar from unlawful violence and the Court was invited to find that the facts disclosed no breach of Article 2 of the Convention in respect of any of the three deceased.

144. The applicants submitted that the Government have not shown beyond reasonable doubt that the planning and execution of the operation was in accordance with Article 2 § 2 of the Convention. Accordingly, the killings were not absolutely necessary within the meaning of this provision.

As to the law

1. *Alleged violation of article 2 of the Convention*

145. The applicants alleged that the killing of Mr McCann, Ms Farrell and Mr Savage by members of the security forces constituted a violation of Article 2 of the Convention which reads:

> "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 person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection".

A. *Interpretation of Article 2*

1. *General approach*

146. The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 34, § 87, and the Loizidou v. Turkey (Preliminary objections) judgment of 23 March 1995, Series A No. 310, p. 27, § 72.

147. It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe (see the above-mentioned Soering v. the United Kingdom judgment, p. 34, § 88). As such, its provisions must be strictly construed.

148. The Court considers that the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (see application No. 10444/82, Stewart v. the

United Kingdom, 10 July 1984, Decisions and Reports, volume 39, pp. 169-171).

149. In this respect the use of the term "absolutely necessary" in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.

150. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.

2. *The obligation to protect life in Article 2 §1*

(a) *Compatibility of national law and practice with Article 2 standards*

151. The applicants submitted under this head that Article 2 § 1 of the Convention imposed a positive duty on States to "protect" life. In particular, the national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State. The State must also give appropriate training, instructions and briefing to its soldiers and other agents who may use force and exercise strict control over any operations which may involve the use of lethal force.

In their view, the relevant domestic law was vague and general and did not encompass the Article 2 standard of absolute necessity. This in itself constituted a violation of Article 2 § 1. There was also a violation of this provision in that the law did not require that the agents of the State be trained in accordance with the strict standards of Article 2 § 1.

152. For the Commission, with whom the Government agreed, Article 2 was not to be interpreted as requiring an identical formulation in domestic law. Its requirements were satisfied if the substance of the Convention right was protected by domestic law.

153. The Court recalls that the Convention does not oblige Contracting Parties to incorporate its provisions into national law (see, *inter alia*, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A No. 98, p. 47, § 84, and the Holy Monasteries v. Greece judgment of 9 December 1994, Series A No. 301-A, p. 39, § 90). Furthermore, it is not the role of the Convention institutions to examine *in abstracto* the compatibility of national legislative or constitutional provisions with the requirements of the Convention (see, for example, the Klass and Others v. Germany judgment of 6 September 1978, Series A No. 28, p. 18, § 33).

154. Bearing the above in mind, it is noted that Article 2 of the Gibraltar Constitution (see paragraph 133 above) is similar to Article 2 of the Convention with the exception that the standard of justification for the use of force which results in the deprivation of life is that of "reasonably justifiable" as opposed to "absolutely necessary" in paragraph 2 of Article 2. While the Convention standard appears on its face to be stricter than the relevant national standard, it has been submitted by the Government that, having regard to the manner in which the standard is interpreted and applied by the national courts (see paragraphs 134-35 above), there is no significant difference in substance between the two concepts.

155. In the Court's view, whatever the validity of this submission, the difference between the two standards is not sufficiently great that a violation of Article 2 § 1 could be found on this ground alone.

156. As regards the applicants' arguments concerning the training and instruction of the agents of the State and the need for operational control, the Court considers that these are matters which, in the context of the present case, raise issues under Article 2 § 2 concerning the proportionality of the State's response to the perceived threat of a terrorist attack. It suffices to note in this respect that the Rules of Engagement issued to the soldiers and the police in the present case provide a series of rules governing the use of force which carefully reflect the national standard as well as the substance of the Convention standard (see paragraphs 16, 18 and 136-37 above).

(b) *Adequacy of the Inquest proceedings as an investigative mechanism*

157. The applicants also submitted under this head, with reference to the relevant standards contained in the UN Force and Firearms Principles (see paragraphs 138-39 above), that the State must provide an effective *ex post facto* procedure for establishing the facts surrounding a killing by agents of the State through an independent judicial process to which relatives must have full access.

Together with the *amici curiae*, Amnesty International and British-Irish Rights Watch and Others, they submitted that this procedural requirement had not been satisfied by the Inquest procedure because of a combination of shortcomings. In particular, they complained that no independent police investigation took place of any aspect of the operation leading to the shootings; that normal scene-of-crime procedures were not followed; that not all eye witnesses were traced or interviewed by the police; that the Coroner sat with a jury which was drawn from a "garrison" town with close ties to the military; that the Coroner refused to allow the jury to be screened to exclude members who were Crown servants; that the public interest certificates issued by the relevant government authorities effectively curtailed an examination of the overall operation.

They further contended that they did not enjoy equality of representation with the Crown in the course of the Inquest proceedings and were thus severely handicapped in their efforts to find the truth since, *inter alia*, they had had no legal aid and were only represented by two lawyers; witness statements had been

made available in advance to the Crown and to the lawyers representing the police and the soldiers but, with the exception of ballistic and pathology reports, not to their lawyers; they did not have the necessary resources to pay for copies of the daily transcript of the proceedings which amounted to £500 £700.

158. The Government submitted that the Inquest was an effective, independent and public review mechanism which more than satisfied any procedural requirement which might be read into Article 2 § 1 of the Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations into the circumstances of death should be assessed. Moreover, it was important to distinguish between such an investigation and civil proceedings brought to seek a remedy for an alleged violation of the right to life. Finally, they invited the Court to reject the contention by the intervenors British-Irish Rights Watch and Others that a violation of Article 2 § 1 will have occurred whenever the Court finds serious differences between the UN Principles on Extra-Legal Executions and the investigation conducted into any particular death (see paragraph 140 above).

159. For the Commission, the Inquest subjected the actions of the State to extensive, independent and highly public scrutiny and thereby provided sufficient procedural safeguards for the purposes of Article 2 of the Convention.

160. The Court considers that it is unnecessary to decide in the present case whether a right of access to court to bring civil proceedings in connection with deprivation of life can be inferred from Article 2 § I since this is an issue which would be more appropriately considered under Articles 6 and 13 of the Convention – provisions that have not been invoked by the applicants.

161. It confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.

162. However, it is not necessary in the present case for the Court to decide what form such an investigation should take and under what conditions it should be conducted, since public Inquest proceedings, at which the applicants were legally represented and which involved the hearing of seventy-nine witnesses, did in fact take place. Moreover, the proceedings lasted nineteen days and, as is evident from the Inquest's voluminous transcript, involved a detailed review of the events surrounding the killings. Furthermore, it appears from the transcript, including the Coroner's summing up to the jury, that the lawyers acting on behalf of the applicants were able to examine and cross-examine key witnesses, including the military and police personnel involved in the plan-

ning and conduct of the anti-terrorist operation, and to make the submissions they wished to make in the course of the proceedings.

163. In light of the above, the Court does not consider that the alleged various shortcomings in the Inquest proceedings, to which reference has been made by both the applicants and the intervenors, substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings.

164. It follows that there has been no breach of Article 2 § 1 of the Convention on this ground.

B. *Application of Article 2 to the facts of the case*

1. *General approach to the evaluation of the evidence*

165. While accepting that the Convention institutions are not in any formal sense bound by the decisions of the Inquest jury, the Government submitted that the verdicts were of central importance to any subsequent examination of the deaths of the deceased. Accordingly, the Court should give substantial weight to the verdicts of the jury in the absence of any indication that those verdicts were perverse or ones which no reasonable tribunal of fact could have reached. In this connection, the jury was uniquely well placed to assess the circumstances surrounding the shootings. The members of the jury heard and saw each of the seventy-nine witnesses giving evidence, including extensive cross-examination. With that benefit they were able to assess the credibility and probative value of the witnesses' testimony. The Government pointed out that the jury also heard the submissions of the various parties, including those of the lawyers representing the deceased.

166. The applicants, on the other hand, maintained that inquests are by their very nature ill-equipped to be full and detailed enquiries into controversial killings such as in the present case. Moreover, the Inquest did not examine the killings from the standpoint of concepts such as "proportionality" or "absolute necessity" but applied the lesser tests of "reasonable force" or "reasonable necessity". Furthermore, the jury focused on the actions of the soldiers as they opened fire as if it were considering their criminal culpability and not on matters such as the allegedly negligent and reckless planning of the operation.

167. The Commission examined the case on the basis of the observations of the parties and the documents submitted by them, in particular the transcript of the Inquest. It did not consider itself bound by the findings of the jury.

168. The Court recalls that under the scheme of the Convention the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 § 1 and 31). Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area. The Court is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it (see, *inter alia*, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A No. 201, p. 29, § 74), and the

Klaas v. Germany judgment of 22 September 1993, Series A No. 269, p. 17, § 29).

169. In the present case neither the Government nor the applicants have, in the proceedings before the Court, sought to contest the facts as they have been found by the Commission although they differ fundamentally as to the conclusions to be drawn from them under Article 2 of the Convention .

Having regard to the submissions of those appearing before the Court and to the Inquest proceedings, the Court takes the Commission's establishment of the facts and findings on the points summarised in paragraphs 13 to 132 above to be an accurate and reliable account of the facts underlying the present case.

170. As regards the appreciation of these facts from the standpoint of Article 2, the Court observes that the jury had the benefit of listening to the witnesses at first hand, observing their demeanour and assessing the probative value of their testimony.

Nevertheless, it must be borne in mind that the jury's finding was limited to a decision of lawful killing and, as is normally the case, did not provide reasons for the conclusion that it reached. In addition, the focus of concern of the Inquest proceedings and the standard applied by the jury was whether the killings by the soldiers were reasonably justified in the circumstances as opposed to whether they were "absolutely necessary" under Article 2 §2 in the sense developed above (see paragraphs 120 and 148-49 above).

171. Against this background, the Court must make its own assessment whether the facts as established by the Commission disclose a violation of Article 2 of the Convention.

172. The applicants further submitted that in examining the actions of the State in a case in which the use of deliberate lethal force was expressly contemplated in writing, the Court should place on the Government the onus of proving, beyond reasonable doubt, that the planning and execution of the operation was in accordance with Article 2 of the Convention. In addition, it should not grant the State authorities the benefit of the doubt as if its criminal liability were at stake.

173. The Court, in determining whether there has been a breach of Article 2 in the present case, is not assessing the criminal responsibility of those directly or indirectly concerned. In accordance with its usual practice therefore it will assess the issues in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A No. 25, p. 64, §160, and the above mentioned Cruz Varas and Others v. Sweden judgment, p. 29,§ 75).

2. *Applicants' allegation that the killings were premeditated*

174. The applicants alleged that there had been a premeditated plan to kill the deceased. While conceding that there was no evidence of a direct order from the highest authorities in the Ministry of Defence, they claimed that there was

strong circumstantial evidence in support of their allegation. They suggested that a plot to kill could be achieved by other means such as hints and innuendoes, coupled with the choice of a military unit like the SAS which, as indicated by the evidence given by their members at the Inquest, was trained to neutralise a target by shooting to kill. Supplying false information of the sort that was actually given to the soldiers in this case would render a fatal shooting likely. The use of the SAS was, in itself, evidence that the killing was intended.

175. They further contended that the Gibraltar police would not have been aware of such unlawful enterprise. They pointed out that the SAS officer E gave his men secret briefings to which the Gibraltar police were not privy. Moreover, when the soldiers attended the police station after the shootings, they were accompanied by an army lawyer who made it clear that the soldiers were there only for the purpose of handing in their weapons. In addition, the soldiers were immediately flown out of Gibraltar without ever having been interviewed by the police.

176. The applicants referred to the following factors, amongst others, in support of their contention:

— The best and safest method of preventing an explosion and capturing the suspects would have been to stop them and their bomb from entering Gibraltar. The authorities had their photographs and knew their names and aliases as well as the passports they were carrying;
— If the suspects had been under close observation by the Spanish authorities from Malaga to Gibraltar, as claimed by the journalist, Mr Debelius, the hiring of the white Renault car would have been seen and it would have been known that it did not contain a bomb (see paragraph 128 above);
— The above claim is supported by the failure of the authorities to isolate the bomb and clear the area around it in order to protect the public. In Gibraltar there were a large number of soldiers present with experience in the speedy clearance of suspect bomb sites. The only explanation for this lapse in security procedures was that the security services knew that there was no bomb in the car;
— Soldier G, who was sent to inspect the car and who reported that there was a suspect car bomb, admitted during the Inquest that he was not an expert in radio signal transmission (see paragraph 53 above). This was significant since the sole basis for his assessment was that the radio aerial looked older than the car. A real expert would have thought of removing the aerial to nullify the radio detonator, which could have been done without destabilising the explosive, as testified by Dr Scott. He would have also known that if the suspects had intended to explode a bomb by means of a radio signal they would not have used a rusty aerial – which would reduce the capacity to receive a clear signal – but a clean one (see paragraph 114 above). It also emerged from his evidence that he was not an explosive expert either. There was thus the possibility that the true role of Soldier G was to report that he

suspected a car bomb in order to induce the Gibraltar police to sign the document authorising the SAS to employ lethal force.

177. In the Government's submission it was implicit in the jury's verdicts of lawful killing that they found as facts that there was no plot to kill the three terrorists and that the operation in Gibraltar had not been conceived or mounted with this aim in view. The aim of the operation was to effect the lawful arrest of the three terrorists and it was for this purpose that the assistance of the military was sought and given. Furthermore, the jury must have also rejected the applicants' contention that Soldiers A, B, C and D had deliberately set out to kill the terrorists, whether acting on express orders or as a result of being given "a nod and a wink".

178. The Commission concluded that there was no evidence to support the applicants' claim of a premeditated plot to kill the suspects.

179. The Court observes that it would need to have convincing evidence before it could conclude that there was a premeditated plan, in the sense developed by the applicants.

180. In the light of its own examination of the material before it, the Court does not find it established that there was an execution plot at the highest level of command in the Ministry of Defence or in the Government, or that Soldiers A, B, C and D had been so encouraged or instructed by the superior officers who had briefed them prior to the operation, or indeed that they had decided on their own initiative to kill the suspects irrespective of the existence of any justification for the use of lethal force and in disobedience to the arrest instructions they had received. Nor is there evidence that there was an implicit encouragement by the authorities or hints and innuendoes to execute the three suspects.

181. The factors relied on by the applicants amount to a series of conjectures that the authorities must have known that there was no bomb in the car. However, having regard to the intelligence information that they had received, to the known profiles of the three terrorists, all of whom had a background in explosives, and the fact that Mr Savage was seen to "fiddle" with something before leaving the car (see paragraph 38 above), the belief that the car contained a bomb cannot be described as either implausible or wholly lacking in foundation.

182. In particular, the decision to admit them to Gibraltar, however open to criticism given the risks that it entailed, was in accordance with the arrest policy formulated by the Advisory Group that no effort should be made to apprehend them until all three were present in Gibraltar and there was sufficient evidence of a bombing mission to secure their convictions (see paragraph 37 above).

183. Nor can the Court accept the applicants' contention that the use of the SAS, in itself, amounted to evidence that the killing of the suspects was intended. In this respect it notes that the SAS is a special unit which has received specialist training in combating terrorism. It was only natural, therefore, that in light of the advance warning that the authorities received of an impending ter-

rorist attack they would resort to the skill and experience of the SAS in order to deal with the threat in the safest and most informed manner possible.

184. The Court therefore rejects as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement amongst those involved in the operation.

3. *Conduct and planning of the operation*

(a) *Arguments of those appearing before the Court*

(1) *The applicants*

185. The applicants submitted that it would be wrong for the Court, as the Commission had done, to limit its assessment to the question of the possible justification of the soldiers who actually killed the suspects. It must examine the liability of the Government for all aspects of the operation. Indeed, the soldiers may well have been acquitted at a criminal trial if they could have shown that they honestly believed the ungrounded and false information they were given.

186. The soldiers had been told by Officer E (the attack commander) that the three suspects had planted a car bomb in Gibraltar, whereas Soldier G – the bomb disposal expert – had reported that it was merely a suspect bomb; that it was a remote-control bomb; that each of the suspects could detonate it from anywhere in Gibraltar by the mere flicking of a switch and that they would not hesitate to do so the moment they were challenged. In reality, these "certainties" and "facts" were no more than suspicions or at best dubious assessments. However they were conveyed as facts to soldiers who not only had been trained to shoot at the merest hint of a threat but also, as emerged from the evidence given during the Inquest, to continue to shoot until they had killed their target.

In sum, they submitted that the killings came about as a result of incompetence and negligence in the planning and conduct of the anti-terrorist operation to arrest the suspects as well as a failure to maintain a proper balance between the need to meet the threat posed and the right to life of the suspects.

(2) *The Government*

187. The Government submitted that the actions of the soldiers were absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 § 2 (a) of the Convention. Each of them had to make split second decision which could have affected a large number of lives. They believed that the movements which they saw the suspects make at the moment they were intercepted gave the impression that the terrorists were about to detonate a bomb. This evidence was confirmed by other witnesses who saw the movements in question. If it is accepted that the soldiers honestly and reasonably believed that the terrorists upon whom they opened fire might have been about to detonate a bomb by pressing a button, then they had no alternative but to open fire.

188. They also pointed out that much of the information available to the authorities and many of the judgments made by them proved to be accurate.

The three deceased were an IRA active service unit which was planning an operation in Gibraltar; they did have in their control a large quantity of explosives which were subsequently found in Spain; and the nature of the operation was a car bomb. The risk to the lives of those in Gibraltar was, therefore, both real and extremely serious.

189. The Government further submitted that in examining the planning of the anti-terrorist operation it should be borne in mind that intelligence assessments are necessarily based on incomplete information since only fragments of the true picture will be known. Moreover, experience showed that the IRA were exceptionally ruthless and skilled in counter-surveillance techniques and that they did their best to conceal their intentions from the authorities. In addition, experience in Northern Ireland showed that the IRA is constantly and rapidly developing new technology. They thus had to take into account the possibility that the terrorists might be equipped with more sophisticated or more easily concealable radio-controlled devices than the IRA had previously been known to use. Finally, the consequences of underestimating the threat posed by the active service unit could have been catastrophic. If they had succeeded in detonating a bomb of the type and size found in Spain, everyone in the car park would have been killed or badly maimed and grievous injuries would have been caused to those in adjacent buildings, which included a school and an old people's home.

190. The intelligence assessments made in the course of the operation were reasonable ones to make in the light of the inevitably limited amount of information available to the authorities and the potentially devastating consequences of underestimating the terrorists' abilities and resources. In this regard the Government made the following observations:

— It was believed that a remote-controlled device would be used because it would give the terrorists a better chance of escape and would increase their ability to maximise the proportion of military rather than civilian casualties. Moreover, the IRA had used such a device in Brussels only six weeks before;
— It was assumed that any remote-control such as that produced to the Court would be small enough to be readily concealed about the person. The soldiers themselves successfully concealed radios of a similar size about their persons;
— As testified by Captain Edwards at the Inquest, tests carried out demonstrated that a bomb in the car park could have been detonated from the spot where the terrorists were shot (see paragraph 116 above);
— Past experience strongly suggested that the terrorists' detonation device might have been operated by pressing a single button;
— As explained by Witness O at the Inquest, the use of a blocking car would have been unnecessary because the terrorists would not be expected to have any difficulty in finding a free space on 8 March. It was also dangerous because it would have required two trips into Gibraltar, thereby significantly increasing the risk of detection (see paragraph 23, point e) above);

— There was no reason to doubt the *bona fides* of Soldier G's assessment that the car was a suspect car bomb. In the first place his evidence was that he was quite familiar with car bombs. Moreover, the car had been parked by a known bomb-maker who had been seen to "fiddle" with something between the seats and the car aerial appeared to be out of place. IRA car bombs had been known from experience to have specially-fitted aerials and G could not say for certain from an external examination that the car did not contain a bomb (see paragraph 48 above). Furthermore, all three suspects appeared to be leaving Gibraltar. Finally the operation of cordoning-off the area around the car began only twenty minutes after the above assessment had been made because of the shortage of available manpower and the fact that the evacuation plans were not intended for implementation until 7 or 8 March;
— It would have been reckless for the authorities to assume that the terrorists might not have detonated their bomb if challenged. The IRA were deeply committed terrorists who were, in their view, at war with the United Kingdom and who had in the past shown a reckless disregard for their own safety. There was still a real risk that if they had been faced with a choice between an explosion causing civilian casualties and no explosion at all, the terrorists would have preferred the former.

(3) *The Commission*

191. The Commission considered that, given the soldiers' perception of the risk to the lives of the people of Gibraltar, the shooting of the three suspects could be regarded as absolutely necessary for the legitimate aim of the defence of others from unlawful violence. It also concluded that, having regard to the possibility that the suspects had brought in a car bomb which, if detonated, would have occasioned the loss of many lives and the possibility that the suspects could have been able to detonate it when confronted by the soldiers, the planning and execution of the operation by the authorities did not disclose any deliberate design or lack of proper care which might have rendered the use of lethal force disproportionate to the aim of saving lives.

(b) *The Court's assessment*

(1) *Preliminary considerations*

192. In carrying out its examination under Article 2 of the Convention, the Court must bear in mind that the information that the United Kingdom authorities received that there would be a terrorist attack in Gibraltar presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligation flowing from both domestic and international law.

193. Several other factors must also be taken into consideration.

In the first place, the authorities were confronted by an active service unit of the IRA composed of persons who had been convicted of bombing offences

and a known explosive expert. The IRA, judged by its actions in the past, had demonstrated a disregard for human life, including that of its own members.

Secondly, the authorities had had prior warning of the impending terrorist action and thus had ample opportunity to plan their reaction and, in co-ordination with the local Gibraltar authorities, to take measures to foil the attack and arrest the suspects. Inevitably, however, the security authorities could not have been in possession of the full facts and were obliged to formulate their policies on the basis of incomplete hypotheses.

194. Against this background, in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The Court will consider each of these points in turn.

(2) *Actions of the soldiers*

195. It is recalled that the soldiers who carried out the shooting (A, B, C and D) were informed by their superiors, in essence, that there was a car-bomb in place which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries, and were also likely to be armed and to resist arrest (see paragraphs 23, 24-7, and 2831 above).

196. As regards the shooting of Mr McCann and Ms Farrell, the Court recalls the Commission's finding that they were shot at close range after making what appeared to Soldiers A and B to be threatening movements with their hands as if they were going to detonate the bomb (see paragraph 132 above). The evidence indicated that they were shot as they fell to the ground but not as they lay on the ground (see paragraphs 59-67 above). Four witnesses recalled hearing a warning shout (see paragraph 75 above). Officer P corroborated the soldiers' evidence as to the hand movements (see paragraph 76 above). Officer Q and Police Constable Parody also confirmed that Ms Farrell had made a sudden, suspicious move towards her handbag (ibid.).

197. As regards the shooting of Mr Savage, the evidence revealed that there was only a matter of seconds between the shooting at the Shell garage (McCann and Farrell) and the shooting at Landport tunnel (Savage). The Commission found that it was unlikely that Soldiers C and D witnessed the first shooting before pursuing Mr Savage who had turned around after being alerted by either the police siren or the shooting (see paragraph 132 above).

Soldier C opened fire because Mr Savage moved his right arm to the area of his jacket pocket, thereby giving rise to the fear that he was about to detonate the bomb. In addition, Soldier C had seen something bulky in his pocket which

he believed to be a detonating transmitter. Soldier D also opened fire believing that the suspect was trying to detonate the supposed bomb. The soldiers' version of events was corroborated in some respects by witnesses H and J who saw Mr Savage spin round to face the soldiers in apparent response to the police siren or the first shooting (see paragraphs 83 and 85 above).

The Commission found that Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he had hit the ground (see paragraph 132 above). This conclusion was supported by the pathologists' evidence at the Inquest (see paragraph 110 above).

198. It was subsequently discovered that the suspects were unarmed, that they did not have a detonator device on their persons and that there was no bomb in the car (see paragraphs 93 and 96 above).

199. All four soldiers admitted that they shot to kill. They considered that it was necessary to continue to fire at the suspects until they were rendered physically incapable of detonating a device (see paragraphs 61, 63, 80 and 120 above). According to the pathologists' evidence Ms Farrell was hit by eight bullets, Mr McCann by five and Mr Savage by sixteen (see paragraphs 108-10 above).

200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life (see paragraph 195 above). The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.

201. The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

(3) *Control and organisation of the operation*

202. The Court first observes that, as appears from the Operational Order of the Commissioner, it had been the intention of the authorities to arrest the suspects at an appropriate stage. Indeed evidence was given at the Inquest that

arrest procedures had been practised by the soldiers before 6 March and that efforts had been made to find a suitable place in Gibraltar to detain the suspects after their arrest (see paragraphs 18 and 55 above).

203. It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why, as emerged from the evidence given by Inspector Ullger, the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. Although surprised at the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby (see paragraph 34 above). In addition, the security services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for (see paragraph 33 above).

204. On this issue, the Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.

205. The Court confines itself to observing in this respect that the danger to the population of Gibraltar which is at the heart of the Government's submissions in this case – in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. In its view, either the authorities knew that there was no bomb in the car – which the Court has already discounted (see paragraph 181 above) – or there was a serious miscalculation by those responsible for controlling the operation. As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood.

The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head.

206. The Court notes that at the briefing on 5 March attended by Soldiers A, B, C, and D it was considered likely that the attack would be by way of a large car-bomb. A number of key assessments were made. In particular, it was thought that the terrorists would not use a blocking car; that the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted (see paragraphs 23-31 above).

207. In the event, all of these crucial assumptions, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous. Nevertheless, as has been demonstrated by the Government, on the basis of their experience

in dealing with the IRA, they were all possible hypotheses in a situation where the true facts were unknown and where the authorities operated on the basis of limited intelligence information.

208. In fact, insufficient allowances appear to have been made for other assumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility (see paragraph 45 above).

In addition, at the briefings or after the suspects had been spotted, it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture (see paragraph 57 above). It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted (see paragraph 115 above).

Moreover, even if allowances are made for the technological skills of the IRA, the description of the detonation device as a "button job" without the qualifications subsequently described by the experts at the Inquest (see paragraphs 115 and 131 above), of which the competent authorities must have been aware, oversimplifies the true nature of these devices.

209. It is further disquieting in this context that the assessment made by Soldier G, after a cursory external examination of the car, that there was a "suspect car-bomb" was conveyed to the soldiers, according to their own testimony, as a definite identification that there was such a bomb (see paragraphs 48, and 51-2 above). It is recalled that while Soldier G had experience in car-bombs, it transpired that he was not an expert in radio communications or explosives; and that his assessment that there was a suspect car-bomb, based on his observation that the car aerial was out of place, was more in the nature of a report that a bomb could not be ruled out (see paragraph 53 above).

210. In the absence of sufficient allowances being made for alternative possibilities, and the definite reporting of the existence of a car bomb which, according to the assessments that had been made, could be detonated at the press of a button, a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable.

211. However, the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. As noted by the Coroner in his summing up to the jury at the Inquest, all four soldiers shot to kill the suspects (see paragraphs 61, 63, 80 and 120 above). Soldier E testified that it had been discussed with the soldiers that there was an increased chance that they would have to shoot to kill since there would be less time where there was a "button" device (see paragraph 26 above). Against this background,

the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

212. Although detailed investigation at the Inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued (see paragraph 104, at point 1 (iii) above), it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement (see paragraphs 136 and 137 above).

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 § 2 (a) of the Convention.

214. Accordingly, it finds that there has been a breach of Article 2 of the Convention.

II. *Application of Article 50 of the Convention*

215. Article 50 of the Convention provides as follows:

> "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 ... 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".

216. The applicants requested the award of damages at the same level as would be awarded under English law to a person who was unlawfully killed by agents of the State. They also asked, in the event of the Court finding that the killings were both unlawful and deliberate or were the result of gross negli-

gence, exemplary damages at the same level as would be awarded under English law to a relative of a person killed in similar circumstances.

217. As regards costs and expenses, they asked for all costs arising directly or indirectly from the killings, including the costs of relatives and lawyers attending the Gibraltar Inquest and all Strasbourg costs. The solicitor's costs and expenses in respect of the Gibraltar Inquest are estimated at £ 56,200 and his Strasbourg costs at £28,800. Counsel claimed £ 16,700 in respect of Strasbourg costs and expenses.

218. The Government contended that, in the event of a finding of a violation, financial compensation in the form of pecuniary and non-pecuniary damages would be unnecessary and inappropriate.

As regards the costs incurred before the Strasbourg institutions, they submitted that the applicants should be awarded only the costs actually and necessarily incurred by them and which were reasonable as to quantum. However, as regards the claim for costs in respect of the Gibraltar Inquest, they maintained that (1) as a point of principle, the costs of the domestic proceedings, including the costs of the Inquest, should not be recoverable under Article 50; (2) since the applicants' legal representatives acted free of charge, there can be no basis for an award to the applicants; (3) in any event, the costs claimed were not calculated on the basis of the normal rates of the solicitor concerned.

A. *Pecuniary and non-pecuniary damage*

219. The Court observes that it is not clear from the applicants' submissions whether their claim for financial compensation is under the head of pecuniary or non-pecuniary damages or both. In any event, having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head. It therefore dismisses the applicants' claim for damages.

B. *Costs and expenses*

220. The Court recalls that, in accordance with its case-law, it is only costs which are actually and necessarily incurred and reasonable as to quantum that are recoverable under this head.

221. As regards the Gibraltar costs, the applicants stated in the proceedings before the Commission that their legal representatives had acted free of charge. In this connection, it has not been claimed that they are under any obligation to pay the solicitor the amounts claimed under this item. In these circumstances, the costs cannot be claimed under Article 50 since they have not been actually incurred.

222. As regards the costs and expenses incurred during the Strasbourg proceedings, the Court, making an equitable assessment, awards £ 22,000 and £ 16,000 in respect of the solicitor's and counsel's claims respectively, less 37,731 French francs received by way of legal aid from the Council of Europe.

For these reasons, the court

1. *Holds* by 10 votes to 9 that there has been a violation of Article 2 of the Convention;

2. *Holds* unanimously that the United Kingdom is to pay to the applicants, within three months, £38,700 (thirty-eight thousand seven hundred) for costs and expenses incurred in the Strasbourg proceedings, less 37,731 (thirty-seven thousand seven hundred and thirty-one) French francs to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;

3. *Dismisses* unanimously the applicants' claims for damages;

4. *Dismisses* unanimously the applicants' claim for costs and expenses incurred in the Gibraltar Inquest;

5. *Dismisses* unanimously the remainder of the claims for just satisfaction.

The Court was composed of the following judges: Mr R. Ryssdal, *President*, Mr R. Bernhardt, Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr C. Russo. Mr A. Spielmann, Mr N. Valticos, Mrs E. Palm, Mr R. Pekkanen, Mr J.M. Morenilla, Sir John Freeland, Mr A.B. Baka, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici, Mr J. Makarczyk, Mr B. Repik, Mr P. Jambrek, Mr P. Küris, Mr U. Löhmus, and also of Mr H. Petzold, *Registrar*

Joint dissenting opinion of Judges Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Freeland, Baka and Jambrek

1. We are unable to subscribe to the opinion of a majority of our colleagues that there has been a violation of Article 2 of the Convention in this case.

2. We will take the main issues in the order in which they are dealt with in the judgment.

3. As to the section which deals with the interpretation of Article 2, we agree with the conclusion in paragraph 155 that the difference between the Convention standard and the national standard as regards justification for the use of force resulting in deprivation of life is not such that a violation of Article 2 §1 could be found on that ground alone. We also agree with the conclusion in paragraph 164 that there has been no breach of Article 2 § I on the ground of any shortcoming in the examination at national level of the circumstances surrounding the deaths.

4. As to the section dealing with the application of Article 2 to the facts of the case, we fully concur in rejecting as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement among those involved in the operation (paragraph 184).

5. We also agree with the conclusion in paragraph 200 that the actions of the four soldiers who carried out the shootings do not, in themselves, give rise to

a violation of Article 2. It is rightly accepted that those soldiers honestly believed, in the light of the information which they had been given, that it was necessary to act as they did in order to prevent the suspects from detonating a bomb and causing serious loss of life: the actions which they took were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

6. We disagree, however, with the evaluation made by the majority (paragraphs 202-14) of the way in which the control and organisation of the operation were carried out by the authorities. It is that evaluation which, crucially, leads to the finding of violation.

7. We recall at the outset that the events in this case were examined at the domestic level by an Inquest held in Gibraltar over a period of 19 days between 6 and 30 September 1988. The jury, after hearing the evidence of 79 witnesses (including the soldiers, police officers and surveillance personnel involved in the operation and also pathologists, forensic scientists and experts on the detonation of explosive devices), and after being addressed by the coroner in respect of the applicable domestic law, reached by a majority of nine to two a verdict of lawful killing. The circumstances were subsequently investigated in depth and evaluated by the Commission, which found in its report, by a majority of eleven to six, that there had been no violation of the Convention.

The finding of the Inquest, as a domestic tribunal operating under the relevant domestic law, is not of itself determinative of the Convention issues before the Court. But, having regard to the crucial importance in this case of a proper appreciation of the facts and to the advantage undeniably enjoyed by the jury in having observed the demeanour of the witnesses when giving their evidence under examination and cross-examination, its significance should certainly not be underestimated. Similarly, the Commission's establishment and evaluation of the facts is not conclusive for the Court; but it would be mistaken for the Court, at yet one further remove from the evidence as given by the witnesses, to fail to give due weight to the report of the Commission, the body which is primarily charged under the Convention with the finding of facts and which has, of course, great experience in the discharge of that task.

8. Before turning to the various aspects of the operation which are criticised in the judgment, we would underline three points of a general nature.

First, in undertaking any evaluation of the way in which the operation was organised and controlled, the Court should studiously resist the temptations offered by the benefit of hindsight. The authorities had at the time to plan and make decisions on the basis of incomplete information. Only the suspects knew at all precisely what they intended- and it was part of the purpose, as it had no doubt been part of their training, to ensure that as little as possible of their intentions was revealed. It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an ongoing anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken. It

should not be so regarded unless it is established that in the circumstances as they were known at the time another course should have been preferred.

9. Secondly, the need for the authorities to act within the constraints of the law, while the suspects were operating in a state of mind in which members of the security forces were regarded as legitimate targets and incidental death or injury to civilians as of little consequence, would inevitably give the suspects a tactical advantage which should not be allowed to prevail. The consequences of the explosion of a large bomb in the centre of Gibraltar might well be so devastating that the authorities could not responsibly risk giving the suspects the opportunity to set in train the detonation of such a bomb. Of course the obligation of the United Kingdom under Article 2 § 1 of the Convention extended to the lives of the suspects as well as to the lives of all the many others, civilian and military, who were present in Gibraltar at the time. But, quite unlike those others, the purpose of the presence of the suspects in Gibraltar was the furtherance of a criminal enterprise which could be expected to have resulted in the loss of many innocent lives if it had been successful. They had chosen to place themselves in a situation where there was a grave danger that an irreconcilable conflict between the two duties might arise.

10. Thirdly, the Court's evaluation of the conduct of the authorities should throughout take full account of (a) the information which had been received earlier about IRA intentions to mount a major terrorist attack in Gibraltar by an active service unit of three individuals; and (b) the discovery which (according to evidence given to the Inquest by witness O) had been made in Brussels on 21 January 1988 of a car containing a large amount of Semtex explosive and four detonators, with a radio-controlled system – equipment which, taken together, constituted a device familiar in Northern Ireland.

In the light of (a), the decision that members of the SAS should be sent to take part in the operation in response of the request of the Gibraltar Commissioner of Police for military assistance was wholly justifiable. Troops trained in a counter-terrorist role and to operate successfully in small groups would clearly be a suitable choice to meet the threat of an IRA active service unit at large in a densely populated area such as Gibraltar, where there would be an imperative need to limit as far as possible the risk of accidental harm to passers-by.

The detailed operational briefing on 5 March 1988 (paragraphs 22-31) shows the reasonableness, in the circumstances as known at the time, of the assessments then made. The Operational Order of the Gibraltar Commissioner of Police, which was drawn up on the same day, expressly proscribed the use of more force than necessary and required any recourse to firearms to be had with care for the safety of persons in the vicinity. It described the intention of the operation as being to protect life; to foil the attempt; to arrest the offenders; and the securing and safe custody of the prisoners (paragraphs 17 and 18).

All of this is indicative of appropriate care on the part of the authorities. So, too, is the cautious approach to the eventual passing of control to the military on 6 March 1988 (paragraphs 45-54).

11. As regards the particular criticisms of the conduct of the operation which are made in the judgment, foremost among them is the questioning (in paragraphs 203-5) of the decision not to prevent the three suspects from entering Gibraltar. It is pointed out in paragraph 203 that, with the advance information which the authorities possessed and with the resources of personnel at their disposal, it would have been possible for them "to have mounted an arrest operation" at the border.

The judgment does not, however, go on to say that it would have been practicable for the authorities to have arrested and detained the suspects at that stage. Rightly so, in our view, because at that stage there might not be sufficient evidence to warrant their detention and trial. To release them, after having alerted them to the state of readiness of the authorities, would be to increase the risk that they or other IRA members could successfully mount a renewed terrorist attack on Gibraltar. In the circumstances as then known, it was accordingly not "a serious miscalculation" for the authorities to defer the arrest rather than merely stop the suspects at the border and turn them back into Spain.

12. Paragraph 206 of the judgment then lists certain "key assessments" made by the authorities which, in paragraph 207, are said to have turned out, in the event, to be erroneous, although they are accepted as all being possible hypotheses in a situation where the true facts were unknown and where the authorities were operating on the basis of limited intelligence information. Paragraph 208 goes on to make the criticism that "insufficient allowance appears to have been made for other assumptions".

13. As a first example to substantiate this criticism, the paragraph then states that since the bombing was not expected until 8 March "there was equally the possibility that the terrorists were on a reconnaissance mission".

There was, however, nothing unreasonable in the assessment at the operational briefing on 5 March that the car which would be brought into Gibraltar was unlikely, on the grounds then stated, to be a "blocking" car (see paragraph 23, point e). So, when the car had been parked in the assembly area by one of the suspects and all three had been found to be present in Gibraltar, the authorities could quite properly operate on the working assumption that it contained a bomb and that, as the suspects were unlikely to risk two visits, it was *not* "equally" possible that they were on a reconnaissance mission.

In addition, Soldier F, the senior military adviser to the Gibraltar Commissioner of Police, gave evidence to the Inquest that, according to intelligence information, reconnaissance missions had been undertaken many times before: reconnaissance was, he had been told, complete and the operation was ready to be run. In these circumstances, for the authorities to have proceeded otherwise than on the basis of a worst-case scenario that the car contained a bomb which was capable of being detonated by the suspects during their presence in the territory would have been to show a reckless failure of concern for public safety.

14. Secondly, it is suggested in the second sub-paragraph of paragraph 208 that, at the briefings or after the suspects had been spotted, "it might have been

thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as McCann and Farrell strolled towards the border area since this would have increased the risk of detection and capture".

Surely, however, the question is rather whether the authorities could safely have operated on the assumption that the suspects would be unlikely to be prepared to explode the bomb when, even if for the time being moving in the direction of the border, they became aware that they had been detected and were faced with the prospect of arrest. In our view, the answer is clear: certainly, previous experience of IRA activities would have afforded no reliable basis for concluding that the killing of many civilians would itself be a sufficient deterrent or that the suspects, when confronted, would have preferred no explosion at all to an explosion causing civilian casualties. It is relevant that, according to Soldier F's evidence at the Inquest, part of the intelligence background was that he had been told that the IRA were under pressure to produce a "spectacular". He also gave evidence of his belief that, when cornered, the suspects would have no qualms about pressing the button to achieve some degree of propaganda success: they would try to derive such a success out of having got a bomb into Gibraltar and that would outweigh in their minds the propaganda loss arising from civilian casualties.

15. The second sub-paragraph of paragraph 208 goes on to suggest that "it might also have been thought improbable that at that point" – that is, apparently, as McCann and Farrell "strolled towards the border" – "[the suspects] would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted".

Here, the question ought, we consider, to be whether the authorities could prudently have proceeded otherwise than on the footing that there was at the very least a possibility that, if not before the suspects became aware of detection then immediately afterwards, the transmitter would be in a state of readiness to detonate the bomb.

16. It is next suggested, in the third sub-paragraph of paragraph 208, that "even if allowance is made for the technological skills of the IRA, the description of the detonation device as a "button job" without the qualifications subsequently described by the experts at the Inquest..., of which the competent authorities must have been aware, oversimplifies the true nature of these devices". The exact purport of this criticism is perhaps open to some doubt. What is fully clear, however, is that, as the applicants' own expert witness accepted at the Inquest, a transmitter of the kind which was thought likely to be used in the present case *could* be set up so as enable detonation to be caused by pressing a single button; and in the light of past experience it would have been most unwise to discount the possibility of technological advance in this field by the IRA.

17. Paragraph 209 of the judgment expresses disquiet that the assessment made by Soldier G that there was a "suspect car bomb" was conveyed to the soldiers on the ground in such a way as to give them the impression that the presence of a bomb had been definitely identified. But, given the assessments

which had been made of the likelihood of a remote control being used, and given the various indicators that the car should indeed be suspected of containing a bomb, the actions which the soldiers must be expected to have taken would be the same whether their understanding of the message was as it apparently was or whether it was in the sense which Soldier G apparently intended. In either case, the existence of the risk to the people of Gibraltar would have been enough, given the nature of that risk, justifiably to prompt the response which followed.

18. Paragraph 209, in referring to the assessment made by Soldier G, also recalls that while he had experience with car bombs, he was not an expert in radio communications or explosives. In considering that assessment, it would, however, be fair to add that, although his inspection of the car was of brief duration, it was enough to enable him to conclude, particularly in view of the unusual appearance of its aerial in relation to the age of the car and the knowledge that the IRA had in the past used cars with aerials specially fitted, that it was to be regarded as a suspect car bomb.

The authorities were, in any event, not acting solely on the basis of Soldier G's assessment. There had also been the earlier assessment, to which we have referred in paragraph 13 above, that a "blocking" car was unlikely to be used. In addition, the car had been seen to be parked by Savage, who was known to be an expert bomb-maker and who had taken some time (two to three minutes, according to one witness) to get out of the car, after fiddling with something between the seats.

19. Paragraph 210 of the judgment asserts, in effect, that the use of lethal force was made "almost unavoidable" by the conveyance to Soldiers A, B, C and D of a series of working hypotheses which were vitiated by the absence of sufficient allowances for alternative possibilities and by "the definite reporting of a car-bomb which could be detonated at the press of a button".

We have dealt in paragraphs 13-16 with the points advanced in support of the conclusion that insufficient allowance was made for alternative possibilities; and in paragraphs 17 and 18 with the question of reporting as to the presence of a car bomb.

We further question the conclusion that the use of lethal force was made "almost unavoidable" by failings of the authorities in these respects. Quite apart from any other consideration, this conclusion takes insufficient account of the part played by chance in the eventual outcome. Had it not been for the movements which were made by McCann and Farrell as Soldiers A and B closed on them and which may have been prompted by the completely coincidental sounding of a police car siren, there is every possibility that they would have been seized and arrested without a shot being fired; and had it not been for Savage's actions as Soldiers C and D closed on him, which may have been prompted by the sound of gunfire from the McCann and Farrell incident, there is every possibility that he, too, would have been seized and arrested without resort to shooting.

20. The implication at the end of paragraph 211 that the authorities did not exercise sufficient care in evaluating the information at their disposal before transmitting it to soldiers "whose use of firearms automatically involved shooting to kill" appears to be based on no more than "the failure to make provision for a margin of error" to which the beginning of the paragraph refers. We have dealt already with the "insufficient allowances for alternative possibilities" point (see, again, paragraphs 13-16 above), which we take to be the same as the alleged failure to provide for a margin of error which is referred to here. Any assessment of the evaluation by the authorities of the information at their disposal should, in any event, take due account of their need to reckon throughout with the incompleteness of that information (see paragraph 8 above); and there are no cogent grounds for any suggestion that there was information which they ought reasonably to have known but did not.

21. Paragraph 212, after making a glancing reference to the restrictive effect of the public interest certificates and saying that it is not clear "whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest", goes on to say that "their reflex action in this vital respect lacks the degree of caution to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police". It concludes with the assertion that this "failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation".

22. As regards any suggestion that, if an assessment on the issue had been required by their training or instruction to be carried out by the soldiers, shooting to wound might have been considered by them to have been warranted by the circumstances at the time, it must be recalled that those circumstances included a genuine belief on their part that the suspects might be about to detonate a bomb by pressing a button. In that situation, to shoot merely to wound would have been a highly dangerous course: wounding alone might well not have immobilised a suspect and might have left him or her capable of pressing a button if determined to do so.

23. More generally as regards the training given, there was in fact ample evidence at the Inquest to the effect that soldiers (and not only these soldiers) would be trained to respond to a threat such as that which was thought to be posed by the suspects in this case – all of them dangerous terrorists who were believed to be putting many lives at immediate risk – by opening fire once it was clear that the suspect was not desisting; that the intent of the firing would be to immobilise; and that the way to achieve that was to shoot to kill. There was also evidence at the Inquest that soldiers would not be accepted for the SAS unless they displayed discretion and thoughtfulness; that they would not go ahead and shoot without thought, nor did they; but they did have to react very fast. In ad-

dition, evidence was given that SAS members had in fact been successful in the past in arresting terrorists in the great majority of cases.

24. We are far from persuaded that the Court has any sufficient basis for concluding, in the face of the evidence at the Inquest and the extent of experience in dealing with terrorist activities which the relevant training reflects, that some different and preferable form of training should have been given and that the action of the soldiers in this case "lacks the degree of caution in the use of firearms to be expected of law enforcement personnel in a democratic society". (We also question, in the light of the evidence, the fairness of the reference to *"reflex action* in this vital respect" – underlining supplied. To be trained to react rapidly and to do so, when the needs of the situation require, is not to take reflex action.)

Nor do we accept that the differences between the guide to police officers in the use of firearms (paragraph 137 of the judgment) and the "Firearms – rules of engagement" annexed to the Commissioner's Operational Order (paragraph 136), when the latter are taken together (as they should be) with the Rules of Engagement issued to Soldier F by the Ministry of Defence (paragraph 16), can validly be invoked to support a contention that the standard of care enjoined upon the soldiers was inadequate. Those differences are no doubt attributable to the differences in backgrounds and requirements of the recipients to whom there were addressed, account being taken of relevant training previously given to each group (it is to be noted that, according to the evidence of Soldier F to the Inquest, many lectures are given to SAS soldiers on the concepts of the rule of law and the use of minimum force). We fail to see how the instructions for the soldiers could themselves be read as showing a lack of proper caution in the use of firearms.

Accordingly, we consider the concluding stricture, that there was some failure by the authorities in this regard suggesting a lack of appropriate care in the control and organisation of the arrest operation, to be unjustified.

25. The accusation of a breach by a State of its obligation under Article 2 of the Convention to protect the right to life is of the utmost seriousness. For the reasons given above, the evaluation in paragraphs 203 to 213 of the judgment seems to us to fall well short of substantiating the finding that there has been a breach of the Article in this case. We would ourselves follow the reasoning and conclusion of the Commission in its comprehensive, painstaking and notably realistic report. Like the Commission, we are satisfied that no failings have been shown in the organisation and control of the operation by the authorities which could justify a conclusion that force was used against the suspects disproportionately to the purpose of defending innocent persons from unlawful violence. We consider that the use of lethal force in this case, however regrettable the need to resort to such force may be, did not exceed what was, in the circumstances as known at the time, "absolutely necessary" for that purpose and did not amount to a breach by the United Kingdom of its obligations under the Convention.

Committee of Ministers of the Council of Europe, Strasbourg

(Supervision ex art. 54 ECHR)

Resolution DH (90) 8

— Concerning the judgment of the European Court of Human Rights of 7 July 1989 in the *Soering case*
— Adopted by the Committee of Ministers on 12 March 1990 at the 435th meeting of the Ministers' Deputies

FOLLOW-UP IN THE SOERING CASE

The Committee of Ministers, under the terms of Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"),

Having regard to the judgment of the European Court of Human Rights in the Soering case delivered on 7 July 1989 and transmitted the same day to the Committee of Ministers;

Recalling that the case originated in an application against the United Kingdom lodged with the European Commission of Human Rights on 8 July 1988 under Article 25 of the Convention by Jens Soering, a German national, who complained *inter alia* that his imminent extradition to the United States of America where he feared that he would be sentenced to death on a charge of capital murder and subjected to the "death row phenomenon" would constitute, if implemented, a violation of Article 3 of the Convention;

Recalling that the case was brought before the Court by the Commission on 25 January 1989, by the Government of the United Kingdom on 30 January 1989 and by the Government of the Federal Republic of Germany on 3 February 1989;

Whereas in its judgment of 7 July 1989 the Court unanimously:
— held that, in the event of the Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of Article 3 of the Convention;
— held that, in the same event, there would be no violation of Article 6, paragraph 3.c, of the Convention;
— held that it had no jurisdiction to entertain the complaint under Article 6, paragraphs 1 and 3.d, of the Convention;
— held that there was no violation of Article 13 of the Convention;
— held that the United Kingdom was to pay to the applicant, in respect of legal costs and expenses, the sum of 26,752,80 pounds and 5,030,60 French francs, together with any value added tax that may be chargeable; – rejected the remainder of the claim for just satisfaction;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 54 of the Convention;

Having invited the Government of the United Kingdom to inform it of the measures which had been taken in consequence of the judgment, having regard to its obligation under Article 53 of the Convention to abide by it;

Whereas, during the examination of the case by the Committee of Ministers, the Government of the United Kingdom gave the Committee information about the measures taken in consequence of the judgment, which information appears in the appendix to this resolution;

Having satisfied itself that the Government of the United Kingdom has paid the applicant the sums provided for in the judgment,

Declares, after having taken note of the information supplied by the Government of the United Kingdom, that it has exercised its functions under Article 54 of the Convention in this case.

APPENDIX TO RESOLUTION DH (90) 8

Information provided by the Government of the United Kingdom during the examination of the Soering case before the Committee of Ministers

> «Following the judgment of the European Court of Human Rights, the Government of the United Kingdom in a diplomatic note of 28 July 1989 informed the United States authorities that the extradition of the applicant on charges of capital murder or any other offence the penalty for which may include the imposition of the death penalty was refused. The applicant would be surrendered on the basis that he would not be proceeded against for any offence other than the two counts of first degree murder including any lesser offence.
>
> The Authorities of the United States of America confirmed in a diplomatic note of 31 July 1989 that, in the light of the applicable provisions of the 1972 extradition treaty, United States law would prohibit the applicant's prosecution in Virginia for the offence of capital murder.»

B.

COMMISSIONE E CORTE INTERAMERICANA DEI DIRITTI UMANI

1. Inter-American Court of Human Rights, San José
   Judgment of 19 January 1995 – *Neira Alegría et al. v. Peru.*

2. Inter-American Court of Human Rights, S. José
   Judgment on compensatory damages (*Godinez Cruz case*).
   Judgment of July 21, 1989.

Inter-American Court of Human Rights, San José

Judgment

Judgment of 19 January 1995 - *Neira Alegría et al. v. Peru*

Violation of the right to life by disproportionate use of force against dangerous armed rioters in the San Juan Bautista Penitentiary / Neira Alegría et al. v. Peru

I

1. On October 10, 1990, the Inter-American Commission on Human Rights (hereinafter "the Commission") submitted a case against the State of Peru (hereinafter "the Government," or "Peru"). which originated in petition N° 10.078.

2. The Commission invoked Articles 51 and 61 of the American Convention on Human Rights (hereinafter "the Convention." or the "American Convention") and Article 50 of the Commission's Rules of Procedure. The Commission submitted this case in order for the Court to determine whether the State involved had violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 4 (Right to Life), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the Convention, to the detriment of Víctor Neira-Alegría, Edgar Zenteno-Escobar, and William Zenteno-Escobar. The Commission asked that the Court *"decide this case in accordance with the provisions of the Convention; that it determine the responsibility for the violation indicated; and that it grant fair compensation to the next of kin of the victim(s)."* In its final arguments (*infra*, para. 57) the Commission added Articles 5 and 27, and deleted Article 2 from its request.

3. According to the denunciation submitted to the Commission, on June 18, 1986, Víctor Neira-Alegría, Edgar Zenteno-Escobar, and William Zenteno-Escobar were being detained at the correctional facility of San Juan Bautista, known as "El Frontón," being accused of allegedly committing the offence of terrorism. The Commission adds that as a consequence of a riot at that correctional facility on the date indicated. the Government, by means of Supreme Decree No. 006-86 JUS, delegated the control of the prisons to the Joint Command of the Armed Forces and that, as a result of this decision, the San Juan Bautista correctional facility was included in the so-called "Restricted Military Zones." The Commission further indicated that, since the date on which the Armed Forces proceeded to crush the riots, these persons have been missing; that their relatives have not seen or heard about them since; that the possibility of their being alive has not yet been given up; and that, therefore, concern is expressed for their personal safety and well-being.

4. The Commission affirms that, on August 31, 1987, it received the petition for this case, which was dated at the beginning of that month in Lima, Peru. On September 8 1987, the Commission acknowledged receipt of the petition

and requested the Government to furnish the pertinent information with respect thereto. Not having received an answer. it reiterated its request for information on four occasions (January 11 and June 7, 1988. and February 23 and June 9, 1989), advising the Government, as provided for in Article 42 of the Commission's Regulations, of the consequences of its failure to provide the pertinent information. On June 26. 1989, the Government sent a collective answer to several cases under the Commission's consideration and. on July 20 of the same year, the Commission transmitted this information to the petitioner.

5. On September 13, 1989, the petitioner submitted its comments on the Government's answer and informed the Commission that *"judicial proceedings on the events that occurred at the 'San Juan Bautista' Penitentiary (El Fronton) were in progress before the Exclusive Jurisdiction of Military Justice, proceedings to which the petitioner alleges he was denied access."*

6. In the memorial submitted to the Court, the Commission stated that on September 25, 1989 it held a hearing attended by the representatives of the petitioners and those of the Government where the former referred to the enormous disproportion between the seriousness of the riot and the lethal means employed by the military operation to crush it. They affirmed that the repressive zeal materialized in the elimination of prisoners who were no longer resisting or who had already given themselves up. They further insisted that inmates Neira, Zenteno, and Zenteno continued to be regarded as missing since the Government of Peru refused to provide information as to their whereabouts and fate. For his part, the representative of the Government did not make any comments.

7. On September 29, 1989, the Government informed the Commission that the case was under the consideration of the Exclusive Jurisdiction of Military Justice, for which reason *"the internal jurisdiction of the State"* had not been exhausted, and that *"it would be advisable for the IACHR* [the Commission] *to wait for the conclusion of such proceedings before arriving at a final decision"* on the case.

8. The Commission examined the case during its 77th Regular Session and approved Resolution 43/90 of June 7, 1990, the concluding section of which reads as follows:

> 1. To declare that the complaint of the present case is admissible .
>
> 2. To declare that a friendly solution to the present case is inappropriate.
>
> 3. To declare that the Government of Peru has not fulfilled its obligations with respect to human rights and the guarantee imposed by Articles 1 and 2 of the Convention.
>
> 4. To declare that the Government of Peru has violated the right to life recognized in Article 4, the right to personal liberty enshrined in Article 7, the judicial guarantees of Article 8 and the right of judicial protection found in Article 25, all from the American Convention on Human Rights, as a consequence of the acts which occurred in the San Juan Bautista Prison, in Lima, on June 18, 1986, that led to the disappearance of Víctor Neira-Alegría, Edgar Zenteno-Escobar, and William Zenteno-Escobar.
>
> 5. To formulate the following recommendations for the Government of Peru

(Convention Article 50(3) and Article 47 of the Inter-American Commission on Human Rights' Regulations):

a. Peru must fulfil Articles 1 and 2 of the Convention adopting an effective recourse that guarantees the fundamental rights in the cases of forced or involuntary disappearance of individuals;

b. Conduct a thorough, impartial investigation into the facts object of the complaint, so that those responsible may be identified, brought to justice and receive the punishment prescribed for such heinous acts, and determine the situation of the individuals whose disappearance has been denounced;

c. Adopt the necessary measures to prevent similar acts from occurring in the future;

d. Make necessary reparations for the violations of rights previously indicated and pay just indemnity to the victims' families.

6. To transmit the present report to the Government of Peru so that the latter may make any observations it deems appropriate within 90 days from the date it is sent. Pursuant to Art. 47(6) of the Commission's Regulations, the parties are not authorized to publish the present report.

7. To submit the present case to the Inter-American Court of Human Rights unless the Government of Peru solves the matter within the three months allotted in the previous paragraph.

9. On June 11, 1990, the Commission notified the Government of the Resolution and informed it that the set time period would commence on that date.

10. On August 14, 1990, the Government requested an extension of 30 days to comply with the recommendations. The Commission granted the requested extension beginning September 11, 1990.

11. On September 24, 1990, the Government informed the Commission, *inter alia*, that the domestic legal remedies had been exhausted as of January 14, 1987. On this date the decision of the Court of Constitutional Guarantees, rejecting the appeal of the *habeas corpus* request (*infra*, para. 40), was published in Peru's Official Journal, "*El Peruano.*" The Government concluded that Resolution 43/90 of the Commission should be declared "groundless."

12. The Commission analyzed the Government's note at its 78th Regular Session and confirmed its decision to submit the case to the consideration of the Court.

II

13. The Court is competent to hear the instant case. On July 28, 1978, Peru ratified the Convention, and on January 21, 1981, it accepted the contentious jurisdiction of the Court referred to in Article 62 of the Convention.

III

14. On October 22, 1990, the Secretariat of the Court (hereinafter "the Secretariat"), pursuant to Article 26(1) of the Rules of Procedure, notified the Government of the complaint.

15. The Government designated Adviser Minister Eduardo Barandiarán as

its Agent, and doctor Jorge E. Orihuela-Ibérico as Judge *ad hoc.* On January 2, 1991, doctor Sergio Tapia-Tapia was appointed as new Agent.

16. By resolution of November 12, 1990, the President of the Court (hereinafter "the President"), in agreement with the Agent of Peru and the Commission's Delegates and in consultation with the Court's Permanent Commission (hereinafter "the Permanent Commission"), set March 29, 1991 as the deadline for the Commission to submit the memorial to which Article 29 of the Rules of Procedure refers, and June 28 of that same year as the deadline for the Government to submit its countermemorial.

17. These documents were received on March 28 and June 27, 1991 respectively.

18. On June 26, 1991, the Agent of Peru interposed preliminary objections alleging *"the lack of the Commission's jurisdiction"* and the *"expiration of the time period permitted for filing the petition."* On July 31, 1991, the Secretariat received the Commission's written submission containing its observations and conclusions on these preliminary objections.

19. On December 6, 1991, a public hearing was held to hear the position of the parties on the preliminary objections.

20. On December 11, 1991, in a judgment passed by four votes to one, the Court rejected the preliminary objections interposed by the Government.

21. The Agent of Peru submitted a request for interpretation and appealed for a revision of the judgment rejecting the preliminary objections, both of which were answered by the Commission. On June 30, 1992, a public hearing was held for this request and, on July 1, 1992, the Government renounced its request for a revision remedy.

22. On July 3, 1992, the Court adopted, by five votes against one, the decision to take note of the discontinuance of the Government's revision remedy and to reject the request for interpretation of its December 11, 1991 judgment on the preliminary objections as improper.

23. In its countermemorial of June 27, 1991, the Government denied and completely opposed the facts described by the Commission to the Court. The Government alleged that those facts did not reflect *"the actual situation as verified by the reality of events that occurred at the 'El Frontón' correctional island on the occasion of the armed riot and taking of hostages under the leadership of more than one hundred"* inmates accused of terrorism. The Government then requested a sanction against the Commission for having submitted the case to the Court.

24. By Resolution of August 3, 1991, the President granted the parties time limits for the submission of evidence, as well as for the formulation of comments concerning these communications, which expired on October 15, 1991.

25. The Government and the Commission submitted documentary evidence, and Peru presented its comments on the evidence submitted by the Commission. Among other things, the Government objected to the testimonial proof as improper and unnecessary and opposed the appearance of several of the witnesses and experts offered by the Commission.

26. On December 11, 1991, the Court formed a special committee to determine the procedure for examination of the evidence and authorized the President to convoke the parties to a private meeting on January 17 and 18, 1992.

27. As a consequence of the preceding and by Resolution of January 18, 1992, the President summoned the parties to a public hearing to be held on June 30, 1992, in order to hear the allegations of the Government and the comments of the Commission concerning the opposition of the Government to the appearance of some of the witnesses offered by the Commission. The President also resolved that, in case the Court deem it pertinent, the testimonies of the Commission's witnesses and experts would be received in a public hearing on July 1, 1992 and that the Commission should submit the resumes and opinions of said experts before March 2, 1992. He further requested the Government to submit a copy of certain documents and to adopt the measures necessary to ensure that the bodies of the inmates who died at "El Frontón" not be moved from the cemeteries where they were buried.

28. On February 12, 1992, the Government asked the Court to modify the President's Resolution. It also requested that the dates for the hearings be maintained to resolve the issue of the disqualification of witnesses. It further requested that the hearing for the delivery of its allegations and the Commission's comments not be made public. The Court denied this request on June 29. 1992, as it felt that no exceptional circumstances, such as those referred to in Article 14 of the Rules of Procedure, were present in this case.

29. The Commission requested a 30-day extension for submitting its experts' resumes and opinions in compliance with the President's resolution. The Government objected.

30. On March 24, 1992, the President partially modified his January 18, 1992, Resolution and resolved that, if found pertinent after the hearing, the Court would opportunely summon the witnesses and experts offered by the Commission to deliver their testimonies. By note of that same date, the President denied the application for extension to which the preceding paragraph refers *"in view of the fact that the Commission has had the opportunity and the time necessary to submit said information by the deadline set, and that, by their very nature, judicial deadlines must be met except for exceptional causes which are not found in this case."*

31. On April 9, 1992, the Commission applied for reconsideration against the preceding decision and submitted the resumes and expert opinions of Enrique Bernardo, Guillermo Tamayo, Robert H. Kirschner and Clyde C. Snow. By note of April 30, 1992, the Government requested that the documents be returned to the Commission as their submission was improper and would avoid compliance with the March 24 decision.

32. By Resolution of July 1, 1992, the Court confirmed the President's decision not to grant the 30-day extension requested by the Commission; instructed that the resumes and expert opinions submitted be maintained in the case file to be examined in due time; and authorized the President to re-

solve, subject to prior consultation with the Permanent Commission, whether to admit the statements of the experts offered by the Commission.

33. By note of July 3, 1992, the Government requested the annulment of the preceding decision, which request the President rejected for being notoriously improper.

34. During the 21st Regular Session of the General Assembly of the Organization of American States (hereinafter "the OAS"), the State Parties in the Convention elected Dr. Alejandro Montiel-Arguello, Dr. Máximo Pacheco-Gómez, and Dr. Hernán Salgado Pesantes as new judges of the Court and reelected Judge Héctor Fix-Zamudio. On June 29, 1992, the Court, with its new membership having been designated as of January 1, 1992, and in consideration of Judge *ad hoc* Jorge E. Orihuela-Ibérico's request for an interpretation of Article 54(3) of the Convention in relationship to this case. decided *"to proceed with the consideration of the Neira Alegría et al. case, except as it relates to the motions interposed by the Government's Agent against the December 11, 1991 judgment, which shall be decided by the Court with the membership it had at the time said judgment was passed ."* Judge Nieto added a dissenting opinion, and Judges Montiel and Orihuela added their respective individual opinions.

35. On June 30, 1992, the Court, pursuant to the provisions of Article 37 of the Rules of Procedure, decided to reject the objections or disqualification arguments raised against the testimonial evidence offered by the Commission, and authorized the President to determine, subject to prior consultation with the Permanent Commission, the dates for the public hearings. The President scheduled the hearings to start on July 6, 1993 in order to receive the declarations of the witnesses and experts proposed by the Commission and hear the arguments of the parties on the merits of the case.

36. By note of September 22, 1992, the Government reported the following in connection with the President's request of January 18 of that year:

> The cemeteries mentioned in said resolution have an official and permanent status and generally remain subject to control measures under the direction of their respective administrations. For this reason, the bodies buried therein may not be moved, except in conformity with the rules governing these matters and at the request of the interested party.

37. Between July 6 and 10, 1993, the Court held public hearings on the merits of the case, and heard the concluding arguments of the parties.

Appearing before the Court:

a) For the Government of Peru: Sergio Tapia-Tapia, Agent; Hernán Ponce-Monge, Advisor; José Ernesto Ráez-González, Advisor [1]

b) For the Inter-American Commission on Human Rights: Oscar Lután-

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[1] Mr. Ráez-González was presented as a witness by the Commission after which he was accredited also as Government advisor for the hearing held on July 9, 1993.

Fappiano, Delegate; Domingo Acevedo, Attorney of the Secretariat; José Miguel Vivanco, Advisor; Juan Méndez, Advisor; Carlos Chipoco, Advisor

c) Witnesses and experts presented by the Commission: Sonia Goldenberg, witness; Pilar Coll, witness; Ricardo Chumbes-Paz, witness; José Burneo, witness; Rolando Ames, witness; César Delgado, witness; José Ráez González, witness; Augusto Yamada-Yamada, witness; Juan H. Kruger, witness; Robert H. Kirschner, expert; Clyde C. Snow, expert; Guillermo Tamayo, expert; Enrique Bernardo, expert

d) Regardless of the notice served by the Court, the following witnesses offered by the Commission did not appear at these hearings: Aquilina M. Tapia-de-Neira; José Rojas-Mar; Agustín Mantilla-Campos; César Elejalde-Estenssoro; Enrique Zileri; Juan de Dios Jiménez-Morán; César San Martín Castro

Notwithstanding the fact that the Secretariat had opportunely convoked the Judge *ad hoc*, he did not appear at these hearings. Judge Máximo Pacheco-Gómez excused himself from participating in the XXVIII Regular Session and, consequently, was not present at these hearings.

38. The Court granted the parties a term ending September 10, 1993 by which to submit their written conclusions concerning the evidence presented in this case. The Commission and the Government submitted their conclusions in due time.

39. Notwithstanding the fact that the Judge *ad hoc* had been convoked, he did not attend the sessions held by the Court concerning this judgment and, therefore, does not sign the judgment.

40. According to the documents delivered to the Court on July 16, 1986, Irene Neira-Alegría and Julio Zenteno Camahualí interposed an action for *habeas corpus* in favour of the three persons to whom this case refers. The Instructional Judge of the Twenty-First Court of Lima took a statement from the President of the National Correctional Council; the latter submitted a list showing the three persons cited to have been under custody in the San Juan Bautista Prison, charged with the offence of terrorism, on the date that the riot was crushed. On July 17, 1986, the judge declared that the action was estopped on the basis that the Government, by Supreme Decree 012-86-IN of June 2 of that year, had decreed a state of emergency in the provinces of Lima and El Callao and that Supreme Decree 006-86 JUS was published on the 20th of the same month declaring the San Juan Bautista Prison a Restricted Military Zone. The Judge's decision was confirmed on August I, 1986 by the Eleventh Correctional Court of Lima. On the 25th of that same month, the Supreme Court of Justice, criminal section, declared that it found no grounds for annulment in the latter decision and, on December 5, the Constitutional Guarantees Court ruled that *"the Supreme Court's decision that had been appealed stood inalterable."* This latter decision was published in the "El Peruano" Official Journal *(supra*, para. 11).

41. The Second Permanent Instructional Court of the Navy initiated proceedings to determine the possible criminal responsibility of the members of the

Navy who had crushed the riot, because during that action, in addition to the inmates killed, three members of the Marine Infantry who were wounded by gun fire as well as one of the hostages who belonged to the Republican Guard also died.

The Instructional Judge arrived at the following conclusions: 34 inmates had surrendered; 97 had died, and adding to that number the skeletal remains of at least fourteen additional persons resulted in a total of 111 dead inmates; the removal of debris from the prison was accomplished with great difficulty between June 20, 1986 and March 31, 1987; only four of the 97 bodies (excluding the remains of least fourteen additional persons) were identified (a figure that contrasts with that established by the fingerprint analysis which indicated that seven persons were identified). In this respect the following was stated:

> 21. The identification task carried out by Investigations Police personnel became more difficult because of the state of putrefaction, saponification and mummification of most of the corpses and skeletal remains found during the removal of debris; thus, because of their very nature, the remains cannot be identified. Nor has it been possible to compare the fingerprint samples taken by DIP-PIP and DIRCOTE with those on the identification cards that are in the files of INPE, since, in spite of several requests by the court, the latter have not been sent.
>
> 22. The tooth prints taken by Navy Medical personnel from those corpses from which it was still possible to do so, were not compared since such a method of identification of inmates was not used, neither at the INPE, nor at DIP, Lima, Callao, or DIRCOTE.

It would be appropriate to point out that, in many of the autopsy reports, crushing and multiple trauma are cited among the causes of death. The Navy Court pointed out also that it had not been possible to establish the total number of inmates who were at the correctional facility on the day that the riot started, since the criminal identification cards had not been delivered to the Court. On July 6, 1987, the case was dismissed, and it was determined that there was no responsibility on the part of the accused, a decision that was confirmed on the 16th of the same month and year by the Permanent War Council of the Navy.

42. The proceedings were reopened by decision of the Supreme Council of Military Justice in order to carry out procedures that remained to be completed, none of which refers to identification of the deceased. On October 5, 1987, the Second Permanent Instructional Court of the Navy ratified its July 6, 1987 decision to dismiss the case, which was confirmed by the Permanent War Council of the Navy on the 7th of the same month of October.

Again, on December 23, 1987, the Supreme Council of Military Justice decided to refer the case back to the instructional stage and, for that purpose, to activate the jurisdiction of its War Section. These proceedings ended on July 20~1989 with the decision that those who participated in the crushing of the riot were not liable.

43. The Congress of Peru appointed an investigative commission to ex-

amine the events that occurred at the San Juan Bautista and two other correctional institutions. The Commission was formally installed on August 7, 1987 and, in December of that same year, submitted a majority and a minority report to Congress.

In Conclusion 14, the majority report reads as follows:

> At 03:00 hours the Navy of Peru takes charge of the operations.
>
> Its action is in response to the conviction that the inmates are armed and equipped with fortifications and tunnels, as was later corroborated by the subsequent investigation. Also, the inmates had not been subdued by the Republican Guard and they caused the death of and injuries to Navy and Police officers.
>
> The disproportion of the war potential employed is nevertheless inferred from the results of the action. The final demolition, after the surrender which occurred at 14:30 hours on the nineteenth, would not have a logical explanation and would, consequently, be unjustified. ...

Amnesty International states it has compiled versions from survivors and has disseminated them in a document published in several languages, stating that alleged executions of surrendered rioters had occurred at El Frontón.

One of the survivors of the riots informally reported the same to a third person who, upon being summoned by the investigative Committee to ratify his version, refused to do so. The Military Jurisdiction should investigate these reports in depth.

In the statement of the facts contained in the minority report of the investigative commission of Congress the following is stated:

> 15(D) Attention is called to the lack of interest for rescuing possible survivors after the demolition ... 15(E) The subsequent appearance of a survivor on June 20 and four survivors on June 21 indicates that it would have been possible to rescue more inmates, had there been an interest in doing so ... 16. The removal of debris in search of corpses took the Navy an excessively and inexplicably long period of time ...

In the chapter entitled "Previous Matters" which presents the conclusions of the same minority report, the following is established:

> 3. It has been shown that the action of the judicial and Public Ministry authorities was illegally impaired and limited ... 4. It has been shown that the government, in failing to comply with its obligation to protect human life, gave orders which resulted in an unjustifiable number of deaths ... a. The option adopted, to crush the riots by means of military force in the shortest and most critical time, meant placing the life of the hostages and inmates in serious and unnecessary danger ... b. The military force used was disproportionate in relationship to the actual danger present, and no precautionary measures were put into effect to reduce the human cost of crushing the riot ... 5. ... At the El Frontón Correctional Island, the initial version concerning the operation has not satisfactorily explained either the goal of the operation or the fate of the survivors, which gives rise to the possibility that executions outside the judicial domain, similar to those at the Lurigancho correctional facility, may have taken place. Even if such executions did not take place, the fact alone of

the demolition of the Blue Pavilion, whether intentional or not, constitutes a crime against life (2).

Note (2) which is quoted at the end of the preceding paragraph reads as follows:

(2) The technical report we are attaching hereto points to the existence of evidence that at least one of the columns which supported the structure of the Pavilion was blasted with dynamite from the outside. causing the final collapse. Our evaluation has revealed, likewise, serious inconsistencies in the official explanation as to the manner in which the inmates, who were allegedly enclosed in tunnels, lost their lives by the collapse of the Pavilion.

V

44. During the public hearings held on this case, the Government abstained from presenting evidence and the Commission introduced the witnesses and experts whose statements are summarized below.

45. Witness Sonia Goldenberg stated that, as a journalist, she had interviewed Jesús Mejía-Huerta who informed her that after the bombing of the correctional facility some 70 inmates were still inside; that they were summoned in groups and that there were executions; that he had eight or ten bullet wounds and was thrown into a ditch with others who were wounded. Later, the Blue Pavilion was blown with dynamite. She also stated that she interviewed Juan Tulich-Morales who informed her that he knew that the leaders arrested were taken to the naval base of San Lorenzo and were later shot.

46. Witness Pilar Coll stated that, in August 1987, she was in an office authorized by the investigative Commission of Congress to take the testimonies of the relatives of those detained in the correctional facilities and of some of the survivors: that she interviewed Jesús Mejía Huerta who told her in greater detail what he had already stated to the previous witness. The witness also stated that some relatives of the prisoners knew that some of the survivors had disappeared.

47. Expert Guillermo Tamayo-Pinto-Bazurco, a civil engineer, stated that in 1987 the Projects and Construction Center, of which he is Chairman, was contracted by the Congressional Commission that was investigating the events at the correctional institutions; that he visited the correctional island of El Frontón: that the Blue Pavilion had been demolished and that the total demolition had been caused by plastic explosives placed at the foot of the columns; that he had seen the traces of the shock wave outside the building; that there were twenty meters of tunnels but that they did not affect the solidity of the structure and that there was no indication that there had been explosions in them.

48. Expert Enrique Bernardo Cangahuala, a civil engineer, stated that he had been hired some years before by the Senate Commission to make an assessment, from the civil engineering point of view, of the problem at the San Juan

Bautista correctional facility; that they prepared a report after visiting the site and gathering background information; that the Association of Engineers endorsed the report; that they found tunnels but that those tunnels did not go through to openings on the coastline; that they found evidence of explosives on the Pavilion columns; that with the work of ten workers the debris could have been removed in one month; that, had the purpose of using explosives been to enter the Pavilion, the explosive would have been placed on the walls, thus, the objective was to demolish the building; that there is no evidence that an explosion would have taken place inside the building; that a plastic explosive could not provoke an explosion comparable to that of dynamite; and that it had been possible for the people to take shelter inside the tunnels, but not for them to get out.

49. Witness Ricardo Aurelio Chumbes-Paz stated that he is a lawyer and that at the time of the events he was Instructional Judge of El Callao and is currently a Criminal Judge; that on June 18, 1986, he heard on the radio about certain riots at the El Frontón correctional facility; that, at approximately 1:00 pm, the President of the Supreme Court commissioned him to observe the events without decision-making powers in order to report on them later; that the Naval authorities denied him the means to travel to the correctional island; that, at approximately 3:00 or 4:00 pm, a *habeas corpus* petition interposed by the lawyers of the inmates at the correctional institution was filed with his office; that, at approximately 9:00 pm, a boat was made available to him that took him to the island; that he interviewed the Warden of the prison who informed him that the island was under Navy control; that he also interviewed the Vice Minister of the Interior who informed him that the Government, through the Cabinet, had authorized the Armed Forces to crush the riots; that immediately thereafter there was a power outage and explosions; that he approached a railing located some 50 meters from the prison and yelled, urging delegates of the inmates to come out but did not obtain any answer; that he was denied contact with the Commander in charge of the military operation; that at dawn, as he was boarding a boat to leave, he heard explosions; that on the third day he learned through the media of the deaths resulting from the crushing of the riot; that he tried to visit the prison again but was stopped, having been told that it was a Restricted Military Zone; that in other cases of uprisings the riots had been crushed without having to use lethal means; that the inmates of the "El Frontón" prison could not have escaped; that the guarantees or, in the specific case of "El Frontón", *habeas corpus* remedy, were ineffective in protecting the lives, the physical safety and the basic rights of the persons mentioned in these measures; that when corpses are examined before they are taken away, fingerprints, tooth prints and sometimes toe prints are taken; and that, when a prisoner enters the prison, fingerprints and photographs are taken.

50. Witness José Antonio Burneo-Labrín, an attorney and professor of human rights at San Marcos University, stated that in 1986 he was Director of the Juridical Department of the Social Action Episcopal Commission of

the Catholic Church; that some two or three weeks after the events at the prisons, Ms Alegría, the mother of one of the victims, and the father of the two Zenteno boys came to that office requesting assistance in obtaining information on the fate of their children; that he filed a *habeas corpus* writ with the Twenty-First Instructional Court of Lima on July 16, 1986; that the Chairman of the Joint Command of the Armed Forces and the Commandant General of the Navy stated that the information had to be requested from the correctional authorities or the Special Judge of the Navy who was examining the bodies; that the President of the National Correctional Council delivered to the Judge a list of the prisoners who were at "El Frontón" on the day of the events, which showed 152 inmates, Víctor Raúl Neira Alegría and the Zenteno brothers being among them, and requested that 27 safe and unharmed prisoners and seven wounded ones had been placed under his custody; that the judge decided not to proceed with the *habeas corpus* motion; that an appeal was made against this decision which, by two votes to one, was dismissed by the Correctional Court of Lima; that on August 25, 1986, he lodged an appeal for annulment with the Supreme Court, and that the Criminal Section of that Court decided that there was no nullity; that the CEAS lodged an appeal for annulment with the Constitutional Guarantees Court and that four of its members voted in favour of the appeal but that one vote was still necessary, since five favourable votes are required; and that, in this manner, the national jurisdiction was exhausted and the family was advised to address the Inter-American Commission.

51. Witness César Delgado-Barreto, an attorney, stated that he had been elected Senator in 1985; that he was a member of the Senate Human Rights Justice Commission; that after the events at the prisons, at the request of the President of the Republic, the Congress named a bicameral and multi-party commission of 13 members, including the witness, which held meetings for four months; that at the "El Frontón" riot the Republican Guard entered into action first, the Marine Infantry following it; that three rockets were launched first, after which plastic explosives were used; that, in his opinion, the means employed were disproportionate, since there was no need to have used explosives; that the commission was assisted by a group of engineers who prepared a report on the demolition; that he does not know of any investigation which would have determined the whereabouts of Neira Alegría and the Zentenos; that the majority and minority reports of the commission coincide as to the facts and differ because of the commission's political make-up concerning the liability of the ministers who approved the participation of the Joint Command in the crushing action at the prisons; and that one of the survivors informed a third person that there were executions of rioters after they had surrendered. but that, after having been summoned by the Commission to ratify his version, he refused to do so.

52. Witness Rolando Ames-Cobiám a graduate in Political Science, stated that in 1987, while he was a Senator, he was named President of the Congres-

sional Commission created to investigate the events at the three prisons where riots had occurred; that the Commission conducted the inquiry as rigorously as possible; that the majority and minority reports coincide as to the facts, the difference being in the amount of responsibility attributed to the highest echelons of Government in the process of repression at the prisons; that the Government expressed that it did not deem the rebellion at the three prisons to be a problem related to the police, but rather *"like the great confrontation between the Government and Sendero Luminoso ... since the public announcements and the declarations of the President of the Republic are clear in so defining the state of affairs, Sendero Luminoso vs. the Government;"* that this led to the crushing of the riots in the shortest possible time through the Joint Command of the Armed Forces; that the two-thirds of the Blue Pavilion still standing were demolished by dynamite charges placed on the outside column, which produced an absolutely unnecessary number of deaths of the persons that were not actively resisting; that no interest was expressed in looking for the wounded or for persons in the tunnels; that access to the prison was not allowed until one year later; that Neira-Alegría and the Zenteno brothers were not among the surrendered prisoners but were on the list that the National Correctional Council gave to the Commission; that the survivors of the riots refused to testify before the Commission; that Congress approved the majority report of the investigative Commission; that the final explosion that demolished the prison occurred not while an intense attack was in progress but instead when the attack ended and that it did not occur as a result of a dynamite explosion but rather by the blasting of the columns that sustained the building; that, in addition to the 28 inmates who surrendered on the actual day of the events, one day later there appeared one or two more, and three days later another one or two; that the investigative Commission requested information about the investigation being carried out by the Supreme Council of Military Justice, but that the Navy Section did not provide any information and even refused to provide the names of the officers who were in charge of the operation; that the Commission did not obtain any evidence that the inmates of the prison had dynamite; that the Commission attempted to obtain information as to why instruments such as tear or nerve gas were not used, and it was told that there was no time to apply such methods because of the urgency to crush the riot that same night; and that the rioters did not have any possibility to escape.

53. Witness José Ráez-González, a surgeon, stated that at the request of the Navy he asked the Forensic Medicine Institute to appoint two experts to make studies on the remains of bodies from "El Frontón" and, that in this capacity, he travelled to the island from February to April 1987 and examined more or less 90 corpses; that the purpose of the forensic doctor is to determine the cause of death and help with identification; that the corpses had gone beyond the entire primary putrefaction stage, some were mummified, and others had lost all soft parts and only fragments were left; that in many cases it was not possible to determine the cause of death since only bone remains were available and, that in

other cases, it was determined that death occurred because of multiple fractures; that in some cases a description was made of pieces of clothing, size, sex, age, and dental remains; that it is not the responsibility of the doctor to contact the relatives of the victims to try to identify the corpses; that identification is the responsibility of the Investigations Department; that he was able to take fingerprints from some of the corpses; that most of the deaths occurred by crushing; that once the expert examination was concluded, he delivered the records, summaries and comments to the Navy judge and signed the death certificates; that many factors make it impossible to take fingerprints from a corpse; and that he does not remember seeing burns on the corpses.

54. Witness Augusto Yamada-Yamada, M.D., Head Physician of the Pathological Anatomy Department of the Navy Hospital, an officer of the Navy with the rank of Commander of Navy Health, stated that on June 19 and 20, 1986 he started to conduct autopsies at "El Frontón"; that members of the police took fingerprints, while an odontologist took the tooth prints; that he prepared the autopsy records and the death certificates; that he was under the orders of the Judge of the Navy; that of the 38 autopsies, he certified that 17 indicated firearm wounds, 21 indicated crushing as the cause of death; that in some cases the bullet wounds were multiple and had not been inflicted at short distance; that identification was being handled by the Investigations Police; that on four death certificates, the names of the dead to be written on them were provided by the Judge; that he did not find shrapnel in the corpses; that the bodies he examined were more or less complete, except for three which did not have their heads and that he performed the autopsies on June 19 and 20, several in July, and five on January 22, 1989.

55. Witness Juan Kruger-Párraga, an anatomical pathologist M.D., stated that, up to 1989, he was head of the Pathology Department of the Naval Medical Center with the rank of Captain; that the purpose of the autopsy, among others, is to determine the cause of death, because in Peru identification of the bodies is the responsibility of the Investigations Police; that the identification is not a part of the doctor's mission; that he was summoned to perform autopsies at the "El Frontón" Island, and the first time that he was there was on July 5, 1986, and the last on January 22, 1987; that he performed 23 autopsies and on all of the records he indicated that *"some were in, or the majority were in, a state of putrefaction"* and many showed multiple fractures by crushing; that none of the autopsy records that he signed identifies the person; that odontologists participated in the autopsies taking tooth prints in those cases where dental pieces were found, and that these prints were given to the Judge of the Navy; that some of the bodies were in civilian clothes but that he did not specify this in the record; that he did not find traces of firearm wounds in the bodies; that, because of the condition of the bodies, he was not able to determine whether any among them had died on the 18th or the 19th; that each autopsy took two or more hours; that in few of the corpses did he find signs of burns.

56. Expert Robert H. Kirschner, a forensic doctor and pathologist, stated that he is Assistant and Deputy Medical Examiner to the main Medical Examiner of Cook County, Illinois, in Chicago and surrounding areas; that in his professional practice he has performed more than seven thousand autopsies and described some of his experiences. It was his opinion that, in the case of the prison in Peru, the authorities must have had, as is customary, fingerprints of the inmates and that it would have been easy to compare them to those of the corpses, the same as with tooth prints, tattoos, and old scars; that, to this effect, the assistance of the family is very important; that on June 20 it would have been very easy, having the necessary information, to identify all the corpses; that it is very important to photograph and make diagrams of the site of a disaster before removing the bodies, even to determine the cause of death; that the autopsies were performed professionally but that mistakes were made by those in charge of the identifications; that, even now, many identifications could be made, even without an exhumation, especially with the relatives cooperation; that identification is impossible in only a few cases; that an internal explosion would leave perceptible traces on the body.

57. Expert Dr. Clyde C. Snow, a forensic doctor and anthropologist, stated that since 1984 he has been called many times outside the United States of America to investigate cases of disappearances or mass executions in Argentina, Bolivia, Chile, Guatemala, El Salvador, Iraq, Kurdistan, and the former Yugoslavia; that many of those cases were more difficult than the "El Frontón" case because, in this case, a list of the inmates was available, and the correctional records should have contained physical descriptions, fingerprints, dental proof, etc.; that to a certain extent mummification makes identification easier, particularly because of fingerprints and marks on the skin; that statistically it is not probable that one doctor would have found 17 bodies among 96 with bullet wounds while the other two doctors found none; that, in a building much larger than the Blue Pavilion, the removal and identification of the bodies was done in two or three weeks; that if he had been summoned to identify the bodies at "El Fronton", he would have first gathered all the data about the victims and then would have photographed each body at the place where it had been found; that even seven months after the incident it would have been possible to identify more than 90 per cent of the bodies, and that even now this would be possible by gathering all the data on fingerprints and tooth prints and, in some cases by exhuming the bodies.

VI

58. In the concluding arguments of September 10, 1993, the Commission prepared its analysis of the evidence and requested:

> 1. By virtue of the *de facto* and *de jure* reasons previously pointed out, the Commission asks the Honourable Court to pass judgment in the instant case. declaring:
> a. That Víctor Neira-Alegría, Edgar Zenteno-Escobar, and William Zenteno-Es-

cobar were disappeared between June 18 and 19, 1986, by agents of the Peruvian State during a military operation controlled and directed by the Navy of Peru at the correctional establishment of El Frontón.

b. That, as a consequence thereof, the Peruvian State has violated, to the detriment of the victims, the right to life, the right to humane treatment, the right to personal liberty and the right to judicial protection recognized in Articles 4, 5, 7, and 25 of the American Convention on Human Rights. That the Peruvian State has likewise violated the deadlines established for cases of suspension of guarantees, as provided for in Article 27 of the Convention. All of the preceding stands in relationship to the failure to comply with the obligation to respect and assure the rights recognized in Article 1(1) of the Convention, to which Peru is a party.

2. That in consequence the Court order the Peruvian State to:

a. Carry out an exhaustive investigation of the events that occurred on June 18 and 19, 1986 at the correctional establishment of El Frontón, in order to identify those responsible for the violations of human rights committed to the detriment of Víctor Neira-Alegría, Edgar Zenteno-Escobar, and William Zenteno-Escobar; punish the perpetrators; and inform the victims' next of kin of the whereabouts of those who have disappeared.

b. Pay pecuniary compensation to the victims' next of kin for the damages inflicted upon them.

c. Take charge of the payment of court costs and attorneys' fees, including professional fees of the Commission's legal consultants who have participated in the handling of these cases, in accordance with the provisions of Article 45, paragraph 1, of the Rules of Procedure of the Court, and in conformity with the statement of account the parties must submit to the Honourable Court for approval. In this respect the Commission requests that the Court, at the applicable procedural stage, open a special proceeding to itemize the expenditures that the processing of the instant case has warranted.

59. In the final argument of September 10, 1993, the Government prepared its analysis of the evidence and concluded:

4.1. The complaint has not been duly proven with respect to the allegation that the Peruvian State violated the commitments pledged to under the American Convention on Human Rights, particularly Articles 1, 2, 4, 7, 8, and 25, on the occasion of the crushing of the riots led by inmates charged with the crime of terrorism at the "El Frontón" correctional island on June 18 and 19, 1986 and the following days.

4.2. The Government of Peru has complied with its obligations to respect the rights and liberties recognized in the American Convention on Human Rights, and, consequently, the allegation of the complaint which indicates failure to comply with Article I of said Inter American legal instrument must be declared groundless. To the extent that the violation of the precepts specified in the complaint are not ascertained, it follows that there has not been failure to comply with Article I of the American Convention, in light of the interpretation of the Inter-American Court contained in the judgements of July 29, 1988 (para. 161 to 167) and January 20, 1989 (para. 170 to 176).

4.3. The Government of Peru has complied with the duty of adopting domestic legal provisions. The evidence submitted in the instant case does not verify a failure to observe the precept contained in Article 2 of the American Convention since it has been demonstrated that a regulatory order was in force prior to the events in

question, as well as the fact that it displayed its legal consequences through authorities that were pre-determined by the Constitution and the Law ...

4.4. In the instant case, the abundant evidence submitted does not prove that the Peruvian State violated Article 7 of the American Convention, given the fact that the alleged victims were deprived of their freedom by decisions of ordinary justice ...

4.5. In the case under consideration, there is no proof that the Peruvian State was involved with the violation of Article 8 of the American Convention ...

4.6. In the course of the proceedings, it has not been proven that the Government of Peru would be responsible for having violated Article 25 of the American Convention ...

VII

60. In the terms of Article 5(2) of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.

61. In the instant case, Peru had the right and the duty to subdue the uprising of the San Juan Bautista Prison, even more so given the fact that it did not occur suddenly. Rather, the uprising appears to have been prepared in advance, given that the prisoners had made weapons of different types, dug tunnels, and practically taken control of the Blue Pavilion. It must also be kept in mind that, during the initial phase of the crushing of the riot by the Republican Guard, the prisoners captured one corporal and two guards as hostages, wounded another four guards, and took possession of three rifles and an automatic pistol with which they caused deaths among the forces that entered to crush the riot.

62. The majority's Peruvian Congressional Commission investigative report states that the *"disproportion of the war potential employed is nevertheless inferred from the results of the action. The final demolition, after the surrender which occurred at 14:30 hours on the nineteenth, would not have a logical explanation and would, consequently, be unjustified."* Also, the minority report stated as follows:

> It has been shown that the government, in failing to comply with its obligation to protect human life, gave orders which resulted in an unjustifiable number of deaths ... The military force used was disproportionate in relationship to the actual danger present, and no precautionary measures were put into effect to reduce the human cost of crushing the riot *(supra* 43).

63. The Court considered it unnecessary to analyze whether the functionaries and authorities who took part in the crushing of the riot acted consistently with their functions and in accordance with domestic law, since the responsibility for the actions of Government functionaries is attributable to the State, independently of whether the functionary contravened provisions of internal law or overstepped the limits of his authority: under international law a State

is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law *(Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C No. 4, para. 170 ; *Godínez Cruz Case*, Judgment of January 20, 1989. Series C No. 5, para. 179).

64. Of the 97 bodies on which autopsies were performed, only seven were identified. It has not been shown that all procedures necessary to obtain a larger number of identifications were carried out, nor is there proof that the assistance of the relatives of the victims was requested for that purpose. It should be noted that there is a discrepancy in the number of prisoners in the Blue Pavilion before the riot and the number of rioters who surrendered plus the number of dead. According to the proceedings in the military jurisdiction, there were 111 dead (bone remains of fourteen persons and 97 bodies) and 34 survivors, which adds up to a total of 145 persons, while the non-official list delivered by the President of the National Correctional Council includes 152 inmates before the riot. The removal of debris took place between June 23, 1986 and March 31, 1987, that is, over a period of nine months.

65. The Court feels that it is not up to the Inter American Commission to determine the whereabouts of the three persons to whom these proceedings refer, but instead, because of the circumstances at the time, the prisons and then the investigations were under the exclusive control of the Government, the burden of proof therefore corresponds to the defendant State. This evidence was or should have been at the disposal of the Government had it acted with the diligence required. In previous cases, the Court has said:

> [i]n contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.
>
> The State controls the means to verify acts occurring within its territory. Although the Commission had investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State. *(Velásquez Rodríguez Case, supra* 63, para. 135136; *Godínez Cruz Case, supra* 63, para. 141-142.)

66. The Court deems it proven that Víctor Neira Alegría, Edgar Zenteno-Escobar and William Zenteno Escobar were being held in the Blue Pavilion of the San Juan Bautista Prison on June 18, 1986, the date on which the crushing of the uprising started. This fact is certified by the list submitted by the President of the National Correctional Council to the instructional judge of the Twenty-First Court of Lima, where a *habeas corpus* writ was under consideration, and by the list submitted by the Head of Identifications of the San Juan Bautista Prison to the Second Permanent Instructional Court of the Navy. This fact has not been contested by the Government.

67. The Court considers it proven that the three cited persons were not among the rioters who surrendered and that their bodies were not identified. The preceding was certified by the September 20, 1990 note sent by the Minister of Foreign Affairs of Peru to the Commission, which was transmitted by its

Alternate Ambassador to the OAS. This note is binding on the Peruvian State (cfr. *Legal Status of Eastern Greenland Judgment*, 1933, P.C.I.J. Series, A/B, page 71) and reads as follows:

> The allegedly missing persons, Víctor Neira-Alegría, Edgar Zenteno-Escobar, and William Zenteno-Escobar, are not among the rioters who surrendered in the events of the San Juan Bautista Prison from June 18 to 19, 1986, nor are their bodies, according to the records, among the few that could be identified.
>
> On the other hand, as a result of these incidents, 92 death certificates were issued corresponding to non-identified bodies, three of which undoubtedly correspond to those three persons whom the Commission regards as missing.

68. In the instant case, an escape of the inmates and actions by third parties other than State authorities not alleged by the Peruvian State are excluded.

69. The Court considers it proven that the Pavilion was demolished by the forces of the Peruvian Navy, as may be concluded from the reports submitted by the experts in the hearing (*supra*, paras. 47 and 48), from the deposition made on July 16, 1986 by the President of the National Correctional Council before the Instructional Judge of the Twenty-First Court of Lima, and from the fact that many of the dead, according to the autopsies, had been crushed to death. The majority and minority reports of the Congress (*supra* para. 43) are consistent in regards to the disproportionate use of force. These reports are official and are regarded by this Court to be sufficient proof of that fact.

70. Also to be taken into consideration is the congressional minority commission report, which affirmed without objection by the Government, that there was lack of interest in rescuing the surviving rioters after the demolition, since a few days later four inmates appeared alive and more could have been alive (*supra* para. 43).

71. The Court likewise considers it proven that the identification of the bodies was not undertaken with the required diligence, since only a few of those bodies recovered during the days immediately following the end of the conflict were identified. Of the rest, which were recovered over a span of nine months, certainly a long period, this was not done either although, according to the statement of the experts (*supra* 56 and 57), identification could have been possible by applying certain techniques. This conduct on the part of the Government constitutes a serious act of negligence.

72. Based on the preceding, the Court concludes that Víctor Neira-Alegría, Edgar Zenteno-Escobar and William Zenteno-Escobar lost their lives due to the effects of the crushing of the uprising by the forces of the Government and as a consequence of the disproportionate use of force.

73. The Court must now determine whether the actions and omissions attributable to the State constitute violations of the American Convention. It must be pointed out that the Commission, in its complaint, indicates the violation of Articles 1, 2, 4, 7, 8, and 25, but that, in its allegations, it omits Article 2 and adds Articles 5 and 27.

74. Article 4(1) of the Convention states that *'"[n]o one shall be arbitrarily*

deprived of his life." The expression 'arbitrarily' excludes, as is obvious, the legal proceedings applicable in those countries that still maintain the death penalty. But, in the present case, the analysis that must be made has to do with the right of the State to use force, even if this implies depriving people of their lives to maintain law and order, an issue that currently is not under discussion. There is an abundance of reflections in philosophy and history as to how the death of individuals in these circumstances generates no responsibility whatsoever against the State or its officials. Although it appears from arguments previously expressed in this judgment that those detained in the Blue Pavilion of the San Juan Bautista Prison were highly dangerous and, in fact armed. it is the opinion of this Court, those do not constitute sufficient reasons to justify the amount of force used in this and other prisons where riots had occurred. The incident was understood as a political confrontation between the Government and the real or alleged terrorists of Sendero Luminoso *(supra* 52), a confrontation which probably led to the demolition of the Pavillion and all of its consequences: among them the death of inmates who would have eventually surrendered, the clear negligence in the search for survivors and, later, in the recovery of the bodies.

75. As this Court has stated in previous cases,

> [w]ithout question. the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders.
>
> However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes. the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action. *(Velásquez Rodríguez Case, supra* 63, para. 154; *Godínez Cruz Case, supra* 63, para. 162.)

76. Given the circumstances that surrounded the crushing of the riot at the San Juan Bautista Prison; the fact that eight years after the riot occurred there is still no knowledge of the whereabouts of the three persons to whom this case refers, as was acknowledged by the Minister of Foreign Affairs stating that the victims were not among the survivors and that *"three of the* [non-identified bodies], *undoubtedly correspond to those three persons;"* and the disproportionate use of force; it may be reasonably concluded that they were arbitrarily deprived of their lives by the Peruvian forces in violation of Article 4(1) of the Convention.

77. This Court likewise considers that the Government of Peru also violated the provisions of Articles 7(6) and 27(2) of the American Convention through the application of Supreme Decrees 012-lN and 006-86 JUS of June 2 and 6, 1986, which declared the state of emergency in the Provinces of Lima and El Callao and applied the status of Restricted Military Zone in three correctional facilities, including the San Juan Bautista Prison. In effect, while such decrees did not expressly suspend the *habeas corpus* remedy or action recognized in Article 7(6) of the Convention, in reality, compliance with both decrees resulted in the ineffectiveness of said instrument of protection, thereby resulting

in its suspension to the detriment of the alleged victims. *habeas corpus* was the ideal procedure by which the judicial authority could investigate and acquire knowledge as to the whereabouts of the three persons to which this case refers.

78. In the *habeas corpus* writ filed on June 16, 1986 with the Twenty-First Instructional Judge of Lima, in favour of Víctor Neira-Alegría and Edgar and William Zenteno Escobar against the President of the Joint Command of the Armed Forces and the Commandant General of the Navy, Irene Neira-Alegría and Julio Zenteno-Camahualí stated that their next of kin had not been found on the occasion of the crushing of the uprising at the San Juan Bautista Prison where they were being held and had not since appeared, possibly because they had been abducted. The petitioners requested that, in the event that the detainees had died, the Judge demand that the military authorities indicate where the bodies could be found and deliver the respective death certificates.

79. The *habeas corpus* application was declared inadmissible by the judge in his decision of July 17, 1986, on the grounds that the petitioners did not prove that the prisoners had been abducted, the incidents that occurred at the three prisons (including the San Juan Bautista Prison) were subject to investigation by the military courts and the Office of the Attorney General of the Nation, and that such occurrences were outside the scope of the summary *habeas corpus* procedure.

80. In accordance with arguments previously pointed out (*supra* para. 40), on August 1 of that year, the Eleventh Correctional Court of Lima confirmed the original judgment based on the essential argument that the exclusive military tribunal was exercising jurisdiction with respect to the San Juan Bautista Prison, making it impossible for the regular jurisdictional bodies to intervene. On the 25th of the same month of August, the Criminal Section of the Supreme Court declared that, *"in consideration of its grounds,"* the application for annulment made against the appeal decree judgment was inadmissible. Finally, on December 5, 1986, the Constitutional Guarantees Court, to which the petitioners had appealed, declared, that the judgment of the Supreme Court *"stood inalterable,"* since the minimum number of five votes in favour, had not been obtained as required by Peruvian law.

81. This Court considers it useful to stress that the judgment of the Constitutional Guarantees Court stood upon a voting where four justices were in favour of admitting the appeal filed, and two were in favour of denying the annulment. In virtue of this, while it is true that the minimum number of five votes in favour was not obtained, the singular vote of the four justices represents the majority opinion of the Court. The pertinent section of the opinion was affirmed when it said: *"That while it is true that such a situation does not constitute a legal definition for kidnapping, it leads to the conclusion that the judge should have exhausted the investigation concerning the lives and whereabouts of the persons in whose favour the /habeas corpus) action is being brought."* Thus, in the opinion of said justices, the appeal against the judgment of the Supreme Court was justici-

able. Had the appeal been admitted, the intervention of military justice would not have impaired the *habeas corpus* proceeding.

82. The Court has interpreted Articles 7(6) and 27(2) of the Convention in Advisory Opinions OC-8 and OC-9 of January 30 and October 6, 1987 respectively. In the former opinion, the Court maintained that

> writs of *habeas corpus* and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that they serve, moreover, to preserve legality in a democratic society. This Court also deemed that [i]n order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. *(Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paras. 42 and 35.)

83. In Advisory Opinion OC-9, this Court added that the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the Rule of Law, even during the state of exception that results from the suspension of guarantees. *(Judicial guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 38.)

84. These interpretative criteria are applicable to this case in that the control and jurisdiction of the armed forces over the San Juan Bautista Prison translated into an implicit suspension of the *habeas corpus* action, by virtue of the application of the Supreme Decrees that imposed the state of emergency and the Restricted Military Zone status.

85. In accordance with Article 1(1) of the Convention, *"[T]he 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 ..."* Thus, as a consequence, this provision is a general one, and its violation is always related to the violation of a provision that establishes a specific human right. As the Court already expressed it in a previous case, Article I specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated. (*Velásquez Rodríguez Case, supra* 63, para 162; *Godínez Cruz Case, supra* 63, para. 171.)

86. This Court considers that in this case the Government has not violated

Article 5 of the Convention. While the deprivation of a person's life could also be understood as an injury to his or her personal integrity. this is not the meaning of the cited provision of the Convention. In essence, Article 5 refers to the rule that nobody should be subjected to torture or to cruel. inhuman, or degrading punishment or treatment, and that all persons deprived of their liberty must be treated with respect for the inherent dignity of the human person. It has not been demonstrated that the three persons to whom this matter refers had been subjected to cruel treatment or that the Peruvian authorities had damaged their dignity during the time that they were being detained at the San Juan Bautista Prison. Nor is there proof that said persons would have been deprived of the judicial guarantees to which Article 5 of the Convention refers during the proceedings brought against them.

87. The Court must express its position concerning the court costs and attorneys' fees of these proceedings. In this respect, it would be appropriate to insist that

> the Commission cannot demand that expenses incurred as a result of its own internal work structure be reimbursed through the assessment of costs. The operation of the human rights organs of the American System is funded by the Member States by means of their annual contributions. *(Aloeboetoe et al. Case, Reparations (Article 63(1) American Convention on Human Rights).* Judgment of September 10, 1993, Series C No. 15, para. 114.)

88. However, the Court must sentence Peru to pay the expenditures that the victims' next of kin may have incurred during these proceedings, which determination shall be left to the Government and the Commission, the Court reserving the right to determine them should the parties not reach an agreement.

89. Article 63(1) of the Convention states as follows:

> 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.

In the current circumstances it is clear that the Court may not rule that the victims be guaranteed the enjoyment of the rights of which they were deprived. It is then only appropriate to determine the reparation of the consequences of the violation and the payment of fair compensation.

90. The Court lacks the elements of judgment that would enable it to determine the extent of the compensation, as such information was neither submitted by the parties nor discussed during the proceedings. Therefore, the Court shall limit itself to the passing of an *in genere* judgment, leaving its determination in the hands of the parties. Should the parties not reach an agreement, the final decision shall be made by the Court.

91. Therefore,

THE COURT,

unanimously

1. Declares that Peru has violated the right to life recognized in Article 4(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Víctor Neira-Alegría, Edgar Zenteno Escobar and William Zenteno-Escobar.

2. Declares that Peru has, to the detriment of the three persons cited, violated the right to *habeas corpus* established in Article 7(6), in relation to the prohibition established in Article 27(2) of the American Convention on Human Rights.

3. Decides that Peru is obliged to pay fair compensation to the next of kin of the victims on the occasion of these proceedings and to reimburse the expenditures that they have incurred in their petitions before the national authorities.

4. Decides that the form and extent of the compensation and the reimbursement of the expenditures shall be determined by Peru and the Commission, by mutual agreement, within a term of six months as of the date of notification of this judgment.

5. Reserves the power to review and approve the agreement and, should there be no agreement, to determine the extent of the compensation and expenditures, to which effect the Court does not close this case.

The Court was composed of the following judges:

Héctor Fix-Zamudio, *President*, Hernán Salgado-Pesantes, *Vice-President*, Rafael Nieto-Navia, Alejandro Montiel-Arguello, Máximo Pacheco-Gómez. Also present Manuel E. Ventura-Robles, *Secretary*, and Ana María Reina, *Deputy Secretary*.

Inter-American Court of Human Rights, S. José

Judgment on compensatory damages

Judgment of July 21, 1989 - *Godinez Cruz case*
Art. 63(1) American Convention on Human Rights

In the Godínez Cruz case, the Inter-American Court of Human Rights, composed of the following judges:
Héctor Gros-Espiell, President; Héctor Fix-Zamudio, Vice-President Rodolfo; E. Piza E., Judge; Pedro Nikken, Judge; Rafael Nieto-Navia, Judge; Rigoberto Espinal-Irías, Judge ad hoc; also present Manuel E. Ventura-Robles, interim Secretary,
pursuant to Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), Article 44(1) of the Court's Rules of Procedure, and in accord with the judgment on the merits of January 20, 1989, the Court enters the following judgment in the instant case brought by the Inter-American Commission on Human Rights against the State of Honduras.

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted this case to the Inter-American Court of Human Rights (hereinafter "the Court") on April 24, 1986. It originated in a complaint (No. 8097), against the State of Honduras (hereinafter "Honduras" or "the Government"), lodged with the Secretariat of the Commission on October 9, 1982.

2. In its judgment on the merits of January 20, 1989, the Court

> 5. Decides that Honduras is hereby required to pay fair compensation to the next of kin of the victim.
>
> 6. Decides that the form and amount of such compensation shall be fixed by the Court and, for this purpose, retains jurisdiction in the case.
>
> (Godínez Cruz Case, Judgment of January 20, 1989. Series C No. 5, para. 203).

I

3. The Court has jurisdiction to order the payment of fair compensation to the injured party in the instant case. Honduras ratified the Convention on September 8, 1977, and recognized the contentious jurisdiction of the Court on September 9, 1981, by depositing the instrument referred to in Article 62 of the Convention. The Commission submitted the case to the Court pursuant to Articles 61 of the Convention and 50(1) and 50(2) of its Regulations, and the Court decided the case on January 20, 1989.

II

4. By Resolution of January 20, 1989, the Court decided:

1. To authorize the President, to consult with the Permanent Commission of the Court, to initiate whatever studies and name whatever experts might be convenient, so the Court will have the elements of judgment necessary to set the form and amount of compensation.

2. To authorize the President to obtain the opinion of the victim's family, the Inter-American Commission on Human Rights, and the Government of Honduras.

3. To authorize the President, should it be necessary, and following consultation with the Permanent Commission of the Court, to set a hearing in this matter.

5. The attorneys recognized as counselors or advisers to the Commission (hereinafter "the attorneys") asked the Court for a public hearing to receive a psychiatric report on the moral damages suffered by the victim's family and the testimony of one of the experts on the methods and conclusions of the report.

6. Citing paragraph 2 of the Resolution of January 20, 1989, Mrs. Enmidida Escoto de Godínez, the wife of Saúl Godínez Cruz, submitted a pleading dated February 26, 1989, in which she asked the Court order the Government to comply with the following points:

1) An end to forced disappearances in Honduras.

2) An investigation of each of the 150 cases.

3) A complete and truthful public report on what happened to the disappeared persons.

4) The trial and punishment of those responsible for this practice.

5) A public undertaking to respect human rights, especially the right to life, liberty, and integrity of the person.

6) A public act to honour and dignify the memory of the disappeared. A street, park, elementary school, high school, or hospital could be named for the victims of disappearances.

7) The demobilization and disbanding of the repressive bodies especially created to kidnap, torture, make disappear and assassinate.

8) Guarantees to respect the work of humanitarian and family organizations and public recognition of their social function.

9) An end to all forms of overt or indirect aggression or pressure against the families of the disappeared and public recognition of their honour.

10) The establishment of a fund for the primary, secondary, and university education of the children of the disappeared.

11) Guaranteed employment for the children of the disappeared who are of working age.

12) The establishment of a retirement fund for the parents of the disappeared.

7. As required by the Resolution of January 20, 1989, the Commission submitted its opinion on March 1, 1989. It asserted that the just compensation to be paid by Honduras to the family of Saúl Godínez Cruz should include the following:

1. The adoption of measures by the State of Honduras which express its emphatic condemnation of the facts that gave rise to the Court's judgment. In particular, it should be established that the Government has an obligation to carry out an exhaustive investigation of the circumstances of the disappearance of Saúl Godínez and to bring charges against anyone responsible for the disappearance.

2. The granting to the wife and daughter of Saúl Godínez of the following benefits:

a) Payment to the wife of Saúl Godínez, Mrs. Enmidida Escoto de Godínez, of the highest pension recognized by Honduran law.

b) Payment to the daughter of Saúl Godínez, Emma Patricia Godínez Escoto, of a pension or subsidy until she completes her university education, and

c) Title to an adequate house, equivalent to the house of a middle class professional family.

3. Payment to the wife and daughter of Saúl Godínez of a cash amount corresponding to the resultant damages, loss of earnings, and emotional harm suffered by the family of Saúl Godínez, to be determined by the Illustrious Court based upon the expert opinion offered by the victim's family.

8. On March 10, 1989, the attorneys submitted a pleading in which they assert that, in conformity with Article 63 of the Convention, reparation should be moral as well as monetary.

The measures they request as moral reparation are the following:

— A public condemnation of the practice of involuntary disappearances carried out between 1981 and 1984;
— An expression of solidarity with the victims of that practice, including Saúl Godínez. Public homage to those victims by naming a street, thoroughfare, school or other public place after them;
— An exhaustive investigation of the phenomenon of involuntary disappearances in Honduras, with special attention to the fate of each of the disappeared. The resulting information should be made known to the family and the public;
— Prosecution and appropriate punishment of those responsible for in citing, planning, implementing or covering up disappearances, in accord with the laws and procedures of Honduras.

In their opinion, the cash indemnity paid to the family of Saúl Godínez Cruz should include the following: damages, two hundred thousand lempiras; loss of earnings, two million eighty-three thousand three hundred and eight lempiras; emotional damages, four million five hundred sixty-seven thousand lempiras; and punitive damages, two million two hundred eighty-three thousand lempiras.

They especially request

> that Enmidida Escoto de Godínez and her minor daughter, Emma Patricia Godínez Escoto, be recognized as the beneficiaries, and that the Government of Honduras be ordered to adopt special legislation making that determination, in order to facilitate the payment of indemnity without the need for judicial proceedings for a declaration of absence, presumed death or declaration of heirship. For that purpose, we formally state on behalf of those persons that there are no other persons with a superior claim to inherit from Saúl Godínez.

Moreover, they ask the Court to establish dead lines within which the Government should make moral reparation, and to reserve the right to see that they are met. Regarding the monetary reparation, they ask the Court to set "a deadline of 90 days for the execution of the judgment, and that a lump-sum payment be made prior to that date to Enmidida Escoto de Godínez."

9. On March 10, 1989, the Delegate of the Commission submitted a clinical report prepared by a team of psychiatrists on the state of health of the family of Saúl Godínez Cruz.

10. The Agent informed the Court on March 14, 1989 that, in payment of the indemnity, his Government was willing to apply the Honduran law of the National Social Security Institute for Teachers (Instituto Nacionál de Previsión del Magisterio), which it considered the most favourable in this case because it establishes the right to payment of fourteen thousand eight hundred and sixty-three lempiras and fifty cents, which includes 36 monthly paychecks plus 70 per cent in severance pay. Moreover, the Government offered as a gesture to pay an additional amount for a total of sixty thousand lempiras "in accordance with the Law of Retirement and Pensions for Teachers, because 'GODINEZ CRUZ' was a member of that system."

11. On March 15, 1989, the Court held a public audience to hear the parties regarding the indemnity to be awarded.

The following persons were present:

a) in representation of the Government of Honduras, Ambassador Edgardo Sevilla Idiáquez, Agent

b) in representation of the Inter-American Commission on Human Rights, Dr. Edmundo Vargas Carreno, Delegate, Dr. Claudio Grossman, Adviser

c) called by the Commission, Dr. Federico Allodi, a psychiatrist, testified to the emotional harm suffered by the family of the victim.

12. As instructed by its President, the Secretariat of the Court addressed the Government on April 3, 1989, to request the following information to be duly certified by the appropriate officials:

> 1. The dates of birth of Manfredo Velásquez Rodríguez and Saúl Godínez Cruz, with their civil status at the time of disappearance as established by Honduran law;
>
> 2. The position or positions they held and the salaries or other income they received, either from the government, government entities or private institutions, together with their social security status or equivalent, and their income tax statements, if any;
>
> 3. Academic or professional degrees or special qualifications relevant to their financial and social situation at the time of disappearance, and the title to any property in their name;
>
> 4. The names and status of their wives; and those of any concubines recognized in any official document; the age of the former and the latter at the time of the disappearances; any property in their name or other sources of in come, and the conjugal property eights of the wives (community property and others);
>
> 5. The names and civil status of their children, those of the marriage and any

outside the marriage; their ages at the time of the disappearances; whether they were students, and whether any are physically or mentally handicapped;

6. The names and civil status of their parents, their ages at the time of the disappearances; whether they had or have property or income of their own, and whether they were or are dependents of the disappeared;

7. The names, civil status, ages and situation of any other possible claimants under Honduran law at the time of the disappearances, or any other person recognized as a dependent in social security documents, tax statements or other documents which might contain that information;

8. Whether the disappeared had life insurance or other personal insurance, in what amount, the period of coverage, and the names of the beneficiaries;

9. Mortuary tables for men and women and commutation schedules (the latter are used for future tax discounts in return for prompt payment) effective in Honduras at the time of the disappearances;

10. Certified copies of Honduran legislation regarding: a) legal heirs as defined by civil and labor law; b) conjugal property rights (community property or other); c) beneficiaries with rights to support payments, showing the criteria used to determine support; d) beneficiaries of any government pensions based upon death or permanent disability; e) Honduran legislative and jurisprudential criteria for indemnification for death, accidental or non accidental.

13. On April 26, 1989, the Government submitted its response to the Commission's submission of March 1, 1989 (supra 7). The pleading also refers to matters that, in its opinion, should be taken into account in the indemnification of the family of Saúl Godínez Cruz. Regarding measures to express its condemnation of the facts that gave rise to the judgment and its obligation to investigate the disappearance of Saúl Godínez Cruz and prosecute those responsible, the Government believes the Court's judgment of January 20, 1989 "is very clear and precise regarding the obligation of Honduras to pay damages, which is to pay *just compensation to the family of the victim, and nothing more*" (underlined in the original). Insofar as the benefits the Commission believes should be paid to the wife of Saúl Godínez Cruz, the Government believes that such payment "is only admissible insofar as whatever may be provided for by the system to which Mr. GODINEZ CRUZ may have been affiliated." It asserts that damages, loss of earnings, and emotional harm are inadmissible because their purpose "is not merely to compensate the GODINEZ CRUZ family, but... to pay the expenses of the intense media campaign waged against Honduras within and outside the country by national and foreign associations, and to pay the fees of lawyers and other professionals who cooperated with the Commission in this case."

14. In reply to point 2 of the Court's communication of April 3, 1989 (supra 12), the Government submitted on May 19, 1989 various documents and resolutions containing the information requested.

15. On that same date, in response to point 1 of that communication (supra 12), the Government submitted a copy of the birth certificate of Saúl Godínez Cruz.

16. In response to points 2 and 9, the Government submitted the following information on May 26, 1989:

> a) Certification by the Secretary of the General Tax Office (Dirección General de Tributación) according to which Mssrs. MANFREDO VELASQUEZ RODRIGUEZ and SAUL GODINEZ CRUZ did not file tax returns in 1979, 1980 and 1981.
>
> b) Mortuary Tables CSO 1958, commutation values at 7%, used by the Superintendent of Banks and Insurance (Superintendencia de Bancos y Seguros).

17. On that same date, in compliance with point 10, the Government submitted the following documentation:

> 1. Provisions on inheritance upon death and inter vivos gifts, contained in Book III of the 1906 Civil Code of Honduras.
>
> 2. Regulatory provisions of the Social Security Law applicable in Honduras when an insured person dies (Resolution No. 193, December 17, 1971).
>
> 3. Provisions of the Family Code: Duties and Rights arising from Marriage, Informal Union, Economic Relationship, Family Patrimony, Paternity and Parent-Child Relationship (Decree No. 76-84).
>
> 4. Provisions of the Law of Military Social Security (Decree No. 905).
>
> 5. Retirement Law for the Judicial Branch (Decree No. 114 of the National Congress, May 5, 1954).
>
> 6. Law of Retirement and Pensions for Employees and Officials of the Executive Branch.
>
> 7. Law of the National Institute of Social Security for Teachers.

18. In reference to information requested but not yet submitted, the Government stated on June 13, 1989 that it

> ... has sent notes to various institutions and only a few have replied; nevertheless, despite the difficulties, the documents we have requested will be sent opportunely as they arrive.
>
> Likewise, I also inform you that in regard to numbers 4, 5, and 6 of the note of the Honorable Court, my Government believes it will be impossible to send certain documents which are very personal, and, therefore, suggests that this information should be presented by the Inter-American Commission or by the legal representatives of the plaintiffs against the State of Honduras.

19. Amici curiae pleadings were submitted by the Central American Association of Relatives of the Detained-Disappeared (Asociación Centroamericana de Familiares de Detenidos-Desaparecidos) and the following twelve jurists: Jean-Denis Archambault, Alejandro Artucio, Alfredo Etcheberry, Gustavo Gallón Giraldo, Diego García Sayán, Alejandro M. Garro, Robert K. Goldman, Jorge Mera, Denis Racicot, Joaquín Ruiz Giménez, Arturo Valencia Zea and Eugenio Raúl Zaffaroni.

III

20. In accordance with resolutory point number 6 of the judgment on the merits entered on January 20, 1989, the Court must rule upon the form and

amount of the compensatory damages the Government is obligated to pay to the family of Saúl Godínez Cruz (Godínez Cruz Case, supra 2).

IV

21. The written and oral arguments made to the Court show substantial differences of opinion insofar as the scope, bases and amount of the compensation. Some arguments refer to the need to rely upon the internal law of Honduras, or part of it, in determining or paying the indemnity.

22. Because of those disagreements and in order to implement the judgment on the merits of January 20, 1989, the Court must now define the scope and content of the just compensation to be paid by the Government to the family of Saúl Godínez Cruz.

23. It is a principle of international law, which jurisprudence has considered "even a general concept of law," that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21, and Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184).

24. Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non patrimonial damages, including emotional harm.

25. As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.

26. Indemnification for human rights violations is supported by international instruments of a universal and regional character. The Human Rights Committee, created by the International Covenant of Civil and Political Rights of the United Nations, has repeatedly called for, based on the Optional Protocol, indemnification for the violation of human rights recognized in the Covenant (see, for example, communications 4/1977; 6/1977; 11/1977; 132/1982; 138/1983; 147/1983; 161/1983; 188/1984; 194/1985; etc., Reports of the Human Rights Committee, United Nations). The European Court of Human Rights has reached the same conclusion based upon Article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

27. Article 63(1) of the American Convention provides as follows:

> 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.

28. This Article does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so it is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it.

29. This implies that, in order to fix the corresponding indemnity, the Court must rely upon the American Convention and the applicable principles of international law.

V

30. The Commission and the attorneys maintain that, in implementing the judgment, the Court should order the Government to take some measures, such as the investigation of the facts related to the involuntary disappearance of Saúl Godínez Cruz; the punishment of those responsible; a public statement condemning that practice; the revindication of the victim, and other similar measures.

31. Measures of this type would constitute a part of the reparation of the consequences of the violation of rights or freedoms and not a part of the indemnity, in accordance with Article 63(1) of the Convention.

32. However, in its judgment on the merits (Godínez Cruz Case, supra 2, para. 191), the Court has already pointed out the Government's continuing duty to investigate so long as the fate of a disappeared person is unknown (supra 30). The duty to investigate is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible (Godínez Cruz Case, supra 2, para. 184).

33. Although these obligations were not expressly incorporated into the resolutory part of the judgment on the merits, it is a principle of procedural law that the bases of a judicial decision are a part of the same. Consequently, the Court declares that those obligations on the part of Honduras continue until they are fully carried out.

34. Otherwise, the Court understands that the judgment on the merits of January 20, 1989, is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims.

35. The attorneys also request the payment by the Government of punitive damages as part of the indemnity, because this case involved extremely serious violations of human rights.

36. The expression "fair compensation," used in Article 63(1) of the Convention to refer to a part of the reparation and to the "injured party," is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.

37. Because of the foregoing, the Court believes, then, that the fair com-

pensation, described as "compensatory" in the judgment on the merits of January 20, 1989, includes reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of Saúl Godínez Cruz.

VI

38. Having defined the scope and limitations of the fair compensation referred to in resolutory point number 6 of the judgment on the merits, the Court now turns to the bases for the payment of the same.

39. In this regard, the attorneys ask for compensation for patrimonial damages within the concept of damages and include in the latter the expenses of the family related to the investigation of the whereabouts of Saúl Godínez Cruz.

40. The Court cannot grant that request in the present case. Though it is theoretically correct that those expenses come within the definition of damages, they cannot be awarded in the instant case because they were not pleaded or proven opportunely. No estimate or proof of expenses related to the investigation of the whereabouts of the victim was submitted during the trial. Likewise, with regard to litigation expenses in bringing the matter before the Court, the judgment on the merits already denied an award of costs because there was no pleading to support the request (Godínez Cruz Case, supra 2, para. 202).

41. The Government argues that the compensation should be on the basis of the most favourable treatment possible for the family of Saúl Godínez Cruz under Honduran law, which is that provided by the Law of the National Institute of Social Security for Teachers in the case of accidental death. According to the Government, the family would be entitled to a total of fourteen thousand eight hundred sixty-three lempiras and fifty cents, to which it would contribute an additional amount to bring the compensation to sixty thousand lempiras.

42. The Commission does not propose an amount, but rather asserts that the compensation should include two elements: a) the greatest benefits that Honduran legislation allows nationals in cases of this type and which, according to the Commission, are those granted by the Institute of Military Pensions, and b) a cash amount which should be set according to what is provided for by Honduran and international law.

43. The attorneys believe that the basis should be the loss of earnings, calculated according to the income that Saúl Godínez Cruz received at the time of his kidnapping, at the age of 32, and the possible promotions, Christmas bonuses, allowances and other benefits he would have been entitled to at retirement. They calculate an amount which would be one million three hundred eighty-eight thousand eight hundred and eighty-seven lempiras. They add to that the retirement benefits for ten years, according to life expectancy in Honduras for a person of that social class, calculated at six hundred ninety-four thousand four hundred twenty one lempiras, which gives a total amount of two million eighty-three thousand three hundred and eight lempiras.

44. The Court notes that the disappearance of Saúl Godínez Cruz cannot be considered an accidental death for the purposes of compensation, given that it is the result of serious acts imputable to Honduras. The amount of compensation cannot, therefore, be based upon guidelines such as life insurance, but must be calculated as a loss of earnings based upon the income the victim would have received up to the time of his possible natural death. In that sense, one can take as a point of departure the salary that, according to the certification of the Executive Director of the Personnel and Scales Office of the Magistery, dependancy of the Ministry of Education of Honduras on March 13, 1989, Saúl Godínez Cruz was receiving at the time of his disappearance (405 lempiras per month) and calculate the amount he would have received at the time of his obligatory retirement at the age of sixty, as provided by Article 69 of the Law of the National Institute of Social Security for Teachers and which the Government itself considers the most favourable. At retirement, he would have been entitled to a pension until his death.

45. However, the calculation of the loss of earnings must consider two distinct situations. When the beneficiary of the indemnity is a victim who is totally and permanently disabled, the compensation should include all he failed to receive, together with appropriate adjustments based upon his probable life expectancy. In that circumstance, the only income for the victim is what he would have received, but will not receive, as earnings.

46. If the beneficiaries of the compensation are the family members, the situation is different. In principle, the family members have an actual or future possibility of working or receiving income on their own. The children, who should be guaranteed the possibility of an education which might extend to the age of twenty-five, could, for example, begin to work at that time. It is not correct, then, in these cases, to adhere to rigid criteria, more appropriate to the situation de scribed in the above paragraph, but rather to arrive at a prudent estimate of the damages, given the circumstances of each case.

47. Based upon a prudent estimate of the possible income of the victim for the rest of his probable life and on the fact that, in this case, the compensation is for the exclusive benefit of the family of Saúl Godínez Cruz identified at trial, the Court sets the loss of earnings in the amount of four hundred thousand lempiras to be paid to the wife and to the daughter of Saúl Godínez Cruz as set out below.

48. The Court must now consider the question of the indemnification of the moral damages (supra 25), which is primarily the result of the psychological impact suffered by the family of Saúl Godínez Cruz because of the violation of the rights and freedoms guaranteed by the American Convention, especially by the dramatic characteristics of the involuntary disappearance of persons.

49. The moral damages are demonstrated by expert documentary evidence and the testimony of Dr. Federico Allodi (supra 11), psychiatrist and Professor of Psychology at the University of Toronto, Canada. According to his testimony, the above doctor examined the wife of Saúl Godínez Cruz, Mrs. Enmidida Es-

coto de Godínez and his daughter, Emma Patricia Godínez Escoto. According to those examinations, they had symptoms of fright, anguish, depression and withdrawal, all because of the disappearance of the head of the family. The Government could not disprove the existence of psychological problems that affect the family of the victim. The Court finds that the disappearance of Saúl Godínez Cruz produced harmful psychological impacts among his immediate family which should be indemnified as moral damages.

50. The Court believes the Government should pay compensation for moral damages in the amount of two hundred and fifty thousand lempiras, to be paid to the wife and daughter of Saúl Godínez Cruz as specified below.

VII

51. The Court now determines how the Government is to pay compensation to the family of Saúl Godínez Cruz.

52. Payment of the six hundred and fifty thousand lempiras awarded by the Court must be carried out within ninety days from the date of notification of the judgment, free from any tax that might eventually be considered applicable. Nevertheless, the Government may pay in six equal monthly instalments, the first being payable within ninety days and the remainder in successive months. In this case, the balance shall be incremented by the appropriate interest, which shall be at the interest rates current at that moment in Honduras.

53. One-fourth of the indemnity is awarded to the wife who shall receive that sum directly. The remaining three-fourths shall be for the daughter. With the funds from the award to the daughter, a trust fund shall be set up in the Central Bank of Honduras under the most favourable conditions permitted by Honduran banking practice. The daughter shall receive monthly payments from this trust fund, and at the age of twenty-five shall receive the totality of the capital.

54. The Court shall supervise the implementation of the compensatory damages at all of its stages. The case shall be closed when the Government has fully complied with the instant judgment.

VIII

55. *Therefore, the Court,*

unanimously

1. Awards six hundred and fifty thousand lempiras in compensatory damages to be paid to the family of Saúl Godínez Cruz by the State of Honduras;

unanimously

2. Decides that the amount of the award corresponding to the wife of Saúl Godínez Cruz shall be one hundred and sixty-two thousand five hundred lempiras;

unanimously

3. Decides that the amount of the award corresponding to the daughter of

Saúl Godínez Cruz shall be four hundred and eighty-seven thousand five hundred lempiras;

unanimously

4. Orders that the form and means of payment of the indemnity shall be those specified in paragraphs 52 and 53 of this judgment;

unanimously

5. Decides that the Court shall supervise the indemnification ordered and shall close the file only when the compensation has been paid.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this twenty-first day Of July, 1989.

Héctor Gros-Espiell, President; Héctor Fix-Zamudio; Rodolfo E. Piza E.; Pedro Nikken, Rafael Nieto-Navia; Rigoberto Espinal-Irias; Manuel E. Ventura-Robles, interim Secretary.

Judge Thomas Buergenthal was unable to participate in the preparation and signing of the judgment because of reasons of health.

C.

COMITATO DELLE NAZIONI UNITE SUI DIRITTI UMANI

1. UN-Human Rights Committee, Geneva/New York
   Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning communication No. 470/1991
   Submitted by: Joseph Kindler.
   State party concerned: Canada:
   Decision of 30 July 1993.

UN-Human Rights Committee, Geneva/New York

Views

Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning communication No. 470/1991 – Submitted by: Joseph Kindler
State party concerned: Canada
Decision of 30 July 1993

Extradition to the United States even at risk of death penalty and death row phenomenon not considered to violate the CCPR

Views of the Committee

Appendix: Individual opinions under rule 94(3) of the Committee's rules of procedure
A: by Mr. Kurt Herndl and Mr. Walled Sadi
B: by Mr. Bertil Wennergren
C: by Mr. Rajsooner Lallah
D: by Mr. Fausto Pocar
E: by Ms. Christine Chanet
F: bv Mr. Francisco Jose Aguilar Urbina

The facts as submitted by the author

1. The author of the communication is Joseph Kindler, a citizen of the United States of America, born in 1961, at the time of his submission detained in a penitentiary in Montreal, Canada, and on 26 September 1991 extradited to the United States. He claims to be a victim of a violation of articles 6, 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 In November 1983 the author was convicted in the State of Pennsylvania, United States, of first degree murder and kidnapping; the jury recommended the death sentence. According to the author, this recommendation is binding on the court. In September 1984, prior to sentencing, the author escaped from custody. He was arrested in the province of Quebec in April 1985. In July 1985 the United States requested and in August 1985 the Superior Court of Quebec ordered his extradition.

2.2 Article 6 of the 1976 Extradition Treaty between Canada and the United States provides:

> "When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed".

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act. On January 17, 1986, after hearing the author's counsel, the Minister of Justice decided not to seek these assurances.

2.4 The author filed an application for review of the Minister's decision with the Federal Court, which dismissed the application in January 1987. The author's appeal to the Court of Appeal was rejected in December 1988. The matter then came before the Supreme Court of Canada, which decided on 26 September 1991 that the extradition of Mr. Kindler would not violate his rights under the Canadian Charter of Human Rights. The author was extradited on the same day.

The complaint:

3. The author claims that the decision to extradite him violates articles 6, 7, 9, 14 and 26 of the Covenant. He submits that the death penalty *per se* constitutes cruel and inhuman treatment or punishment, and that conditions on death row are cruel, inhuman and degrading. He further alleges that the judicial procedures in Pennsylvania, inasmuch as they relate specifically to capital punishment, do not meet basic requirements of justice. In this context, the author, who is white, generally alleges racial bias in the imposition of the death penalty in the United States, without, however, substantiating how this alleged bias would affect him.

The State party's observations and the author's comments

4.1 The State party recalls that the author illegally entered the territory of Canada, where he was arrested in April 1985. It submits that the communication is inadmissible *ratione personae, loci* and *materiae*.

4.2 It is argued that the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States. The State party refers in this connection to the Committee's Views in communication No. 61/1979 ([1]), where it was found that the Committee "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant".

4.3 The State party indicates that the author's allegations concern the penal

([1]) *Leo Hertzberg et al. v. Finland*. Views adopted on 2 April 1982, para. 9.3.

law and judicial system of a country other than Canada. It refers to the Committee's inadmissibility decision in communication No. 217/1986 ([2]), where the Committee observed "that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant". The State party submits that the Covenant does not impose responsibility upon a State for eventualities over which it has no jurisdiction.

4.4 Moreover. it is submitted that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, since the Covenant does not provide for a right not to be extradited. In this connection, the State party quotes the Committee's inadmissibility decision in communication No. 117/1981 ([3]): "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country". It further argues that even if extradition could be found to fall within the scope of protection of the Covenant in exceptional circumstances, these circumstances are not present in the instant case.

4.5 The State party further refers to the United Nations Model Treaty on Extradition ([4]), which clearly contemplates the possibility of unconditional surrender by providing for discretion in obtaining assurances regarding the death penalty in the same fashion as is found in article 6 of the Canada-United States Extradition Treaty. It concludes that interference with the surrender of a fugitive pursuant to legitimate requests from a treaty partner would defeat the principles and objects of extradition treaties and would entail undesirable consequences for States refusing these legitimate requests. In this context, the State party points out that its long, unprotected border with the United States would make it an attractive haven for fugitives from United States justice. If these fugitives could not be extradited because of the theoretical possibility of the death penalty, they would be effectively irremovable and would have to be allowed to remain in the country, unpunished and posing a threat to the safety and security of the inhabitants.

4.6 The State party finally submits that the author has failed to substantiate his allegations that the treatment he may face in the United States will violate his rights under the Covenant. In this connection, the State party points out that the imposition of the death penalty is not *per se* unlawful under the Covenant. As regards the delay between the imposition and the execution of the death sentence, the State party submits that it is difficult to see how a period of detention during which a convicted prisoner would pursue all avenues of appeal, can be held to constitute a violation of the Covenant.

([2]) *H. v.d. P. v. the Netherlands*, declared inadmissible on 8 April 1987, para. 3.2.

([3]) *M.A. v. Italy*, declared inadmissible on 10 April 1984. para. 13.4.

([4]) Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990; see General Assembly resolution 45/168 of 14 December 1990.

5. In his reply to the State party's submission, the author maintains that, since the right to life is at stake, there is no possible argument for leaving extradition outside the Committee's jurisdiction.

The Committee's admissibility considerations and decision:

6.1 During its 45th session in July 1992, the Committee considered the admissibility of the communication. It observed that extradition as such is outside the scope of application of the Covenant ([5]), but that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant ([6]). The Committee noted that the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. Accordingly, the Committee found that the communication was thus not excluded *ratione materiae.*

6.2 The Committee considered the convention of the State party that the claim is inadmissible *ratione loci.* Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

6.3 The Committee therefore considered itself competent to examine whether the State party is in violation of the Covenant by virtue of its decision

([5]) Communication No. 117/1981 (*M.A. v. Italy*), paragraph 13.4: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country".

([6]) *Aumeerundy-Cziffra et al. v. Mauritius* (No. 35/1978, Views adopted on 9 April 1981 and *Torres v. Finland* (No. 291/1988, Views adopted on 2 April 1990).

to extradite the author under the Extradition Treaty of 1976 between the United States and Canada, and the Extradition Act of 1985.

6.4 The Committee observed that the Covenant does not prohibit capital punishment for the most serious crimes provided that certain conditions are met. Article 7 of the Covenant prohibits torture and cruel, inhuman and degrading treatment. In respect of the so-called "death row phenomenon" the Committee recalled its earlier jurisprudence and noted that "prolonged judicial proceedings do not *per se* constitute cruel inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons." (7) This also applies to appeal and review proceedings in cases involving capital punishment, although an assessment of the particular circumstances of each case would be called for. In States whose judicial system provides for review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies can be necessary to review the sentence. Thus, even prolonged periods of detention under a strict custodial regime on death row could not necessarily be considered to constitute cruel, inhuman and degrading treatment if the convicted person is merely availing himself of appellate remedies (8). But each case will depend on its own facts.

6.5 The Committee observed further that article 6 provides a limited authorization to States to order capital punishment within their own jurisdiction. It decided to examine on the merits the question whether the scope of the authorization permitted under article 6 extends also to allowing foreseeable loss of life by capital punishment in another State. even one with full procedural guarantees.

6.6 The Committee also found that it is clear from the *travaux préparatoires* that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements. Nonetheless, whether an alien is required to leave the territory through expulsion or extradition, the general guarantees of article 13 in principle apply, as do the requirements of the Covenant as a whole. In this connection the Committee noted that the author, even though he had unlawfully entered the territory of Canada, had ample opportunity to present his arguments against extradition before the Canadian courts, including the Supreme Court of Canada, which considered the facts and the evidence before it and found that the extradition of the author would not violate his rights under Canadian or international law. In this context the Committee reiterated its constant jurisprudence that it is not competent to re-

(7) Views on communications Nos 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) adopted on 6 April 1989, paragraph 13.6.

(8) Views on communications Nos. 270/1988 and 271/1988 (*Randolph Barrett & Clyde Sutcliffe v. Jamaica*), adopted on 30 March 1992, paragraph 8.4.

evaluate the facts and evidence considered by national courts. What the Committee may do is to verify whether the author was granted all the procedural safeguards provided for in the Covenant. The Committee concluded that a careful study of all the material submitted by the author and by the State party does not reveal arguments that would support a complaint based on the absence of those guarantees during the course of the extradition process.

6.7 The Committee also observed that, in principle, lawful capital punishment under article 6 does not *per se* raise an issue under article 7. The Committee considered whether there are nonetheless special circumstances that in this particular case still raise an issue under article 7. Canadian law does not provide for the death penalty, except in military cases. Canada may by virtue of article 6 of the Extradition Treaty seek assurances from the other State which retains the death penalty, that a capital sentence shall not be imposed. It may also, under the Treaty, refuse to extradite a person when such an assurance is not received. While the seeking of such assurances and the determination as to whether or not to extradite in their absence is discretionary under the Treaty and Canadian law, these decisions may raise issues under the Covenant. In particular, the Committee considered that it might be relevant to know whether the State party satisfied itself, before deciding not to invoke article 6 of the Treaty, that this would not involve for the author a necessary and foreseeable violation of his rights under the Covenant.

6.8 The Committee also found that the methods employed for judicial execution of a sentence of capital punishment may in a particular case raise issues under article 7.

7. On 31 July 1992 the Committee decided that the communication was admissible in as much as it might raise issues under articles 6 and 7 of the Covenant. The Committee further indicated that, in accordance with rule 93, paragraph 4, of its rules of procedure, the State party could request a review of the decision on admissibility at the time of the examination of the merits of the communication. Two Committee members appended a dissenting opinion to the decision on admissibility (9).

The State party's submission on the merits and request for review of admissibility:

8.1 In its submissions dated 2 April and 26 May 1993, the State party submits facts on the extradition process in general, on the Canada-United States extradition relationship and on the specifics of the present case. It further requests a review of the Committee's decision on admissibility.

8.2 The State party recalls that "extradition exists to contribute to the safety of the citizens and residents of States. Dangerous criminal offenders seeking a safe haven from prosecution or punishment are removed to face jus-

(9) See Appendix under A.

tice in the State in which their crimes were committed. Extradition furthers international cooperation in criminal justice matters and strengthens domestic law enforcement. It is meant to be a straightforward and expeditious process. Extradition seeks to balance the rights of fugitives with the need for the protection of the residents of the two States parties to any given extradition treaty. The extradition relationship between Canada and the United States dates back to 1794... In 1842, the United States and Great Britain entered into the Ashburton-Webster Treaty which contained articles governing the mutual surrender of criminals... this treaty remained in force until the present Canada-United States Extradition Treaty of 1976."

8.3 With regard to the principle *aut dedere aut judicare* the State party explains that while some States can prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim, other States, such as Canada and certain other States in the common law tradition, cannot.

8.4 Extradition in Canada is governed by the Extradition Act and the terms of the applicable treaty. The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies. Under Canadian law extradition is a two step process, the first involving a hearing at which a judge considers whether a factual and legal basis for extradition exists. The person sought for extradition may submit evidence at the judicial hearing. If the judge is satisfied on the evidence that a legal basis for extradition exists, the fugitive is ordered committed to await surrender to the requesting State. Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of *habeas corpus* in a provincial court. A decision of the judge on the *habeas corpus* application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister and counsel for the fugitive, with leave, may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers a complete record of the case from the judicial phase, together with any written and oral submissions from the fugitive, and while the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. Finally, a fugitive may seek judicial review of the Minister's decision by a provincial court and appeal a warrant of surrender, with leave, up to the Supreme Court of Ca-

nada. In interpreting, Canada's human rights obligations under the Canadian Charter, the Supreme Court of Canada is guided by international instruments to which Canada is a party, including the Covenant.

8.5 With regard to surrender in death penalty cases, the Minister of Justice decides whether or not to request assurances on the basis of an examination of the particular facts of each case. The Canada-United States Extradition Treaty was not intended to make the seeking of assurances a routine occurrence but only in circumstances where the particular facts of the case warrant a special exercise of discretion.

8.6 With regard to the abolition of the death penalty in Canada, the State party notes that "A substantial number of States within the international community, including the United States, continue to impose the death penalty. The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States. By seeking assurances on a routine basis, in the absence of exceptional circumstances, Canada would be dictating to the requesting State, in this case the United States, how it should punish its criminal law offenders. The Government of Canada contends that this would be an unwarranted interference with the internal affairs of another State. The Government of Canada reserves the right... to refuse to extradite without assurances. This right is held in reserve for use only where exceptional circumstances exist. In the view of the Government of Canada, it may be that evidence showing that a fugitive would face certain or foreseeable violations of the Covenant would be one example of exceptional circumstances which would warrant the special measure of seeking assurances under article 6. However, there was no evidence presented by Kindler during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty in the United States generally, or in the State of Pennsylvania in particular, violates the Covenant."

8.7 The State party also refers to article 4 of the United Nations Model Treaty on Extradition, which lists optional, but not mandatory, grounds for refusing extradition: "(d) If the offence for which extradition is requested carries the death penalty under the law of the Requesting State, unless the State gives such assurance as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out." Similarly, article 6 of the Canada-United States Extradition Treaty provides that the decision with respect to obtaining assurances regarding the death penalty is discretionary.

8.8 With regard to the link between extradition and the protection of society, the State party submits that Canada and the United States share a 4,800 kilometre unguarded border, that many fugitives from United States justice cross that border into Canada and that in the last twelve years there has been a steadily increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had increased to 83. "Requests involving death penalty cases are a new and growing problem for Canada... a policy of routinely seeking assurances under article 6 of the Ca-

nada-United States Extradition Treaty will encourage even more criminal law offenders, especially those guilty of the most serious of crimes, to flee the United States for Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

9.1 With respect to Mr. Kindler's case, the State party recalls that he challenged the warrant of committal and the warrent of surrender in accordance with the extradition process outlined above, and that his counsel made written and oral submissions to the Minister to seek assurances that the death penalty not be imposed. He argued that extradition to face the death penalty would offend his rights under section 7 (comparable to articles 6 and 9 of the Covenant) and section 12 (comparable to article 7 of the Covenant) of the Canadian Charter of Rights and Freedoms.

9.2 As to the Committee's admissibility decision, the State party reiterates its argument that the communication is inadmissible *ratione materiae* because extradition *per se* is beyond the scope of the Covenant. A review of the *travaux préparatoires* reveals that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. In the light of the negotiating history of the Covenant, the State party submits that "a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto would stretch the principles governing the interpretation of human rights instruments in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation."

9.3 As to the merits, the State party stresses that Mr. Kindler enjoyed a full hearing on all matters concerning his extradition to face the death penalty. "If it can be said that the Covenant applies to extradition at all... an extraditing State could be said to be in violation of the Covenant only where it returned a fugitive to certain or foreseeable treatment or punishment, or to judicial procedures which in themselves would be a violation of the Covenant." In the present case, the State party submits that whereas it was reasonably foreseeable that Mr. Kindler would be held in the State of Pennsylvania subject to a sentence of death, it was not reasonably foreseeable that he would in fact be put to death or be held in conditions of incarceration that would violate rights under the Covenant. The State party points out that Mr. Kindler is entitled to many avenues of appeal in the United States and that he can petition for clemency; furthermore, he is entitled to challenge in the courts of the United States the

conditions under which he is held while his appeals with respect to the death penalty are outstanding.

9.4 As to the imposition of the death penalty in the United States, the State party recalls that article 6 of the Covenant did not abolish capital punishment under international law. "In countries which have not abolished the death penalty the sentence of death may still be imposed for the most serious crimes in accordance with law in force at the time of the commission of the crime, not contrary to the provisions of the Covenant and not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The death penalty can only be carried out pursuant to a final judgment rendered by a competent court. It may be that Canada would be in violation of the Covenant if it extradited a person to face the possible imposition of the death penalty where it was reasonably foreseeable that the requesting State would impose the death penalty under circumstances which would violate article 6. That is, it may be that an extraditing State would be violating the Covenant to return a fugitive to a State which imposed the death penalty for other than the most serious crimes, or for actions which are not contrary to a law in force at the time of commission, or which carried out the death penalty in the absence of or contrary to the final judgement of a competent court. Such are not the facts here... Kindler did not place any evidence before the Canadian courts, before the Minister of Justice or before the Committee which would suggest that the United States was acting contrary to the stringent criteria established by article 6 when it sought his extradition from Canada... The Government of Canada, in the person of the Minister of Justice, was satisfied at the time the order of surrender was issued that if Kindler is executed in the State of Pennsylvania, this will be within the conditions expressly prescribed by article 6 of the Covenant. The Government of Canada remains satisfied that this is so."

9.5 Finally, the State party observes that it is in a difficult position attempting to defend the criminal justice system of the United States before the Committee. It contends that the Optional Protocol process was never intended to place a State in the position of having to defend the laws or practices of another State before the Committee."

9.6 With respect to the issue whether the death penalty violates article 7 of the Covenant, the State party submits that article 7 cannot be read or interpreted without reference to article 6. The Covenant must be read as a whole and its articles as being in harmony... It may be that certain forms of execution are contrary to article 7. Torturing a person to death would seem to fall into this category as torture is a violation of article 7. Other forms of execution may be in violation of the Covenant because they are cruel, inhuman or degrading. However, as the death penalty is permitted within the narrow parameters set by article 6, it must be that some methods of execution exist which would not violate article 7."

9.7 As to the methods of execution, the State party indicates that the method of execution in Pennsylvania is lethal injection, which is the method

proposed by those who advocate euthanasia for terminally ill patients. It is thus at the end of the spectrum of methods designed to cause the least pain.

9.8 As to the "death row phenomenon" the State party submits that each case must be examined on its facts, including the conditions in the prison in which the prisoner would be held while on "death row", the age and the mental and physical condition of the prisoner subject to those conditions, the reasonably foreseeable length of time the prisoner would be subject to those conditions, the reasons underlying the length of time and the avenues, if any, for remedying unacceptable conditions. "Mr. Kindler argued before the Minister of Justice and in Canadian courts that conditions on 'death row' in the State of Pennsylvania would amount to a denial of his rights. His evidence consisted of some testimony and academic journal articles on the effect that electrocution, as a method of execution, was alleged to have on the psychological state of prisoners held on death row. He did not present evidence on the facilities or prison routines in the State of Pennsylvania ... he did not present evidence on his plans to contest the death sentence in the United States and the expected length of time he would be held awaiting a final answer from the courts of the United States. He did not present evidence that he intended to seek a commutation of his sentence. The evidence he did tender was considered by the courts and by the Minister of Justice but was judged insubstantial and therefore insufficient to reverse the premises underlying the extradition relationship in existence between Canada and the United States. The Government of Canada submits that the Minister of Justice and the Canadian courts in the course of the extradition process in Canada, with its two phases of decision-making and avenues for judicial review, examined and weighed all the allegations and facts presented by Kindler. The Minister of Justice, in deciding to surrender Kindler to face the possible imposition of the death penalty, considered all the factors. The Minister was not convinced on the evidence that the conditions of incarceration in the State of Pennsylvania, when considered with the reasons for the delay and the continuing access to the courts in the United States, would violate the rights of Kindler, either under the Canadian Charter of Rights and Freedoms or under the Covenant. The Canadian Supreme Court upheld the Minister's decision, making it clear that the decision was not seen as subjecting Kindler to a violation of his rights... The Minister of Justice and the Canadian courts came to the conclusion that Kindler would not be subjected to a violation of rights which can be expressed as 'death row phenomenon'. The Government of Canada contends that the extradition process and its result in the case of Kindler satisfied Canada's obligation in respect of the Covenant on this point."

Comments by author's counsel

10.1 In his comments on the State party's submission, author's counsel argues that whereas article 6 of the Covenant does foresee the possibility of the imposition of the death penalty, article 6, paragraph 2, applies only to countries

"which have not abolished the death penalty". Since Canada has abolished capital punishment in non military law, the principle applies that one cannot do indirectly what one cannot do directly, and that Canada was required to demand guarantees that Mr. Kindler would not be executed and that he would be treated in accordance with article 7 of the Covenant.

10.2 Author's counsel refers to the factum presented to the Canadian Supreme Court on Mr. Kindler's behalf. In said factum, the relevant aspects of Canadian Constitutional and Administrative law are discussed, and the arguments are said to be applicable *mutatis mutandis* to articles 6 and 7 of the Covenant. In paragraphs 38 to 49 of the factum, author's counsel argues that the United States use of the death penalty is not compatible with the standards of the Covenant. He refers to a book by Zimring and Hawkings, *Capital Punishment and the American Agenda* (1986), which argues the absence of any deterrent effect and the essentially vengeance-based motives for the resurgence of capital punishment in the United States. He also quotes extensively from the judgement of the European Court of Justice in the *Soering v. United Kingdom* case. He indicates that while the majority Court declined to find capital punishment *per se* cruel and unusual in every case, it did condemn the death row phenomenon as such. The European Court concluded:

> "For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of the Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for psychiatric services... However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration."

10.3 Counsel further quotes from the concurring opinion of Judge De Meyer, arguing that "No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State."

10.4 Counsel also quotes from numerous articles analysing the Soering decision, including one by Gino J. Naldi of the University of East Anglia:

"The Court considered whether the death penalty violated article 3. The Court noted that as originally drafted, the Convention did not seek to prohibit the death penalty. However, subsequent national practice meant that few High Contracting Parties now retained it and this was reflected in Protocol No. 6 which provides for the abolition of the death penalty but which the United Kingdom has not ratified notwithstanding its virtual abolition of the death penalty. Yet the very existence of this Protocol led the Court to the conclusion that article 3 had not developed in such a manner that it could be interpreted as prohibiting the death penalty...

In the present case the Court found that Soering's fears that he would be exposed to the 'death row phenomenon' were real... The fact that a condemned prisoner was subjected to the severe regime of death row in a high security prison for six to eight years, notwithstanding psychological and psychiatric services, compounded the problem... The Court was additionally influenced by Soering's age and mental condition. Soering was eighteen years old at the time of the murders in 1985 and in view of a number of international instruments prohibiting the imposition of the death penalty on minors ... the Court expressed the opinion that a general principle now exists that the youth of a condemned person is a significant factor to be taken into account... Another factor the Court found relevant was psychiatric evidence that Soering was mentally disturbed at the time of the crime. The Court was also influenced by the fact that Soering's extradition was sought by the Federal Republic of Germany whose constitution allows its nationals to be tried for offences committed in other countries but prohibits the death penalty. Soering could therefore be tried for his alleged crimes without being exposed to the 'death row phenomenon' ." ([10])

10.5 Counsel contests the argument by the State party that Mr. Kindler was not a minor at the time of the offence. "It is not sufficient to state that Mr. Kindler is not a minor and is charged with a serious offence because in a society in which minors and mentally defective citizens can be executed, the access to a pardon is almost non-existent for someone like Mr. Kindler; yet the right to apply for pardon is an essential one in the Covenant."

10.6 Counsel further contends that the Canadian Minister of Justice did not consider the issue of the "death row phenomenon" or the period of time or the conditions of "death row".

10.7 He points to works of law and political science favouring abolition, which are permeated by the horror at the thought of execution and the sense of cruelty which always accompanies it.

10.8 The fact that the Covenant provides for capital punishment for serious offences does not prevent an evolution in the interpretation of the law. "By now capital punishment must be viewed as *per se* cruel and unusual, and as a violation of Sec. 6 and 7 of the Covenant in all but the most horrendous cases of heinous crime: it can no longer be accepted as the standard penalty for murder;

([10]) Gino J. Naldi, Death Row Phenomenon Held Inhuman Treatment, "The Review (International Commission of Jurists)", December 1989, at pp. 61-62.

thus except for those unusual cases, the Covenant does not authorize it. In this context, executing Mr. Kindler would by itself be a violation of Sec. 6 and 7 and he should not have been extradited without guarantees."

10.9 With regard to Canada's argument that it does not wish to become a haven for foreign criminals, counsel contends that there is no proof that this would happen, nor was such proof advanced at any time in the proceedings.

11. As to the admissibility of the communication, counsel rejects the State party's arguments as unfounded. In particular, he contends that "it is not logical to exclude extradition from the Covenant or to require certainty of execution as Canada suggests ... law almost never deals with certainties but only with probabilities and possibilities. "He stresses "that there is plenty of evidence that, *with respect to the death sentence*, the legal system of the United States is not in conformity with the Covenant and that therefore, applying its own principles ..., Canada should have considered all the issues raised by Mr. Kindler. It is thus not possible for Canada to argue that Mr. Kindler's petition was inadmissible; he alleged *Canada's* repeated violation of the Covenant, not that of the United States; that the American system might be indirectly affected is no concern for Canada."

Review of admissibility and consideration of merits

12.1 In his initial submission author's counsel claimed that Mr. Kindler was a victim of violations of articles 6, 7, 9, 10, 14 and 26 of the Covenant.

12.2 When the Committee, at its forty-fifth session, examined the admissibility of the communication, it found some of the author's allegations unsubstantiated and therefore inadmissible; it further considered that the communication raised new and complex questions with regard to the compatibility with the Covenant, *ratione materiae*, of extradition to face capital punishment, in particular with regard to the scope of articles 6 and 7 of the Covenant to such situations and their concrete application in the present case. It therefore declared the communication admissible inasmuch as it might raise issues under articles 6 and 7 of the Covenant. The State party has made extensive new submissions on both admissibility and merits and requested, pursuant to rule 93, paragraph 4, of the Committee's rules of procedure, a review of the Committee's decision on admissibility.

12.3 In reviewing its decision on admissibility, the Committee takes note of the objections of the State party and of the arguments by author's counsel in this respect. The Committee observes that with regard to the scope of articles 6 and 7 of the Covenant, the Committee's jurisprudence is not dispositive on issues of admissibility such as those raised in the instant communication. Therefore, the Committee considers that an examination on the merits of the communication will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face capital punishment.

13.1 Before examining the merits of this communication, the Committee observes that, as indicated in the admissibility decision, what is at issue is not whether Mr. Kindler's rights have been or are likely to be violated by the United States, which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will often also be party to various bilateral obligations, including those under extradition treaties. A State party to the Covenant is required to ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1 of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

13.2 If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction. the State party itself may be in violation of the Covenant.

14.1 With regard to a possible violation by Canada of article 6 the Covenant by its decision to extradite the author, two related questions arise:

(a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Kindler?

14.2 As to (a), the Committee recalls its General Comment on Article 6 ([11]), which provides that while States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use. The General Comment further notes that the terms of article 6 also point to the desirability of abolition of the death penalty. This is an object towards which ratifying parties should strive: "All measures of abolition should be considered as progress in the enjoyment of the right to life". Moreover, the Committee notes the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Furthermore, even where capital punishment is retained by States in their legislation, many of them do not exercise it in practice.

([11]) General Comment No. 6(16) of 27 July 1982, para. 6.

14.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgement rendered by a competent court. The Committee notes that Mr. Kindler was convicted of premeditated murder, undoubtedly a very serious crime. He was over 18 years of age when the crime was committed. The author has not claimed before the Canadian courts or before the Committee that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under article 14 of the Covenant.

14.4 Moreover, the Committee observes that Mr. Kindler was extradited to the United States following extensive proceedings in the Canadian Courts, which reviewed all the evidence submitted concerning Mr. Kindler's trial and conviction. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition.

14.5 The Committee notes that Canada has itself save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to question (b), namely whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility.

14.6 While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assur-

ances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.

15.1 As regards the author's claims that Canada violated article 7 of the Covenant, this provision must be read in the light of other provisions of the Covenant, including article 6, paragraph 2, which does not prohibit the imposition of the death penalty in certain limited circumstances. Accordingly, capital punishment as such, within the parameters of article 6, paragraph 2, does not per se violate article 7.

15.2 As to whether the "death row phenomenon" associated with capital punishment, constitutes a violation of article 7, the Committee recalls its jurisprudence to the effect that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies." ([12]) The Committee has indicated that the facts and the circumstances of each case need to be examined to see whether an issue under article 7 arises.

15.3 In determining whether, in a particular case, the imposition of capital punishment could constitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this context the Committee has had careful regard to the judgement given by the European Court of Human Rights in the *Soering v. United Kingdom* case ([13]). It notes that important facts leading to the judgement of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems. The author's counsel made no specific submissions on prison conditions in Pennsylvania, or about the possibility or the effects of prolonged delay in the execution of sentence; nor was any submission made about the specific method of execution. The Committee has also noted in the Soering case that, in contrast to the present case, there was a simultaneous request for extradition by a State where the death penalty would not be imposed.

([12]) *Howard Martin v. Jamaica*, No. 317/1988, Views adopted on 24 March 1993, paragraph 12.2.

([13]) European Court of Human Rights, judgment of 7 July 1989, Series A No. 161.

16. Accordingly, the Committee concludes that the facts as submitted in the instant case do not reveal a violation of article 6 of the Covenant by Canada. The Committee also concludes that the facts of the case do not reveal a violation of article 7 of the Covenant by Canada.

17. The Committee expresses its regret that the State party did not accede to the Special Rapporteur's request under rule 86, made in connection with the registration of the communication on 26 September 1991.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not reveal a violation by Canada of any provision of the International Covenant on Civil and Political Rights."

Appendix

Individual opinions under rule 94, paragraph 3, of the Human Rights Committee's rules of procedure, concerning the Committee's Views on communication No. 470/1991 (Joseph Kindler v. Canada)

Appendix A

Individual opinion by Mr. Kurt Herndl and Mr. Waleed Sadi (concurring on the merits/dissenting on admissibility)

We fully concur in the Committee's finding that the facts of this case do not reveal a violation by Canada of any provision of the Covenant. We wish, however, to repeat our concerns expressed in the dissenting opinion we appended to the Committee's decision on admissibility of 31 July 1992:

> "(...) 3. This communication in its essence poses a threat to the exercise by a State of its international law obligations under a valid extradition treaty. Indeed, an examination of the *travaux préparatoires* of the Covenant on Civil and Political Rights reveals that the drafters gave due consideration to the complex issue of extradition and decided to exclude this issue from the Covenant, not by accident, but because there were many delegations opposed to interference with their governments' international law obligations under extradition treaties.
>
> 4. Yet, in the light of the evolution of international law, in particular of human rights law, following the entry into force of the Covenant in 1976, the question arises whether under certain exceptional circumstances the Human Rights Committee could or even should examine matters directly linked with a State party's compliance with an extradition treaty. Such exceptional circumstances would be present if, for instance, a person were facing arbitrary extradition to a country where substantial grounds existed for believing that he or she could be subjected, for example, to torture. In other words, the Committee could declare communications involving the extradition of a person from a State party to another State (irrespective of whether it is a State party), admissible *ratione materiae* and *ratione loci*, provided that the author substantiated his claim that his basic human rights

would be violated by the country seeking his extradition; this requires a showing of reasonable cause to believe that such violations would probably occur. In the communication at bar, the author has not made such a showing, and the State party has argued that the Extradition Treaty with the United States is not incompatible with the provisions of the Covenant and that it complies with the requirements of the Model Treaty on Extradition produced at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990.

5. The majority opinion nevertheless declared this communication admissible, albeit provisionally, because it views the extradition of the author by Canada to Pennsylvania as possibly raising issues under articles 6 and 7 of the Covenant. Yet, the facts as presented to the Committee do not disclose any probability that violations of the author's Covenant rights by a State party to the Optional Protocol would occur. As an alien who illegally entered the territory of Canada, his only link with Canada is that in 1985 he was committed for extradition and that the legality of his extradition was tested in the Canadian courts and, following due consideration of his arguments, affirmed by the Supreme Court of Canada in September 1991. The author does not raise any complaint about a denial of due process in Canada. His allegations concern hypothetical violations of his rights by the United States, which is not a State party to the Optional Protocol. In our opinion, the "link" with the State party is much too tenuous for the Committee to declare the communication admissible. Moreover, Mr. Kindler, who was extradited to the United States in September 1991, is still appealing his conviction before the Pennsylvania courts. In this connection, an unreasonable responsibility is being placed on Canada by requiring it to defend, explain or justify before the Committee the United States system of administration.

6. Hitherto, the Committee has declared, numerous communications inadmissible, where the authors had failed to substantiate their allegations for purposes of admissibility. A careful examination of the material submitted by author's counsel in his initial submission and in his comments on the State party's submission reveals that this is essentially a case where a deliberate attempt is made to avoid application of the death penalty, which still remains a legal punishment under the Covenant. Here the author has not substantiated his claim that his rights under the Covenant would, with a reasonable degree of probability, be violated by his extradition to the United States.

7. As for the issues the author alleges may arise under article 4 the Committee concedes that the Covenant does not, prohibit the imposition of the death penalty for the most serious crimes. Indeed, if it did prohibit it, the Second Optional Protocol on the Abolition of the Death Penalty would be superfluous. Since neither Canada nor the United States is a party to the Second Optional Protocol, it cannot be expected of either State that they ask for or that they give assurances that the death penalty, will not be imposed. The question whether article 6, paragraph 2, read in conjunction with article 6, paragraph 1, could lead to a different conclusion is, at best, academic and not a proper matter for examination under the Optional Protocol.

8. As for the issues that may allegedly arise under article 7 of the Covenant, we agree with the Committee's reference to its jurisprudence in the Views on communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) and Nos. 270 and 271/1988 (*Barrett and Sutcliffe v. Jamaica*), in which the Committee

decided that the so called "death row phenomenon" does not *per se* constitute cruel, inhuman and degrading treatment, even if prolonged judicial proceedings can be a source of mental strain for the convicted prisoners. In this connection it is important to note that the prolonged periods of detention on death row are a result of the convicted person's recourse to appellate remedies. In the instant case the author has not submitted any arguments that would justify the Committee's departure from its established jurisprudence.

9. A second issue allegedly arising under article 7 is whether the method of execution – in the State of Pennsylvania by lethal injection – could be deemed as constituting cruel, inhuman or degrading treatment. Of course, any and every form of capital punishment can be seen as entailing a denial of human dignity; any and every form of execution can be perceived as cruel and degrading. But, since capital punishment is not prohibited by the Covenant, article 7 must be interpreted in the light of article 6, and cannot be invoked against it. The only conceivable exception would be if the method of execution were deliberately cruel. There is, however, no indication that execution by lethal injection inflicts more pain or suffering than other accepted methods of execution. Thus the author has not made a *prima facie* case that execution by lethal injection may raise an issue under article 7.

10. We conclude that the author has failed to substantiate a claim under article 2 of the Optional Protocol, that the communication raises only remote issues under the Covenant and therefore that it should be declared inadmissible under article 3 of the Optional Protocol as an abuse of the right of submission."

K. HERNDL AND W. SADI

APPENDIX B

Individual opinion by Mr. Bertil Wennergren (dissenting)

I cannot share the Committee's Views on a non-violation of article 6 of the Covenant. In my opinion, Canada violated article 6, paragraph 1, of the Covenant by extraditing the author to the United States, without having sought assurances for the protection of his life, i.e. non-execution of a death sentence imposed upon him. I justify this conclusion as follows:

Firstly, I would like to clarify my interpretation of article 6 of the Covenant. The Vienna Convention on the Law of Treaties stipulates that a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object of the provisions of article 6 is human life and the purpose of its provisions is the protection of such life. Thus, paragraph I emphasizes this point by guaranteeing to every human being the inherent right to life. The other provisions of article 6 concern a secondary and subordinate object, namely to allow States parties that have not abolished capital punishment to resort to it until such time they feel ready to abolish it. In the *travaux préparatoires* to the Covenant, the death penalty was seen by many delegates and bodies participating in the drafting process an "anomaly" or a "necessary evil". Against this background, it would appear to be logical to interpret the fundamental rule

in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly. The principal difference between my and the Committee's Views on this case lies in the importance I attach to the fundamental rule in paragraph 1 of article 6, and my belief that what is said in paragraph 2 about the death penalty has a limited objective that cannot by any reckoning override the cardinal principle in paragraph 1.

The rule in article 6, paragraph 1, of the Covenant stands out from among the others laid down in article 6; moreover, article 4 of the Covenant makes it clear that no derogations from this rule are permitted, not even in time of a public emergency threatening the life of the nation. No society, however, has postulated an absolute right to life. All human rights, including the right to life, are subject to the rule of necessity. If, but only if, absolute necessity so requires, it may be justifiable to deprive an individual of his life to prevent him from killing others or so as to avert man-made disasters. For the same reason, it is justifiable to send citizens into war and thereby expose them to a real risk of their being killed. In one form or another, the rule of necessity is inherent in all legal systems; the legal system of the Covenant is no exception.

Article 6, paragraph 2, makes an exception for States parties that have not abolished the death penalty. The Covenant permits them to continue applying the death penalty. This "dispensation" for States parties should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence strictly speaking legal. It merely provides a possibility for States parties to be released from their obligations under articles 2 and 6 of the Covenant, namely to respect and to ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons having committed the "most serious crime(s)".

The standard way to ensure the protection of the right to life is to criminalize the killing of human beings. The act of taking human life is normally subsumed under terms such as "manslaughter", "homicide" or "murder". Moreover, there may, be omissions which can be subsumed under crimes involving the intentional taking of life, inaction or omission that causes the loss of a person's life, such as a doctor's failure to save the life of a patient by intentionally failing to activate life support equipment, or failure to come to the rescue of a person in a life-threatening situation of distress. Criminal responsibility for the deprivation of life lies with private persons and representatives of the State alike. The methodology of criminal legislation provides some guidance when assessing the limits for a State party's obligations under article 2, paragraph 1, of the Covenant, to protect the right to life within its jurisdiction.

What article 6, paragraph 2, does not, in my view, is to permit States parties that have abolished the death penalty to reintroduce it at a later stage. In this way, the "dispensation" character of paragraph 2 has the positive effect of preventing a proliferation of the deprivation of peoples' lives through the execution

of death sentences among States parties to the Covenant. The Second Optional Protocol to the Covenant was drafted and adopted so as to encourage States parties that have not abolished the death penalty to do so.

The United States has not abolished the death penalty and therefore may, by operation of article 6, paragraph 2, deprive individuals of their lives by the execution of death sentences lawfully imposed. The applicability of article 6, paragraph 2, in the United States should not however be construed as extending to other States when they must consider issues arising under article 6 of the Covenant in conformity with their obligations under article 2, paragraph 1, of the Covenant. The "dispensation" clause of paragraph 2 applies merely domestically and as such concerns only the United States, as a State party to the Covenant.

Other States, however, are in my view obliged to observe their duties under article 6, paragraph 1, namely to protect the right to life. Whether they have or have not abolished capital punishment does not, in my opinion, make any difference. The dispensation in paragraph 2 does not apply in this context. Only the rule in article 6, paragraph 1, applies, and it must be applied strictly. A State party must not defeat the purpose of article 6, paragraph 1, by failing to provide anyone with such protection as is necessary to prevent his/her right to life from being put at risk. And under article 2, paragraph 1, of the Covenant, protection shall be ensured to all individuals without distinction of any kind. No distinction must therefore be made on the ground, for instance, that a person has committed a "most serious crime".

The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of States parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State's obligations under article 6, paragraph 1, is permitted. This is why Canada, in my view, violated article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States, without having secured assurances that Mr. Kindler would not be subjected to the execution of a death sentence.

B. WENNERGREN

APPENDIX C

Individual opinion by Mr. Rajsoomer Lallah (dissenting)

1. I am unable to subscribe to the Committee's Views to the effect that the facts before it do not disclose a violation by Canada of any provision of the Covenant.

2.1 I start by affirming my agreement with the Committee's opinion, as

noted in paragraph 13.1 of the Views, that what is at issue is not whether Mr. Kindler's rights have been, or run the real risk of being, violated in the United States and that a State party to the Covenant is required to ensure that it carries out other commitments it may have under a bilateral treaty in a manner consistent with its obligations under the Covenant. I further agree with the Committee's view, in paragraph 13.2, to the effect that, where a State party extradites a person in such circumstances as to expose him to a real risk that his rights under the Covenant will be violated in the jurisdiction to which that person is extradited, then that State party may itself be in violation of the Covenant.

2.2 I wonder, however, whether the Committee is right in concluding that, by extraditing Mr. Kindler, and thereby exposing him to the real risk of being deprived of his life, Canada did not violate its obligations under the Covenant. The question whether the author ran that risk under the Covenant in its concrete application to Canada must be examined, as the Committee sets out to do, in the light of the fact that Canada's decision to abolish the death penalty for all civil, as opposed to military, offences was given effect to in Canadian law.

2.3 The question which arises is what exactly are the obligations of Canada with regard to the right to life guaranteed under article 6 of the Covenant even if read alone and, perhaps and possibly, in the light of other relevant provisions of the Covenant, such as equality of treatment before the law under article 26 and the obligations deriving from article 5(2) which prevents restrictions or derogations from Covenant rights on the pretext that the Covenant recognizes them to a lesser extent. The latter feature of the Covenant would have, in my view, all its importance since the right to life is one to which Canada gives greater protection than might be thought to be required, on a minimal interpretation, under article 6 of the Covenant.

2.4 It would be useful to examine, in turn, the requirements of articles 6, 26 and 5(2) of the Covenant and their relevance to the facts before the Committee.

3.1 Article 6(1) of the Covenant proclaims that everyone has the inherent right to life. It requires that this right shall be protected by law. It also provides that no one shall be arbitrarily deprived of his life. Undoubtedly, in pursuance of article 2 of the Covenant, domestic law will normally provide that the unlawful violation of that right will give rise to penal sanctions as well as civil remedies. A State party may further give appropriate protection to that right by outlawing the deprivation of life by the State itself as a method of punishment where the law previously provided for such a method of punishment. Or, with the same end in view, the State party which has not abolished the death penalty is required to restrict its application to the extent permissible under the remaining paragraphs of article 6, in particular, paragraph 2. But, significantly, paragraph 6 has for object to prevent States from invoking the limitations in article 6 to delay or to prevent the abolition of capital punishment. And Canada has decided to abolish this form of punishment for civil, as opposed to military, offences. It can be said that, in so far as civil offences are concerned, paragraph

2 is not applicable to Canada, because Canada is not a State which, in the words of that paragraph, has not abolished the death penalty.

3.2 It seems to me, in any event, that the provisions of article 6(2) are in the nature of a derogation from the inherent right to life proclaimed in article 6(1) and must therefore be strictly construed. Those provisions cannot justifiably be resorted to in order to have an adverse impact on the level of respect for, and the protection of, that inherent right which Canada has undertaken under the Covenant "to respect and to ensure to all individuals within its territory and subject to its jurisdiction". In furtherance of this undertaking, Canada has enacted legislative measures to do so, going to the extent of abolishing the death penalty for civil offences. In relation to the matter in hand, three observations are called for.

3.3 First, the obligations of Canada under article 2 of the Covenant have effect with respect to "all individuals within its territory and subject to its jurisdiction", irrespective of the fact that Mr. Kindler is not a citizen of Canada. The obligations towards him are those that must avail to him in his quality as a human being on Canadian soil. Secondly, the very notion of "protection" requires prior preventive measures, particularly in the case of a deprivation of life. Once an individual is deprived of his life, it cannot be restored to him. These preventive measures necessarily include the prevention of any real risk of the deprivation of life. By extraditing Mr. Kindler without seeking assurances, as Canada was entitled to do under the Extradition Treaty, that the death sentence would not be applied to him, Canada put his life at real risk. Thirdly, it cannot be said that unequal standards are being expected of Canada as opposed to other States. In its very terms, some provisions of article 6 apply to States which do not have the death penalty and other provisions apply to those States which have not yet abolished that penalty. Besides, unequal standards may, unfortunately, be the result of reservations which States may make to particular articles of the Covenant though, I hasten to add, it is questionable whether all reservations may be held to be valid.

3.4 A further question arises under article 6(1), which requires that no one shall be arbitrarily deprived of his life. The question is whether the granting of the same and equal level of respect and protection is consistent with the attitude that, so long as the individual is within Canada's territory, that right will be fully respected and protected to that level, under Canadian law viewed in its total effect even though expressed in different enactments (penal law and extradition law), whereas Canada might be free to abrogate that level of respect and protection by the deliberate and coercive act of sending that individual away from its territory to another State where the fatal act runs the real risk of being perpetrated. Could this inconsistency be held to amount to a real risk of an "arbitrary" deprivation of life within the terms of article 6(1) in that unequal treatment is in effect meted out to different individuals within the same jurisdiction? A positive answer would seem to suggest itself as Canada, through its judicial arm, could not sentence an individual to death under Canadian law whereas Ca-

nada, through its executive arm, found it possible under its extradition law to extradite him to face the real risk of such a sentence.

3.5 For the above reasons, there was, in my view, a case before the Committee to find a violation by Canada of article 6 of the Covenant.

4. Consideration of the possible application of articles 26 and 5 of the Covenant would, in my view, lend further support to the case for a violation of article 6.

5. In the light of the considerations discussed in paragraph 3.4 above, it would seem that article 26 of the Covenant which guarantees equality before the law has been breached. Equality under this article, in my view, includes substantive equality under a State party's law viewed in its totality and its effect on the individual. Effectively, different and unequal treatment may be said to have been meted out to Mr. Kindler when compared with the treatment which an individual having committed the same offence would have received in Canada. It does not matter, for this purpose, whether Canada metes out this unequal treatment by reason of the particular arm of the State through which it acts, that is to say, through its judicial arm or through its executive arm. Article 26 regulates a State party's legislative, executive as well as judicial behaviour. That, in my view, is the prime principle, in questions of equality and non-discrimination under the Covenant, guaranteeing the application of the rule of law in a State party.

6. I have grave doubts as to whether, in deciding to extradite Mr. Kindler, Canada would have reached the same decision if it had properly directed itself on its obligations deriving from article 5(2), in conjunction with articles 2, 6 and 26, of the Covenant. It would appear that Canada rather considered, in effect, the question whether there were, or there were not, special circumstances justifying the application of the death sentence to Mr. Kindler, well realizing that, by virtue of Canadian law, the death sentence could not have been imposed in Canada itself on Mr. Kindler on conviction there for the kind of offence he had committed. Canada had exercised its sovereign decision to abolish the death penalty for civil, as distinct from military, offences, thereby ensuring greater respect for, and protection of the individual's inherent right to life. Article 5(2) would, even if article 6 of the Covenant were given a minimal interpretation, have prevented Canada from invoking that minimal interpretation to restrict or give lesser protection to that right by an executive act of extradition though, in principle, permissible under Canadian extradition law.

R. LALLAH

APPENDIX D

Individual opinion by Mr. Fausto Pocar (dissenting)

While I agree with the decision of the Committee in so far as it refers to the consideration of the claim under article 7 of the Covenant, I am not able to

agree with the findings of the Committee that in the present case there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States that the death penalty would not be imposed against Mr. Kindler, must in my view receive an affirmative answer.

Regarding the death penalty, it has to be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee has pointed out in its General Comment 6(16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable." Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates – within certain limits and in view of a future abolition – the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Consequently, a State party that has abolished the death penalty is in my view under the legal obligation, according to article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State's jurisdiction, and to an indirect one, as it is the case when the State acts – through extradition, expulsion or compulsory return – in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

F. POCAR

APPENDIX E

Individual opinion of Ms. Christine Chanet (dissenting)

The questions posed to the Human Rights Committee by Mr. Kindler's communication are clearly set forth in paragraph 14.1 of the Committee's decision.

Paragraph 14.2 does not require any particular comment on my part.

On the other hand, when replying to the questions thus identified in paragraph 14.1, the Committee, in order to conclude in favour of a non-violation by Canada of its obligations under article 6 of the Covenant, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.

Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and thus rules out the application of the text to countries which have abolished the death penalty.

Lastly, the text imposes a series of obligations on the States in question. Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant – and that in an express and unambiguous way – for non-abolitionist States.

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 that "nothing in this article shall be invoked ... to prevent the abolition of capital punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in article 5, paragraph 2, of the Covenant that "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". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the Kindler decision results from the first two. Assuming that Canada is implicity authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada in paragraphs 14.3, 14.4 and 14.5, as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had

abolished the death penalty on its territory, has by extraditing Mr. Kindler to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Kindler, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes a discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affeaing the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

CH. CHANET

APPENDIX F

Dissenting opinion by Mr. Francisco José Aguilar Urbina

I. *Inability to join in the majority opinion*

1. I requested the Secretariat to clarify various defects in the Draft in respect of which no explanation had been given despite the fact that I had already requested their elucidation in advance. I asked, *inter alia*, for explanations regarding the system followed in the State of Pennsylvania for sentencing a person. In paragraph 2.1 of the Draft it was stated that "*the jury recommended the death sentence*". From my first statement during the discussion, I commented that there could be three possibilities, and that whether I joined in the majority or opposed it depended on which procedure was applied. Those possibilities were:

(a) That the jury could pronounce only on the guilt of the accused and that it was left to the judge, as a matter of law, to impose the sentence;

(b) That the jury not only pronounced on the innocence or guilt of the accused but also recommended the penalty, with the judge, however, remaining completely free to impose the sentence in keeping with his assessment of the case in conformity with law (in the terms in which paragraph 2.1 was drafted, this would appear to be the procedure practised by the State of Pennsylvania);

(c) That the jury ruled the innocence or guilt of the accused and, at the same time, decided upon the sentence to be imposed, not by way of a recommendation but as a penalty which the judge would necessarily be obliged to declare, not being able to change it in any circumstance but simply serving as a mouthpiece for the jury.

Consequently, in so far as the crux of the matter was whether Canada, in granting Mr. Kindler's extradition, had exposed him, *necessarily or foreseeably*, to a violation of article 6 of the Covenant, I was unable to give an opinion until that point was clarified, orally and in writing. It was necessary for me to know for certain what conditions governed the imposition of the death penalty. However, the Secretariat explained that the author had informed the Committee that the recommendation of the jury was binding (and this is stated in paragraph 2.1 of the Views), [...] that the question had been addressed in the Canadian courts where it had been established that such was the system applied in Pennsylvania.

2. I also asked for explanations concerning the powers of the Canadian Minister of Justice under the Extradition Treaty between Canada and the United States of America, especially because it was not at all clear – in the Spanish version of the Draft which contained the text of article 6 of the Treaty whether the requesting State (in this case, the United States of America) should not have officially provided assurances that the death penalty would not be applied. Moreover, I requested to be given the possibility of acquainting myself with the text of article 25 of the 1985 Extradition Act, to which reference was made in paragraph 2.3 of the Draft but which was not reproduced anywhere.

3. I also requested the Secretariat to clarify exactly of which offence the author of the communication had been found guilty, in so far as a number of matters were not clear, especially when working with the Spanish version of the text:

(a) In paragraph 2.1 of the Draft it was stated that Joseph John Kindler had been "*convicted ... of first degree murder and kidnapping.*" [14] Nevertheless, in other parts of the Draft, as well as in the Amendments, it was merely stated that Mr. Kindler had been convicted of committing a murder. The first aspect that remained unclear was the type of murder concerned, since there was confusion

[14] Draft, para. 2.1 (emphasis added).

in the terms used which in practice made it impossible to know what sentence hung over the author of the communication. In some parts it was stated that it was first degree murder, in others murder or murder with aggravating circumstances; in one of the paragraphs of the Draft it was even stated that he had been convicted of having committed "a most serious crime" ([15]). Faced with such confusion, I considered that the Committee could not have taken a decision until the acts for which Mr. Kindler had been convicted had been made absolutely clear. Although it is not for the Human Rights Committee to express an opinion on the procedure followed in the trial of the author of the communication in a country which is not a party to the Optional Protocol and which has not abolished the death penalty, it is important to know whether the acts imputed to him constitute "*most serious crimes*" within the meaning of article 6, paragraph 2, of the Covenant.

(b) In this connection, I asked for clarification, in the first place, as to whether the murder of which the author of the communication was convicted was the result of the kidnapping, of which he was also convicted, or whether the two offences were separate. This latter possibility can be inferred from the different treatment that has been given to the two offences in the Views, especially in so far as the "kidnapping" is mentioned only in paragraph 2.1. I therefore asked to be informed whether the murder of which Mr. Kindler was convicted resulted from the kidnapping. In that connection, it should be borne in mind that basically there are three possibilities that can be imputed to the author of the communication as constituting murder – in the first two places, first degree murder – but which differ in seriousness for the purposes of the implementation of article 6, paragraph 2, of the Covenant:

(1) That Mr. Kindler may have committed a purpose-related murder, in other words, a murder in which the author, at the time of the killing, was intending to prepare, facilitate or commit the kidnapping. One of the aims which the murderer may seek to achieve, in this particular case, is to secure impunity for himself. The important point here is that the death of the victim appears, in the eyes of the murderer, to be a necessary – or simply convenient or favourable – means of perpetrating another offence or of avoiding punishment for committing that other offence;

(2) That Mr. Kindler may have committed a cause-related murder. The murder results from the fact that the intended purpose of the attempt to commit another offence was not achieved – in the case of the author of the communication – the kidnapping. Cause-related murder is motivated by failure, unlike purpose-related murder, which is prompted by an illicit hope;

(3) The third possibility that presents itself is that the death of the kid-

([15]) Draft, para. 14.4.

napped person may not have been caused by Mr. Kindler but may have been the result of action taken to prevent the perpetrator from committing the offence of kidnapping. Here the death results from the criminal actions of the author of the communication, although he himself did not commit the murder directly.

(c) The confusion increases when we see that in the Views mention is made of "murder", of "murder with aggravating circumstances" and of "premeditated murder". The first point that would have to be noted is that, in legal terms, first degree murder is in itself the killing of a person in aggravating circumstances, so that to speak of "first degree murder with aggravating circumstances" (*asesinato con circunstancias agravantes*) would be pleonastic. It is quite clear that the murder committed by Mr. Kindler is one in which first degree factors were involved. However, on the one hand not all first degree murders constitute most serious crimes within the meaning of article 6.

(d) On the other hand, the Committee, when it states that Mr. Kindler committed a *premeditated murder* without indicating that he committed more than one murder, would rule out the possibility that he may have committed other types of first degree murder. I asked the Secretariat to inform me on the basis of what information it was affirmed that specifically premeditated murder had been committed. Premeditated murder is a specific kind of murder different from other types of murder, such as those mentioned in subparagraphs (1) and (2) above. It is a kind of murder involving "cold" reflection on the part of the murderer, who not only decides to commit the crime but, once he has resolved to do so, begins to give detailed consideration to how to carry it out. Thus there is, in the offence of *premeditated murder*, a dual reflection: in the first place the murderer decides to commit the act; in the second place, he reflects on the means that he intends to use to carry it out.

(e) If premeditated murder was involved, the other offences related to kidnapping would be eliminated. It would no longer be a matter of categorization connected with the perpetration of the other offence (purpose-related murder) or with frustration at not having been able to carry it out successfully (cause-related murder), but rather of an "unrelated" murder involving, as the ground for aggravation. cold reflection regarding the means that were used to carry it out.

(f) Consequently, if what was involved was a *premeditated murder*, mention should not have been made of the kidnapping. However, if on the contrary the case was one of *related murder*, either purpose-related or cause-related, connected with the kidnapping, then these are no grounds for speaking of premeditated murder or for imputing to the author the coldness in the choice of means or manner of carrying out the murder that is characteristic of premeditation.

4. I find it intolerable that most of the doubts which I raised with the Secretariat were at no time cleared up before the Committee took a majority decision. The only doubt that was resolved was that concerning the system of sen-

tencing followed in the State of Pennsylvania, but in the form of information imparted by the author to the Committee and not as a reliable fact ([16]).

II. *Decision to write a dissenting opinion on the merits of the communication*

5. After having considered the unconditional handing-over of the author of the communication by the Government of Canada to the Government of the United States of America, I have arrived at the conclusion that Canada has violated the International Covenant on Civil and Political Rights.

III. *Extradition and the protection afforded by the Covenant*

6. In analysing the relationship between the Covenant and extradition, it is remiss – and even dangerous, as far as the full enjoyment of the rights set forth in the Covenant is concerned – to state that since "it is clear from the *travaux préparatoires* that it was not intended that article 13 of the Covenant, which provides *specific rights relating to the expulsion of aliens lawfully in the territory of a State party*, should detract from normal extradition arrangements", extradition would remain outside the scope of the Covenant ([17]). In the first place, we have to note that extradition, even though in the broad sense it would amount to expulsion, in a narrow sense would be included within the procedures regulated by article 14 of the Covenant. Although the procedures for ordering the extradition of a person to the requesting State vary from country to country, they can roughly be grouped into three general categories: (1) a purely judicial procedure, (2) an exclusively administrative procedure, or (3) a mixed procedure involving action by the authorities of two branches of the State, the judiciary and the executive. This last procedure is the one followed in Canada. The important point, however, is that the authorities dealing with the extradition proceedings constitute, for this specific case at least, a "tribunal" that applies a procedure which must conform to the provisions of article 14 of the Covenant

7. The fact that the drafters of the International Covenant on Civil and Political Rights did not include extradition in article 13 is quite logical, but on that account it cannot be affirmed that their intention was to leave extradition proceedings outside the protection afforded by the Covenant. The fact is, rather, that extradition does not fit in with the legal situation defined in article 13. The essential difference lies, in my opinion, in the fact that this rule refers exclusively to the expulsion of "an alien lawfully in the territory of a State party". Extradition is a kind of "expulsion" that goes beyond what is contemplated in the rule. Firstly, extradition is a specific procedure, whereas the rule laid down in article 13 is of a general nature; however article 13 merely stipulates that expulsion must give rise to a decision in accordance with law, and even – in cases

([16]) Views, para. 2.1.
([17]) Views, para. 6.6 (emphasis added).

where there are compelling reasons of national security – it is permissible for the alien not to be heard by the competent authority or to have his case reviewed. Secondly, whereas expulsion constitutes a unilateral decision by a State, grounded on reasons that lie exclusively within the competence of that State – provided that they do not violate the State's international obligations, such as those under the Covenant – extradition constitutes an act based upon a request by another State. Thirdly, the rule in article 13 relates to aliens who are in the territory of a State party to the Covenant, whereas extradition may relate both to aliens and to nationals; indeed, on the basis of its discussions the Committee has considered the practice of expelling nationals (for example exile) in general (other than under extradition proceedings) to be contrary to article 12 ([18]).

Fourthly, the rule in article 13 relates to persons who are lawfully in the territory of a country; in the case of extradition, the individuals against whom the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary – and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien's presence to national law – in a great many instances persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.

8. Although extradition cannot be considered to be a kind of expulsion within the meaning of article 13 of the Covenant, this does not imply that it is excluded from the scope of the Covenant. Extradition must be strictly adapted in all cases to the rules laid down in the agreement. Thus the extradition proceedings must follow the rules of due process as required by article 14 and, furthermore, their consequences must not entail a violation of any other provision. Therefore, a State cannot allege that extradition is not covered by the Covenant in order to evade the responsibility that would devolve upon it for the possible absence of protection in a foreign jurisdiction.

IV. *The extradition of Mr. Joseph Kindler to the United States of America*

9. In this particular case, Canada extradited the author of the communication to the United States of America, where he had been found guilty of first degree murder. It will have to be seen – as the Committee stated in its decision on the admissibility of the communication – whether Canada, in granting Mr. Kindler's extradition, exposed him, necessarily or foreseeably, to a violation of article 6 of the Covenant.

10. The same State party argued that "the author cannot be considered a

([18]) In this connection, see the summary records of the Committee's recent discussions regarding Zaire and Burundi, in relation to the expulsion of nationals and Venezuela in relation to the continuing existence, in criminal law, of the penalty of exile.

victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about *possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States*" ([19]). Although it is impossible to foresee a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring – or necessary – in other words, it will inevitably occur, unless exceptional events prevent it from happening. An initial aspect that has to be elucidated is, then, the nature of the jury's decision under the Code of Criminal Procedure of the State of Pennsylvania. The fact that Mr. Kindler may (foreseeably) or must (necessarily) be sentenced to death depends on the, judge's power to change the jury's "recommendation". Although the Secretariat merely indicated that the author of the communication had stated that the recommendation of the jury had to be complied with by the judge, documents in the possession of the Secretariat showed that it was more than a simple statement by Mr. Kindler." ([20]) Before the Supreme Court of Canada the author stated, without being refuted by the Canadian Executive or the contrary being established in any other way that "the recommendation is binding and the judge must impose the death sentence" ([21]). In view of this affirmation, we must then take it for granted that the author, necessarily and foreseeably, will be sentenced to death and that, consequently, he may be executed at any moment. In this connection, it is the law of Pennsylvania that obliges the judge to comply with the jury's order. Canada's contention that what is involved is an event that may not materialize because it depends on the law and actions of the authorities is groundless. In the case of the Code of Criminal Procedure under which the court that sentenced Mr. Kindler operates, the imposition of the death penalty is definite, since the judge cannot change the jury's decision.

11. It is possible, in this connection, that the author may appeal against the jury's decision, in which case the foresee ability and necessity of the execution could be affected in such a way that the death sentence might not hang over Mr. Kindler. However, four questions must be borne in mind in order to be able to decide that the death sentence would not necessarily or foreseeably be imposed:

(a) Whether the author still has the possibility of appealing against the sentence of first instance, in which he was sentenced to death;

(b) In the event of his still having that possibility, whether – if he was found guilty of the first degree murder of which he was convicted – the court of second instance must comply with the decision reached by the jury of first in-

([19]) Views, para. 4.2 (emphasis added).

([20]) See above, para. 8.

([21]) Appeal of Joseph John Kindler to the Supreme Court of Canada, para. 1, p. 1.

stance or whether it can impose another sentence more beneficial for the protection of the life of the author of the communication;

(c) The fact that the prevailing trend in the United States of America is to bar appeals in cases involving the death sentence. The intention not to accept appeals in such cases has already been stated, at least in the case of the Supreme Court of Justice;

(d) The fact that, according to the available documentation, the imposition of the death sentence might become increasingly frequent in the State of Pennsylvania. Thus, whereas in the author's pleas before the Supreme Court of Canada in May 1990 it is stated that the death penalty has not been applied in that State for a long time – although a large number of persons are awaiting execution by electric chair – the State party, in defending the extradition before the Committee, indicates that "the method of execution in Pennsylvania is lethal injection, which is the method proposed by those who advocate euthanasia" ([22]). Such an affirmation, which is, moreover, unacceptable in so far as it appears to be a defence of the death penalty by a State which has abolished it for all offences except a few of a military nature, would appear to serve to conceal the fact that, in the jurisdiction to which Mr Kindler has been extradited, attempts have been made to find more effective methods of execution, implying that executions have been resumed in the State of Pennsylvania.

Consequently, and in application of the principle of *in dubio pro reo*, it has to be assumed that the execution of the author of the communication is a foreseeable event which, furthermore, will necessarily take place unless exceptional events intervene ([23]).

12. However, in connection with the "exceptional circumstances" mentioned by the State party in the reply of the Government of Canada to the communication from Joseph John Kindler following the Human Rights Committee's decision on admissibility dated 2 April 1993 (hereinafter referred to as the Reply) ([24]), the majority opinion in the Committee was that events that would have affected the jury's decision when it convicted Mr. Kindler were involved. The Canadian authorities should, therefore, have made an assessment of the proceedings at the trial in the United States.

([22]) Views, para. 9.7.

([23]) In this connection, I understand by "exceptional events" (it should be noted that "exceptional events" differ somewhat from "exceptional circumstances") those events or acts which would prevent the execution of the author of the communication. They would normally be of a political nature, such as a pardon or the entry into force of legislation abolishing the death penalty. However, since these are decisions of a political nature, taken by persons who depend on the voters' will, and since the death penalty is favoured by a substantial majority of the population of the United States, the possibility that such exceptional events could occur is extremely remote.

([24]) Reply paras. 22 and 23.

13. Nevertheless, I cannot agree with the Committee in its assessment of what those "exceptional circumstances" are. In the first place, the Government of Canada has not explained what they consist of; it only mentions that "evidence showing that a fugitive would face *certain or foreseeable* violations of the Covenant" ([25]) would constitute an example of exceptional circumstances. It can be seen how the State party itself agrees that exceptional circumstances have a connection with the consequences of the extradition. Accordingly, the erroneous perception which the majority of the members of the Committee have had has led it to believe that the exceptional circumstances refer to the trial and conviction of Mr. Kindler in Pennsylvania. Thus the majority states that "all the evidence submitted concerning Mr. Kindler's trial and conviction" had been reviewed ([26]) when it is certain that the jurisprudence of the Supreme Court of Canada has indicated that the judge who deals with the extradition may not weigh the evidence or give an opinion as to its credibility and that such functions are left to the jury or judge in the trial that determines whether an offence has been committed ([27]).

14. In the second place, the Committee observes, in its majority opinion, that the discretionary right to seek assurances "would normally be exercised where exceptional circumstances existed" and that "careful consideration was given to this possibility" ([28]). Nevertheless, here too the Committee has a wrong perception. Canada itself, in its Reply, refers to exceptional circumstances only in two paragraphs and in a very summary manner; it also states, with reference to them, that "*there was no evidence presented by Mr. Kindler* during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty... violates the Covenant" ([29]). This affirmation contains two elements which do not allow me to share the majority opinion:

(a) Firstly – and this relates to my contention in the previous paragraph – the exceptional circumstances are connected with the application of the death penalty and not with the proceedings at the trial and the sentencing;

(b) Secondly, there was no exhaustive examination of what the State considers to be exceptional circumstances, since Mr. Kindler submitted no evidence in that connection. According to what we are told by the State party, it was not the responsibility of the Canadian courts, the Minister of Justice or the Human Rights Committee to study *ex officio* the details of the trial and sentencing but

([25]) Reply para. 23 (emphasis added).

([26]) Views, para. 14.4

([27]) Supreme Court of Canada, United States of America vs. Shepard (1977), 2 S.C.R. 1067, pp. 1083-1087.

([28]) Views, para. 14.5.

([29]) Reply, para. 23 (emphasis added). In the same connection, the State refers to exceptional circumstances in para. 86 of the same document.

rather of Mr. Kindler to present, before all the organs that had heard the case, evidence that the death penalty violated his rights, in which case there would be an exceptional circumstance. In so far as the author did not present such "evidence", the State party admits that it had not been possible to give careful attention to that possibility.

15. Nevertheless, the most important aspect of the *exceptional circumstances* is that related to the State party's affirmations that they refer to the application of the death penalty. I have pointed out on several occasions that exceptional circumstances have to be considered in relation to the possibility that the death penalty may be applied. I do not share the idea expressed by Canada concerning the relationship between those circumstances and the death penalty. In my view, the most important matter is the link between the application of the death penalty and the protection given to the lives of persons within the jurisdiction of the Canadian State. For them, the death penalty constitutes in itself a *special circumstance*. For that reason – and in so far as the jury decided that the author of the communication must die – Canada had a duty to seek assurances that Joseph John Kindler would not be executed.

16. The fact that the death penalty constitutes a special circumstance derives from article 6 of the Extradition Treaty. Of all the provisions of the Treaty, only this one (relating to the extradition of persons who may be sentenced to death or who have already been so sentenced) makes it possible for one of the parties to seek from the other assurances that the individual whose extradition is requested will not be executed. This article stipulates that the death penalty is different from other sentences and must be viewed in a special way.

17. This provision also accepts that the States parties to the Extradition Treaty have values and traditions in regard to the death penalty *which the requesting State must respect*. Consequently, in order to guarantee respect for those values and traditions, both have provided, in article 6, for the inclusion of an exception rule in the Extradition Treaty. This fact is closely linked to the assertion which Canada made before the Human Rights Committee to the effect that the request for assurances was not pertinent in the case in question in so far as "The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States" ([30]). This contention seems to me to be unacceptable for three main reasons:

(a) It is stipulated in the Extradition Treaty that, where it is possible that the death penalty may be applied, the State requested to hand over the fugitive may seek assurances that he will not be executed and the requesting State has accepted a priori that it may be asked to apply a philosophy that does not accept death as a punishment for a crime under the ordinary law;

(b) The Extradition Treaty envisages that a person may not be extradited

([30]) Views, para. 8.6.

to the United States except for offences that are recognized as such in Canada. This would be the clearest case of the imposition of the penal concepts of one country on another, in so far as, even when there is reliable evidence of the guilt of an individual or he had already been sentenced in the United States, he could not be extradited since Canadian penal legislation would not consider his conduct to be an offence;

(c) Not to request assurances out of a desire to see the foreign law strictly applied amounts to imposing (in a self-inflicting manner) the law of one of the component parts of the United States of America (Pennsylvania) and its pro-death-penalty philosophy on the Canadian legal and social system.

18. It has been argued that Mr. Kindler was extradited without any assurances being sought because to have requested them would have prevented his handing-over to the United States authorities. This is another assertion that I cannot accept. On the one hand, since the State party to the Extradition Treaty has accepted in advance that assurances may be requested of it, it must be prepared to give them in any case ([31]). On the other hand, Canada is affirming that the authorities of the United States of America are not willing in any circumstance to give those assurances and that they are even prepared to use extradition as a means of imposing their conception of penal law on Canada. I do not believe this to be the case.

19. The problem that arises with the extradition of Mr. Kindler to the United States without any assurances having been requested is that he has been deprived of the enjoyment of a right in conformity with the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first place, it has to be viewed in the light of paragraph 1, which declares that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes – for those States which have not abolished the death penalty – a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of the article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

20. In this connection, when Mr. Kindler entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed Canada has denied the protection which he enjoyed and has *necessarily* exposed him to be sentenced to

([31]) I must point out that article 6 of the Extradition Treaty between Canada and the United States of America places no limit on requests for assurances. The exceptional circumstances which could provide a basis for requesting assurances form part of the Extradition Act.

death and *foreseeably* to being executed. Canada has therefore violated article 6 of the Covenant.

21. Further, Canada's misinterpretation of the rule in article 6, paragraph 2, of the International Covenant on Civil and Political Rights raises the question of whether it has also violated article 5, specifically paragraph 2 thereof. The Canadian Government has interpreted article 6, paragraph 2, as authorizing the death penalty. For that reason it has found that Mr. Kindler's extradition, even though he will necessarily be sentenced to death and will foreseeably be executed, would not be prohibited by the Covenant, since the latter would authorize the application of the death penalty. In making such a misinterpretation of the Covenant, the State party asserts that Mr. Kindler's extradition would not be contrary to the Covenant. In this connection, then, Canada has denied Mr. Joseph John Kindler a right which he enjoyed under its jurisdiction, adducing that the Covenant would give a lesser protection – in other words, that the International Covenant on Civil and Political Rights would recognize the right to life in a lesser degree than Canadian legislation. In so far as the misinterpretation of article 6, paragraph 2, has led Canada to consider that the Covenant recognizes the right to life in a lesser degree than its domestic legislation and has used that as a pretext to extradite the author to a jurisdiction where he will certainly be executed, Canada has also violated article 5, paragraph 2, of the Covenant.

22. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing-over to another State of a person who runs the risk of being executed or who will be executed. Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

23. One final aspect to be dealt with is the way in which Mr. Kindler was extradited, no notice being taken of the request that the author should not be extradited prior to the Committee forwarding its final views on the communication to the State party ([32]) made by the Special Rapporteur on New Communications under rule 86 of the rules of procedure of the Human Rights Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Kindler without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

24. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation

([32]) Rules of procedure of the Human Rights Committee.

as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its censurable action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Kindler was extradited on account of his nationality ([33]) and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

25. In conclusion, I find Canada to be in violation of article 5, paragraph 2, and articles 6 and 26 of the International Covenant on Civil and Political Rights. I agree with the majority opinion that there has been no violation of article 7 of the Covenant.

F.J. AGUILAR URBINA

Done in English, French and Spanish, the English text version being the original version.

([33]) The various passages in the Reply which refer to the relations bet veen Canada and the United States, the 4,800 kilometres of unguarded frontier between the two countries and the growing number of extradition applications by the United States to Canada should be taken into account. The State party has indicated that United States fugitives cannot be permitted to take the non extradition of the author in the absence of assurances as an incentive to flee to Canada.

D.

COMITATO DELLE NAZIONI UNITE CONTRO LA DISCRIMINAZIONE RAZZIALE

1. UN-Committee on the Elimination of all Forms of Racial Discrimination, Geneva
   Opinion of 16 March 1993 concerning Communication No. 4/1991 submitted by: L.K.
   State party concerned: The Netherlands.

UN-Committee on the Elimination of all Forms of Racial Discrimination, Geneva

Opinion

Opinion of 16 March 1993 concerning Communication No. 4/1991
Submitted by: L.K.
State party concerned: The Netherlands

State's obligation to treat instances of racial discrimination with particular attention / mere existence of a law making discrimination a criminal act insufficient / L.K. v. The Netherlands

The Committee on the Elimination of Racial Discrimination established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (...) adopts the following

OPINION

L The author of the communication (dated 6 December 1991) is L.K., a Moroccan citizen currently residing in Utrecht, the Netherlands. He claims to be a victim of violations by the Netherlands of articles 2, paragraph 1 (d); 4 litera c), 5, litera d(i) and litera e(iii); and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The author is represented by counsel.

The fact as found by the Committee

2.1 On 9 August 1989, the author, who is partially disabled, visited a house for which a lease had been offered to him and his family, in the Nicholas Ruychaverstraat, a street, with municipal subsidized housing in Utrecht. He was accompanied by a friend A.B. When they arrived, some twenty people had gathered outside the house. During the visit, the author heard several of them both say and shout: "No more foreigners". Others intimated to him that if he were to accept the house, they would set fire to it and damage his car. The author and A.B. then returned to the Municipal Housing Office and asked the official responsible for the file to accompany them to the street. There, several local inhabitants told the official that they could not accept the author as their neighbour, due to a presumed rule that no more than 5% of the street's inhabitants should be foreigners. Told that no such rule existed, street residents drafted a petition, which noted that the author could not be accepted and recommended that another house be allocated to his family.

2.2. On the same day, the author filed a complaint with the municipal police of Utrecht, on the ground that he had been the victim of racial discrimination under article 137 (literae c and d) of the Criminal Code (Wetboek van Strafrecht). The complaint was directed against all those who had signed the peti-

tion and those who had gathered outside the house. He submits that initially, the police officer refused to register the complaint, and that it took mediation by a local anti-discrimination group before the police agreed to prepare a report.

2.3 The State party's version of the facts coincides to a large extent with that given by the author, with some differences. According to the State party, the author visited the house allocated to him by the Municipality of Utrecht twice, once on 8 August 1989, together with an official of the Utrecht Municipal Housing Department, and again on 9 August 1989 with a friend. During the first visit, the official started a conversation with a local resident, a woman, who objected to the author as a future tenant and neighbour. During the conversation, several other residents approached and made remarks such as "We've got enough foreigners in this street" and "They wave knives about and you don't even feel safe in your own street". While the author was no longer present when these remarks were made, the Housing Department official was told that the house would be set on fire as soon as the prior tenant's lease had expired. As to the second visit, it is submitted that when the author arrived at the house with a friend, A.B., a group of local residents had already gathered to protest against the potential arrival of another foreigner. When the author remained reluctant to reject the Housing Dept's offer, the residents collected signatures on a petition. Signed by a total of 28 local residents, it bore the inscription "Not accepted because of poverty? Another house for the family please?", and was forwarded to the Housing Dept. official.

2.4 In response to the complaint of 9 August 1989, the police prepared a report on the incident (Proces-Verbaal No. 4239/89) on 25 September 1989; according to the State party, 17 out of the 28 residents who had signed the petition had been questioned by the police, and 11 could not be contacted before the police report was finalized.

2.5 In the meantime, the author's lawyer had apprised the prosecutor at the District Court of Utrecht of the matter and requested access to all the documents in the file. On 2 October 1989, the prosecutor forwarded these documents, but on 23 November 1989 he informed the author that the matter had not been registered as a criminal case with his office, because it was not certain that a criminal offence had taken place. On 4 January 1990, therefore, counsel requested the Court of Appeal of Amsterdam (Gerechtshof) to order the prosecution of the "group of residents of the Nicholas Ruychaverstraat in Utrecht" for racial discrimination, pursuant to article 12 of the Code of Criminal Procedure.

2.6 Counsel submits that after several months, he was informed that the Registry of the Court of Appeal had indeed received the case file on 15 January 1990. On an unspecified date but shortly thereafter, the Prosecutor- General at the Court of Appeal had requested further information from the District Court Prosecutor, which was supplied rapidly. However, it was not until 10 April 1991 that counsel was able to consult the supplementary information, although he

had sought to obtain it on several occasions between 15 February 1990 and 15 February 1991. It was only after he threatened to apply for an immediate judgment in tort proceedings against the prosecutor at the Court of Appeal that the case was put on the Court agenda for 10 April 1991. On 5 March 1991, the Prosecutor-General at the Court of Appeal asked the Court to declare the complaint unfounded or to refuse to hear it on public interest grounds.

2.7. Before the Court of Appeal, it transpired that only two of the street's inhabitants had actually been summoned to appear; they did not appear personally but were represented. By judgment of 10 June 1991, the Court of Appeal dismissed the author's request. It held inter alia that the petition was not a document of deliberately insulting nature, nor a document that was inciting to racial discrimination within the meaning of article 137, literae c) and e), of the Criminal Code. In this context, the Court of Appeal held that the heading to the petition – which, taking into account statements made during the hearing and to the police, should be interpreted as meaning "Not accepted because of a fight? Another house for the family please?" – could not be considered to be insulting or as an incitement to racial discrimination, however regrettable and undesirable it might have been.

2.8 Under article 12 of the Code of Criminal Procedure, counsel requested the Prosecutor-General at the Supreme Court to seek the annulment of the decision of the Court of Appeal, in the interest of law. On 9 July 1991, the request was rejected. As a last resort, counsel wrote to the Minister of Justice, asking him to order the prosecutor to initiate proceedings in the case. The Minister replied that he could not grant the request, as the Court of Appeal had fully reviewed the case and there was no scope for further proceedings under article 12 of the Code of Criminal Procedure. However, the Minister asked the Chief Public Prosecutor in Utrecht to raise the problems encountered by the author in tripartite consultations between the Chief Public Prosecutor, the Mayor and the Chief of the Municipal Police of Utrecht. At such tripartite consultations on 21 January 1992, it was agreed that anti-discrimination policy would receive priority attention.

The complaint

3.1 The author submits that the remarks and statements of the residents of the street constitute acts of racial discrimination withing the meaning of article 1, paragraph 1, of the Convention, as well as of article 137 literae c), d), and e), of the Dutch Criminal Code; the latter provisions prohibit public insults of a group of people solely on the basis of their race, public incitement of hatred against people on account of their race, and the publication of documents containing racial insults of a group of people.

3.2 The author contends that the judicial authorities and the public prosecutor did not properly examine all the relevant facts of the case or at least did not formulate a motivated decision in respect of his complaint. In particular, he submits that the police investigation was neither thorough nor complete. Thus,

A.B. was not questioned; and street residents were only questioned in connection with the petition, not with the events outside the house visited by the author on 8/9 August 1989. Secondly, the author contends that the decision of the prosecutor not to institute criminal proceedings remained unmotivated. Thirdly, the prosecutor is said to have made misleading statements in an interview to a local newspaper in December 1989, in respect of the purported intentions of the street residents vis-à-vis the author. Fourthly, the Prosecutor-General at the Court of Appeal is said to have unjustifiably prolonged the proceedings by remaining inactive for over one year. Finally, the Court of Appeal itself is said to have relied on incomplete evidence.

3.3 Author's counsel asserts that the above reveals violations of articles 2, paragraph 1(d), juncto 4 and 6; he observes that articles 4 and 6 must be read together with the first sentence and paragraph 1 litera d) of article 2, which leads to the conclusion that the obligations of States parties to the Convention are not met if racial discrimination is merely criminalized. Counsel submits that although the freedom to prosecute or not to prosecute, known as the expediency principle, is not set aside by the Convention, the State party, by ratifying the Convention, accepted to treat instances of racial discrimination with particular attention, inter alia, by ensuring the speedy disposal of such cases by domestic judicial instances.

The State party's information and observations and counsel's comments:

4.1 The State party does not formulate objections to the admissibility of the communication and concedes that the author has exhausted available domestic remedies. It also acknowledges that article 137, literae c), d), and e), of the Criminal Code are in principle applicable to the behaviour of the street's residents.

4.2 In respect of the contention that the police investigations of the case were incomplete, the State party argues that it is incorrect to claim that the residents of the street were questioned only about the petition. A number of residents made statements about the remark that a fire would be set if the author moved into the house. The State party also contends that although lapse of time makes it impossible to establish why A.B. was not called to give evidence before the Court of Appeal, it is "doubtful... whether a statement from him would have shed a different light on the case. After all, no one disputes that the remarks objected to were made".

4.3 The State party similarly rejects the contention that the prosecutor did not sufficiently motivate the decision not to prosecute and that the interview given by the press officer of the prosecutor's office to an Utrecht newspaper on 6 December 1989 was incomplete and erroneous. Firstly, it observes that the decision not to prosecute was explained at length in the letter dated 25 June 1990 from the public prosecutor in Utrecht to the Prosecutor-General at the Amsterdam Court of Appeal, in the context of the author's complaint filed under article 12 of the Code of Criminal procedure. Secondly, the interview

of 6 December 1989 did not purport to reflect the opinion of the public prosecutor's office but that of the residents of the street.

4.4 In respect of the contention that the proceedings before the Court of Appeal were unduly delayed, the State party considers that although the completion of the report by the Prosecutor-General took longer than anticipated and might be desirable, a delay of fifteen months between lodging of the complaint and its hearing by the Court of Appeal did not reduce the effectiveness of the remedy; accordingly, the delay cannot be considered to constitute a violation of the Convention.

4.5 The State party observes that Dutch legislation meets the requirements of article 2, paragraph 1(d), of the Convention, by making racial discrimination a criminal offence under articles 137 litera c) et seq. of the Criminal Code. For any criminal offence to be prosecuted, however, there must be sufficient evidence to warrant prosecution. In the Government's opinion, there can be no question of a violation of articles 4 and 6 of the Convention because, as set out in the public prosecutor's letter of 25 June 1990, it had not been sufficiently established that any criminal offence had been committed on 8 and 9 August 1989, or who had been involved.

4.6 In the State party's opinion, the fact that racial discrimination has been criminalized under the Criminal Code is sufficient to establish compliance with the obligation in article 4 of the Convention, since this provision cannot be read to mean that proceedings are instituted in respect of every type of conduct to which the provision may apply. In this context, the State party notes that decisions to prosecute are taken in accordance with the expediency principle, and refers to the Committee's opinion on communication 1/1984 addressing the meaning of this very principle ([1]). The author was able to avail himself of an effective remedy, in accordance with article 6 of the Convention, because he could and did file a complaint pursuant to article 12 of the Code of Criminal Procedure, against the prosecutor's refusal to prosecute. The State party emphasizes that the review of the case by the Court of Appeal was comprehensive and not limited in scope.

4.7 Finally, the State party denies that it violated article 5 d) (i) and e) (iii) of the Convention vis-à-vis the author; the author's right to freely choose his place of residence was never impaired, either before or after the events of August 1989. In this context, the State party refers to the Committee's Opinion on communication No. 2/1989, where it was held that the rights enshrined in article 5(e) of the Convention are subject to progressive implementation, and that it was "not within the Committee's mandate to see to it that these rights are established" but rather to monitor the implementation of these rights, once they have been granted on equal terms ([2]) The State party points out that "appro-

([1]) *Yilmaz-Dogan v. Netherlands*, Opinion of 10 August 1988, paragraph 9.4.
([2]) *D.T. Diop v. France*, Opinion of 18 March 1991, paragraph 6.4.

priate rules have been drawn up to ensure an equitable distribution of housing...", and that these rules were applied to the author's case.

5.1 In his comments, counsel challenges several of the State party's observations. Thus, he denies that the police enquiry was methodical and asserts that A.B. could and indeed would have pointed out those who made threatening and discriminatory remarks on 9 August 1989, had he been called to give evidence. Counsel further submits that he was not able to consult the public prosecutor's decision of 25 June 1990 not to institute criminal proceedings until 10 April 1991, the date of the hearing before the Court of Appeal.

5.2 Counsel takes issue with the State party's version of the prosecutor's interview of 6 December 1989 and asserts that if the press officer related the version of the street residents without any comment whatsoever, she thereby suggested that their account corresponded to what had in fact occurred. Finally, counsel reaffirms that the judicial authorities made no effort to handle the case expeditiously. He notes that criminal proceedings in the Netherlands should duly take into account the principles enshrined in article 6 of the European Convention on the Protection of Human Rights, of which the obligation to avoid undue delays in proceedings is one.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, decide whether or not it is admissible under the Convention. Under rule 94, paragraph 7, the Committee may, in appropriate cases and with the consent of the parties concerned, join consideration of the admissibility and of the merits of a communication. The Committee notes that the State party does not raise objections to the admissibility of the communication, and that it has formulated detailed observations in respect of the substance of the matter under consideration. In the circumstances, the Committee decides to join consideration of admissibility and consideration of the merits of the communication.

6.2 The Committee has ascertained, as it is required to do under rule 91, that the communication meets the admissibility criteria set out therein. It is, therefore, declared admissible.

6.3 The Committee finds on the basis of the information before it that the remarks and threats made on 8 and 9 August 1989 to L.K. constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin, contrary to article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, and that the investigation into these incidents by the police and prosecution authorities was incomplete.

6.4 The Committee cannot accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of State parties under the Convention.

6.5 The Committee reaffirms its view as stated in its Opinion on Communication No. 1/1984 of 10 August 1987 (*Yilmaz-Dogan v. The Netherlands*) that "the freedom to prosecute criminal offences – commonly known as the expediency principle – is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the raison d'être of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention."

6.6 When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition. In the instant case, the State party failed to do this.

6.7 The Committee finds that in view of the inadequate response to the incidents, the police and judicial proceedings in this case did not afford the applicant effective protection and remedies within the meaning of article 6 of the Convention.

6.8 The Committee recommends that the State party review its policy and procedures concerning the decision to prosecute in cases of alleged racial discrimination, in the light of its obligations under article 4 of the Convention.

6.9 The Committee further recommends that the State party provide the applicant with relief commensurate with the moral damage he has suffered.

7. Pursuant to rule 95, paragraph 5, of its rules of procedure, the Committee invites the State party, in its next periodic report under article 9, paragraph 1, of the Convention, to inform the Committee about any action it has taken with respect to the recommendations set out in paragraphs 6.8 and 6.9 above.

Done in English, French, Russian and Spanish, the English text being the original version.

E.

COMITATO DELLE NAZIONI UNITE CONTRO LA TORTURA

1. UN-Committee against Torture, Geneva
   Decision on admissibility
   Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerning Communications Nos. 1/1988, 2/1988 and 3/1988 submitted by O.R., M.M. and M.S. on behalf of their deceased relatives.
   Date of communication: 22 November 1988.
   State party concerned: Argentina.
   Date of decision: 23 November 1989.

2. UN Committee against Torture, Geneva
   Views of the Committee against Torture under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerning Communicalion No. 15/1994 submitted by Mr. Tahir Hussain Khan.
   Date of communication: 4 July 1994.
   State party concerned: Canada.
   Date of adoption of Views: 15 November 1994.

UN-Committee against Torture, Geneva

Decision on admissibility

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerning Communications Nos. 1/1988, 2/1988 and 3/1988 submitted by O.R., M.M. and M.S. on behalf of their deceased relatives.
Date of communication: 22 November 1988.
State party concerned: Argentina.
Date of decision: 23 November 1989.

Communication against Argentina inadmissible *ratione temporis*

A. DECISION TO DEAL JOINTLY WITH THREE COMMUNICATIONS

The Committee against Torture,

Considering that communications Nos. 1/1988, 2/1988 and 3/1988 refer to closely related events said to have taken place in Argentina in 1976, and to the enactment of certain legislation in December 1986 and June 1987,

Considering further that the three communications can appropriately be dealt with together,

1. *Decides*, pursuant to rule 105, paragraph 3, of its rules of procedure, to deal jointly with these communications;

2. *Further decides* that this decision shall be communicated to the State party and the authors of the communications.

B. DECISION ON ADMISSIBILITY

1. The authors of the communications are O.R., M.M. and M.S., Argentinian citizens residing in Argentina, writing on behalf of their deceased relatives M.R., J.M. and C.S., who were Argentinian citizens and were allegedly tortured to death by Argentine military authorities in June, July and November 1976, respectively. The authors are represented by counsel.

2.1 The authors claim that the enactment of Act No. 23,521 of 8 June 1987 (known as the "Due Obedience Act" or "Ley de Obediencia Debida") and its application to the legal proceedings in the cases of their relatives constitute violations by Argentina of articles 2, 10, 13, 16, 19 and 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Similarly, it is also claimed that the proclamation of Act No. 23,492 on 24 December 1986 (known as the "Finality Act" or "Ley de Punto Final") entails violations of the Convention.

2.2 The Convention against Torture was signed by the Government of Argentina on 4 February 1985, ratified on 24 September 1986 and entered into force on 26 June 1987. Article 2 of the Convention provides in part:

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

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

2.3 It is claimed that Act No. 23,521 is incompatible with Argentina's obligations under the Convention. The Act presumes, without admitting proof to the contrary, that those persons who held lower military ranks at the time the crimes were committed were acting under superior orders; the Act therefore exempts them from punishment. The immunity also covers superior military officers who did not act as commander-in-chief, chief of zone, or chief of security police or penitentiary forces, provided that they did not themselves decide or that they did not participate in the elaboration of criminal orders.

2.4 With regard to the time frame of application of the Convention, the authors acknowledge that their relatives were tortured to death during the prior Argentine Government, before the entry into force of the Convention. They challenge, however, the compatibility of the Due Obedience Act with the Convention. Although Act No. 23,521 was enacted before the entry into force of the Convention against Torture, the authors refer to article 18 of the Vienna Convention on the Law of Treaties (in force 27 January 1980), which provides that

"A State is obliged to refrain from acts which would defeat the object or purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification ..."

Both signature and ratification of the Convention against Torture by Argentina took place prior to the enactment of Act No. 23,521.

2.5 At issue is also the compatibility with the Convention against Torture of Act No. 23,492, of 24 December 1986, known as Law of "Punto Final", which established a deadline of 60 days for commencing new criminal investigations with regard to the events of the so-called "dirty war" (*guerra sucia*). This deadline expired on 22 February 1987.

3. By decisions under rule 108 of its rules of procedure, the Committee against Torture transmitted the three communications to the State party requesting information concerning the question of the admissibility of the communications.

4.1 On 14 July 1989 the State party objected to the admissibility of the communications on the grounds that all events in question, including the enactment of the laws challenged by the authors took place prior to the entry into force of the Convention against Torture.

4.2 In particular, the State party refers to article 28 of the Vienna Convention on the Law of Treaties which stipulates:

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

4.3 In this connection, the State party observes that this provision merely codifies the existing customary law with regard to the non-retroactivity of treaties. It refers to decisions of the Permanent Court of International Justice (Series A/B, No. 4, 24) and of the International Court of Justice (Reports, 1952, 40) holding that a treaty only applies retroactively if such an intention is expressed in the treaty or may be clearly inferred from its provisions.

4.4 In respect of this provision, the International Law Commission has observed:

> "... in numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission of Human Rights has held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question."

4.5 The State party places Acts Nos. 23,492 and 23,521 in this context, since their scope of application extends from 24 March 1976 to 26 September 1983 and the Convention against Torture came into force on 26 June 1987.

5.1 The State party further contends that the authors have failed to exhaust domestic remedies, and indicates that all victims of crimes have a right to compensation for the physical and moral injury suffered and that Act No. 23,492 recognizes this right in article 6, which specifically provides that "the extinction of penal action pursuant to article 1 does not affect civil proceedings."

5.2 Moreover. article 30 of the Criminal Code stipulates that the obligation to indemnify takes precedence over all other obligations incurred by the person responsible subsequent to the crime, including payment of the fine, while article 31 stipulates that the obligation to pay compensation is jointly shared by all those responsible for the crime. Thus, both the victims and their relatives as well as any third parties who might have suffered injury, even indirectly, are entitled to full compensation. Article 1112 of the Argentine Civil Code stipulates that public officials guilty of culpable omission in the course of their duties are liable to pay compensation. As far as the liability of the State is concerned, articles 43 and 1113 clearly stipulate that the State is responsible for its agents.

6.1 Counsel for the authors, in an undated submission received on 12 September 1989, contests the State party's observations and reiterates that "what is being challenged is the application of the Due Obedience Act to the accused, as well as the very existence of that law, which breaches the Convention against Torture."

6.2 With regard to the requirement of exhaustion of domestic remedies, counsel contends that there are no effective remedies, in particular with regard to compensation. Although the Government in principle accepts its liability to pay compensation, in practice it allegedly prevents injured parties from obtaining compensation from the military courts, thus requiring them to pursue other channels, through the civil courts. Counsel further explains that "the distinction between civil and criminal action has not been accepted in our codes of

procedure, which for the purposes of compensation for the consequences of a crime provide that proceedings must be continued in the same kind of court. Failure to do so has been regarded by our foremost procedural experts as a violation of the right to a defence. When the return to democracy began, the direct victims and/or their representatives plunged into criminal proceedings in order to ensure the investigation of the facts, the punishment of those responsible, the search for missing persons (which is still continuing) and the discovery of the truth about what actually happened. In addition there was a need for a statement by the criminal courts confirming the existence of the reported events and the form they took. Those who began proceedings to seek compensation came up against the requirement that the civil courts should be used, and the rejection of all the civil cases."

7.1 Before considering any claims contained in a communication, the Committee against Torture shall, in accordance with rule 107 of its rules of procedure, decide whether or not it is admissible under article 22 of the Convention.

7.2 Principles of the judgement of Nürnberg, and refers to article 5 of the Universal Declaration of Human Rights, and article 7 of the International Covenant on Civil and Political Rights, all of which constitute norms of international law recognized by most States Members of the United Nations, including Argentina. Thus, even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture. In this context, it would seem that Argentine Act No. 23,521 on "due obedience" pardons the acts of torture which occurred during the "dirty war". Nevertheless, the Committee is bound to observe that its competence with respect to communications is defined by article 22 of the Convention against Torture, whereby that competence is limited to violations of this Convention and does not extend to the norms of general international law.

7.3 With regard to the temporal application of the Convention, the Committee recalls that the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on 26 June 1987. In this connection the Committee observes that the Convention only has effect from that date and cannot be applied retroactively. Therefore, the promulgation of the "Punto Final" Act on 24 December 1986 and the enactment, on 8 June 1987, of the "Due Obedience" Act could not, *ratione temporis*, have violated a Convention that had not yet entered into force.

7.4 The only issue remaining before the Committee is whether there have been any violations of the Convention subsequent to its entry into force. A question arises concerning the immediate application of the provisions of the Convention, e.g. with regard to the right of victims of torture to a remedy. Article 13 provides in part:

> "Each State party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to,

and to have his case promptly and impartially examined by, its competent authorities."

Although the authors have not invoked article 14 of the Convention, the Committee *ex officio* shall examine whether issues arise under this article, which stipulates in part:

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

7.5 The Committee observes that "torture" for the purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention. Thus the scope of articles 13 and 14 of the Convention does not cover torture that took place in 1976, ten years before the entry into force of the Convention, and the right to redress provided for in the Convention necessarily arises only with respect to events subsequent to 26 June 1987.

8. The Committee therefore decides:

(a) That the communications are inadmissible *ratione temporis*;

(b) That this decision shall be communicated to the State party and to the authors through their counsel.

9. The Committee observes, however, that even if the Convention against Argentina is morally bound to provide a remedy to victims of torture and to their dependants, notwithstanding the fact that the acts of torture occurred before the entry into force of the Convention, under the responsibility of a *de facto* government which is not the present Government of Argentina. The Committee notes with concern that it was the democratically elected post military authority that enacted the Punto Final and the Due Obedience Acts, the latter after the State had ratified the Convention against Torture and only 18 days before the Convention entered into force. The Committee deems this to be incompatible with the spirit and purpose of the Convention. The Committee notes that, as a result, many persons who committed acts of torture remain unpunished, including the 39 senior officers pardoned by decree of the President of Argentina on 6 October 1989, who were to have been tried by the civil courts. This policy is in stark contrast to the attitude of the State towards the victims of the "dirty war" of 1976-1983. The Committee urges the State party not to leave the victims of torture and their dependants wholly without a remedy. If civil action for compensation is no longer possible because the period of limitations for lodging such an action has run, the Committee would welcome, in the spirit of article 14 of the Convention, the adoption of appropriate measures to enable adequate compensation.

10. The Committee would also welcome receiving from the State party detailed information concerning (a) the number of successful claims for compensation for victims of acts of torture during the "dirty war", or for their depen-

dants, and (b) such pension schemes that may exist, apart from compensation, for the victims of torture or their dependants, including the criteria for eligibility for such pension.

Done in English, French, Russian and Spanish, the English text being the original version.

The Committee was composed of the following members: Alfredo R.A. Bengzon (Philippines), Peter Thomas Burns (Canada), Christine Chanet (France), Soccoro Diaz Palacios (Mexico), Alexis Dipanda Mouelle (Cameroon), Yuri A. Khitrin (USSR), Dimitar N. Mikhailov (Bulgaria), Bent Sorensen (Denmark), Joseph Voyame (Switzerland).

UN Committee against Torture (UN-CAT), Geneva

Views

Views of the Committee against Torture under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerning Communication No. 15/1994 submitted by Mr. Tahir Hussain Khan.
Date of communication: 4 July 1994.
State party concerned: Canada.
Date of adoption of Views: 15 November 1994

Obligation to refrain from forcibly returning to Pakistan a student leader of the Kashmiri independence movement

1. The author of the communication, dated 4 July 1994, is Mr. Tahir Hussain Khan, of Kashmiri origin, citizen of Pakistan, currently residing in Montreal, Canada. He claims to be a victim of a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Canada. He is represented by counsel.

The facts as submitted by the author

2.1 The author, who was born on 14 August 1963 in Baltistan, Kashmir, left Pakistan on I July 1990, out of fear for his personal security. He arrived in Canada on 15 August 1990 and requested a residence permit on the grounds that he was a refugee. The Immigration and Refugee Board of Canada heard the author on 14 January 1992 and concluded that the author was not a refugee within the meaning of the Refugee Convention. The author's subsequent motion for leave for judicial review was refused on 17 April 1992 by a judge of the Federal Court. No further effective judicial recourse is said to exist.

2.2 The author's request to be allowed to stay in Canada for humanitarian reasons was refused by the immigration authorities on 10 May 1994. The author's removal to Pakistan was ordered to be effectuated on 17 July 1994.

3.1 The author, who is a professional cricket player, is an active member of the Baltistan Student Federation and supports the Baltistan movement to join Kashmir. The Baltistan Student Federation is associated with the Jammu and Kashmir Liberation Front. According to the author, the Baltistan area is historically part of Kashmir but currently claimed by Pakistan as part of Pakistan. He claims that Pakistan has denied the inhabitants of Baltistan their full political rights and that the area is completely militarized. The Pakistani authorities violently repress the movement for civil rights and independence and individual activists are persecuted. In this context, the author states that a friend and co-activist was assassinated in August 1992.

3.2 The author submits that he fears persecution from Islamic fundamentalists, the Pakistan Inter-Service Intelligence (ISI) and the Government of Pakistan because of his membership in the Baltistan Student Federation (BSF). He states that he was a local leader and organizer for the BSF in Rawalpindi, and that he organized many demonstrations to publicize the goals of his organization. He claims that he was arrested on several occasions and accused of being an Indian agent. In 1987, he was arrested by the ISI at the offices of the BSF in Skurdu, together with four other BSF leaders. They were taken to the police station in Skurdu and kept in a special ISI section. The author alleges that he and those arrested with him were hung from the ceiling by their hands with rope and badly beaten. After a week of maltreatment (cold showers, sleep deprivation, being placed on ice blocks), the author was released on bail.

3.3 On another occasion, in April 1990, the author, together with others, was arrested after leading a demonstration for the BSF in Karachi. He was taken to jail in Hyderabad, where he was beaten and subjected to electric shocks. He also alleges that he was cut on his back and that chemicals were applied to the cuts, which caused him severe pain. After two weeks, he was released on bail and told to appear before the Court on 7 July 1990.

3.4 A letter, dated 27 July 1994, from a medical doctor at the *Hôpitaj Saint-Luc* in Montreal affirms that the author has marks and scars on his body which correspond with the alleged torture.

The complaint

4.1 The author claims that the Canadian authorities did not address the central facts of his case in the decision not to recognise him as a refugee and that his claim was not justly dealt with.

4.2 The author, who is now in charge of the BSF overseas. claims that he cannot return to Pakistan, because he risks persecution and attacks on his life. He claims that he will be immediately arrested at the airport, be detained and tortured. In this context, the author refers to reports by Amnesty International and Asia Watch and claims that evidence exists of systematic torture by Pakistani authorities. He attaches a supporting affidavit by a Kashmir human rights lawyer, who testifies that demonstrations organized by the Baltistan Student Federation have been repressed by Pakistani authorities and that its leaders are at risk of being arrested or killed. He also attaches a copy of a letter, dated 15 August 1994, from the Baltistan Student Federation, in which the author is advised to remain in Canada, since the circumstances under which an arrest warrant was issued against him are still prevailing.

Issues and proceedings before the Committee:

5. On 15 July 1994, the communication was transmitted to the State party, with a request that the author should not be expelled before the Committee

would have communicated its decision under rule 108 of the rules of procedure. In reply, the State party, by submission of 2 September 1994, requested the Committee to examine the communication on the merits during its next session in November 1994. For this purpose, the State party agreed not to contest the admissibility of the communication.

State party's observations

6.1 In its submission, dated 3 October 1994, the State party states that a post-claim risk assessment, conducted in September 1994, resulted in the conclusion that Mr. Khan would not face a danger to life, extreme sanction or inhumane treatment, should he be returned to Pakistan. In the light of this finding and in the light of the need to process a large number of refugee claims in Canada in a timely fashion, the State party requests the Committee to examine the merits of the communication at its thirteenth session. It confines its observations to the merits of the communication only.

6.2 The State party begins by explaining the refugee determination process in Canada, as applied to Mr. Khan, prior to amendments made in February 1993. The refugee determination process was composed of two separate oral hearings, both of which were held before independent, quasi-judicial administrative tribunals. In both these hearings, claimants had the right to be represented by counsel of their choice, and were afforded the opportunity to present evidence, cross-examine witnesses and make representations. If either member of a two-member panel which conducted the initial hearing determined that there was some possible basis for success in the claim for refugee status, the claim proceeded to a second oral hearing before the Refugee Division of the Immigration and Refugee Board. At the second oral hearing, two members of the Refugee Division examined whether the claimant met the definition of "Convention refugee". The claim would succeed if either member of the panel was satisfied that this was the case. Leave to appeal a negative decision before the Federal Court of Appeal could be asked and was granted if the claimant could show that there was a "fairly arguable case" or a "serious question to be determined". If leave was granted and the Court rendered a negative decision, leave could be sought to challenge this decision before the Supreme Court of Canada.

6.3 The State party submits that the United Nations High Commissioner for Refugees has praised Canada's refugee protection system as being "among the very best in the world".

6.4 The State party states that outside the framework of the refugee claim process, the Immigration Act allows to determine whether circumstances exist which warrant the granting of permanent resident status to individuals for humanitarian and compassionate reasons. All failed refugee claims before February 1993 were automatically considered for this purpose. Guidelines have been developed to assist immigration officers in making this determination. The guide-

lines include an assessment of the risk to a person who may not he a "Convention refugee", but may nonetheless face maltreatment abroad.

6.5 After the amendments to the Immigration Act. which came into force on I February 1993, the Act provides for a post-claim risk assessment for those individuals who are found not to be Convention refugees but face a risk of serious harm should they be returned to their country of origin. A person is allowed to stay in Canada if he, upon removal, would be subjected to an objectively identifiable risk to his life, of extreme sanctions, or of inhumane treatment. In the risk assessment process claimants have an opportunity to make written submissions on the risks they would face if removed from Canada. A post-claim determination officer reviews also other relevant material, such as the claimant's immigration file, material from the Refugee Division hearing and country specific information. If a post-claim determination officer comes to the conclusion that removal from Canada would subject a person to the risk identified above, he is allowed to apply for permanent residency. A negative decision is subject to judicial review proceedings, with leave, before the Federal Court Trial Division, and from there to the Federal Court of Appeal and the Supreme Court of Canada.

6.6 After two non-governmental experts had prepared a study, in April 1994, in which concerns were expressed about the post-claim risk assessment process (in particular with regard to the low acceptance rate), the Minister of Citizenship and Immigration announced specific interim measures. Instructions were issued with regard to a broader application of the regulatory criteria. It was under these criteria and instructions that Mr. Khan's case was recently reviewed.

7.1 As to Mr. Khan's case, the State party states that he was first interviewed by immigration officials on 9 August 1990. He declared that he had entered Canada illegally from the United States, and that he had left Pakistan on I July 1990. On 18 September 1990, the author signed a Statutory Declaration in which he claimed political refuge. An interpreter was present at that occasion. He informed the immigration officer about his political activities and stated that he had received several threats. The author was then referred to an immigration inquiry to determine his status in Canada.

7.2 At the inquiry, the author made his claim for refugee status under the procedures set out in the Immigration Act. On that occasion, he described his political activity and alleged two instances of detention, one in November 1987 and the second in March 1990. After a hearing on 24 May 1991, the author's claim was found to have a credible basis and thus referred to the Refugee Division for a full oral hearing. At the hearing, on 29 August 1991, the author was represented by a lawyer; interpretation was provided. The State party submits that the information provided by the author at the hearing was inconsistent with that provided by him earlier. Furthermore, the oral testimony is said to have been internally inconsistent. Although numerous opportunities were given to the author to clarify these inconsistencies, the State party submits that the testimony remained self-contradictory. Consequently, in its decision, dated 14 Jan-

uary 1992, the Refugee Division determined that the author was not a refugee and that his oral testimony had been fabricated. The author's leave to appeal was dismissed by the Federal Court of Appeal on 22 April 1992.

7.3 The State party emphasizes that in no instance during the proceedings in determination of his refugee claim, the author or his counsel alleged ill-treatment or torture during the claimed periods of detention, nor did they allude to future fear of torture.

7.4 After the author's leave to appeal had been dismissed, he was informed that he should leave Canada on or before 23 May 1992. The author failed to do so. After the author failed to report to the immigration office on 16 September 1992, as requested, a warrant for his arrest was issued. The author was arrested on 21 September 1992, and on 23 September 1992, a deportation order was issued against him. He remained in detention until the scheduled day of his removal, 8 October 1992. On that date, his scheduled removal was delayed because of his violent and aggressive behaviour, which made it inappropriate to proceed with the removal without escort officers.

7.5 On 27 October 1992, the author's presence was required at a preliminary hearing in respect of charges of assault against him, following a fight in a bar in March 1992. Under paragraph 50 (1) (a) of the Immigration Act, the author could not be removed from Canada until after these charges were resolved. On 29 October 1992, the author was released from detention, awaiting the outcome of the trial against him, which was scheduled for 25 February 1993.

7.6 On 30 December 1992, counsel for the author requested the exceptional granting of resident status on humanitarian and compassionate grounds. The State party emphasizes that this request was mainly based on his community involvement in Quebec and on the unstable situation in Pakistan, and that no materials were filed demonstrating a personal risk for the author of torture or maltreatment, if he were to be returned to Pakistan. On 29 January 1993, the application was refused.

7.7 On 25 February 1994, the author was convicted of assault causing bodily harm and sentenced to one year probation and a ninety dollar fine. Consequently, his departure from Canada was scheduled for 17 March 1994. On 15 March 1994, the author was arrested while attempting to enter the United States illegally and contrary to the conditions imposed upon him after his release from detention. On 16 March 1994, he was ordered detained for removal purposes. According to the State party, the author threatened immigration officers, saying that he could not be held responsible for what might happen to escort officers who would take him back to Pakistan. His removal was delayed and the author remained in detention.

7.8 On 15 April 1994, counsel for the author made another humanitarian and compassionate application. This application was refused on 10 May 1994. The State party submits that the author could have applied to the Federal Court if he felt that the review had been unfair, but he failed to do so. Instead, counsel

made additional humanitarian and compassionate review submissions, without however submitting the requisite processing fee. As a result, the application was not considered. The State party states that in the materials submitted by counsel, no reference was made to the author having been previously ill-treated in Pakistan.

7.9 On 15 June 1994, counsel brought an application before the Refugee Division for reconsideration of the author's refugee claim. On 18 June 1994, the application was denied. No attempt was made by counsel or the author to challenge this decision.

7.10 On 4 July 1994, the author was released from detention. The State party submits that it had been agreed that the author would get the opportunity to arrange his voluntary departure to a country other than Pakistan. It was agreed that he would leave Canada voluntarily by 15 July 1994, and that, failing that, removal to Pakistan would proceed on 17 July 1994.

7.11 After having been informed that the author had submitted a communication to the Committee against Torture, the State party arranged for a review of the author's case by a post-claim determination officer. It is submitted that the post-claim determination officer evaluated the materials filed by the author's counsel (including the materials submitted to the Committee), the author's Personal Information Form, the decision of the Refugee Division as well as other materials obtained from the Documentation Centre of the Immigration and Refugee Board (including reports from Amnesty International, Asia Watch and newspaper clippings on the situation of the Northern Territories in Pakistan). The officer also relied on research done by the staff of the Documentation Centre. On 19 September 1994, the author was informed that a negative decision had been reached. The officer concluded that the author was one of thousands of residents in Northern Pakistan who advocate a change in the status of Kashmir, that the Government of Pakistan had supported secessionist groups and that therefore no reasons existed why the Pakistani authorities would be interested in the author. Moreover, the officer doubted the credibility of the author's story, since he commenced his refugee claim in 1990, but did not allege torture until 1994.

8.1 The State party refers to the Committee's Views in respect of the communication No. 13/1993 (Mutombo v. Switzerland), and submits that, in determining whether article 3 of the Convention against Torture applies, the following considerations are relevant: (a) the general situation of human rights in a country must be taken into account, but the existence of a consistent pattern of gross, flagrant or mass violations of human rights is not in and of itself determinative; (b) the individual concerned must be personally at risk of being subjected to torture in the country to which he would return; and (c) "substantial grounds" in article 3(1) means that the risk of the individual being tortured if returned is a "foreseeable and necessary consequence". The State party submits that it examined each of these elements and that it came to the conclusion

that no substantial grounds existed for believing that the author would be in danger of being subjected to torture.

8.2 The State party submits that, although the human rights situation in Pakistan is of concern, this does not mean that a consistent pattern of gross, flagrant or mass violations of human rights exists. As regards the Northern part of Pakistan, the materials examined by immigration officials show that the political status of the Northern Territories has never been resolved. In theory, it is disputed territory and it has never been represented in the Pakistan National Assembly. In practice, it is administered as Pakistani territory. The Jammu and Kashmir Liberation Front, to which the Baltistan Student Federation is allegedly associated, is one of the numerous militant organizations that operate in the Kashmir region of both India and Pakistan, some of whom advocate independence while others advocate accession to Pakistan. The State party submits that the JKLF was founded in 1964 and that it is responsible for numerous acts of terrorism, including summary executions, kidnappings and bomb explosions.

8.3 As to the question whether the author personally faces a risk of being subjected to torture if returned to Pakistan, the State party submits that there are significant inconsistencies in the statements made by the author during the various proceedings. For instance, the dates of arrests and length of detentions given by the author at several occasions are at variance with each other, as are the reasons given for his arrest. The State party contends that these inconsistencies impact significantly on the veracity of the author's story and the credibility of his claims.

8.4 In this context, the State party refers to the finding of the Refugee Division, whose members had the benefit of conducting an oral hearing with the author, that the author's testimony was largely fabricated. The State party submits that "it is a widely acknowledged principle of international law, recognized in the practice of international tribunals (and in particular human rights treaty bodies which have authority to consider individual communications) that the findings of national tribunals on matters of fact and domestic law should not be disturbed by an international body." It states that the Committee should therefore be extremely hesitant to alter findings of fact by the Refugee Division.

8.5 As regards the medical evidence submitted by the author, the State party emphasizes that this was not produced until July 1994, although the refugee claim dates from 1990. It further states that the evidence confirms that the author has various scars, but that there is no indication that these scars are the result of torture or that they could have been caused by other events in the author's life, such as his sport career. The State party states that the medical evidence was considered in the post-claim risk assessment, but that the author's failure to produce medical evidence in proceedings before the Canadian tribunals deprived them of the opportunity to test this evidence. The State party argues that there was no reason why the author could not have advanced this evidence in previous proceedings of competent tribunals and submits that the issue was directly relevant to the determination made by the Refugee Divi-

sion. It is argued that the generally applicable principles relating to the reception of new evidence militate strongly against the Committee accepting it now as a basis for overriding the prior findings of the Canadian tribunals.

8.6 The State party contends that the available evidence does not support the author's claim that he personally is sought after by the Pakistani authorities. The State party submits that the author's secessionist activities are pursued by thousands of others in his region with the support of Pakistan. It is moreover argued that there is no evidence that the Baltistan Student Federation, of which the author allegedly is a leader, is the target of Pakistani repression. The State party further points out that, although the author alleges that there is an outstanding warrant for his arrest, he does not identify the charge or actions on which that warrant is based. The State party moreover indicates that the author's family continues to live in Pakistan unharmed and without harassment.

8.7 In this context, the State party submits that article 3 of the Convention should not be interpreted to offer protection to persons who voluntarily place themselves at risk. "In other words, Mr. Khan should not be able to invoke article 3 on the basis that he might again participate in the activities of a militant organization and be subject to the risks associated with the violent activities such organizations use and in turn, face. [...] The important point is that currently Mr. Khan does not attract any particular attention in Pakistan and his return by Canada would not pose a risk."

8.8 In conclusion, the State party submits that the evidence presented by the author is insufficient to demonstrate that the risk of being tortured is a "foreseeable and necessary" consequence of his return to Pakistan. In this context, the State party submits that the supporting affidavit by a lawyer from Pakistan was from a member of the Jammu and Kashmir Liberation Front, itself a terrorist organization with a particular interpretation of the Kashmiri situation. No sufficient evidence has been submitted which shows that the author's BSF activities render him a target of the Pakistani authorities. On the contrary, the documentation available suggests that the author's militant activities were in fact common in the north of Pakistan and supported by the Government.

Counsel's comments and State party's clarification

9.1 In his comments, dated 26 October 1994, on the State party's submission, counsel claims that it is clear that the real circumstances of the author's case have never been fairly examined by the State party. He refers to the documentation submitted to the Committee, among which information indicating that already eight activists for Kashmir independence had been killed by Pakistani supporters and that a bomb attack had taken place against one of the JKLF leaders, and claims that there is a great deal of documentary evidence of repression against those who want independence for Kashmir. He also refers to the earlier submitted affidavit by a Kashmir human rights lawyer, at present a refugee claimant in Canada, who corroborates the author's story.

9.2 In particular, counsel submits that there is a great deal of evidence of systematic torture by the Pakistani authorities. He states that the Pakistan Human Rights Commission's annual report refers to the prevalence of death by torture and torture with impunity by the police. Other reports support this finding.

9.3 Counsel concedes that the Canadian refugee claim determination system is good on paper, but argues that even in a good system, mistakes are made. In this context, he emphasizes that the Canadian system does not allow for an appeal on the merits, but only for an appeal (with leave) on matters of law. Because of this, there is no possibility to correct errors on facts and the system has been criticised for that. Counsel refers to a report, dated December 1993, on the Immigration and Refugee Board, which shows that serious problems exist. He adds that it is known among refugee lawyers that the problems with the Board in Montreal are more serious than elsewhere, because of the incompetence of board members. He claims that it is clear from reading the decision of the Refugee Board in the author's case that the basis of his claim has not been examined. He claims also that the transcript of the hearing shows that the author and his representative were constantly interrupted in their presentation of the case, and that there was no examination of what had happened to the author in Pakistan. Instead, the members of the Board focused on contradictions in the dates of events.

9.4 Counsel submits that from early 1991 to early 1993, less than one percent of refused refugees were given status in Canada under the post-claim risk assessment process. After severe criticism, the system was amended and new regulatory criteria were established. However, counsel states that these new criteria were still applied by the same deportation officers who had refused everybody before. He claims that the recent figures (0.3% acceptance rate in 1993) show that the new system is a farce. For this reason, the Government called for a further report (see above, para. 6.6). This report condemned incompetence, unwillingness to apply international human rights standards and bureaucratic opposition to treating people fairly. It stated that post-claim risk assessments should not be made by deportation agents, but by other officials. It is stated that the recommendations of the report have not been implemented by the Government.

9.5 Counsel claims that the post-claim decision in the author's case, dated 10 May 1994, show all the shortcomings established by the report, since the grounds in favour of protecting the author were not examined.

9.6 Counsel claims that the alleged inconsistencies and contradictions in the author's evidence and submissions are not such that they make his testimony unreliable. He states that the author has submitted sufficient evidence to corroborate his story. As regards the State party's argument that no evidence of previous torture was submitted before July 1994, counsel points out that the author was in detention from mid-March to July 1994 and that the medical examination was conducted immediately after his release. As to the State party's claim

that the author was given the opportunity to find a third country, counsel states that he is not aware of such an offer.

9.7 As regards the review conducted by the State party after July 1994, counsel argues this was not an independent review. He states that the review was done by a low-level administrative official working for the enforcement side of Immigration Canada. He further states that there is no evidence that this officer examined the situation in Azad Kashmir and the Northern areas of Pakistan. In this context, counsel points out that he made submissions on 15 September 1994, and that the decision is dated 19 September 1994. In the decision, no reference is made to the evidence submitted. Counsel argues that the decision is based on wrong grounds: (a) it states that Pakistan supports groups which want independence: according to counsel, Pakistan is strongly opposed to the independence movement and wants Kashmir to become part of Pakistan; (b) it states that the author has no profile that is different from thousands of other people in this area: counsel submits that there is evidence (newspaper pictures, a police report, a video, an affidavit) which shows him to be a leader in the Baltistan Student Federation; (c) it states that the author never mentioned torture before 1994: according to counsel, this is untrue, since the author earlier made reference to being "so weak that my family was scared to see me", to Pakistan being governed under torture, and to having been beaten in the police station.

9.8 Counsel agrees generally with the interpretation given by the State party to the application of article 3 of the Convention. He contends, however, that it is an exaggeration to say that torture must be a necessary and foreseeable consequence. He argues that substantial grounds clearly exist to fear that the author, who is a student leader of the Kashmiri independence movement and has been its representative in Canada, will be subjected to torture. Counsel refers to a report of Amnesty International, which states that "torture, including rape, in the custody of the police, the paramilitary and the armed forces is endemic, widespread and systematic in Pakistan." He contests the State party's view that there is no consistent pattern of gross, flagrant or mass violations of human rights in Pakistan, and submits that the situation in the Northern areas is particularly bad. In this context, counsel refers to testimonies given by human rights activists to the United Nations Commission on Human Rights in March 1994.

9.9 Counsel contests the State party's view that the JKLF is a terrorist organization, and claims that there is no evidence of use of violence by the JKLF in Pakistan occupied Kashmir. He submits that the party is widely recognized to be the most popular political party in both Indian- and Pakistan-occupied Kashmir. He submits that the vast majority of Kashmiris today support independence for their country. He claims that the Pakistani authorities are repressing everyone who advocates independence.

9.10 To support the argument that the author will risk torture upon his return to Pakistan, counsel submits an arrest warrant, dated 12 September

1990, against the author, apparently related to an incident on 6 June 1990, in which the author, referred to in the accompanying police report as "President Baltistan Student Federation, Rawalpindi", led a demonstration in Rawalpindi to demand constitutional rights for Baltistan and criticised the Government. He also claims that the author's brother has fled the country and now lives in England, whereas the author's parents have left Baltistan and now live in Azad Kashmir. Counsel further refers to the medical evidence, and argues that, if the State party doubts its conclusions, it should have conducted an examination by its own experts.

9.11 Counsel concludes that there is sufficient evidence to show that the author is personally sought after by the Pakistani authorities. He argues that the author should not be sent back to a country where his life is in danger. He claims that the evidence shows that the author faces immediate detention and torture on his return.

10. In reaction to counsel's submission, the State party argues that the central issue before the Committee *is not* the general operation of Canada's refugee determination system, but whether the author has established that he is personally at risk of being subject to torture in Pakistan upon his return.

Decision on admissibility and examination of the merits

11. Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5(a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee notes that the State party has not raised any objections to the admissibility of the communication and that it has requested the Committee to proceed to an examination of the merits. The Committee finds therefore that no obstacles to the admissibility of the communication exist and proceeds with the consideration of the merits of the communication.

12.1 The Committee notes that both parties have made considerable submissions with regard to the fairness of the refugee claim determination system and the post-claim risk assessment procedures. The Committee observes that it is not called upon to review the prevailing system in Canada in general, but only to examine whether in the *present* case Canada complied with its obligations under the Convention. Nor is the Committee called upon to determine whether the author's rights under the Convention have been violated by Pakistan, which is not a State party to the Convention. The issue before the Committee is whether the forced return of the author to Pakistan would violate the obligation of Canada under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

12.2 Article 3 reads:

> "1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that Mr. Khan would be in danger of being subjected to torture. In reaching this conclusion, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances.

12.3 The Committee notes that the author of the present case has claimed that he was a local leader of the Baltistan Student Federation, that he has twice been tortured by Pakistani police and military, that he was scheduled to appear before a Court upon charges related to his political activities, and that he will face arrest and torture if he were to return to Pakistan. In support of his claim, the author presented, among other documentation, a medical report which does not contradict his allegations. The Committee notes that some of the author's claims and corroborating evidence have been submitted only after his refugee claim had been refused by the Refugee Board and deportation procedures had been initiated; the Committee, however, also notes that this behaviour is not uncommon for victims of torture. The Committee, however, considers that, even if there could be some doubts about the facts as adduced by the author, it must ensure that his security is not endangered. The Committee notes that evidence exists that torture is widely practised in Pakistan against political dissenters as well as against common detainees.

12.4 The Committee considers therefore that in the present case substantial grounds exist for believing that a political activist like the author would be in danger of being subjected to torture. It notes that the author has produced a copy of an arrest warrant against him, for organizing a demonstration and for criticising the Government, and that moreover he has submitted a copy of a

letter from the President of the Baltistan Student Federation, advising him that it would be dangerous for him to return to Pakistan. The Committee further notes that the author has adduced evidence that indicates that supporters of independence for the Northern areas and Kashmir have been the targets of repression.

12.5 Moreover, the Committee considers that, in view of the fact that Pakistan is not a party to the Convention, the author would not only be in danger of being subjected to torture, in the event of his forced return to Pakistan, but would no longer have the possibility of applying to the Committee for protection.

12.6 The Committee therefore concludes that substantial grounds exist for believing that the author would be in danger of being subjected to torture and, consequently, that the expulsion or return of the author to Pakistan in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

13. In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from forcibly returning Tahir Hussain Khan to Pakistan.

Done in English, French, Russian and Spanish, the English text being the original version.

F.

L'APPLICAZIONE DELLE NORME INTERNAZIONALI SUI DIRITTI UMANI DA PARTE DELLE CORTI INTERNE E DELLA CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE

1. Corte di giustizia delle Comunità Europee, Lussemburgo, Sentenza 4 ottobre 1991 causa C-159/90, *Society for the Protection of Unburn Children Ireland Ltd c. Stephen Grogan e altri*, domanda vertente sull'interpretazione degli artt. 59 – 66 del Trattato CEE

2. Supreme Court of the Netherlands, Sentence in the case *C.D.S. v. The State of the Netherlands*, 30 March 1990

3. Corte Costituzionale italiana, Sentenza 25-27 giugno 1996 (CPP, art. 698, 2° comma; l. 26 maggio 1984, n. 225, nella parte in cui dà esecuzione all'art. IX del trattato di estradizione del 13 ottobre 1983 tra Italia e Stati Uniti)

Corte di Giustizia delle Comunità Europee, Lussemburgo

Sentenza

4 ottobre 1991 Procedimento C-159/90,
avente ad oggetto la domanda di pronuncia pregiudiziale proposta alla Corte, ai sensi dell'art. 177 del Trattato CEE, dalla High Court di Dublino, nella causa dinanzi ad essa pendente tra

Society for the Protection of Unborn Children Ireland Ltd e Stephen Grogan e altri,

domanda vertente sull'interpretazione degli artt. 59-66 del Trattato CEE,

LA CORTE,

composta dai signori O. Due, presidente, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco, presidenti di sezione, Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn, giudici,

avvocato generale: W. Van Gerven

cancelliere: sig.ra D. Louterman, amministratore principale

viste le osservazioni scritte presentate:

— per la Society for the Protection of Unborn Children Ireland Ltd, dai sigg. James O'Reilly, SC, e Anthony M. Collins, barrister-at-law, su incarico di Collins, Crowley & Co., solicitors;
— per i sigg. Grogan e a., dalla sig.ra Mary Robinson, SC, e M. Seamus Woulfe, barrister-at-law, su incarico di Taylor & Buchalter, solicitors;
— per il governo irlandese, dal sig. Louis J. Dockery, chief state solicitor, in qualità di agente, assistito dai sigg. Dermot Gleeson, SC, e Aindries O'Caoimh, barrister-at-law;
— per la Commissione delle Comunità europee, dalla sig.ra Karen Banks, membro del servizio giuridico, in qualità di agente;

vista la relazione d'udienza,

sentite le osservazioni orali della Society for the Protection of Unborn Children Ltd, rappresentata dai sigg. James O'Reilly, SC, e Shane Murphy, barrister-at-law, dei sigg. Grogan e a., rappresentati dai sigg. John Rodgers, SC, e Seamus Woulfe, barrister-at-law, del governo irlandese e della Commissione, all'udienza del 6 marzo 1991,

sentite le conclusioni dell'avvocato generale, presentate all'udienza dell'11 giugno 1991,

ha pronunciato la seguente

Sentenza

1. Con ordinanza 5 marzo 1990, pervenuta in cancelleria il 23 marzo seguente, la High Court di Dublino ha posto, ai sensi dell'art. 177 del Trattato CEE, tre questioni pregiudiziali relative all'interpretazione del diritto comunitario, ed in particolare dell'art. 60 del Trattato CEE.

2. Tali questioni sono state sollevate nell'ambito di una controversia che oppone la Society for the Protection of Unborn Children Ireland Ltd (in prosieguo: la « SPUC ») a Stephen Grogan e quattordici altri responsabili di associazioni studentesche circa la diffusione in Irlanda di informazioni dettagliate concernenti l'identità e l'ubicazione di cliniche di un altro Stato membro, dove vengono praticate interruzioni della gravidanza per intervento medico.

3. L'aborto è sempre stato vietato in Irlanda, prima dalla common law, successivamente dalla legge. Le disposizioni pertinenti attualmente in vigore sono gli artt. 58 e 59 dell'Offences Against the Person Act (legge sui reati contro la persona) del 1861, riportati nello Health (Family Planning) Act (legge relativa alla salute: pianificazione familiare) del 1979.

4. Nel 1983 un emendamento costituzionale approvato con referendum ha inserito nell'art. 40, n. 3, della Costituzione irlandese un terzo comma così formulato:

> «Lo Stato riconosce il diritto alla vita del nascituro. Esso s'impegna a rispettare tale diritto nelle proprie leggi e, nella misura in cui ciò è realizzabile, a difenderlo e a farlo valere con le proprie leggi, tenendo nel debito conto l'uguale diritto della madre alla vita ».

5. Secondo la giurisprudenza dei giudici irlandesi (High Court, sentenza 19 dicembre 1986, e Supreme Court, sentenza 16 marzo 1988, The Attorney General at the relation of the Society for the Protection of Unborn Children Ireland Ltd/Open Door Counselling Ltd e Dublin Wellwoman Centre Ltd, 1988 Irish Reports 593), l'art. 40, n. 3, terzo comma, della Costituzione irlandese vieta l'attività consistente nell'aiutare donne incinte che si trovano sul territorio irlandese a recarsi all'estero affinché sia ad esse ivi praticata un'interruzione della gravidanza per intervento medico, in particolare informandole circa l'identità e l'ubicazione di una o più cliniche determinate che praticano l'interruzione della gravidanza per intervento medico, nonché sulle modalità per entrare in contatto con tali cliniche.

6. La SPUC, attrice nella causa principale, è un'associazione di diritto irlandese, costituita in particolare al fine di impedire la depenalizzazione dell'aborto e per affermare, difendere e promuovere la vita umana fin dal momento del concepimento.

I sigg. Grogan e a., convenuti nella causa principale, erano, nel corso degli anni 1989/1990, membri dei direttivi di associazioni studentesche che pubblicavano opuscoli destinati agli studenti. Questi ultimi contenevano informazioni circa la possibilità di far effettuare legalmente interruzioni della gravidanza per

intervento medico nel Regno Unito, nonché sull'identità e l'ubicazione di talune cliniche che praticano tale intervento nel Regno Unito e sulle modalità per entrare in contatto con dette cliniche. E pacifico che le associazioni studentesche non avevano alcun rapporto con le cliniche stabilite in un altro Stato membro.

7. Nel settembre 1989, la SPUC chiedeva ai convenuti nella causa principale, nella loro qualità di responsabili delle loro rispettive associazioni, di impegnarsi a non pubblicare nel corso dell'anno accademico 1989/1990 informazioni del tipo di quelle sopra indicate. Non avendo ricevuto risposta da parte di detti convenuti, la SPUC ha adito la High Court al fine di ottenere una dichiarazione con cui si accertasse l'illiceità della diffusione di tali informazioni, nonché un'ingiunzione che vietasse tale diffusione.

8. Con sentenza 11 ottobre 1989, la High Court ha deciso di sottoporre alla Corte di giustizia talune questioni pregiudiziali, ai sensi dell'art. 177 del Trattato CEE, prima di pronunciarsi sull'ingiunzione richiesta dall'attrice. Tale sentenza ha costituito oggetto di un appello dinanzi alla Supreme Court la quale, il 19 dicembre 1989, ha concesso l'ingiunzione richiesta, ma non ha riformato la decisione della High Court di adire la Corte di giustizia in via pregiudiziale. Per il resto, ciascuna delle parti è stata autorizzata a presentare una domanda alla High Court, al fine di ottenere una modifica della decisione della Supreme Court alla luce della pronuncia pregiudiziale della Corte di giustizia.

9. La High Court, ritenendo che, come essa aveva già indicato nella sentenza 11 ottobre 1989, la controversia sollevasse problemi di interpretazione del diritto comunitario, ha deciso di sospendere il procedimento e di sottoporre alla Corte le seguenti questioni pregiudiziali:

> «1) Se un'attività organizzata o una pratica dirette a procurare l'aborto o l'interruzione della gravidanza per intervento medico rientrino nella definizione di "servizi" contemplata nell'art. 60 del Trattato CEE.
>
> 2) Se, in mancanza di qualsiasi misura che stabilisca il ravvicinamento delle normative degli Stati membri relative alle attività organizzate o alle pratiche per procurare l'aborto o l'interruzione della gravidanza per intervento medico, uno Stato membro possa vietare la diffusione di specifiche informazioni sull'identità, l'ubicazione di una o più cliniche determinate di un altro Stato membro in cui vengono praticati aborti o sulle modalità per entrare con esse in contatto.
>
> 3) Se nel diritto comunitario un soggetto disponga del diritto di diffondere nello Stato membro A specifiche informazioni sull'identità, l'ubicazione di una o più determinate cliniche di uno Stato membro B in cui vengono praticati aborti e sulle modalità per entrare con esse in contatto, qualora il procurato aborto sia vietato dalla costituzione e dalla legge penale dello Stato membro A, ma sia lecito, a determinate condizioni, nello Stato membro B ».

10. Per una più ampia illustrazione degli antefatti della causa principale, dello svolgimento del procedimento nonché delle osservazioni scritte presentate dinanzi alla Corte, si fa rinvio alla relazione d'udienza. Questi elementi del fascicolo sono richiamati in prosieguo solo nella misura necessaria alla comprensione del ragionamento della Corte.

Sulla competenza della Corte

11. Nelle sue osservazioni scritte, la Commissione ha rilevato che la soluzione della questione se l'ordinanza di rinvio fosse stata adottata nell'ambito dell'azione principale o in quello del procedimento d'ingiunzione non risultava chiaramente.

12. A tal riguardo, occorre ricordare che, come la Corte ha dichiarato nella sentenza 21 aprile 1988, Pardini, punto 11 della motivazione (causa 338/85, Racc. pag. 2041), gli organi giurisdizionali nazionali hanno la facoltà di adire la Corte in via pregiudiziale ai sensi dell'art. 177 del Trattato solo se è pendente dinanzi ad essi una controversia nell'ambito della quale ad essi è richiesta una pronunzia che possa tener conto della sentenza pregiudiziale. Invece, la Corte non è competente a conoscere del rinvio pregiudiziale qualora, al momento in cui esso viene effettuato, il giudizio dinanzi al giudice a quo sia ormai concluso.

13. Per quanto riguarda il presente procedimento, occorre osservare che, se la High Court ha adito la Corte nell'ambito del procedimento d'ingiunzione, la Supreme Court l'ha esplicitamente autorizzata a modificare, alla luce della sentenza pregiudiziale della Corte, l'ingiunzione concessa. Se invece le questioni pregiudiziali sono state poste nell'ambito del procedimento principale, la High Court dovrà risolvere tale causa con una decisione sul merito. In entrambi i casi, al giudice nazionale è richiesta una pronuncia che possa tener conto della sentenza pregiudiziale. Di conseguenza, esso è autorizzato a sottoporre, ai sensi dell'art. 177 del Trattato, questioni pregiudiziali alla Corte, la quale è competente a risolverle.

14. La SPUC, da parte sua, ha sostenuto che nessuna questione di diritto comunitario si poneva nel presente procedimento e che la Corte deve rifiutare di risolvere le questioni sottoposte. Da un lato, i convenuti nella causa principale avrebbero distribuito le informazioni di cui trattasi al di fuori di qualsiasi attività economica, il che escluderebbe l'applicazione delle norme del Trattato sulla libera prestazione dei servizi la cui interpretazione è richiesta. Dall'altro, l'attività di informazione, essendosi svolta interamente in Irlanda e non coinvolgendo alcun altro Stato membro, sarebbe estranea a dette disposizioni del Trattato.
15. A tal riguardo, è sufficiente constatare che le circostanze fatte valere dalla SPUC rientrano nel merito delle questioni poste dal giudice nazionale. Di conseguenza, pur potendo essere prese in considerazione al fine di risolvere tali questioni, esse sono irrilevanti qualora si tratti di valutare la competenza della Corte a pronunciarsi sulla domanda pregiudiziale (v. sentenza 28 giugno 1984, Moser, causa 180/83, Racc. pag. 2539). Pertanto occorre procedere all'esame delle questioni sottoposte.

Sulla prima questione

16. Con la sua prima questione, il giudice nazionale intende in sostanza sapere se l'interruzione della gravidanza per intervento medico, effettuata in conformità al diritto dello Stato in cui essa avviene, sia un servizio ai sensi dell'art. 60 del Trattato CEE.

17. In base al primo comma di detta disposizione, sono considerate come servizi ai sensi del Trattato le prestazioni fornite normalmente dietro retribuzione, in quanto non siano regolate dalle disposizioni relative alla libera circolazione delle merci, dei capitali e delle persone. Il secondo comma, punto d), dello stesso art. 60 indica esplicitamente che le attività delle libere professioni rientrano nella nozione di servizi.

18. Ora, occorre rilevare che l'interruzione della gravidanza, così come lecitamente praticata in diversi Stati membri, è un'attività medica normalmente fornita dietro retribuzione e che può essere praticata nell'ambito di una libera professione. In ogni caso, la Corte ha già dichiarato nella sentenza 31 gennaio 1984, Luisi e Carbone, punto 16 della motivazione (cause riunite 286/82 e 26/83, Racc. pag. 377) che le attività mediche rientrano nel campo di applicazione dell'art. 60 del Trattato.

19. La SPUC sostiene tuttavia che l'interruzione della gravidanza per intervento medico non può essere considerata un servizio poiché essa è gravemente immorale ed implica la distruzione della vita di un terzo, cioè del nascituro.

20. Indipendentemente dal valore di tali argomenti dal punto di vista morale, occorre ritenere che essi non possono avere alcuna influenza sulla soluzione della prima questione posta. Infatti, non spetta alla Corte sostituire la sua valutazione a quella del legislatore degli Stati membri in cui le attività di cui trattasi sono lecitamente praticate.

21. Pertanto occorre risolvere la prima questione posta dal giudice nazionale nel senso che l'interruzione della gravidanza per intervento medico, effettuata in conformità al diritto dello Stato in cui essa avviene, è un servizio ai sensi dell'art. 60 del Trattato.

Sulla seconda e terza questione

22. In considerazione delle circostanze della causa principale, occorre ritenere che il giudice nazionale, con la sua seconda e terza questione, intende in sostanza sapere se il diritto comunitario si opponga a che uno Stato membro in cui l'interruzione della gravidanza per intervento medico è proibita vieti ad associazioni studentesche di diffondere informazioni sull'identità e l'ubicazione di cliniche di un altro Stato membro in cui sono lecitamente praticate interruzioni volontarie della gravidanza, nonché sulle modalità per entrare in contatto con queste cliniche, quando le cliniche di cui trattasi non sono in alcun modo all'origine della diffusione di dette informazioni.

23. Anche se le questioni poste dal giudice nazionale fanno riferimento al diritto comunitario nel suo insieme, la Corte ritiene che il suo esame debba riguardare le disposizioni degli artt. 59 e seguenti del Trattato CEE, relative alla libera prestazione dei servizi, nonché l'argomento relativo ai diritti fondamentali, che ha costituito oggetto di ampi sviluppi nelle osservazioni presentate dinanzi ad essa.

24. Per quanto riguarda anzitutto le disposizioni dell'art. 59 del Trattato, che vietano qualsiasi restrizione alla libera prestazione dei servizi, dalle circo-

stanze della causa principale risulta che il nesso tra l'attività delle associazioni studentesche di cui i sigg. Grogan e a. sono i responsabili e le interruzioni della gravidanza per intervento medico praticate dalle cliniche di un altro Stato membro è troppo tenue perché il divieto di diffondere informazioni possa essere ritenuto come una restrizione di cui all'art. 59 del Trattato.

25. Infatti, una situazione in cui le associazioni studentesche che diffondono le informazioni oggetto della causa principale non collaborano con le cliniche di cui esse pubblicano gli indirizzi si distingue da quella che ha dato luogo alla sentenza 7 marzo 1990, GB-Inno-BM (causa C-362/88, Racc. pag. I-667), nella quale la Corte ha dichiarato che un divieto di diffondere pubblicità commerciale poteva costituire un ostacolo alla libera circolazione delle merci e doveva quindi essere represso a norma degli artt. 30, 31 e 36 del Trattato CEE.

26. Ora, le informazioni alle quali si riferiscono le questioni pregiudiziali non sono diffuse per conto dell'operatore economico stabilito in un altro Stato membro. Al contrario, queste informazioni costituiscono una manifestazione della libertà di espressione e di informazione, indipendente dall'attività economica svolta dalle cliniche stabilite in un altro Stato membro.

27. Ne deriva che, in ogni caso, un divieto di diffondere informazioni in circostanze quali quelle della causa principale non può essere considerato come una restrizione di cui all art. 59 del Trattato.

28. In secondo luogo, dev'essere esaminato l'argomento dei convenuti nella causa principale secondo cui il divieto di cui trattasi, in quanto si basa su un emendamento costituzionale approvato nel 1983, è incompatibile con la disposizione dell'art. 62 del Trattato CEE, in virtù della quale gli Stati membri non introducono nuove restrizioni alla libertà effettivamente raggiunta, per quanto riguarda la prestazione dei servizi, al momento dell'entrata in vigore del Trattato.

29. A tal riguardo è sufficiente constatare che la disposizione dell'art. 62, che ha un carattere complementare rispetto a quelle dell'art. 59, non può vietare restrizioni che non rientrano nel campo di applicazione di quest'ultimo articolo.

30. In terzo ed ultimo luogo, i convenuti nella causa principale sostengono che i diritti fondamentali, e in particolare la libertà di espressione e di informazione riconosciuta in ispecie dall'art. 10, n. 1, della Convenzione europea dei diritti dell'uomo, si oppongono ad un divieto quale quello di cui trattasi nella causa principale.

31. A tal proposito, occorre ricordare che, come risulta in particolare dalla sentenza 18 giugno 1991, Ellinikí Radiophonía Tileórasi, punto 42 della motivazione (causa C-260/89, Racc. pag. I-2925), dal momento che una normativa nazionale entra nel campo di applicazione del diritto comunitario, la Corte, adita in via pregiudiziale, deve fornire tutti gli elementi di interpretazione necessari per la valutazione, da parte del giudice nazionale, della conformità di tale normativa con i diritti fondamentali di cui la Corte assicura il rispetto, quali essi risultano, in particolare, dalla Convenzione europea dei diritti dell'uomo. Per contro, essa non ha tale competenza nei confronti di una normativa nazionale

che non si colloca nell'ambito del diritto comunitario. In considerazione delle circostanze della causa principale e tenuto conto delle conclusioni precedenti relative alla portata delle disposizioni degli artt. 59 e 62 del Trattato, risulta che tale è il caso del divieto che costituisce oggetto della causa dinanzi al giudice nazionale.

32. Occorre quindi risolvere la seconda e terza questione posta dal giudice nazionale nel senso che il diritto comunitario non si oppone a che uno Stato membro in cui l'interruzione della gravidanza per intervento medico è proibita vieti ad associazioni studentesche di diffondere informazioni sull'identità e l'ubicazione di cliniche di un altro Stato membro in cui sono lecitamente praticate interruzioni volontarie della gravidanza, nonché sulle modalità per entrare in contatto con tali cliniche, quando le cliniche di cui trattasi non sono in alcun modo all'origine della diffusione di dette informazioni.

Sulle spese

33. Le spese sostenute dal governo irlandese nonché dalla Commissione delle Comunità europee, che hanno presentato osservazioni alla Corte, non possono dar luogo a rifusione. Nei confronti delle parti nella causa principale, il presente procedimento ha il carattere di un incidente sollevato dinanzi al giudice nazionale, cui spetta quindi statuire sulle spese.

Per questi motivi,

LA CORTE,

pronunciandosi sulla questione ad essa sottoposta dalla High Court di Dublino con ordinanza 5 marzo 1990, dichiara:

1) L'interruzione della gravidanza per intervento medico, effettuata in conformità al diritto dello Stato in cui essa avviene, è un servizio ai sensi dell'art. 60 del Trattato CEE.

2) Il diritto comunitario non si oppone a che uno Stato membro in cui l'interruzione della gravidanza per intervento medico è proibita vieti ad associazioni studentesche di diffondere informazioni sull'identità e l'ubicazione di cliniche di un altro Stato membro in cui sono lecitamente praticate interruzioni volontarie della gravidanza, nonché sulle modalità per entrare in contatto con tali cliniche, quando le cliniche di cui trattasi non sono in alcun modo all'origine della diffusione di dette informazioni.

Due, Mancini, O'Higgins, Moitinho de Almeida, Rodríguez Iglesias, Díez de Velasco, Slynn, Kakouris, Joliet, Schockweiler, Grévisse, Zuleeg, Kapteyn

Così deciso e pronunciato a Lussemburgo il 4 ottobre 1991.

Il cancelliere: J.-G. Giraud

Il Presidente; O. Due

Lingua processuale: l'inglese.

Supreme Court of The Netherlands

Sentence in the case *C.D.S. v. The State of the Netherlands*, 30 March 1990

SUMMARY

— As is clear from the history of Article 1 of the European Convention on Human Rights ([1]), the purpose of the Article and of the Convention as a whole means that the phrase 'within their jurisdiction' ('die ressorteert onder haar rechtsmacht' and 'relevant de leur jurisdiction') must be interpreted widely, namely in the sense that the Contracting Parties have undertaken to secure the rights and freedoms referred to in that Article to everyone who is under their actual power and responsibility, not only in their own territory but even outside it. This wide interpretation is in keeping with the meaning attributed to this provision by the organs set up under the Convention.

— In the light of this interpretation the oniy possible conclusion is that S., an American serviceman whose handing over had been requested by the United States because he had killed his wife in the Netherlands, was within the jurisdiction of the State within the meaning of Article 1 since he was present in the territory of the State, and the State also had actual power over and responsibility for S. since the very matter at issue is whether or not the State will comply with the American request. The fact that the State has undertaken by treaty to leave the trial of the present offence to the United States does not detract from the existence of the State's jurisdiction within the meaning of Article 1.

— On the ground of Articles 1 and 6 of Protocol VI to the European Conventio in conjunction with Article 2(1) of the Convention, the State has undertaken to refrain from acts which can result in the exposure of someone within its jurisdiction to the death penalty, even if the penalty is imposed or carried out elsewhere. Violation of this legal duty constitutes in principle a tort.

— The question then arises as to whether the State can justify its actions by relying on its obligations under Article VII (5)(a) of the NATO Status of Forces Agreement of 1951 ([2]). The two treaty provisions in question cannot be reconciled with one another, even by reference to a mutual order of ranking. The submission that the European Convention takes precedence under international law finds no support in law.

— In such a situation, the principle should be that it is not acceptable that the mere fact that the State has bound itself by treaty to undertake a particular act can prevent the Dutch courts from assessing whether such act constitutes an infrin-

([1]) Art. 1 reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'

([2]) Art. VII(5)(a) reads: 'The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian conponent of their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above pronvisions.'

gement of another treaty norm under which individuals can derive rights directly and whether the State is acting unlawfully against them. It is not decisive in this connection whether the treaty obligation relied upon by the State is based on a rule which can also be invoked directly by individuals, with the result that it is not necessary to examine to what extent Article VII of the NATO Status of Forees Agreement has direct effeet.

— What it comes down to in this connection is whether, in view of all the circumstances of the case, when the relevant interests are weighed–including the national and international interests that are involved in the performance of both sets of treaty obligations–the treaty obligation in question constitutes such a serious impediment to the State's compliance with its obligation to the relevant individual that it cannot be required to perform this obligation towards the individual and cannot therefore be ordered to do so.

— In view of the great importance when must be attributed to the right not to suffer the death penalty, the weighing of the various interests in this case must inevitably result in a decision in S.'s favour.

— This is also in keeping with the notion underlying the State's practice–a practice which is logical for States which do not have the death penalty–when concluding extradition treaties with countries which do have the death penalty of including a reservation as set out in Article 8 of the Extradition Act [3] and as also included in Article 7 of the 1980 Extradition Treaty with the United States (which is not in fact applicable here) [4].

THE FACTS

S., an American serviceman stationed in the Netherlands, was accused of having killed his wife in the Netherlands and of having dismembered her body. By letter of 13 April 1988 the State Secretary for Justice notified the United States authorities that she (the State Secretary) had decided not to proceed with a request to those authorities in accordance with Article VII(3) of the 1951 NATO Status of Forces Agreement [5] for a waiver of their primary right to

[3] Art. 8 reads: 'If the offence in respoect of which exdradition is requested carries the death penalty under the law of the requesting State, the person claimed shall not be extradited unless in Our Minister's opinion there is an adeguate guarantee that this penalty, if a sentence to this effect should follow will not be carried out.'

[4] Art 7 reads: '(1) When the offence for which extradiction is requested is punishable by death under the laws of the Requesting State and the law of the Requested State do not permit such punishment for that offence, extradition may be refused unless the Requesting State furnishes such assurances as the Requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed. (2)In special circumstances, having particular regard to the age, health or other personal condition of the person sought, the Executive Authority of the Requested State may refuse extradition if it has reason to belive that extradition will be incompatible with humanitarian considerations.'

[5] Art. VII(3) reads: 'In cases where the right to exercise jurisdiction is concurrent

exercise jurisdiction with regard to this offence. Under Article 118 of the American Uniform Code of Military Justice, the death penalty could be pronounced in respect of this offence (to which S. had confessed). On 15 April S. applied to the President of the District Court of The Hague (cause list No. 13.950) for an interim injunction ordering the State (1) not to place him within the jurisdiction of the United States, (2) to request the United States to waive its primary right to exercise jurisdicdon within the meaning of Article VII(3) of the NATO Status of Forces Agreement, and (3) to request the United States to state unconditionally in writing that S. would not be sentenced to death in this case and that a death penalty would not be carried out. By judgment of 9 May 1988 the President ordered the State to enter into negotiations with the American authorities–before handing S. over to such authorities–to secure an assurance that any death penalty that might be imposed would not be carried out. By having failed to do this to date, the Dutch authorities had, in the view of the President, acted in contravention of the Dutch principle of law that the death penalty should be avoided wherever possible.

The State Secretary notified S.'s counsel by letter of 14 June 1988, with which she enclosed the correspondence with the US authorities, that she saw no further way of avoiding compliance with the Dutch obligations under the NATO Status of Forces Agreement and that S. would therefore be handed over for trial on 30 June 1988. To prevent this, S. applied for a second time to the President of the District Court of The Hague (cause list No. 13.949) for an interim injunction. The President considered that since it was uncertain whether the death penalty would be imposed (the US authorities had refused the Dutch request to this effect), it was necessary to exercise caution. In his view, Protocol VI to the Europcan Convention on Human Rights was inconsistent with extradition. He therefore issued an injunction barring extradition (judgment of 29 June 1988). The State appealed against both judgments of the President to the Court of Appeal of The Hague. The Court of Appeal gave judgment in both cases on 27 October 1988. In case no. 13.950 the Court of Appeal quashed the

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the following rules shall apply: (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to: (i) offences solely against the property or security of that State or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent; (ii) offences arising out any act or omission done in the performance of official duty. (b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction. (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.'

judgment of the President, holding that it could not be said that the State was under a legal duty to negotiate before handing over S., although it was free to do so. As regards case no. 13.949 the Court of Appeal held that since the United States had not waived its primary right to exercise jurisdiction over S., which resulted from the NATO Status of Forces Agreement and was based on the principle of extraterritoriality, the Netherlands had no jurisdiction over S. and S. was not therefore within the jurisdiction of the Netherlands within the meaning of Article 1 of the European Convention on Human Rights. He could not therefore rely on the rights and freedoms secured under that Convention or – in view of Article 6 of Protocol VI to the Convention – on Article 1 of that Protocol. The Court of Appeal therefore quashed the judgment of the President in this case too. Nonetheless, in view of the radical and irreversible nature of the handing over, the Court of Appeal ordered that S. should not be handed over to the United States authorities until the judgment had become final and irreversible.

S. appealed in cassation to the Supreme Court against both judgments. The Supreme Court combined the cases and dealt with them together. It then quashed both judgments of the Court of Appeal and upheld the judgment of the President of the District Court in case No. 13.949.

(omissis)

3.2. The Court of Appeal based its decision in both cases on its view that S. was not within the jurisdiction of the Netherlands within the meaning of Article 1 of the European Convention on Human Rights, and that he could therefore rely on the rights and freedoms secured in Title 1 of that Convention or on Article 1 of the Sixth Protocol to that Convention "since the United States had not waived its primary right to exercise jurisdiction over S., which resulted from the NATO Status of Forces Agreement and was based on the principle of extraterritoriality" (legal consideration 4 in case No. 13.949, to which legal consideration 3 of the judgment in the other case refers).

This view has been contested by part 1 of the ground of appeal, which is identical in both cases, although an additional complaint is contained in case no. 13.950.

This part is well-founded in so far as it complains about the incorrect interpretation of Article 1 of the European Convention. As is clear from the history of Article 1 of the Convention as referred to in the opinion of the Public Prosecutions Department at 4.2, the purpose of that Article and of the Convention as a whole means that the phrase "within their jurisdiction" ("*die ressorteert onder haar rechtsmacht*" and "*relevant de leur jurisdiction*") must be interpreted widely, namely in the sense that the Contracting Parties have undertaken to secure the rights and freedoms referred to in that Article to everyone who is under their actual power and responsibility, not only in their own territory but even outside it. This wide interpretation is in conformity with the meaning attributed to this provision by the organs set up in the Convention (the Supreme Court

would refer to section 86 of the judgment of the European Court of Human Rights of 7 July 1989 in the *Soering* case and to the rulings of the European Commission of Human Rights mentioned in the opinion of the Public Prosecutions Department at 4.3).

In the light of this interpretation the only possible conclusion is that S. is within the jurisdiction of the State within the meaning of Article 1 of the European Convention on Human Rights since he is present in the territory of the State, and the State also has actual power over and responsibility for S. since the very matter at issue is whether or not the State will comply with the request of the United States authorities to hand S. over to them. The fact that the State has undertaken by treaty to leave the trial of offences of this kind to the United States does not detract from the excistence of the State's jurisdiction within the meaning of Article 1 of the European Convention.

3.3. In the light of the above, it is necessary next to examine whether S.'s submission that his handing over to the United States authorities is in violation of the provisions of the European Convention cited by him and therefore constitutes a tort is correct. In principle, this is indeed the case for the followhg reasons. It must be assumed that such handing over may result in the death penalty being imposed and carried out on S.

The Sixth Protocol to the European Convention on Human Rights concerning the abolition of the death penalty came into effect for the Netherlands on 1 May 1986. Article 1 of the Protocol provides that "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Article 6 provides that "as between the States 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". This means, *inter alia*, that the final part of the sentence of Article 2, paragraph 1, second sentence, of the European Convention ("save in the execution of a sentence of a court following his conviction for a crime for which this penalty (the death penalty) is provided by law") does not in principle apply to the Netherlands (6).

The State is therefore bound under the European Convention on Human Rights to refrain from acts which can result in someone within its jurisdiction being exposed to the death penalty, even if the penalty is imposed or carried out elsewhere. After all, similar considerations apply to Article 2 of the European Convention in conjunction with Article 1 of the Sixth Protocol as those which were followed by the European Court of Human Rights in section 88 of its above-mentioned judgment with respect to Article 3 of the European Convention in a case in which the Sixth Protocol did not apply.

Violation of this legal duty constitutes in principle a tort against S.

3.4. The question then arises as to whether the State can justify its pro-

(6) The Supreme Court used the Dutch text of the articles.

posed actions by relying on its obligations under Article VII(5)(a) of the NATO Status of Forces Agreement of 1951 in order to hand over S. to the United States authorities.

The two treaty provisions in question cannot be reconciled with one another, even by reference to a mutual order of ranking. The submission in (d) of this part of the ground of appeal that the European Convention takes precedence under international law finds no support in law. In such a situation, the principle should be that it is not acceptable that the mere fact that the State has bound itself by treaty to undertake a particular act can prevent the Dutch courts from assessing whether such act constitutes an infringement of another treaty norm under which individuals can derive rights directly and hence whether the State is acting unlawfully against them. It is not decisive in this connection whether the treaty obligation relied upon by the State is based on a rule which can also be invoked directly by individuals, with the result that it is not necessary to examine to what extent Article VII of the NATO Status of Forces Agreement, relied on by the State, has direct effect. What it comes down to in this connection is whether, in view of all the circumstances of the case, when the relevant interests are weighed–including the national and international interests that are involved in the performance of both sets of treaty obligations–the treaty obligation in question constitutes such a serious impediment to the State's compliance with its obligation to the relevant individual that it cannot be required to perform this obligation towards the individual and cannot therefore be ordered to do so.

3.5. In the present case it is necessary to weigh S.'s interest in ensuring that his right not to be exposed to the death penalty and hence not to be deprived of his life, as guaranteed in the European Convention in conjunction with the Sixth Protocol, is not violated against the interest of the State in complying with its obligations towards the United States under the NATO Status of Forces Agreement and also the international interests which are involved at a more general level in properly observing the NATO Agreement. In view of the great importance which must be attributed to the right not to suffer the death penalty, the weighing of the various interests in this case must inevitably result in a decision in S.'s favour. This is also in keeping with the notion underlying the State's practice–a practice which is logical for States which do not have the death penalty–when concluding extradition treaties with countries which do have the death penalty of including a reservation as set out in Article 8 of the Etradition Act and as also included in Article 7 of the Extradition Treaty with the United States (which is not in fact applicable here).

3.6. The other complaints in the ground of appeal do not need to be dealt with. This also applies to the complaint added in case no. 13.950. This is because it follows from the above reasoning that the State is not entitled to hand over S. to the United States authorities if the handing over would result in his being exposed to the death penalty. The President was therefore entitled–even in the first interim injunction proceedings–to bar the State from handing over S. to the United States authorities as long as it was not certain that the death pen-

alty, if imposed on him, would not be carried out. This means that the Court of Appeal should have dismissed the State's grounds of appeal against the judgment of the President of 9 May 1988, regardless of the other aspects of the provisions granted by the President in that judgment.

3.7. It follows from the above that the judgments of the Court of Appeal cannot be upheld.

The Supreme Court may dispose of the cases itself.

In case no. 13.949 the sole ground of appeal of the State should be dismissed on the basis of the above and the judgment of the President of 29 June 1988 should be upheld.

The order imposed on the State in that judgment should be construed as meaning that the bar on handing over S. to the United States authorities applies if and in so far as the possibility continues to exist that S. will suffer the death penalty.

This order superseded the instruction to the State given in the judgment of 9 May 1988 to enter into negotiations with the United States authorities and deprived this instruction of significance. This means that the only matter remaining to be decided in the appeal relating to that judgment is the costs. Since it follows that the State's grounds of appeal against that judgment were unfounded, the State must be regarded as the party found to be in the wrong and should therefore bear the costs [...] (7)

(7) The District Court of Utrecht had sentenced S. to six years' imprisonment on 11 October 1988. The Court of Appeal of Amsterdam quashed this judgment on appeal on 29 May 1989, holding that in view of Article VII (3) of the NATO Status of Forces Agreements the Dutch criminal courts did not have jurisdiction in this case and should therefore declare themselves incompetent to hear the case (Institute's Collection No. 3327). On appeal in cassation the Supreme Court too held that the Dutch courts did not have jurisdiction. Nor, as the Supreme Court pointed out, was this altered by the fact that in view of the judgments of 30 March 1990 the State could not, under the present circumstances, hand over S. to the United States since this could not in itself infringe the primary right of the United States military authorities to exercise jurisdiction and it was exclusively up to these authorities to decide whether or not this right would be waived and hence possibly to include the question of whether the handing over of S. could be realised after all. The Supreme Court quashed the judgment of the Court of Appeal in so far as it had declared that it lacked competence, and held that the claim of the Public Prosecutions Department was not admissible (judgment of 11 September 1990). Van Sandick also made the following point: 'In early November 1990, a compromise solution was sought. The United States authorities started a pre-trial investigation to determine whether it was possible to charge S. with a crime for which the death penalty could not be given S. opposed and lost, through summary proceedings. By mid-November, the US authorities informed the Dutch Government that the death penalty would not be requested. On this basis, the Dutch authorities decided to turn S. over to the American authorities.'

Corte Costizionale

Sentenza 25 – 27 giugno 1996
(pubblicata nella Gazzetta Ufficiale della Repubblica italiana, 1ª serie speciale, 3 luglio 1996, n. 27, pp. 35 ss.)

Giudizio di legittimità costituzionale in via incidentale
(Codice di procedura penale, art. 698, secondo comma; legge 26 maggio 1984, n. 225, nella parte in cui dà esecuzione all'art. IX del tratto di estradizione)

LA CORTE COSTITUZIONALE

composta dai signori:

Presidente: avv. Mauro Ferri;
Giudici; prof. Luigi Mengoni, prof. Enzo Cheli, dott. Renato Granata, prof. Giuliano Vassalli, prof. Francesco Guizzi, prof. Cesare Mirabelli, prof. Fernando Santosuosso, avv. Massimo Vari, dott. Cesare Ruperto, dott. Riccardo Chieppa, prof. Gustavo Zagrebelsky, prof. Valerio Onida, prof. Carlo Mezzanotte;

ha promunciato la seguente

SENTENZA

nel giudizio di legittimità costituzionale dell'art. 698, secondo comma, del codice di procedura penale, e della legge 26 maggio 1984, n. 225 (Ratifica ed esecuzione del trattato di estradizione tra il Governo della Repubblica italiana e il Governo degli Stati Uniti d'America, firmato a Roma il 13 ottobre 1983), nella parte in cui dà esecuzione all'art. IX del trattato stesso, promosso con ordinanza emessa il 20 marzo 1996 dal Tribunale amministrativo regionale per il Lazio sul ricorso poroposto da Venezia Pietro contro il Ministero di grazia e giustizia, iscritta al n. 404 del registro delle ordinanze 1996 e pubblicata nella Gazzetta Ufficiale della Repubblica n. 6, prima serie speciale, dell'anno 1996.

Visti gli atti di costituzione di Venezia Pietro e del Governo degli Stati Uniti d'America, nonché l'atto di intervento del Presidente del Consiglio dei ministri;

Udito nella udienza pubblica del 28 maggio 1996 il giudice relatore Francesco Guizzi;

Uditi gli avvocati, Mario Salerni per Venezia Pietro, Giuseppe Frigo e Giorgio Luceri per il Governo degli Stati Uniti d'America, e l'avvocato dello Stato Carlo Salimei per il Presidente del Consiglio dei ministri.

Ritenuto in fatto

1. Avverso il decreto del Ministro di grazia e giustizia del 14 dicembre 1995, con cui si concede al Governo degli Stati Uniti l'estradizione del cittadino

italiano Pietro Venezia, raggiunto da provvedimento restrittivo emesso il 30 dicembre 1993 dal giudice della contea di Dade (Florida) con l'imputazione di omicidio di primo grado, l'estradando proponeva ricorso al Tribunale amministrativo regionale del Lazio volto a ottenere l'annullamento, previa sospensione, del citato decreto.

2. A fondamento dell'azione il ricorrente deduceva l'illegittimità del decreto ministeiale per l'incostituzionalità sia dell'art. 698, secondo coma,. del codice di procedura penale, sia della legge 26 maggio 1984, n. 225 (Ratifica ed esecuzione del trattato di estradizione tra il Governo della Repubblica italiana e il Governo degli Stati Uniti d'America, firmato a Roma il 13 ottobre 1983), nella parte in cui ratifica e dà esecuzione all'art. IX del trattato stesso.

2. Disattese le eccezioni sul difetto di giurisdizione prospettate dall'Avvocatura dello Stato, il Tribunale adito sospendeva in via provvisoria il decreto ministeriale impugnato e con provvedimento contestuale promuoveva, in relazione agli artt. 2, 3, 11 e 27 quarto comma della Costituzione, questione di legittimità costituzionale dell'art. 698 secondo comma, del codice di procedura penale, e della legge n. 225 del 1984, nella parte in cui ratifica e dà esecuzione all'art IX del citato trattato di estradizione

2.1. Osserva il collegio rimettente che il decreto impugnato non va ascritto al novero degli atti politici e, dunque, è sottoposto al sindacato del giudice amministrativo. Esso verrebbe a concludere due autonome fasi procedimentali distinte l'una dall'altra, ancorché unite da un nesso di presupposizione, e non v'è dubbio che l'autorità amministrativa esplichi una propria attività di valutazione. Sì che la giurisdizione amministrativa verrebbe a radicarsi sul provvedimento finale, anche se non la si voglia estendere al riesame della sussistenza delle condizioni richieste per l'accoglimento della domanda di estradizione accertate dal giudice ordinario ai sensi dell'art. 704 del codice di procedura penale. Con altrettanta autonomia, il giudice amministrativo potrebbe conoscere le censure inerenti alla legittimita delle fonti normative su cui si basa l'esercizio del potere ministeriale, spettandogli di verificare i presupposti di legittimità dell atto amministrativo alla luce di quanto dispongono gli artt. 24 e 113 della Costituzione.

2.2. Motivando specificamente sulla rilevanza, il Tribunale amministrativo del Lazio ricorda l'orientamento, della Corte costituzionale sull'ammissibilità della questione sollevata dal giudice rimettente che sospenda l'atto impugnato in via provvisoria, sino alla ripresa del giudizio cautelare dopo l'incidente di costituzionalità (cfr. sentenza n. 440 del 1990 e ordinanza n. 24 del 1995). La questione sarebbe quindi rilevante ai fini della decisione sulla domanda cautelare di sospensione del provvedimento impugnato, che sembrerebbe – *prima facie* – immune da vizi di eccesso di potere e procedimentali. in quanto congruamente motivato circa l'affidabilità delle garanzie fornite dal Governo degli Stati Uiniti di non infliggere la pena capitale all'estradando e, comunque, di non darvi esecuzione.

Detto provvedimento si palesa illegittimo, perché adottato in base a disposizioni ritenute incostituzionali. La possibilità di estradare un cittadino italiano

affinché venga sottoposto da parte dello Stato richiedente a un processo per un reato punito con la pena capitale – quantunque subordinata a garanzie o assicurazioni sufficienti in ordine alla mancata irrogazione o esecuzione di essa – sarebbe in conflitto con i principi fondamentali della Costituzione, quale che sia la natura delle assicurazioni fornite. Di qui, la non manifesta infondatezza della questione.

2 3. Viene innanzitutto in rilievo, ad avviiso del rimettente, l'art. 2 della Costituzione, che riconosce e garantisce i diritti inviolabili dell'uomo, fra i quali vi è certo quello alla vita, la cui assolutezza è stata sottolineata da questa Corte nella sentenza n. 54 del 1979. Nel contempo va ricordato che con specifico riferimento all'art. 11 – ove si consente l'estradizione *sub condicione* – il Governo italiano ha apposto riserva alla convenzione europea di estradizione ratificata con la legge 30 gennaio 1963, n. 300, impegnandosi a negare la concessione per i reati puniti dalla legge dello Stato richiedente con la pena capitale.

2.4. Vi sarebbe lesione, altresì dell'art. 27 della Costituzione per il rischio di valutazioni soggettive difformi, in momenti storico-politici diversi, poiché la clausola denunciata affida all'apprezzamento discrezionale del Ministro di grazia e giustizia – secondo criteri non definiti – il giudizio sulle assicurazioni fornite dallo Stato richiedente le quali non presentano quel carattere di certezza che i menzionati parametri costituzionali impongono, fondandosi la garanzia soltanto sulla capacità dell'organismo governativo che ha contratto l'impegno di esigerne il rispetto. Né in proposito suffraga il richiamo all'art 6 della Costituzione degli Stati Uniti d'America, giacché manca nel trattato un presidio di effettività per tali garanzie, non essendo il Governo federale vincolato a particolari forme o tipi di assicurazione, che incontrerebbero, d'altronde, un limite nell'autonomia dei singoli Stati.

Il giudice *a quo* invoca quindi l'art. 3, sotto il profilo dell'uguaglianza, che sarebbe vulnerato per il diverso atteggiamento che lo Stato italiano ha assunto nello stipulare convenzioni con altri Paesi – da ultimo con la Romania, l'Ungheria e il Marocco, nelle quali si è stabilità un vincolo diretto per il giudice dello Stato richiedente a non irrogare o a non eseguire la pena di morte. E infine deduce il contrasto con l'art. 11 della Costituzione, sottolineando che esso consente "limitazioni di sovranità" solo in quanto "necessarie ad un ordinamento che assicuri la pace e la giustizia tra le Nazioni".

3. È intervenuto il Presidente del Consiglio dei ministri, rappresentato e difeso dall'Avvocatura dello Stato, concludendo per l'inammissibilità e, comunque, per l'infondatezza.

3.1. La questione sarebbe inammissibile, poiché il sindacato sulla legittimita dell'atto amministrativo di concessione dell'estradizione è circoscritto alla decisione dell'autorità governativa e non può estendersi alla fase giurisdizionale svoltasi davanti alla corte d'appello competente per territorio e, poi, dinanzi alla Corte di cassazione in sede di impugnazione nel merito. Le due decisioni non potrebbero sovrapporsi, spettando all'autorità giudiziaria l'esame dei requisiti previsti dalla legge e dalla convenzione internazionale, e inerendo al Ministro

il compito di vagliare, in base a considerazioni di natura politica (anche contingenti) circa lo stato delle relazioni diplomatiche con il Paese richiedente, se concedere l'estradizione. Il rapporto fra i due momenti, giurisdizionale e politico-amministrativo, sarebbe chiaramente enunciato dall'art. 701 del codice di procedura penale.

Il tribunale amministrativo regionale del Lazio non poteva espandere il proprio sindacato alla pronuncia sui diritti dell'estradando già apprezzati dall'autorità giudiziaria: doveva limitarsi a giudicare degli interessi legittimi vantati da costui con riguardo alla salvaguardia del giusto procedimento e alla legittimità delle valutazioni di ordine politico compiute dal Ministro; né potrebbe avere cognizione delle censure sulle fonti normative sottostanti all'atto impugnato. Può infatti dubitare, ad avviso dell'Avvocatura, soltanto delle fonti che attribuiscono discrezionalità al Ministro, mentre il collegio rimettente pone in discussione il provvedimento di estradizione, richiamando i diritti soggettivi dell'estradando, fra cui quello alla vita già esaminato dal giudice ordinario.

3.2. Nel merito, la questione sarebbe comunque infondata, e il richiamo alla sentenza n. 54 del 1979 di questa Corte non pertinente: la norma denunciata in quella circostanza consentiva l'estradizione senza alcuna limitazione o cautela anche per i reati sanzionati con la pena capitale; mentre quella oggetto della presente censura postula garanzie che la condanna a morte non sarà irrogata, o eseguita, qualora sia concessa l'estradizione. Del pari irrilevante sarebbe il riferimento alla espressa riserva apposta dall'Italia alla convenzione europea di estradizione, in quanto anteriore al trattato con gli Stati Uniti.

La norma censurata ricollega il provvedimento di estradizione alla sussistenza di parametri certi, obiettivi e autovincolanti che – a giudizio della cassazione – sono riscontrabili nell'impegno assunto dal Governo statunitense con le peculiari caratteristiche dell'obbligazione internazionale, resa vincolante nei confronti dello Stato federato dall'art. 6 della Costituzione del 1787. D'altronde, analoga situazione si verifica anche nel nostro ordinamento, allorché si ottenga l'estradizione soltanto per alcuni reati: in tale ipotesi l'art. 720 del codice di procedura penale vincola l'autorità giudiziaria alle condizioni poste dallo Stato estradante, e liberamente accettate. L'obbligo internazionale è dunque recepito in una norma interna, mentre nell'ordinamento statunitense il rispetto di esso sarebbe assicurato – in ragione della struttura federale – direttamente dalla norma costituzionale.

Nel caso di specie – è quanto rileva la Corte di cassazione – la sanzione capitale deve aversi come non più esistente o comunque inoperante.

Non vi sarebbe lesione, pertanto, degli indicati parametri costituzionali.

L'art. 27, quarto comma, della Costituzione, non si può leggere, infatti, al di fuori del sistema, ma deve coordinarsi sia con l'art. 26 – pertinente nella sua specificità – sia con gli artt. 10 e 11, che conferiscono rango costituzionale ai principi di diritto internzionale generalmente riconosciuti, fra cui l'antico e consolidato *pacta sunt servanda*. Il divieto della pena di morte non può quindi porre in crisi quella fondamentale forma di collaborazione giudiziaria internazionale

che si attua mediante l'estradizione. Significativamente, l'art. 26 della Costituzione consente l'estradizione del cittadino ove sia espressamente prevista dalle convenzioni internazionali, escludendola per i reati politici.

Assolutizzando il divieto per i reati puniti con la pena capitale, si verrebbe a configurare un diritto di asilo o, quanto meno, un ingiustificato diritto a essere assoggettati alla giurisdizione penale italiana per i reati di maggiore gravità (art. 9 del codice penale), e ciò in aperta elusione, secondo l'Avvocatura, del principio della territorialità della legge penale.

4. Destinatario di notifica tanto da parte del giudice *a quo* quanto da parte del ricorrente, il Governo degli Stati Uniti – che assume di essere titolare dell'interesse alla legittimità del provvedimento di estradizione – si è costituito, concludendo per l'infondatezza della questione limitatamente alla legge di ratifica e di esecuzione del trattato di estradizione.

4 1. Nel merito, si richiamano le argomentazioni svolte dalla difesa del Presidente del Consiglio dei ministri sul punto della vincolatività dell'impegno assunto mediante assicurazioni dallo Stato richiedente; e si sottolinea che – in base all'art 1, sezione X, della Costituzione statunitense – gli Stati federati non possono sottoscrivere trattati internazionali, di esclusiva competenza dell'Autorità federale, e sono obbligati a osservarne le disposizioni, secondo quanto chiarito dalla giurisprudenza della Corte Suprema federale. Sì che le assicurazioni fornite dal Governo degli Stati Uniti con le note verbali del 28 luglio 1994, 24 agosto 1995 e 12 gennaio 1996 sono da considerare vincolanti per lo Stato della Florida e i suoi giudici. In caso di violazione, il Governo degli Stati Uniti attiverà i rimedi necessari, sino a provocare l'intervento della Corte federale.

5. Si è costituita anche la parte privata, chiedendo la declaratoria di illegittimità costituzionale delle norme denunciate. L'estradando osserva che il trattato fra l'Italia e gli Stati Uniti non fornisce adeguata tutela all'imputato di un reato punibile, nel territorio degli Stati Uniti, con la pena di morte; mentre più ampie garanzie si riscontrano, ad esempio, nel trattato fra l'Italia e il Marocco, ov'è prevista la sostituzione della pena con quella stabilita, nel nostro Paese, per il medesimo reato. Non vi sarebbe quindi ragionevole certezza circa la mancata irrogazione o non esecuzione della pena di morte, giacché l'art. VI della Costituzione statunitense coprirebbe i trattati fra gli Stati dell'Unione e non quelli internazionali, fra i quali rientra il trattato di estradizione.

Considerato in diritto

1. Viene all'esame della Corte, in relazione agli artt. 2, 3, 11 e 27, quarto comma, della Costituzione, una questione di legittimità costituzionale dell'art. 698, secondo comma, del codice di procedura penale, e della legge 26 maggio 1984, n. 225 (Ratifica ed esecuzione del trattato di estradizione tra il Governo della Repubblica italiana ed il Governo degli Stati Uniti d'America, firmato a Roma il 13 ottobre 1983), nella parte in cui dà esecuzione all'art. IX del trattato ora citato, ove si prevede l'estradizione anche per i reati puniti con la pena ca-

pitale a fronte dell'impegno assunto dal Paese richiedente – con garanzie ritenute sufficienti dal Paese richiesto a non infliggere la pena di morte o, se già inflitta, a non farla eseguire.

2. È ammissibile la costituzione del Governo degli Stati Uniti d'America, in quanto parte legittimata a resistere nel giudizio *a quo* come risulta dal ricorso del Venezia – notificato all'Ambasciata degli Statti Uniti in Italia – e dalle ordinanze di rimessione e di sospensione adottate dal Tribunale amministrativo regionale del Lazio, ritualmente comunicate. Al profilo formale corrisponde la titolarità dell'interesse sostanziale, sia con riguardo all'oggetto della controversia di merito, sia con riferimento all'incidente di costituzionalità su norme che sono a fondamento della richiesta e del provvedimento di concessione dell'estradizione, una delle quali è quella che dà esecuzione al trattato di cui il Governo degli Stati Uniti è contraente.

3. Occorre quindi valutare se la questione sia ammissibile perché sollevata nell'ambito di un giudizio pendente davanti al Tribunale amministrativo regionale del Lazio, riguardante la legittimità del decreto con cui il Ministro di grazia e giustizia ha concesso l'estradizione di Pietro Venezia su richiesta del Governo degli Stati Uniti d'America. L'Avvocatura dello Stato osserva, in proposito, che tale giudizio verte sull'interesse legittimo dell'estradando al corretto esercizio del potere politico-amministrativo del Ministro e non sul diritto soggettivo, quello alla vita, già considerato dal giudice ordinario, con competenza esclusiva, in duplice grado (Corte d'appello e, in sede di impugnazione estesa al merito, Corte di cassazione). Né verrebbero in rilievo le disposizioni denunciate, poiché attengono alla giurisdizione ordinaria rispetto alla quale il decreto ministeriale appare un diaframma insormontabile.

3.1. L'eccezione va disattesa.

L'art. 697 del codice di procedura penale stabilisce che la consegna d'una persona a uno Stato estero può aver luogo soltanto mediante estradizione; e l'art 698, secondo comma, prevede garanzie processuali e procedimentali per i fatti puniti con la pena di morte dalla legge dello Stato estero, subordinando la concessione del provvedimento di estradizione alla decisione del giudice ordinario circa le assicurazioni fornite dal Paese richiedente, e alla successiva valutazione del Ministro di grazia e giustizia su di esse.

Il decreto impugnato davanti al giudice amministrativo ha considerato, in relazione al diritto alla vita dell'estradando, le assicurazioni fornite dallo Stato estero. Ha dunque rilevanza il dubbio di costituzionalità riguardante l'art 698, secondo camma, del codice di procedura penale, poiché esso attribuisce un potere al Ministro che, nella specie, ne ha fatto uso; e ha rilevanza, altresì, quello che concerne la legge di esecuzione del trattato, n. 225 del 1984, poiché in forza di essa sono investite le due autorità (giudiziaria e amministrativa) indicate nel citato art. 698.

Né può sostenersi che il giudice *a quo* avrebbe invocato diritti soggettivi esclusi dalla propria cognizione: il sindacato di legittimità sul provvedimento impugnato – condotto sul piano dell'osservanza delle leggi che regolano l'azione

ministeriale – non può non compiersi, infatti, anche con riguardo alla legalità costituzionale, che è, anzi, primo doveroso controllo da parte di ogni giudice dello Stato. Controllo di legalità che, tuttavia, non può intendersi limitato ai principi dell'azione amministrativa in senso stretto se, e in quanto, essa insista su beni o interessi tutelati (in massimo grado) dalla Costituzione. Di qui, l'ammissibilità della questione.

4. Nel merito la questione è fondata.

Il divieto della pena di morte ha un rilievo del tutto particolare – al pari di quello delle pene contrarie al senso di umanità – nella prima parte della Carta costituzionale. Introdotto dal quarto comma dell'art. 27, sottende un principio «che in molti sensi può dirsi italiano» – sono parole tratte dalla relazione della Commissione dell'Assemblea costituente al progetto di Costituzione, nella parte dedicata ai rapporti civili – principio che «ribadito nelle fasi e nei regimi di libertà del nostro Paese, è stato rimosso nei periodi di reazione e di violenza», configurandosi nel sistema costituzionale quale proiezione della garanzia accordata al bene fondamentale della vita, che è il primo dei diritti inviolabili dell'uomo riconosciuti dall'art. 2.

L'assolutezza di tale garanzia costituzionale incide sull'esercizio delle potestà attribuite a tutti i soggetti pubblici dell'ordinamento repubblicano, e nella specie su quelle potestà attraverso cui si realizza la cooperazione internazionale ai fini della mutua assistenza giudiziaria. Sì che l'art. 27, quarto comma, letto alla luce dell'art. 2 della Costituzione, si pone quale essenziale parametro di valutazione della legittimità costituzionale della norma generale sulla concessione dell'estradizione (art. 698, secondo comma, del codice di procedura penale), e delle leggi che danno esecuzione a trattati internazionali di estradizione e di assistenza giudiziaria.

5. Questa Corte ha già affermato che il concorso, da parte dello Stato italiano, all'esecuzione di pene «che in nessuna ipotesi, e per nessun tipo di reati, potrebbero essere inflitte in Italia nel tempo di pace» è di per sé lesivo della Costituzione (sentenza n. 54 del 1979). Il punto ora in esame è se rappresentino un rimedio adeguato le «garanzie» o «assicurazioni» previste dal citato art. 698, secondo comma, e dalla legge 26 maggio 1984, n. 225, di ratifica ed esecuzione del trattato di estradizione fra il Governo della Repubblica italiana e quello degli Stati Uniti d'America firmato a Roma il 13 ottobre 1983; e in particolare se sia conforme alla Costituzione detta legge, nella parte in cui dà esecuzione all'art. IX del trattato stesso, ove si stabilisce che l'estradizione sarà negata qualora il reato sia punibile con la pena di morte secondo le leggi della Parte richiedente. Salvo che quest'ultima «non si impegni con garanzie ritenute sufficienti dalla Parte richiesta a non fare infliggere la pena di morte oppure, se inflitta, a non farla eseguire».

Come si è detto, il procedimento delineato dall'art. 698, secondo comma, del codice di procedura penale, si impernia su un duplice vagli espletato, caso per caso, dall'autorità giudiziaria e dal Ministro di grazia e giustizia circa la «sufficienza» delle predette garanzie. L'estradizione è dunque concessa (o negata) in

seguito a valutazioni svolte dalle autorità italiane sulle singole richieste con accertamenti nei limiti indicati. Tale soluzione offre, in astratto, il vantaggio di una politica flessibile da parte dello Stato richiesto, e consente adattamenti, nel tempo, in base a considerazioni di politica criminale; ma nel nostro ordinamento, in cui il divieto della pena di morte è sancito dalla Costituzione, la formula delle «sufficienti assicurazioni» – ai fini della concessione dell'estradizione per fatti in ordine ai quali è stabilita la pena capitale dalla legge dello Stato estero – non è costituzionalmente ammissibile. Perché il divieto contenuto nell'art. 27, quarto comma, della Costituzione, e i valori ad esso sottostanti – primo fra tutti il bene essenziale della vita – impongono una garanzia assoluta.

Non hanno fondamento i dubbi della parte privata sulla sussistenza di rimedi giudiziari nell'ordinamento statunitense a tutela della vincolatività dei trattati internazionali stipulati dal Governo federale, e non è in questione l'interpretazione dell'art. VI della Costituzione statunitense. Il punto che qui rileva non è quello dei rimedi contenuti nell'ordinamento straniero, bensì l'intrinseca inadeguatezza del meccanismo adottato dal codice di procedura penale e dalla legge di esecuzione del trattato in esame rispetto al canone costituzionale: l'assolutezza del principio costituzionale richiamato viene infirmata dalla presenza di una norma che demanda a valutazioni discrezionali, caso per caso, il giudizio sul grado di affidabilità e di effettività delle garanzie accordate dal Paese richiedente.

6. Si impone dunque la declaratoria di illegittimità costituzionale dell'art 698, secondo comma, del codice di procedura penale, e della legge n. 225 del 1984, nella parte in cui dà esecuzione all'art. IX del trattato di estradizione tra il Governo italiano e quello degli Stati Uniti d'America, per contrasto con gli artt. 2 e 27, quarto comma, della Costituzione. Va da sé che resta applicabile il rimedio predisposto dall'art. 9, terzo comma, del codice penale, in ottemperanza agli obblighi alternativi che gravano sullo Stato (consegnare o punire): a richiesta del Ministro di grazia e giustizia, sono puniti secondo la legge italiana i colpevoli di delitti commessi in territorio estero, sanzionati con almeno tre anni di reclusione, allorché l'estradizione non sia stata o non possa essere concessa (sentenza n 54 del 1979, n. 7 del Considerato in diritto).

Sono assorbite le censure mosse in riferimento agli artt 3 e 11 della Costituzione.

PER QUESTI MOTIVI LA CORTE COSTITUZIONALE

a) Dichiara l'illegittimità costituzionale dell'art. 698, secondo comma, del codice di procedura penale;

b) Dichiara l'illegittimità costituzionale della legge 26 maggio 1984, n. 225 (Ratifica ed esecuzione del trattato di estradizione tra il Governo della Repubblica italiana ed il Governo degli Stati Uniti d'America, firmato a Roma il 13 ottobre 1983) nella parte in cui dà esecuzione all'art IX del trattato di estradizione ora citato.

Così deciso in Roma, nella sede della Corte costituzionale, Palazzo della Consulta, il 25 giugno 1996

Il Presidente: Ferri

Il relatore: Guizzi

Il cancelliere: Fruscella

Depositata in cancelleria il 27 giugno 1996

Il cancelliere: Fruscella

APPENDICI

APPENDICE I

Testi degli strumenti internazionali che sanciscono il diritto alla vita e che istituiscono procedure giurisdizionali o quasi-giurisdizionali di tutela internazionale dei diritti umani, con lo stato delle ratifiche al 1° gennaio 1996 e i riferimenti della legge di ratifica dell'Italia

1.
Dalla Dichiarazione Universale dei Diritti Umani

Adottata dall'Assemblea Generale delle Nazioni Unite, Ris. 217A (III), 10 dicembre 1948 (*UN Doc. A/810, p. 71 (1948)*)

Art. 3

Ogni individuo ha diritto alla vita, alla libertà ed alla sicurezza della propria persona.

2.
Dal Patto internazionale sui diritti civili e politici

Adottato dall'Assemblea Generale delle NU il 16 dicembre 1966 (*UN Treaty Series*, vol. 999, p. 171).
Entrato in vigore il 23 marzo 1976.

(omissis)

Art. 6

1. Il diritto alla vita è inerente alla persona umana. Questo diritto deve essere protetto dalla legge. Nessuno può essere arbitrariamente privato della vita.

2. Nei paesi in cui la pena di morte non è stata abolita, una sentenza capitale può essere pronunciata soltanto per i delitti più gravi, in conformità alle leggi vigenti al momento in cui il delitto fu commesso e purché ciò non sia in contrasto né con le disposizioni del presente Patto né con la Convenzione per la prevenzione e la punizione del delitto di genocidio. Tale pena può essere eseguita soltanto in virtù di una sentenza definitiva resa da un tribunale competente.

3. Quando la privazione della vita costituisce delitto di genocidio resta inteso che nessuna disposizione di questo articolo autorizza uno Stato parte del presente Patto a derogare in alcun modo a qualsiasi obbligo assunto in base alle norme della Convenzione per la prevenzione e la punizione del delitto di genocidio.

4. Ogni condannato a morte ha il diritto di chiedere la grazia o la commutazione della pena. L'amnistia, la grazia o la commutazione della pena di morte possono essere accordate in tutti i casi.

5. Una sentenza capitale non può essere pronunciata per delitti commessi dai minori di 18 anni e non può essere eseguita nei confronti di donne incinte.

6. Nessuna disposizione di questo articolo può essere invocata per ritardare o impedire l'abolizione della pena di morte ad opera di uno Stato parte del presente Patto.

(omissis)

Parte quarta

Art. 28

1. E istituito un Comitato dei diritti dell'uomo (indicato di qui innanzi, nel presente Patto, come «il Comitato»). Esso si compone di diciotto membri ed esercita le funzioni qui appresso previste.

2. Il Comitato si compone di cittadini degli Stati parti del presente Patto, i quali debbono essere persone di alta levatura morale e di riconosciuta competenza nel campo dei diritti dell'uomo. Sarà tenuto conto dell'opportunità che facciano parte del Comitato alcune persone aventi esperienza giuridica.

3. I membri del Comitato sono eletti e ricoprono la loro carica a titolo individuale.

Art. 29

1. I membri del Comitato sono eletti a scrutinio segreto fra una lista di persone che posseggono le qualità stabilite dall'articolo 28, e che siano state designate a tal fine dagli Stati parti del presente Patto.

2. Ogni Stato parte del presente Patto può designare non più di due persone. Queste persone devono essere cittadini dello Stato che le designa.

3. La stessa persona può essere designata più di una volta.

Art. 30

1. La prima elezione si svolgerà entro sei mesi a partire dalla data di entrata in vigore del presente Patto.

2. Almeno quattro mesi prima della data di ciascuna elezione al Comitato, salvo che si tratti di elezione per colmare una vacanza dichiarata in conformità all'articolo 34, il Segretario generale delle Nazioni Unite invita per iscritto gli Stati parti del presente Patto a designare, nel termine di tre mesi, i candidati da essi proposti come membri del Comitato.

3. Il Segretario generale delle Nazioni Unite compila una lista in ordine alfabetico di tutte le persone così designate, facendo menzione degli Stati parti che le hanno designate, e la comunica agli Stati parti del presente Patto convocata dal Segretario generale delle Nazioni Unite presso la sede dell'Organizzazione. In tale riunione, per la quale il quorum è costituito dai due terzi degli Stati parti del presente Patto, sono eletti membri del Comitato i candidati che ottengono il maggior numero di voti e la maggioranza assoluta dei rappresentanti degli Stati parti presenti e votanti.

Art. 31

1. Il Comitato non può comprendere più di un cittadino dello stesso Stato.

2. Nell'elezione del Comitato, deve tenersi conto di un'equa ripartizione geografica dei seggi, e della rappresentanza sia delle diverse forme di civiltà sia dei principali sistemi giuridici.

Art. 32

1. I membri del Comitato sono eletti per un periodo di quattro anni. Se vengono nuovamente designati sono rieleggibili. Tuttavia, il mandato di nove membri eletti alla prima elezione scadrà al termine di due anni; subito dopo la prima elezione, i nomi di questi nove membri saranno tirati a sorte dal Presidente della riunione di cui al paragrafo 4 dell'articolo 30.

2. Allo scadere del mandato, le elezioni si svolgono in conformità alle disposizioni degli articoli precedenti di questa parte del Patto.

Art. 33

1. Se, a giudizio unanime degli altri membri, un membro del Comitato abbia cessato di esercitare le sue funzioni per qualsiasi causa diversa da un'assenza di carattere temporaneo, il Presidente del Comitato ne informa il Segretario generale delle Nazioni Unite, il quale dichiara vacante il seggio occupato da detto membro.

2. In caso di morte o di dimissione di un membro del Comitato, il Presidente ne informa immediatamente il Segretario generale delle Nazioni Unite, il quale dichiara vacante il seggio a partire dalla data della morte o dalla data in cui avranno effetto le dimissioni.

Art. 34

1. Quando una vacanza viene dichiarata in conformità all'articolo 33, e se il mandato del membro da sostituire non deve aver fine entro i sei mesi successivi alla dichiarazione di vacanza, il Segretario generale delle Nazioni Unite ne avverte gli Stati parti del presente Patto, i quali possono entro due mesi designare dei candidati, in conformità all'articolo 29, per ricoprire il seggio vacante.

2. Il Segretario generale delle Nazioni Unite compila una lista in ordine alfabetico delle persone così designate e la comunica agli Stati parti del presente Patto. L'elezione per ricoprire il seggio vacante si svolge quindi in conformità alle disposizioni pertinenti della presente parte del Patto.

3. Un membro del Comitato eletto ad un seggio dichiarato vacante in conformità all'articolo 33 rimane in carica fino alla scadenza del mandato del membro, il cui seggio nel Comitato sia divenuto vacante ai sensi del predetto articolo.

Art. 35

I membri del Comitato ricevono, con l'approvazione dell'Assemblea generale delle Nazioni Unite, degli emolumenti prelevati sui fondi della Organizza-

zione, alle condizioni stabilite dall'Assemblea generale, avuto riguardo all'importanza delle funzioni del Comitato.

Art. 36

Il Segretario generale delle Nazioni Unite mette a disposizione del Comitato il personale e i mezzi materiali necessari perché esso possa svolgere efficacemente le funzioni previste dal presente Patto.

Art 37

1. Il Segretario generale delle Nazioni Unite convocherà la prima riunione del Comitato nella sede dell'Organizzazione.

2. Dopo la sua prima riunione, il Comitato si riunisce alle scadenze previste dal proprio regolamento interno.

3. Le riunioni del Comitato si tengono normalmente nella Sede delle Nazioni Unite ovvero nell'Ufficio delle Nazioni Unite a Ginevra.

Art.38

Ogni membro del Comitato, prima di assumere la carica, deve fare in udienza pubblica dichiarazione solenne che egli eserciterà le sue funzioni in modo imparziale e coscienzioso.

Art. 39

1. Il Comitato elegge il proprio ufficio di presidenza per un periodo di due anni. I componenti di tale ufficio sono rieleggibili.

2. Il Comitato stabilisce il proprio regolamento interno; questo deve tuttavia contenere, fra l'altro, le disposizioni seguenti: a) Il quorum è di dodici membri; b) Le decisioni del Comitato sono prese a maggioranza dei membri presenti.

Art. 40

1. Gli Stati parti del presente Patto si impegnano a presentare rapporti sulle misure che essi avranno adottate per dare attuazione ai diritti riconosciuti nel presente Patto, nonché sui progressi compiuti nel godimento di tali diritti: a) entro un anno dall'entrata in vigore del presente Patto rispetto a ciascuno degli Stati parti; b) successivamente, ogni volta che il Comitato ne farà richiesta.

2. Tutti i rapporti sono indirizzati al Segretario generale delle Nazioni Unite, che li trasmette per esame al Comitato. I rapporti indicano, ove del caso, i fattori e le difficoltà che influiscano sull'applicazione del presente Patto.

3. Il Segretario generale delle Nazioni Unite, previa consultazione col Comitato, può trasmettere agli istituti specializzati interessati copia di quelle parti dei rapporti che possono riguardare i campi di loro competenza.

4. Il Comitato studia i rapporti presentati dagli Stati parti del presente Patto. Esso trasmette agli Stati parti i propri rapporti e le osservazioni generali. Il Comitato può anche trasmettere al Consiglio economico e sociale tali osserva-

zioni, accompagnate da copie dei rapporti ricevuti dagli Stati parti del presente Patto.

5. Gli Stati parti del presente Patto possono presentare al Comitato i propri rilievi circa qualsiasi osservazione fatta ai sensi del paragrafo 4 del presente articolo.

Art. 41

1. Ogni Stato parte del presente Patto può dichiarare in qualsiasi momento, in base al presente articolo, di riconoscere la competenza del Comitato a ricevere ed esaminare comunicazioni, nelle quali uno Stato parte pretenda che un altro Stato parte non adempie agli obblighi derivanti dal presente Patto. Le comunicazioni di cui al presente articolo possono essere ricevute ed esaminate soltanto se provenienti da uno Stato parte che abbia dichiarato di riconoscere, per quanto lo concerne la competenza del Comitato. Il Comitato non può ricevere nessuna comunicazione riguardante uno Stato parte che non abbia fatto tale dichiarazione. Alle comunicazioni ricevute in conformità al presente articolo si applica la procedura seguente: a) Se uno Stato parte del presente Patto ritiene che un altro Stato parte non applica le disposizioni del presente Patto, esso può richiamare sulla questione, mediante comunicazione scritta, l'attenzione di tale Stato. Entro tre mesi dalla data di ricezione della comunicazione, lo Stato destinatario fa pervenire allo Stato che gli ha inviato la comunicazione delle spiegazioni o altre dichiarazioni scritte intese a chiarire la questione, che dovrebbero includere, purché ciò sia possibile e pertinente, riferimenti alle procedure e ai ricorsi interni già utilizzati, o tuttora pendenti ovvero ancora esperibili. b) Se, nel termine di sei mesi dalla data di ricezione della comunicazione iniziale da parte dello Stato destinatario, la questione non è stata risolta con soddisfazione di entrambi gli Stati parti interessati, tanto l'uno che l'altro hanno il diritto di deferirla al Comitato, mediante notifica fatta sia al Comitato sia all'altro interessato. c) Il Comitato può entrare nel merito di una questione ad esso deferita soltanto dopo avere accertato che tutti i ricorsi interni disponibili siano stati esperiti ed esauriti in conformità ai princìpi di diritto internazionale generalmente riconosciuti. Questa norma non si applica se la trattazione dei ricorsi subisce ingiustificati ritardi. d) Quando esamina le comunicazioni previste dal presente articolo il Comitato tiene seduta a porte chiuse. e) Salvo quanto è stabilito alla lettera c), il Comitato mette i suoi buoni uffici a disposizione degli Stati parti interessati, allo scopo di giungere ad una soluzione amichevole della questione, basata sul rispetto dei diritti dell'uomo e delle libertà fondamentali, quali sono riconosciuti dal presente Patto. f) In ogni questione ad esso deferita, il Comitato può chiedere agli Stati parti interessati, di cui alla lettera b), di fornire qualsiasi informazione pertinente. g) Gli Stati parti interessati di cui alla lettere b), hanno diritto di farsi rappresentare quando la questione viene esaminata dal Comitato e di presentare osservazioni oralmente o per scritto, o in entrambe le forme. h) Il Comitato deve presentare un rapporto, entro dodici mesi dalla data di ricezione della notifica prevista alla lettera b): i) Se è stata trovata una soluzione conforme

alle condizioni indicate alla lettera e), il Comitato limita il suo rapporto ad una breve esposizione dei fatti e della soluzione raggiunta; ii) Se non è stata trovata una soluzione conforme alle condizioni indicate alla lettera e), il Comitato limita il suo rapporto a una breve esposizione dei fatti; il testo delle osservazioni scritte e i verbali delle osservazioni orali presentate dagli Stati parti interessati vengono allegati al rapporto. Per ogni questione, il rapporto è comunicato agli Stati parti interessa

2. Le disposizioni del presente articolo entreranno in vigore quando dieci Stati parti del presente Patto avranno fatto la dichiarazione prevista al paragrafo 1 del presente articolo. Detta dichiarazione sarà depositata dagli Stati parti presso il Segretariato generale delle Nazioni Unite, che ne trasmetterà copia agli altri Stati parti. Una dichiarazione potrà essere ritirata in qualsiasi momento mediante notifica diretta al Segretario generale. Questo ritiro non pregiudicherà l'esame di qualsiasi questione che formi oggetto di una comunicazione già inviata in base al presente articolo; nessun'altra comunicazione di uno Stato parte sarà ricevuta dopo che il Segretario generale abbia ricevuto notifica del ritiro della dichiarazione, salvo che lo Stato parte interessato non abbia fatto una nuova dichiarazione.

Art. 42

1. a) Se una questione deferita al Comitato in conformità all'articolo 41 non viene risolta in modo soddisfacente per gli Stati parti interessati, il Comitato, previo consenso degli Stati parti interessati, può designare una Commissione di conciliazione ad hoc (indicata da qui innanzi come «la Commissione»). La Commissione mette i suoi buoni uffici a disposizione degli Stati parti interessati, allo scopo di giungere ad una soluzione amichevole della questione, basata sul rispetto del presente Patto. b) La Commissione è composta di cinque membri nominati di concerto con gli Stati parti interessati. Se gli Stati parti interessati non pervengono entro tre mesi a un'intesa sulla composizione della Commissione, o di parte di essa, i membri della Commissione sui quali non è stato raggiunto l'accordo sono eletti dal Comitato fra i propri membri, con voto segreto e a maggioranza dei due terzi.

2. I membri della Commissione ricoprono tale carica a titolo individuale. Essi non devono essere cittadini né degli Stati parti interessati, né di uno Stato che non sia parte del presente Patto, né di uno Stato parte che non abbia fatto la dichiarazione prevista all'articolo 41.

3. La Commissione elegge il suo Presidente e adotta il suo regolamento interno.

4. Le riunioni della Commissione si tengono normalmente nella Sede delle Nazioni Unite ovvero nell'Ufficio delle Nazioni Unite a Ginevra. Tuttavia, esse possono svolgersi in qualsiasi altro luogo appropriato che può essere stabilito dalla Commissione previa consultazione con il Segretario generale delle Nazioni Unite e con gli Stati parti interessati.

5. Il segretariato previsto all'articolo 36 presta i suoi servigi anche alle commissioni nominate in base al presente articolo.

6. Le informazioni ricevute e vagliate dal Comitato, sono messe a disposizione della Commissione, e la Commissione può chiedere agli Stati parti interessati di fornire ogni altra informazione pertinente.

7. Dopo un completo esame della questione, ma in ogni caso entro un termine massimo di dodici mesi dal momento in cui ne è stata investita, la Commlsslone presenta un rapporto al Presidente del Comitato, perché sia trasmesso agli Stati parti interessati:

a) se la Commissione non è in grado di completare l'esame della questione entro i dodici mesi, essa si limita ad esporre brevemente nel suo rapporto a qual punto si trovi l'esame della questione medesima; b) se si è giunti ad una soluzione amichevole della questione, basata sul rispetto dei diritti dell'uomo riconosciuti nel presente Patto, la Commissione si limita ad esporre brevemente nel suo rapporto i fatti e la soluzione a cui si è pervenuti; c) se non si è giunti ad una soluzione ai sensi della lettera b), la Commissione espone nel suo rapporto i propri accertamenti su tutti i punti di fatto relativi alla questione dibattuta fra gli Stati parti interessati, nonché le proprie considerazioni circa la possibilità di una soluzione amichevole dell'affare. Il rapporto comprende pure le osservazioni scritte e un verbale delle osservazioni orali presentate dagli stati parti interessati; d) se il rapporto della Commissione è presentato in conformità alla lettera c), gli Stati parti interessati, entro tre mesi dalla ricezione del rapporto, debbono rendere noto al Presidente del Comitato se accettano o meno i termini del rapporto della Commissione.

8. Le disposizioni del presente articolo non pregiudicano le attribuzioni del Comitato previste all'art. 41.

9 Tutte le spese dei membri della Commissione sono ripartite in parti uguali tra gli Stati interessati, in base a un preventivo predisposto dal Segretario generale delle Nazioni Unite.

10. Il Segretario generale delle Nazioni Unite è autorizzato a pagare, se occorre, le spese dei membri della Commissione prima che gli Stati parti interessati ne abbiano effettuato il rimborso, in conformità al paragrafo 9 del presente articolo.

Art. 43

I membri del Comitato e i membri delle commissioni di conciliazione ad hoc che possano essere designati ai sensi dell'articolo 42 hanno diritto a quelle agevolazioni, quei privilegi e quelle immunità riconosciuti agli esperti in missione per conto delle Nazioni Unite, che sono enunciati nelle sezioni pertinenti della Convenzione sui privilegi e le immunità delle Nazioni Unite.

Art. 44

Le disposizioni per l'attuazione del presente Patto si applicano senza pregiudizio delle procedure istituite nel campo dei diritti dell'uomo ai sensi o sulla base degli strumenti costitutivi e delle convenzioni delle Nazioni Unite e degli istituti specializzati; e non impediscono agli Stati parti del presente Patto di ri-

correre ad altre procedure per la soluzione di una controversia, in conformità agli accordi internazionali generali o speciali in vigore tra loro.

Art. 45

Il Comitato, tramite il Consiglio economico e sociale, presenta ogni anno all'Assemblea generale delle Nazioni Unite un rapporto sulle sue attività.

(omissis)

133 ratifiche: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Barbados, Belgio, Benin, Bielorussia, Bolivia, Bosnia-Erzegovina, Brasile, Bulgaria, Burundi, Cambogia, Cameroun, Canada, Capo Verde, Chad, Cile, Cipro, Colombia, Congo, Corea, Corea (Rep. Popolare), Costa d'Avorio, Costa Rica, Croazia, Danimarca, Egitto, El Salvador, Equador, Estonia, Etiopia, Filippine, Finlandia, Francia, Gabon, Gambia, Georgia, Germania, Giappone, Giordania, Grenada, Guatemala, Guinea, Guinea Equatoriale, Guyana, Haiti, India, Iran, Iraq, Irlanda, Islanda, Israele, Italia, Jamaica, Jugoslavia, Kenia, Kirgyzistan, Lesotho, Lettonia, Libano, Libia, Lituania, Lussemburgo, Macedonia, Madagascar, Malawi, Mali, Malta, Marocco, Mauritius, Messico, Moldavia, Mongolia, Mozambico, Namibia, Nepal, Nicaragua, Niger, Nigeria, Norvegia, Nuova Zelanda, Paesi Bassi, Panama, Paraguay, Peru, Polonia, Portogallo, Regno Unito, Repubblica Ceca, Repubblica Centrafricana, Repubblica Dominicana, Romania, Russia, Rwanda, Saint Vincent & Grenadines, San Marino, Sao Tomé & Principe, Senegal, Seychelles, Siria, Slovacchia, Slovenia, Somalia, Spagna, Sri Lanka, Stati Uniti d'America, Sudan, Suriname, Svezia, Svizzera, Tanzania, Togo, Trinidad & Tobago, Tunisia, Ucraina, Ungheria, Uganda, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Zaire, Zambia, Zimbabwe.

Ratificato e reso esecutivo dall'Italia con legge 25 ottobre 1977, n. 881.

3.
Primo protocollo opzionale al Patto internazionale sui diritti civili e politici sulle comunicazioni individuali

Adottato dall'Assemblea generale delle NU il 16 dicembre 1966 (*UN Treaty Series*, vol. 999, p. 171).
Entrato in vigore il 23 marzo 1976.

(Testo integrale)

Gli Stati parti del presente Protocollo

Considerato che, per meglio assicurare il conseguimento dei fini del Patto relativo ai diritti civili e politici (indicato di qui innanzi come «il Patto») e l'applicazione delle sue disposizioni, sarebbe opportuno conferire al Comitato dei

diritti dell'uomo, istituito nella parte quarta del Patto (di qui innanzi indicato come «il Comitato») il potere di ricevere e di esaminare, secondo quanto è previsto nel presente Protocollo, comunicazioni provenienti da individui, i quali pretendano essere vittime di violazioni di un qualsiasi diritto enunciato nel Patto.

Hanno convenuto quanto segue:

Art. 1

Ogni Stato parte dal Patto che diviene parte del presente Protocollo riconosce la competenza del Comitato a ricevere ed esaminare comunicazioni provenienti da individui sottoposti alla sua giurisdizione, i quali pretendano essere vittime di violazioni, commesse da quello stesso Stato parte, di un qualsiasi diritto enunciato nel Patto. Il Comitato non può ricevere alcuna comunicazione concernente uno Stato parte del Patto che non sia parte del presente Protocollo.

Art. 2

Salvo quanto è stabilito all'articolo primo, ogni individuo il quale pretenda che un qualsiasi diritto enunciato nel Patto è stato violato ed abbia esaurito tutti i ricorsi interni disponibili, può presentare una comunicazione scritta al Comitato affinché la esamini.

Art. 3

Il Comitato dichiara irricevibile qualsiasi comunicazione presentata in base a questo Protocollo che sia anonima, o che esso consideri un abuso del diritto di presentare tali comunicazioni ovvero incompatibile con le disposizioni del Patto.

Art 4

1 Salvo quanto è stabilito all'articolo 3, il Comitato rimette ogni comunicazione ad esso presentata in base a questo Protocollo all'attenzione dello Stato parte di detto Protocollo che si pretende abbia violato una qualsiasi disposizione del Patto.

2. Entro i sei mesi successivi, detto Stato sottopone per iscritto al Comitato spiegazioni o dichiarazioni che chiariscano la questione e indichino, ove del caso, le misure che esso potrà aver preso per rimediare alla situazione.

Art. 5

1. Il Comitato esamina le comunicazioni ricevute in base al presente Protocollo tenendo conto di tutte le informazioni scritte ad esso fatte pervenire dall'individuo e dallo Stato parte interessato.

2. Il Comitato non prende in considerazione alcuna comunicazione proveniente da un individuo senza avere accertato che:

a) la stessa questione non sia già in corso di esame in base a un'altra procedura internazionale di inchiesta o di regolamento pacifico; b) l'individuo abbia

esaurito tutti i ricorsi interni disponibili. Questa norma non si applica se la trattazione dei ricorsi subisce ingiustificati ritardi.

3. Il Comitato, quando esamina le comunicazioni previste nel presente Protocollo, tiene le sue sedute a porte chiuse.

4. Il Comitato trasmette le proprie considerazioni allo Stato parte interessato e all'individuo.

Art. 6

Il Comitato include nel rapporto annuale previsto all'articolo 45 del Patto un riassunto delle attività svolte in base al presente Protocollo.

Art. 7

In attesa che siano raggiunti gli obiettivi della risoluzione 1514 (XV) approvata dall'Assemblea generale delle Nazioni Unite il 14 dicembre 1960, riguardante la Dichiarazione sulla concessione dell'indipendenza ai paesi e ai popoli coloniali, le disposizioni del presente Protocollo non limitano in alcun modo il diritto di petizione accordato a questi popoli dallo Statuto delle Nazioni Unite e da altre convenzioni e strumenti internazionali conclusi sotto gli auspici delle Nazioni Unite e di loro istituti specializzati.

Art. 8

1. Il presente Protocollo è aperto alla firma di ogni Stato che abbia firmato il Patto.

2. Il presente Protocollo è sottoposto alla ratifica di ogni Stato che abbia ratificato il Patto o vi abbia aderito. Gli strumenti di ratifica saranno depositati presso il Segretario generale delle Nazioni Unite.

3. Il presente Protocollo sarà aperto all'adesione di ogni Stato che abbia ratificato il Patto o vi abbia aderito.

4. L'adesione sarà effettuata mediante deposito di uno strumento di adesione presso il Segretario generale delle Nazioni Unite.

5. Il Segretario generale delle Nazioni Unite informerà tutti gli Stati che abbiano firmato il presente Protocollo o che vi abbiano aderito del deposito di ogni strumento di ratifica o di adesione.

Art. 9

1. Purché il Patto sia entrato in vigore, il presente Protocollo entrerà in vigore tre mesi dopo la data del deposito presso il Segretario generale delle Nazioni Unite del decimo strumento di ratifica o di adesione.

2. Per ognuno degli Stati che ratificheranno il presente Protocollo o vi aderiranno successivamente al deposito del decimo strumento di ratifica o di adesione, il Protocollo medesimo entrerà in vigore tre mesi dopo la data del deposito, da parte di tale Stato, del suo strumento di ratifica o di adesione.

Art. 10

Le disposizioni del presente protocollo si applicano, senza limitazione o eccezione alcuna, a tutte le unità costitutive degli Stati federali.

Art. 11

1. Ogni Stato parte del presente Protocollo potrà proporre un emendamento e depositarne il testo presso il Segretario generale delle Nazioni Unite. Il Segretario generale comunicherà quindi le proposte di emendamento agli Stati parti del presente Protocollo, chiedendo loro di informarlo se sono favorevoli alla convocazione di una conferenza degli Stati parti per esaminare delle proposte e metterle ai voti. Se almeno un terzo degli Stati parti si dichiarerà a favore di tale convocazione, il Segretario generale convocherà la conferenza sotto gli auspici delle Nazioni Unite. Ogni emendamento approvato dalla maggioranza degli Stati presenti e votanti alla conferenza sarà sottoposto all'approvazione dell'Assemblea generale delle Nazioni Unite.

2. Gli emendamenti entreranno in vigore dopo esser stati approvati dall'Assemblea generale delle Nazioni Unite e accettati, in conformità alle rispettive procedure costituzionali, da una maggioranza di due terzi degli Stati parti del presente Protocollo.

3. Quando gli emendamenti entreranno in vigore, essi saranno vincolanti per gli Stati parti che li abbiano accettati, mentre gli altri Stati parti rimarranno vincolati dalle disposizioni del presente Protocollo e da qualsiasi emendamento anteriore che essi abbiano accettato.

Art. 12

1. Ogni Stato parte potrà denunciare, in qualsiasi momento, il presente protocollo mediante notifica scritta indirizzata al Segretario generale delle Nazioni Unite. La denuncia avrà effetto tre mesi dopo la data in cui il Segretario generale ne avrà ricevuto la notifica.

2. La denuncia non impedirà che le disposizioni del presente Protocollo continuino ad applicarsi a qualsiasi comunicazione presentata in base all'articolo 2 prima della data in cui la denuncia stessa avrà effetto.

Art. 13

Indipendentemente dalle notifiche effettuate ai sensi del paragrafo 5 dell'articolo 8 del presente Protocollo, il Segretario generale delle Nazioni Unite informerà tutti gli Stati indicati al paragrafo 1 dell'articolo 48 del Patto:

a) delle firme apposte al presente Protocollo e degli strumenti di ratifica e di adesione depositati in conformità all'articolo 8;

b) della data in cui il presente Protocollo entrerà in vigore in conformità all'articolo 9 e della data in cui entreranno in vigore gli emendamenti ai sensi dell'articolo 11;

c) delle denuncie fatte in conformità all'art. 12.

Art. 14

1. Il presente Protocollo, di cui i testi cinese, francese, inglese, russo e spagnolo, fanno egualmente fede, sarà depositato negli archivi delle Nazioni Unite.

2. Il Segretario generale delle Nazioni Unite trasmetterà copie autentiche del presente Protocollo a tutti gli Stati indicati all'articolo 48 del Patto.

87 ratifiche: Algeria, Angola, Argentina, Armenia, Australia, Austria, Barbados, Belgio, Benin, Bielorussia, Bolivia, Bosnia-Erzegovina, Bulgaria, Cameroun, Canada, Chad, Cile, Cipro, Colombia, Congo, Corea, Costa Rica, Croazia, Danimarca, El Salvador, Equador, Estonia, Filippine, Finlandia, Francia, Gambia, Georgia, Germania, Guinea Equatoriale, Guinea, Guyana, Irlanda, Islanda, Italia, Jamaica, Kirgyzistan, Lettonia, Libia, Lituania, Lussemburgo, Macedonia, Madagascar, Malta, Mauritius, Mongolia, Namibia, Nepal, Nicaragua, Niger, Norvegia, Nuova Zelanda, Paesi Bassi, Panama, Paraguay, Peru, Polonia, Portogallo, Repubblica Ceca, Repubblica Centrafricana, Repubblica Dominicana, Romania, Russia, Saint Vincent & Grenadines, San Marino, Sao Tomé & Principe, Senegal, Seychelles, Slovacchia, Slovenia, Somalia, Spagna, Suriname, Svezia, Togo, Trinidad & Tobago, Ucraina, Uganda, Ungheria, Uruguay, Venezuela, Zaire, Zambia.

Ratificato e reso esecutivo dall'Italia con legge 25 ottobre 1977, n. 881.

4.
Dal Secondo protocollo opzionale al Patto internazionale sui diritti civili e politici mirante alla abolizione della pena di morte

Adottato dall'Assemblea generale delle NU il 15 dicembre 1989, Ris. 44/128 (*UN. Doc. A/44/824*).
Entrato in vigore l'11 luglio 1991.

The States parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights adopted on 10 December 1948 and article 6 of the International Covenant on Civil and Political Rights adopted on 16 December 1966,

Noting that article 6 of the "nternational Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Art. 1

1. No one within the jurisdiction of a State party to the present Optional Protocol shall be executed.

2. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Art. 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Art. 3

The States parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Art. 4

With respect to the States parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State party claims that another State party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession.

Art. 5

With respect to the States parties to the (First) Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accesslon.

Art. 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.

2. Without prejudice to the possibility of a reservation under article 2 of

the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

(omissis)

29 ratifiche: Australia, Austria, Croazia, Danimarca, Equador, Finlandia, Germania, Irlanda, Islanda, Italia, Lussemburgo, Macedonia, Malta, Mozambico, Namibia, Norvegia, Nuova Zelanda, Paesi Bassi, Panama, Portogallo, Romania, Seychelles, Slovenia, Somalia, Spagna, Svezia, Svizzera, Ungheria, Uruguay, Venezuela.

Ratificato e reso esecutivo in Italia con legge 9 dicembre 1994, n. 734.

5.
Dalla Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali [Convenzione europea dei diritti umani]

Adottata dal Consiglio d'Europa il 4 novembre 1950 (*European Treaty Series* n. 5)
Entrata in vigore il 3 settembre 1953

(omissis)

Art. 2

Il diritto alla vita di ogni persona è protetto dalla legge. Nessuno può essere intenzionalmente privato della vita, salvo che in esecuzione di una sentenza capitale pronunciata da un tribunale, nei casi in cui il delitto sia punito dalla legge con tale pena.

2. La morte non è considerata inflitta in violazione di questo articolo quando derivasse da un ricorso alla forza reso assolutamente necessario:

a) per assicurare la difesa di qualsiasi persona dalla violenza illegale;

b) per effettuare un arresto legale o per impedire l'evasione di una persona legalmente detenuta;

c) per reprimere, in modo conforme alla legge, una sommossa o una insurrezione.

(omissis)

Titolo II

Art. 19

Al fine di assicurare il rispetto degli impegni risultanti dalla presente Convenzione per le Alte Parti Contraenti, è istituita:

a) una Commissione europea dei Diritti dell'Uomo, denominata «la Commissione»;

b) una Corte europea dei Diritti dell'Uomo, denominata «la Corte».

Titolo III

Art. 20

La Commissione si compone di un numero di membri uguale a quello delle Alte Parti Contraenti. La Commissione non può comprendere più di un cittadino dello stesso Stato.

Art. 21

1. I membri della Commissione sono eletti dal Comitato dei Ministri a maggioranza assoluta dei voti, su una lista di nomi presentata dall' Ufficio di presidenza dell'Assemblea Consultiva; ogni gruppo di rappresentanti delle Alte Parti Contraenti alla Assemblea Consultiva presenta tre candidati, almeno due dei quali devono essere della stessa nazionalità.

2. Nella misura in cui è applicabile, la stessa procedura è seguita per completare la Commissione nel caso in cui altri Stati diventino in seguito Parti della presente Convenzione e per provvedere ai seggi divenuti vacanti.

Art. 22

1. I membri della Commissione sono eleni per un periodo di sei anni. Essi sono rieleggibili. Tuttavia, per quanto concerne i membri designati alla prima elezione, le funzioni di sene membri scadranno al termine di tre anni. 2. I membri le cui funzioni devono scadere al termine del periodo iniziale di tre anni sono estrani a sorte dal Segretario Generale del Consiglio d'Europa immediatamente dopo l'espletamento della prima elezione.

3. Al fine di assicurare nella misura del possibile il rinnovo di una metà della Commissione ogni tre anni, il Comitato dei Ministri può, prima di procedere ad ogni ulteriore elezione, decidere che uno o più mandati dei membri da eleggere abbiano una durata diversa da quella di sei anni, senza tuttavia che questa durata possa eccedere nove anni o essere inferiore a tre anni.

4. Nel caso in cui sia necessario conferire più mandati, e il Comitato dei Ministri applichi il paragrafo precedente, la ripartizione dei mandati avviene mediante estrazione a sorte effettuata dal Segretario Generale del Consiglio d'Europa immediatamente dopo l'elezione.

5. Il membro della Commissione eletto in sostituzione di un membro che abbia completato il periodo delle sue funzioni, rimane in carica fino alla scadenza del periodo di mandato del suo predecessore.

6. I membri della Commissione restano in funzione fino a che i loro posti non siano stati ricoperti. Anche successivamente essi continuano a trattare gli affari di cui sono stati già investiti, sino alla loro conclusione.

Art. 23

I membri della Commissione partecipano ad essa a titolo personale.

Art. 24

Ogni Parte Contraente può deferire alla Commissione, attraverso il Segretario Generale del Consiglio d'Europa, ogni inosservanza delle disposizioni della presente Convenzione che essa ritenga possa essere imputata ad un'altra Parte Contraente.

Art. 25

1. La Commissione può essere investita di una domanda indirizzata al Segretario Generale del Consiglio d'Europa da ogni persona fisica, ogni organizzazione non governativa o gruppo di privati, che pretenda d'essere vittima di una violazione da parte di una delle Alte Parti Contraenti dei diritti riconosciuti nella presente Convenzione, nel caso in cui l'Alta Parte Contraente chiamata in causa abbia dichiarato di riconoscere la competenza della Commissione in tale materia. Le Alte Parti Contraenti che hanno sottoscritto una tale dichiarazione s'impegnano a non ostacolare in alcun modo l'effettivo esercizio di tale diritto.

2. Queste dichiarazioni possono essere fatte anche per un periodo determinato.

3. Esse sono depositate presso il Segretario Generale del Consiglio d'Europa che ne trasmette copia alle Alte Parti Contraenti e ne assicura la pubblicazione.

4. La Commissione non eserciterà la competenza che le è attribuita dal presente articolo che quando almeno sei Alte Parti Contraenti si troveranno vincolate dalla dichiarazione prevista nei paragrafi precedenti.

Art. 26

La Commissione non può essere adita che dopo l'esaurimento delle vie di ricorso interne, qual è inteso secondo i principi di diritto internazionale generalmente riconosciuti ed entro un periodo di sei mesi a partire dalla data della decisione interna definitiva.

Art. 27

1. La Commissione non ritiene alcuna domanda avanzata sulla base dell'articolo 25 quando: a) è anonima; b) è essenzialmente la stessa di una precedentemente esaminata dalla Commissione o già sottoposta ad un'altra istanza internazionale d'inchiesta o di regolamentazione e non contiene fatti nuovi.

2. La Commissione dichiara irricevibile ogni domanda avanzata sulla base dell'articolo 25 quando essa giudichi tale domanda incompatibile con le disposizioni della presente Convenzione, manifestamente infondata o abusiva.

3. La Commissione respinge ogni domanda che consideri irricevibile in base all'articolo 26.

Art. 28

Nel caso in cui la Commissione accolga la domanda:

a) al fine di stabilire i fatti, procede ad un esame della domanda in contrad-

dittorio con i rappresentanti delle Parti e, se del caso, a un'inchiesta per la quale tutti gli Stati interessati forniranno tutte le facilitazioni necessarie, dopo uno scambio di vedute con la Commissione;

b) essa si mette a disposizione degli interessati per pervenire ad una regolamentazione amichevole della controversia sulla base del rispetto dei diritti dell'uomo quali li riconosce la presente Convenzione.

Art. 29

Dopo aver accolto un ricorso presentato in applicazione dell'articolo 25, la Commissione può tuttavia decidere all'unanimità di respingerlo se, nel corso dell'esame, essa constati l'esistenza di uno dei motivi di irricevibilità previsti all'articolo 27. In tal caso, la decisione è comunicata alle parti.

Art. 30

Se consegue una regolamentazione amichevole conforme all'articolo 28, la Commissione stende un rapporto che è trasmesso agli Stati interessati, al Comitato dei Ministri ed al Segretario Generale del Consiglio d'Europa, per la pubblicazione. Tale rapporto si limita ad una breve esposizione dei fatti e della soluzione adottata.

Art. 31

1. Se non si è potuta avere una soluzione, la Commissione redige un rapporto nel quale constata i fatti e formula un parere sulla questione se i fatti constatati comportino, da parte dello Stato interessato, una violazione delle obbligazioni che gli incombono in base alla Convenzione. Le opinioni di tutti i membri della Commissione su tale punto possono essere espresse nel rapporto.

2. Il rapporto è trasmesso al Comitato dei Ministri; esso è anche comunicato agli Stati interessati che non hanno però la facoltà di pubblicarlo.

3. Trasmettendo il rapporto al Comitato dei Ministri, la Commissione può formulare le proposte che essa giudica opportune.

Art. 32

1. Se, entro un periodo di tre mesi a partire dalla trasmissione del rapporto della Commissione al Comitato dei Ministri, la controversia non è deferita alla Corte in applicazione dell'articolo 48 della presente Convenzione, il Comitato dei Ministri prende, con una deliberazione a maggioranza dei due terzi dei rappresentanti aventi diritto di partecipare al Comitato, una decisione sulla questione se si sia avuta o meno una violazione della Convenzione.

2. In caso affermativo, il Comitato dei Ministri fissa un periodo entro il quale l'Alta Parte Contraente interessata deve prendere le misure che la decisione del Comitato dei Ministri comporta.

3. Se l'Alta Parte Contraente interessata non ha adottato misure soddisfacenti nel periodo stabilito, il Comitato dei Ministri dà alla sua decisione iniziale,

con la maggioranza sopra prevista al paragrafo 1, il seguito che essa comporta e pubblica il rapporto.

4. Le Alte Parti Contraenti si impegnano a considerare come obbligatoria nei loro confronti ogni decisione che il Comitato dei Ministri può prendere in applicazione dei precedenti paragrafi.

Art. 33

La Commissione si riunisce a porte chiuse.

Art. 34

Fatte salve le disposizioni dell'articolo 24, le decisioni della Commissione sono prese a maggioranza dei membri presenti e votanti.

Art. 35

La Commissione si riunisce quando le circostanze lo esigono. Essa è convocata dai Segretario Generale del Consiglio d'Europa.

Art. 36

La Commissione stabilisce il proprio regolamento interno.

Art. 37

Il segretariato della Commissione è assicurato dal Segretario Generale del Consiglio d'Europa.

Art. 38

La Corte Europea dei Diritti dell'Uomo si compone di un numero di giudici eguale a quello dei membri del Consiglio d'Europa. Essa non può comprendere più di un cittadino di uno stesso Stato.

Art. 39

1. I membri della Corte sono eletti dall'Assemblea Consultiva a maggioranza dei voti espressi su una lista di persone presentata dai Membri del Consiglio d'Europa; ciascuno dei membri deve presentare tre candidati, due almeno dei quali suoi cittadini.

2. Nella misura in cui è applicabile, la stessa procedura è seguita per completare la Corte in caso di ammissione di nuovi membri ai Consiglio d'Europa e per coprire i seggi rimasti vacanti.

3. I candidati dovranno godere della più alta considerazione morale e possedere i requisiti richiesti per l'esercizio delle più alte funzioni giudiziarie o essere dei giureconsulti di riconosciuta competenza.

Art. 40

1. I membri della Corte sono eletti per un periodo di nove anni. Essi sono rieleggibili. Tuttavia, per ciò che concerne i membri designati con la prima ele-

zione, le funzioni di quattro di essi scadranno al termine dei tre anni, quelle di quattro altri membri scadranno dopo sei anni.

2. I membri le cui funzioni devono scadere al termine dei periodi iniziali di tre e sei anni sono estrani a sorte dal Segretario Generale del Consiglio d'Europa immediatamente dopo l'espletamento della prima elezione.

3. Al fine di assicurare nella misura del possibile il rinnovo di un terzo della Corte ogni tre anni, l'Assemblea Consultiva può, prima di procedere ad ogni ulteriore elezione, decidere che uno o più mandati dei membri da eleggere abbiano una durata diversa da quella di nove anni, senza tuttavia che questa possa eccedere dodici anni o essere inferiore a sei anni.

4. Nel caso in cui sia necessario conferire più mandati e l'Assemblea Consultiva applichi il paragrafo precedente, la ripartizione dei mandati avviene mediante estrazione a sorte effettuata dal Segretario Generale del Consiglio d'Europa immediatamente dopo l'elezione.

5. Il membro della Corte eletto in sostituzione d'un membro che non abbia completato il periodo delle sue funzioni, rimane in carica fino alla scadenza del periodo di mandato del suo predecessore.

6. I membri della Corte restano in funzione fino a che i loro posti non siano stati ricoperti Anche successivamente essi continuano a trattare gli affari di cui sono già investiti, fino alla loro conclusione.

Art. 41

La Corte elegge il suo Presidente e il suo vicepresidente per un periodo di tre anni. Essi sono rieleggibili.

Art. 42

I membri della Corte ricevono un'indennità per ogni giorno di funzioni, il cui ammontare sarà determinato dal Consiglio dei Ministri.

Art. 43

Per la trattazione di ogni affare che le viene sottoposto, la Corte si costituisce in una Camera composta di sette giudici. Ne fanno pane d'ufficio il giudice della nazionalità di ogni Stato interessato o, se un tale giudice manchi, una persona scelta dallo Stato per parteciparvi come giudice; i nomi degli altri giudici sono estratti a sorte dal Presidente, prima dell'inizio dell'esame dell'affare.

Art. 44

Solo le Alte Parti Contraenti e la Commissione hanno qualità per presentarsi dinanzi alla Corte.

Art. 45

La competenza della Corte si estende a tutti gli affari concernenti l'interpretazione e l'applicazione della presente Convenzione che le Alte Parti Con-

traenti o la Commissione sottopongano ad essa nelle condizioni previste dall'articolo 48.

Art. 46

1. Ogni Alta Parte Contraente può, in qualsiasi momento, dichiarare di riconoscere come obbligatoria di pieno diritto e senza convenzione speciale, la giurisdizione della Corte su tutti gli affari concernenti l'interpretazione e l'applicazione della presente Convenzione.

2. Le dichiarazioni di cui sopra possono essere fatte incondizionatamente oppure sono condizione di reciprocità da parte di più Alte Parti Contraenti o di determinate Alte Parti Contraenti o per un periodo determinato.

3. Tali dichiarazioni saranno depositate presso il Segretario Generale del Consiglio d'Europa che ne trasmetterà copia alle Alte Parti Contraenti.

Art. 47

La Corte non può essere investita di un affare che dopo la constatazione, fatta dalla Commissione, del fallimento della composizione amichevole ed entro il periodo di tre mesi previsto dall'articolo 32.

Art. 48

A condizione che l'Alta Parte Contraente interessata, se non è che una, o le Alte Parti Contraenti interessate, se sono più d'una, siano soggette alla giurisdizione obbligatoria della Corte, o, in mancanza di ciò, con il consenso dell'Alta Parte Contraente interessata, se non è che una, o delle Alte Parti Contraenti interessate, se sono più d'una, la Corte può essere adita: a) dalla Commissione; b) da un'Alta Parte Contraente di cui la parte lesa è cittadino; c) da un'Alta Parte Contraente che ha fatto ricorso alla Commissione; d) da un'Alta Parte Contraente chiamata in causa.

Art. 49

In caso di contestazione sulla questione della propria competenza, la Corte decide.

Art. 50

Se la decisione della Corte dichiara che una decisione presa o una misura ordinata da un'autorità giudiziaria o da ogni altra autorità di una Parte Contraente si trova interamente o parzialmente in contrasto con obbligazioni che derivano dalla presente Convenzione, e se il diritto interno di detta Parte non permette che in modo incompleto di eliminare le conseguenze di tale decisione o di tale misura, la decisione della Corte accorda, quando è il caso, un'equa soddisfazione alla parte lesa.

Art. 51

1. La decisione della Corte espone i motivi sui quali è fondata.

2. Se la decisione non esprime in tutto o in parte l'opinione unanime dei giudici, ogni giudice avrà il diritto di unirvi la sua opinione individuale.

Art. 52

La decisione della Corte è definitiva.

Art. 53

Le Alte Parti Contraenti si impegnano a conformarsi alle decisioni della Corte nelle controversie nelle quali sono parti.

Art. 54

La decisione della Corte è trasmessa al Comitato dei Ministri che ne sorveglia l'esecuzione.

Art. 55

La Corte stabilisce il suo regolamento e fissa la sua procedura.

Art. 56

1. La prima elezione dei membri della Corte avrà luogo dopo che le dichiarazioni delle Alte Parti Contraenti previste dall'articolo 46 avranno raggiunto il numero di otto.

2. La Corte non potrà essere adita prima di tale elezione.

Titolo V

Art. 57

Ogni Alta Parte Contraente, su domanda del Segretario Generale del Consiglio d'Europa, fornirà le spiegazioni richieste sul modo in cui il proprio diritto interno assicura la effettiva applicazione di tutte le disposizioni della presente Convenzione.

Art. 58

Le spese della Commissione e della Corte sono a carico del Consiglio d'Europa.

Art. 59

I membri della Commissione e della Corte godono, durante l'esercizio delle loro funzioni, dei privilegi e delle immunità previsti dall'articolo 40 dello Statuto del Consiglio d'Europa e negli Accordi conclusi in virtù di tale articolo.

Art. 60

Nessuna delle disposizioni della presente Convenzione può essere interpretata come recante pregiudizio o limitazione ai Diritti dell'Uomo e alle Libertà

fondamentali che possano essere riconosciuti in base a leggi di qualunque Stato Contraente o da altri accordi internazionali di cui tale Stato sia parte.

Art. 61

Nessuna disposizione della presente Convenzione porta pregiudizio ai poteri conferiti al Comitato dei Ministri dallo Statuto del Consiglio d'Europa.

Art. 62

Le Alte Parti Contraenti rinunziano reciprocamente, salvo compromesso speciale, a prevalersi dei trattati, convenzioni o dichiarazioni fra di loro esistenti, in vista di sottomettere, per via di ricorso, una controversia nata dall'interpretazione o dall'applicazione della presente Convenzione ad una procedura di regolamento diversa da quelle previste da detta Convenzione.

Art. 63

1. Ogni Stato, al momento della ratifica o in ogni altro momento successivo, può dichiarare, mediante notifica indirizzata al Segretario Generale del Consiglio d'Europa, che la presente Convenzione troverà applicazione in tutti i territori o in determinati territori di cui assicura le relazioni internazionali.

2. La Convenzione si applicherà al territorio o ai territori designati nella notifica a partire dal trentesimo giorno successivo alla data in cui il Segretario Generale del Consiglio d'Europa avrà ricevuto tale notifica.

3. In detti territori le disposizioni della presente Convenzione saranno applicate tenendo conto delle necessità locali.

4. Ogni Stato che ha fatto una dichiarazione conforme al primo paragrafo di questo articolo, può, in ogni momento, dichiarare relativamente a uno o a più territori previsti in tale dichiarazione che accetta la competenza della Commissione a conoscere dei ricorsi di persone fisiche, di organizzazioni non governative, o di gruppi privati in conformità all'articolo 25 della presente Convenzione.

Art. 64

1. Ogni Stato, al momento della firma della presente Convenzione o del deposito del suo strumento di ratifica, può formulare una riserva riguardo ad una particolare disposizione della Convenzione, nella misura in cui una legge in quel momento in vigore sul suo territorio non sia conforme a tale disposizione. Le riserve di carattere generale non sono autorizzate in base al presente articolo.

2. Ogni riserva emessa in conformità al presente articolo comporta un breve esposto della legge in questione.

Art. 65

1. Un'Alta Parte Contraente non può denunciare la presente Convenzione che dopo un periodo di cinque anni a partire dalla data d'entrata in vigore della

Convenzione nei suoi confronti e dando un preavviso di sei mesi mediante una notifica indirizzata al Segretario Generale del Consiglio d'Europa, che ne informa le Alte Parti Contraenti.

2. Tale denuncia non può avere l'effetto di svincolare l'Alta Parte Contraente interessata dalle obbligazioni contenute nella presente Convenzione in ciò che concerne qualunque fatto che, potendo costituire una violazione di queste obbligazioni, fosse stato compiuto da essa anteriormente alla data in cui la denuncia produce il suo effetto.

3. Con la medesima riserva cessa d'essere Parte della presente Convenzione ogni Parte Contraente che cessi d'essere membro del Consiglio d'Europa.

4. La Convenzione può essere denunciata in conformità alle disposizioni dei precedenti paragrafi relativamente a ogni territorio nel quale sia stata dichiarata applicabile in base all'articolo 63.

Art. 66

1. La presente Convenzione è aperta alla firma dei Membri del Consiglio d'Europa. Essa sarà ratificata. Le ratifiche saranno depositate presso il Segretario Generale del Consiglio d'Europa.

2. La presente Convenzione entrerà in vigore dopo il deposito di dieci strumenti di ratifica.

3. Per ogni firmatario che la ratificherà successivamente, la Convenzione entrerà in vigore dal momento del deposito dello strumento di ratifica.

4. Il Segretario Generale del Consiglio d'Europa notificherà a tutti i membri del Consiglio d'Europa l'entrata in vigore della Convenzione, i nomi delle Alte Parti Contraenti che l'avranno ratificata, come anche il deposito di ogni altro strumento di ratifica che si sia avuto successivamente.

31 ratifiche: Austria, Belgio, Bulgaria, Cipro, Danimarca, Finlandia, Francia, Germania, Grecia, Irlanda, Islanda, Italia, Liechtenstein, Lituania, Lussemburgo, Malta, Norvegia, Paesi Bassi, Polonia, Portogallo, Regno Unito, Repubblica Ceca, Romania, San Marino, Slovacchia, Slovenia, Spagna, Svezia, Svizzera, Turchia, Ungheria.

Ratificata e resa esecutiva dall'Italia con legge 4 agosto 1955, n. 848

5.1
Dichiarazione *ex* art. 25 della Convenzione europea (Petizioni individuali alla Commissione)

(La disposizione è entrata in vigore il 5 luglio 1955)

La Dichiarazione è stata fatta da tutti gli Stati che hanno ratificato la Convenzione

6.
Dal Protocollo addizionale n. 6 alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (abolizione della pena di morte)

Adottato dal Consiglio d'Europa il 28 aprile 1983.
Entrato in vigore il 1° marzo 1985.

Gli Stati membri del Consiglio d'Europa, firmatari del presente Protocollo alla Convenzione per la salvaguardia dei Diritti dell'Uomo e delle Libertà fondamentali, firmata a Roma il 4 novembre 1950 (qui di seguito denominata «la Convenzione»),

Considerando che gli sviluppi intervenuti in parecchi Stati membri del Consiglio d'Europa indicano una tendenza generale a favore dell'abolizione della pena di morte,

Hanno convenuto quanto segue:

Art. 1

La pena di morte è abolita. Nessuno può essere condannato a tale pena né giustiziato.

Art. 2

Uno Stato può prevedere nella sua legislazione la pena di morte per atti commessi in tempo di guerra o in caso di pericolo imminente di guerra; tale pena sarà applicata solo nei casi previsti da siffatta legislazione e conformemente alle sue disposizioni. Lo Stato comunicherà al Segretario Generale del Consiglio d'Europa le disposizioni rilevanti della legislazione in questione.

Art. 3

Non è autorizzata aicuna deroga alle disposizioni del presente Protocollo ai sensi dell'articolo 15 della Convenzione.

Art. 4

Non è ammessa alcuna riserva alle disposizioni del presente Protocollo ai sensi dell'articolo 64 della Convenzione.

(omissis)

24 Ratifiche Andorra, Austria, Danimarca, Finlandia, Francia, Germania, Irlanda, Islanda, Italia, Liechtenstein, Lussemburgo, Malta, Norvegia, Paesi Bassi, Portogallo, Repubblica Ceca, Romania, San Marino, Slovacchia, Slovenia, Spagna, Svezia, Svizzera, Ungheria

Ratificato e reso esecutivo dall'Italia con legge 2 gennaio 1989, n. 8

7.
Protocollo n. 11 alla Convenzione europea (ristrutturazione del procedimento di esame dei ricorsi)

Adottato dal Consiglio d'Europa il 25 marzo 1992 (*European Treaty Series* n. 155)
Non ancora in vigore.

Testo delle sezioni II e III della Convenzione europea una volta entrato in vigore il Protocollo n. 11.

SECTION II- EUROPEAN COURT OF HUMAN RIGHTS

Anticle 19. - *Establishment of the Court*

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Art. 20. - *Number of judges*

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Art. 21. - *Criteria for office*

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2. The judges shall sit on the Court in their individual capacity.

3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a fulltime office; all questions arising from the application of this paragraph shall be decided by the Court.

Art. 22. - *Election of judges*

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Art. 23. - *Terms of office*

1. The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.

2. The judges whose terms of office 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 their election.

3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.

4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.

5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.

6. The terms of office of judges shall expire when they reach the age of 70.

7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Art. 24. - *Dismissal*

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Art. 25. - *Registry and legal secretaries*

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

Art. 26. - *Plenary Court*

The plenary Court shall

a. elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;

b. set up Chambers, constituted for a fixed period of time;

c. elect the Presidents of the Chambers of the Court; they may be re-elected;

d. adopt the rules of the Court; and

e. elect the Registrar and one or more Deputy Registrars.

Art. 27. - *Committees, Chambers and Grand Chamber*

1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is

none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.

3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Art. 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned .

Art. 28. - *Declarations of inadmissibility by committees*

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an individual application submitted under Art. 34 where such a decision can be taken without further examination. The decision shall be final.

Art. 29. - *Decisions by Chambers on admissibility and merits*

1. If no decision is taken under Art. 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Art. 34.

2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Art. 33.

3. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Art. 30. - *Relinquishment of jurisdiction to the Grand Chamber*

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Art. 31. - *Powers of the Grand Chamber*

The Grand Chamber shall

a. determine applications submitted either under Art. 33 or Art. 34 when a Chamber has relinquished jurisdiction under Art. 30 or when the case has been referred to it under Art. 43; and

b. consider requests for advisory opinions submitted under Art. 47.

Art. 32. - *Jurisdiction of the Court*

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Art. 33. - *Inter-State cases*

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Art. 34. - *Individual applications*

The Court may receive applications 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 the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Art. 35. - *Admissibility criteria*

1. The Court 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.

2. The Court shall not deal with any individual application submitted under Art. 34 that

a. is anonymous; or

b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Art. 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Art. 36. - *Third-party intervention*

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Art. 37. - *Striking out applications*

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

a. the applicant does not intend to pursue his application; or

b. the matter has been resolved; or

c. for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Art. 38. - *Examination of the case and friendly settlement proceedings*

1. If the Court declares the application admissible, it shall

a. pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

b. 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 the Convention and the protocols thereto.

2. Proceedings conducted under paragraph 1.b shall be confidential.

Art. 39. - *Finding of a friendly settlement*

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Art. 40. - *Public hearings and access to documents*

1. Hearings shall be public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Art. 41. - *Just satisfaction*

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Art. 42. - *Judgments of Chambers*

Judgments of Chambers shall become final in accordance with the provisions of Art. 44, paragraph 2.

Art. 43. - *Referral to the Grand Chamber*

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of

the Convention or the protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Art. 44. - *Final judgments*

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final

a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or

b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

c. when the panel of the Grand Chamber rejects the request to refer under Art. 43.

3. The final judgment shall be published.

Art. 45. - *Reasons for judgments and decisions*

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2. If a 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.

Art. 46. - *Binding force and execution of judgments*

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

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its exccution.

Art. 47. - *Advisory opinions*

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Art. 48. - *Advisory jurisdiction of the Court*

The Court shall decide whether a request for an advisory opinion sub-

mitted by the Committee of Ministers is within its competence as defined in Art. 47.

Art. 49. - *Reasons for advisory opinions*

1. Reasons shall be given for advisory opinions of the Court.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Art. 50. - *Expenditure on the Court*

The expenditure on the Court shall be borne by the Council of Europe.

Art. 51. - *Privileges and immunities of judges*

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Art. 40 of the Statute of the Council of Europe and in the agreements made thereunder.

SECTION III - MISCELLANEOUS PROVISIONS

Art. 52. - *Enquiries by the Secretary General*

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 the Convention.

Art. 53. - *Safeguard for existing human rights*

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.

Art. 54. - *Powers of the Committee of Ministers*

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

Art. 55. - *Exclusion of other means of dispute settlement*

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.

Art. 56. - *Territorial application*

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, subject to paragraph 4 of this Art.icle, 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 Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Art. 34 of the Convention.

Art. 57. - *Reservations*

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 exctent 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.

Art. 58. - *Denunciation*

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 months' 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 Art. 56.

Art. 59. - *Signature and ratification*

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.

17 ratifiche: Austria, Bulgaria, Cipro, Germania, Islanda, Liechtenstein, Lituania, Malta, Norvegia, Regno Unito, Repubblica Ceca, Romania, Slovacchia, Slovenia, Svezia, Svizzera, Ungheria.

8.
Dalla Dichiarazione americana dei diritti e dei doveri dell'uomo

Adottata dalla Conferenza degli Stati Americani, Bogotà, 2 maggio 1948 (*OAS Doc. OEA/Ser. L/V/II.65, Doc.6, pp.19-25*).

Art. 1

Every human being has the right to life, liberty and security of his person.

9.
Dalla Convenzione americana sui diritti umani

Adottata dall'Organizzazione degli Stati americani il 22 novembre 1969 (*OAS Treaty Series, n. 36*).
Entrata in vigore il 18 luglio 1978.

(omissis)

Art. 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.

(omissis)

Part II - Means of protection

Chapter VI - Competent organs

Art. 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

Art. 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.

Art. 35

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

Art. 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.

Art. 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.

Art. 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 .

Art. 39

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

Art. 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

Art. 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.

Art. 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.

Art. 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

Art. 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.

Art. 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 Commis-

sion 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.

Art. 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 Art. 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 1a and 1b 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.

Art. 47

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

a. Any of the requirements indicated in Art. 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

Art. 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.

Art. 49

If a friendly settlement has been reached in accordance with paragraph 1f of Art. 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.

Art. 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 1e of Art. 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.

Art. 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

Art. 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.

Art. 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.

Art. 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.

Art. 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 Art. 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.

Art. 56

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

Art. 57

The Commission shall appear in all cases before the Court.

Art. 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.

Art. 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[s] 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.

Art. 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

Art. 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.

Art. 62

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

Art. 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.

Art. 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.

Art. 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

Art. 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.

Art. 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.

Art. 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.

Art. 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

Art. 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.

Art. 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.

Art. 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.

Art. 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

Art. 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.

Art. 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.

Art. 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.

Art. 77

1. In accordance with Art. 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.

Art. 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.

(omissis)

25 ratifiche: Argentina, Barbados, Bolivia, Brasile, Cile, Colombia, Costa Rica, Dominica, El Salvador, Equador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Messico, Nicaragua, Panama, Paraguay, Perù, Suriname, Trinidad & Tobago, Uruguay, Venezuela.

Dichiarazione ex art. 62 della Covenzione (giurisdizione della Corte Interamericana): *16 dichiarazioni:* Argentina, Bolivia, Cile, Colombia, Costa Rica, Equador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Perù, Suriname, Trinidad & Tobago, Uruguay, Venezuela.

10.
Dalla Convenzione internazionale sull'eliminazione di ogni forma di discriminazione razziale

Adottata dall'Assemblea generale delle NU il 21 dicembre 1965 (*UN Treaty Series, vol. 660, p. 195*).
Entrata in vigore il 4 gennaio 1969.

Seconda Parte

(omissis)

Art. 8

1. Viene istituito un Comitato per l'eliminazione della discriminazione razziale (qui appresso indicato «il Comitato») composto di diciotto esperti noti per il loro alto senso morale e la loro imparzialità, che vengono eletti dagli Stati contraenti fra i loro cittadini e che vi partecipano a titolo personale, tenuto conto di una equa ripartizione geografica e della rappresentanza delle varie forme di civiltà nonché dei più importanti sistemi giuridici.

2. I membri del Comitato sono eletti a scrutinio segreto dalla lista di candidati designati dagli Stati contraenti. Ogni Stato contraente può designare un candidato scelto tra i propri cittadini.

3. La prima elezione avrà luogo sei mesi dopo la data di entrata in vigore della presente Convenzione. Almeno tre mesi prima della data di ogni elezione, il Segretario generale dell'Organizzazione delle Nazioni Unite invia agli Stati

contraenti una lettera per invitarli a presentare le proprie candidature entro un termine di due mesi. Il Segretario generale compila una lista per ordine alfabetico di tutti i candidati così designati, con l'indicazione degli Stati contraenti che li hanno designati, e la comunica agli Stati contraenti.

4. I membri del Comitato sono eletti nel corso di una riunione degli Stati contraenti, indetta dal Segretario generale presso la Sede dell'Organizzazione delle Nazioni Unite. In tali riunioni, ove il quorum è formato dai due terzi degli Stati contraenti, vengono eletti membri del Comitato i candidati che ottengono il maggior numero di voti e la maggioranza assoluta dei voti dei rappresentanti degli Stati contraenti presenti e votanti.

5. a) I membri del Comitato restano in carica quattro anni. Tuttavia. il mandato di nove fra i membri eletti nel corso della prima elezione avrà termine dopo due anni subito dopo la prima elezione, il nome di questi nove membri sarà sorteggiato dal Presidente del Comitato. b) Per colmare le casuali vacanze, lo Stato contraente il cui esperto abbia cessato di esercitare le proprie funzioni di membro del Comitato nominerà un altro esperto tra i propri concittadini, con riserva dell'approvazione del Comitato.

6. Le spese dei membri del Comitato, per il periodo in cui assolvono le loro funzioni in seno al Comitato sono a carico degli Stati contraenti.

Art. 9.

1. Gli Stati contraenti s'impegnano a presentare al Segretario generale dell'Organizzazione delle Nazioni Unite, perché venga esaminato dal Comitato, un rapporto sulle misure di carattere legislativo, giudiziario, amministrativo o di altro genere che sono state prese per dare esecuzione alle disposizioni della presente Convenzione: a) entro il termine di un anno a partire dall'entrata in vigore della Convenzione, per ogni Stato interessato per ciò che lo riguarda e b) in seguito, ogni due anni ed inoltre ogni volta che il Comitato ne farà richiesta. Il Comitato può chiedere agli Stati contraenti delle informazioni supplementari.

2. Il Comitato sottopone ogni anno all'Assemblea generale dell'Organizzazione delle Nazioni Unite, per il tramite del Segretario generale, un rapporto sulle propria attività e può dare suggerimenti e fare raccomandazioni di carattere generale in base ai rapporti ed alle informazioni che ha ricevuto dagli Stati contraenti. Tali suggerimenti e raccomandazioni di carattere generale unitamente, ove occorra. alle osservazioni degli Stati contraenti, vengono portate a conoscenza dell'Assemblea generale.

Art. 10

1. Il Comitato stabilisce il proprio regolamento interno.

2. Il Comitato nomina il proprio ufficio per un periodo di due anni.

3. Il servizio di segreteria del Comitato è fornito dal Segretario generale delle Nazioni Unite.

4. Il Comitato tiene normalmente le proprie riunioni presso la Sede dell'Organizzazione delle Nazioni Unite.

Art. 11

1. Qualora uno Stato contraente ritenga che un altro Stato contraente non applichi le disposizioni della presente Convenzione, può richiamare l'attenzione del Comitato sulla questione. Il Comitato trasmette allora la comunicazione allo Stato contraente interessato. Entro un termine di tre mesi. Lo Stato che ha ricevuto la comunicazione manda al Comitato le giustificazioni o delle dichiarazioni scritte che chiariscano il problema ed indichino, ove occorra. le eventuali misure adottate da detto Stato per porre rimedio alla situazione.

2. Ove, entro un termine di sei mesi a partire dalla data del ricevimento della comunicazione iniziale da parte dello Stato destinatario, il problema non sia stato risolto con soddisfazione di entrambi gli Stati, sia mediante negoziati bilaterali che mediante qualsiasi altra procedura di cui potranno disporre, sia l'uno che l'altro avranno il diritto di sottoporre nuovamente il problema al Comitato inviandone notifica al Comitato stesso nonché all'altro Stato interessato.

3. Il Comitato non può occuparsi di una questione che gli è sottoposta in conformità del paragrafo 2 del presente articolo che dopo essersi accertato che tutti i ricorsi interni a disposizione sono stati utilizzati o esperiti conformemente ai principi generalmente riconosciuti del diritto internazionale. Tale regola non viene applicata quando le procedure di ricorso superano dei termini ragionevoli.

4. Il Comitato può rivolgersi direttamente agli Stati contraenti per chiedere loro tutte le informazioni supplementari relative alla questione che gli viene sottoposta.

5. Allorché, in applicazione del presente articolo, il Comitato esamina una questione, gli Stati contraenti interessati hanno diritto di nominare un rappresentante che parteciperà, senza diritto di voto, ai lavori dei Comitati per tutta la durata delle discussioni.

Art. 12

1. a) Dopo che il Comitato ha ricevuto e vagliato tutte le informazioni che sono ritenute necessarie, il Presidente nomina una commissione conciliativa ad hoc (qui appresso indicata «la Commissione») composta di cinque persone che possono essere o meno membri del Comitato. I membri sono nominati con il pieno ed unanime consenso delle Parti in controversia e la Commissione pone i propri buoni uffici a disposizione degli Stati interessati, allo scopo di giungere ad una amichevole soluzione del problema, basata sul rispetto della presente Convenzione.

b) Se gli Stati parti nella controversia non giungono ad un'intesa sulla totale o parziale composizione della Commissione entro un termine di tre mesi, i membri della Commissione che non hanno ottenuto il consenso degli Stati parti nella controversia vengono scelti a scrutinio segreto tra i membri del Comitato ed eletti a maggioranza di due terzi dei membri del Comitato stesso.

2. I membri della Commissione partecipano a titolo personale. Essi non devono essere cittadini di uno degli Stati parti nella controversia né cittadini di uno Stato che non sia parte della presente Convenzione.

3. La Commissione elegge il proprio Presidente ed adotta il proprio regolamento interno.

4, La Commissione tiene normalmente le proprie riunioni presso la Sede dell'Organizzazione delle Nazioni Unite o in ogni altro luogo conveniente che verrà stabilito dalla Commissione stessa.

5. Il Segretariato di cui al paragrafo 3 dell'articolo 10 della presente Convenzione propone egualmente i propri servigi a disposizione della Commissione ogni volta che una controversia tra gli Stati parti comporti la costituzione della Commissione stessa. Tutte le spese sostenute dai membri della Commissione vengono ripartite in ugual misura tra gli Stati parti nella controversia, sulla base di valutazioni eseguite dal Segretario generale dell'Organizzazione delle Nazioni Unite.

6. Il Segretario generale sarà autorizzato, ove occorra, a rimborsare ai membri della Commissione le spese sostenute, prima ancora che il rimborso sia stato effettuato dagli Stati parti nella controversia in conformità del paragrafo 6 del presente articolo. Le informazioni ricevute ed esaminate dal Comitato sono poste a disposizione della Commissione, e la Commissione può chiedere agli Stati interessati di fornirle ogni informazione supplementare al riguardo.

Art. 13

1. Dopo aver studiato il problema in tutti i suoi aspetti, la Commissione prepara e sottopone al Presidente del Comitato un rapporto con le sue conclusioni su tutte le questioni di fatto relative alla vertenza tra le parti e con le raccomandazioni che ritiene più opportune per giungere ad una amichevole risoluzione della controversia.

2. Il Presidente del Comitato trasmette il rapporto della Commissione a ciascuno degli Stati parti nella controversia. I detti Stati fanno conoscere al Presidente del Comitato, entro un termine di tre mesi, se accettano o meno le raccomandazioni contenute nel rapporto della Commissione.

3. Allo spirare del termine di cui al paragrafo 2 del presente articolo, il Presidente del Comitato comunica il rapporto della Commissione nonché le dichiarazioni degli Stati parti interessati agli altri Stati parti della Convenzione.

Art. 14

1. Ogni Stato contraente può dichiarare in ogni momento di riconoscere al Comitato la competenza di ricevere ed esaminare comunicazioni provenienti da persone o da gruppi di persone sotto la propria giurisdizione che si lamentino di essere vittime di una violazione, da parte del detto Stato contraente, di uno qualunque dei diritti sanciti dalla presente Convenzione. Il Comitato non può ricevere le comunicazioni relative ad uno Stato contraente che non abbia fatto una tale dichiarazione.

2. Ogni Stato contraente che faccia una dichiarazione in base al paragrafo 1 del presente articolo può istituire o designare, nel quadro del proprio ordinamento giuridico nazionale, un organismo che avrà la competenza di esaminare le petizioni provenienti da individui o da gruppi di individui sotto la giurisdizione di detto Stato che si lamentino di essere vittime di una violazione di uno qualunque dei diritti enunciati nella presente Convenzione che abbiano esaurito gli altri ricorsi locali a loro disposizione .

3. La dichiarazione fatta in conformità del paragrafo 1 del presente articolo, nonché il nome di ogni organismo istituito o designato ai sensi del paragrafo 2 del presente articolo sono depositati dallo Stato contraente interessato presso il Segretario generale dell'Organizzazione delle Nazioni Unite che ne invia copia agli altri Stati contraenti. La dichiarazione può essere ritirata in qualsiasi momento mediante notifica indirizzata al Segretario generale ma tale ritiro non influisce in alcun modo sulle comunicazioni delle quali il Comitato è già investito.

4. L'Organismo istituito o designato conformemente al paragrafo 2 del presente articolo dovrà tenere un registro delle petizioni e copie del registro certificate conformi saranno depositate ogni anno presso il Segretario generale per il tramite dei competenti canali, restando inteso che il contenuto delle dette copie non verrà reso pubblico.

5. Chi abbia rivolto una petizione e non riesca ad avere soddisfazione dall'Organismo istituito o designato conformemente al paragrafo 2 del presente articolo, ha il diritto di inviare in merito, entro sei mesi, una comunicazione al Comitato.

6. a) Il Comitato sottopone a titolo confidenziale qualsiasi comunicazione che gli venga inviata all'attenzione dello Stato contraente che si suppone abbia violato una qualsiasi delle disposizione della Convenzione, ma l'identità dell'individuo o dei gruppi di individui interessati non dovrà essere rivelata senza il consenso esplicito di detto individuo o del detto gruppo di individui. Il Comitato non riceve comunicazioni anonime. b) Entro i tre mesi seguenti lo Stato in questione comunica per iscritto al Comitato le proprie giustificazioni o dichiarazioni a chiarimento del problema con indicate, ove occorra, le misure eventualmente adottate per porre rimedio alle situazione.

7. a) Il Comitato esamina le comunicazioni tenendo conto di tutte le informazioni che ha ricevuto dallo Stato contraente interessato e dall'autore della petizione. Il Comitato esaminerà le comunicazioni provenienti dall'autore di una petizione soltanto dopo essersi accertato che quest'ultimo ha già esaurito tutti i ricorsi interni disponibili. Tuttavia, tale norma non viene applicata allorquando le procedure di ricorso superano un termine ragionevole. b) Il Comitato invia i propri suggerimenti e le eventuali raccomandazioni allo Stato contraente interessato ed all'autore della petizione.

8. Il Comitato include nel proprio rapporto annuale un riassunto di tali comunicazioni e, ove occorra, un riassunto delle giustificazioni e delle dichiarazioni degli Stati contraenti interessati unitamente ai propri suggerimenti e alle proprie raccomandazioni.

9. Il Comitato ha la competenza di adempiere le funzioni di cui al presente

articolo soltanto se almeno dieci Stati parti della Convenzione sono legati da dichiarazioni fatte in conformità del paragrafo 1 del presente articolo.

Art. 15

1. In attesa che vengano realizzati gli obiettivi della Dichiarazione sulla concessione dell'indipendenza ai Paesi ed ai popoli coloniali, contenuta nella Risoluzione 1514 (XV) dell'Assemblea generale dell'Organizzazione delle Nazioni Unite. in data 14 dicembre 1960, le disposizioni della presente Convenzione non limitano per nulla il diritto di petizione accordato a tali popoli da altri strumenti internazionali o dall'Organizzazione delle Nazioni Unite o dalle sue istituzioni specializzate.

2. a) Il Comitato istituito conformemente al paragrafo 1 dell'articolo 8 della presente Convenzione riceve copia delle petizioni provenienti dagli Organi dell'Organizzazione delle Nazioni Unite che si occupano di questioni che abbiano rapporto diretto con i principi e gli obiettivi della presente Convenzione, ed esprime il proprio parere e fa le proprie raccomandazioni circa le petizioni ricevute al momento dell'esame delle petizioni provenienti dagli abitanti di territori sotto amministrazione fiduciaria o non autonomi e di ogni altro territorio al quale si applichi la Risoluzione 1511(XV) dell'Assemblea generale, e che riguardino questioni previste dalla presente Convenzione, delle quali i summenzionati organi sono investiti. b) Il Comitato riceve dagli organi competenti dell'Organizzazione delle Nazioni Unite, copie dei rapporti concernenti le misure di ordine legislativo, giudiziario amministrativo o altro riguardanti direttamente i principi e gli obiettivi della presente Convenzione che le potenze amministranti hanno applicato nei territori citati al comma a) del presente paragrafo ed esprime dei pareri e fa delle raccomandazioni a tali organi.

3. Il Comitato include nei suoi rapporti all'Assemblea generale un riassunto delle petizioni e dei rapporti ricevuti dagli organi dell'Organizzazione delle Nazioni Unite nonché i pareri e le raccomandazioni che gli sono stati richiesti dai summenzionati rapporti e petizioni.

4. Il Comitato prega il Segretario generale dell'Organizzazione delle Nazioni Unite di fornirgli tutte le informazioni riguardanti gli obiettivi della presente Convenzione e di cui esso disponga e relative ai territori citati al comma a) del paragrafo 2 del presente articolo.

Art. 16

Le disposizioni della presente Convenzione concernenti le misure da adottare per definire una controversia o per tacitare una lagnanza vengono applicate indipendentemente dalle altre procedure di definizione di vertenze o tacitazioni di lagnanze in materia di discriminazioni previste dagli strumenti costitutivi dell'Organizzazione delle Nazioni Unite e delle sue istituzioni specializzate o nelle Convenzioni adottate da tali organizzazioni, né vietano agli Stati contraenti di ricorrere ad altre procedure per la definizione di una controversia, in base agli accordi internazionali generali o particolari che li legano.

(omissis)

146 ratifiche: Afghanistan, Albania, Algeria, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Bahrein, Bangladesh, Barbados, Belgio, Bielorussia, Bolivia, Bosnia-Erzegovina, Botswana, Brasile, Bulgaria, Burkina Faso, Burundi, Cambogia, Cameroun, Canada, Capo Verde, Chad, Cile, Cina, Cipro, Colombia, Congo, Corea, Costa d'Avorio, Costa Rica, Croazia, Cuba, Danimarca, Egitto, El Salvador, Emirati Arabi Uniti, Equador, Estonia, Etiopia, Fiji, Filippine, Finlandia, Francia, Gabon, Gambia, Germania, Ghana, Giappone, Giordania, Grecia, Guatemala, Guinea, Guyana, Haiti, India, Iran, Iraq, Islanda, Isole Salomone, Israele, Italia, Jamaica, Jugoslavia, Kuwait, Laos, Lesotho, Lettonia, Libano, Liberia, Libia, Lussemburgo, Macedonia, Madagascar, Maldive, Mali, Malta, Marocco, Mauritania, Mauritius, Messico, Moldavia, Monaco, Mongolia, Mozambico, Namibia, Nepal, Nicaragua, Niger, Nigeria, Norvegia, Nuova Zelanda, Paesi Bassi, Pakistan, Panama, Papua Nuova Guinea, Perù, Polonia, Portogallo, Qatar, Regno Unito, Repubblica Ceca, Repubblica Centrafricana, Repubblica Dominicana, Romania, Russia, Rwanda, Saint Vincent & Grenadines, Saint Lucia, Santa Sede, Sao Tomé & Principe, Senegal, Seychelles, Sierra Leone, Siria, Slovacchia, Slovenia, Somalia, Spagna, Sri Lanka, Stati Uniti d'America, Sudan, Suriname, Svezia, Svizzera, Swaziland, Tajikistan, Tanzania, Togo, Tonga, Trinidad & Tobago, Tunisia, Turkmenistan, Ucraina, Uganda, Ungheria, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Zaire, Zambia, Zimbabwe.

Ratificata e resa esecutiva dall'Italia con legge 13 ottobre 1975, n. 645

10.1
Dichiarazione *ex* art. 14 della Convenzione contro la discriminazione razziale (Compentenza del Comitato a ricevere comunicazioni individuali)

La disposizione è entrata in vigore il 3 dicembre 1982.

21 dichiarazioni: Algeria, Australia, Bulgaria, Cile, Cipro, Costa Rica, Danimarca, Equador, Finlandia, Francia, Islanda, Italia, Norvegia, Paesi Bassi, Perù, Russia, Senegal, Svezia, Ucraina, Ungheria, Ungheria, Uruguay

11.
Dalla Convenzione contro la tortura ed altre pene o trattamenti crudeli, inumani o degradanti

Adottata dall'Assemblea generale delle N.U. il 10 dicembre 1984 *(UN Doc. A/39/51, p. 197 (1984)).*
Entrata in vigore il 27 giugno 1987.

(omissis)

Seconda Parte

Art. 17

1. È istituito un Comitato contro la tortura (qui di seguito denominato «il Comitato»), che ha le funzioni definite qui di seguito. Il Comitato è composto da dieci esperti di alta moralità che possiedono una competenza riconosciuta nel settore dei diritti dell'uomo, i quali siedono nel Comitato a titolo personale. Gli esperti sono eletti dagli Stati parti, tenendo conto di un'equa ripartizione geografica o dell'interesse rappresentato dalla partecipazione ai lavori del Comitato di alcune persone aventi una esperienza giuridica.

2. I membri del Comitato sono eletti a scrutinio segreto in base ad una lista di candidati designati dagli Stati parte. Ogni Stato parte può designare un candidato prescelto tra i suoi cittadini. Gli Stati parti tengono conto dell'interesse a designare dei candidati che siano anche membri del Comitato dei diritti dell'uomo costituito in virtù del Patto internazionale relativo ai diritti civili e politici, e che siano disposti a far parte del Comitato contro la tortura.

3. I membri del Comitato sono eletti nel corso di riunioni biennali degli Stati parti convocate dal Segretario generale dell'Organizzazione delle Nazioni Unite. In dette riunioni nelle quali il quorum è costituito dai due terzi degli Stati parte, sono eletti membri del Comitato i candidati che ottengono il maggior numero di preferenze e la maggioranza assoluta dei voti dei rappresentanti degli Stati parti presenti e votanti.

4. La prima elezione avrà luogo al più tardi sei mesi dopo la data di entrata in vigore della presente Convenzione. Quattro mesi almeno prima della data di ogni elezione, il Segretario generale dell'Organizzazione delle Nazioni Unite, invia una lettera agli Stati parti per invitarli a presentare le loro candidature entro tre mesi. Il Segretario generale compila una lista per ordine alfabetico di tutti i candidati così designati, con l'indicazione degli Stati parti che li hanno designati, e la trasmette agli Stati parti.

5. I membri del Comitato sono eletti per quattro anni. Sono rieleggibili se sono presentati nuovamente. Tuttavia, il mandato di cinque dei membri eletti durante la prima elezione, terminerà dopo due anni; immediatamente dopo la prima elezione, il nome di questi cinque membri sarà estratto a sorte dal presidente della riunione menzionata al paragrafo 3 del presente articolo.

6. Se un membro del Comitato decede, si dimette dalle sue funzioni o non è più in grado, per qualche altra ragione, di svolgere le sue funzioni al Comitato, lo Stato parte che lo ha designato, nomina, tra i suoi cittadini, un altro esperto che farà parte del Comitato per il rimanente periodo del mandato, con riserva dell'approvazione della maggioranza degli Stati parti. Tale approvazione è considerata come acquisita, a meno che la metà, o più della metà degli Stati parti non esprima un'opinione sfavorevole entro sei settimane a partire dal momento in cui sono stati informati dal Segretario generale dell'Organizzazione delle Nazioni Unite della nomina proposta.

7. Gli Stati parti prendono a loro carico le spese dei membri del Comitato per il periodo nel quale questi ultimi svolgono le loro funzioni nel Comitato.

Art. 18

1. Il Comitato elegge il suo ufficio per un periodo di due anni. I membri dell'ufficio sono rieleggibili.

2. Il Comitato stabilisce egli stesso il suo regolamento interno; questo deve, tuttavia, contenere in particolare le seguenti disposizioni: a) il quorum è di sei membri; b) le decisioni del Comitato sono prese con la maggioranza dei membri presenti.

3. Il Segretario generale dell'Organizzazione delle Nazioni Unite pone a disposizione del Comitato il personale e le strutture materiali che gli sono necessarie per svolgere efficacemente le funzioni affidategli in virtù della presente Convenzione.

4. Il Segretario generale dell'Organizzazione delle Nazioni Unite convoca i membri del Comitato per la prima riunione. Dopo la sua prima riunione, il Comitato si riunisce ad ogni occasione prevista dal suo regolamento interno.

5. Gli Stati parti prendono a loro carico le spese derivanti dallo svolgimento delle riunioni degli Stati parti e del Comitato, ivi compreso il rimborso all'Organizzazione delle Nazioni Unite di ogni spesa, quali le spese di personale e di costi per le strutture materiali, che l'Organizzazione avrà sostenuto in conformità al paragrafo 3 del presente articolo.

Art. 19

1. Gli Stati parti presentano al Comitato, tramite il Segretario generale dell'Organizzazione delle Nazioni Unite, delle relazioni sulle misure da loro adottate al fine di dare esecuzione ai loro impegni in virtù della presente Convenzione, entro un periodo di un anno, a partire dall'entrata in vigore della Convenzione per lo Stato parte interessato. Gli Stati parti presentano successivamente, ogni quattro anni, delle relazioni complementari, in merito ad ogni nuova misura adottata, ed ogni altra relazione richiesta dal Comitato.

2. Il Segretario generale dell'Organizzazione delle Nazioni Unite trasmette le relazioni a tutti gli Stati parti.

3. Ogni relazione è esaminata dal Comitato, che può esprimere i commenti di ordine generale che riterrà adeguati in merito alla relazione e trasmette detti commenti allo Stato parte interessato. Tale Stato parte può comunicare, in risposta al Comitato, ogni osservazione che ritenga utile.

4. Il Comitato può, a sua discrezione, decidere di riprodurre nella relazione annuale che esso predispone, in conformità all'articolo 24, ogni commento da esso formulato ai sensi del paragrafo 3 del presente articolo, corredato dalle osservazioni ricevute in merito dallo Stato parte interessato. Qualora lo Stato parte interessato lo richieda, il Comitato può anche riprodurre la relazione presentata ai sensi del paragrafo 1 del presente articolo.

Art. 20

1. Qualora il Comitato riceva informazioni credibili che a suo parere contengano indicazioni fondate sul fatto che la tortura è praticata sistematicamente nel territorio di uno Stato parte, esso invita detto Stato a collaborare nell'esame delle informazioni e, a tal fine, a comunicargli le sue osservazioni in merito.

2. Tenendo conto di ogni osservazione eventualmente presentata dallo Stato parte interessato e di ogni altra informazione pertinente di cui dispone, il Comitato può, se ritiene che ciò sia giustificato, incaricare uno o più dei suoi membri di procedere ad un'inchiesta riservata e di presentargli urgentemente un rapporto.

3. Qualora un'inchiesta sia effettuata ai sensi del paragrafo 2 del presente articolo, il Comitato ricerca la cooperazione dello Stato parte interessato. In accordo con detto Stato parte l'inchiesta può comportare una visita sul suo territorio.

4. Dopo aver esaminato le conclusioni del membro o dei membri che gli sono sottoposte in conformità al paragrafo 2 del presente articolo, il Comitato trasmette dette conclusioni allo Stato parte interessato, con tutti i commenti o suggerimenti che riterrà appropriati, tenendo conto della situazione.

5. Tutti i lavori del Comitato menzionati nei paragrafi da 1 a 4 del presente articolo sono riservati e, durante tutte le fasi dei lavori, ci si sforza di ottenere la cooperazione dello Stato parte. Una volta terminati i lavori relativi ad un'inchiesta svolta ai sensi del paragrafo 2, il Comitato può, dopo consultazioni con lo Stato parte interessato, decidere di far figurare un conciso resoconto dei risultati dei lavori nella relazione annuale che predispone in conformità all'articolo 24.

Art. 21

1. Ogni Stato parte alla presente Convenzione può, in virtù del presente articolo, dichiarare in qualsiasi momento che riconosce la competenza del Comitato a ricevere ed esaminare delle comunicazioni nelle quali uno Stato parte sostiene che un altro Stato parte non adempie ai suoi obblighi ai sensi della presente Convenzione. Tali comunicazioni possono essere ricevute ed esaminate, ai sensi del presente articolo, solo se provengono da un Stato parte che abbia effettuato una dichiarazione nella quale riconosce, per quanto lo riguarda, la competenza del Comitato. Il Comitato non riceve nessuna comunicazione relativa ad uno Stato parte che non abbia effettuato tale dichiarazione. La procedura seguente verrà applicata per le comunicazioni ricevute in virtù del presente articolo:

a) qualora uno Stato parte alla presente Convenzione ritenga che un altro Stato ugualmente parte alla Convenzione, non ne applica le disposizioni, può attirare, mediante comunicazione scritta, l'attenzione di detto Stato sulla questione. Entro un termine di tre mesi dalla data di ricevimento della comunicazione, lo Stato destinatario farà avere allo Stato che ha inviato la comunicazione, delle spiegazioni o ogni altra dichiarazione scritta che chiarisca la questione, le

quali dovranno comprendere in ogni modo possibile ed utile, delle indicazioni relative alle sue regole di procedura ed ai mezzi di ricorso gia utilizzati, o pendenti in istanza, o ancora aperti;

b) qualora, entro un termine di sei mesi, a partire dalla data di ricevimento della comunicazione originale da parte dello Stato destinatario, la questione non sia regolata con soddisfazione dei due Stati parti interessati, entrambi avranno diritto di sottoporla al Comitato, inviando una notifica al Comitato, come pure all'altro Stato interessato;

c) il Comitato può giudicare di una questione che gli è sottoposta, ai sensi del presente articolo, solo dopo essersi assicurato che tutte le vie di ricorso interne disponibili sono state utilizzate o esaurite, in conformità ai principi di diritto internazionale generalmente riconosciuti. Questa regola non si applica nei casi in cui le procedure di ricorso eccedano termini ragionevoli, né nei casi in cui è poco probabile che le procedure di ricorso diano soddisfazione alla persona che è vittima della violazione della presente Convenzione;

d) il Comitato, quando esamina le comunicazioni previste al presente articolo, tiene le sue sedute a pone chiuse;

e) fatte salve le disposizioni del comma c), il Comitato pone i suoi buoni uffici a disposizione degli Stati parti interessati, al fine di pervenire ad una soluzione amichevole della questione, basata sul rispetto degli obblighi previsti dalla presente Convenzione. A tal fine, il Comitato può, se lo ritiene opportuno, costituire una commissione di conciliazione ad hoc;

f) per qualsiasi questione che gli sia sottoposta in virtù del presente articolo, il Comitato può domandare agli Stati parti interessati, di cui al comma b), di fornirgli ogni informazione pertinente;

g) gli Stati parti interessati, di cui al comma b), hanno il diritto di farsi rappresentare al momento dell'esame della questione da parte del Comitato, e di presentare osservazioni verbalmente o per iscritto, o sotto l'una e l'altra forma;

h) il Comitato deve presentare un rapporto in un termine di dodici mesi a partire dal giorno in cui ha ricevuto la notifica di cui al comma b): i) qualora si sia potuto trovare una soluzione in base alle disposizioni del comma e), il Comitato si limita nel suo rapporto ad una breve esposizione dei fatti e della soluzione adottata; ii) qualora una soluzione non abbia potuto essere trovata in base alle disposizioni del comma e), il Comitato si limita, nel suo rapporto, ad una breve esposizione dei fatti; il testo delle osservazioni scritte ed il processo-verbale delle osservazioni orali presentate dagli Stati parti interessati sono uniti al rapporto Per ogni questione, il relativo rapporto sarà comunicato agli Stati parti interessati.

2. Le disposizioni del presente articolo entreranno in vigore quando cinque Stati parti alla presente Convenzione avranno fatto la dichiarazione prevista al paragrafo 1 del presente articolo. Detta dichiarazione è depositata dallo Stato parte presso il Segretario generale dell'Organizzazione delle Nazioni Unite, che ne trasmette copia agli Stati parti. Una dichiarazione può essere ritirata in qualsiasi momento mediante una notifica indirizzata al Segretario generale. Tale

ritiro non pregiudica l'esame di ogni questione che sia oggetto di una comunicazione gia trasmessa in virtù del presente articolo; nessuna altra comunicazione di uno Stato parte sarà ricevuta, in virtù del presente articolo, dopo che il Segretario generale abbia ricevuto notifica del ritiro della dichiarazione, a meno che lo Stato parte interessato non abbia effettuato una nuova dichiarazione.

Art. 22

1. Ogni Stato parte alla presente Convenzione può, ai sensi del presente articolo, dichiarare in ogni momento che riconosce la competenza del Comitato a ricevere ed esaminare comunicazioni presentate da o per conto di privati che dipendono dalla sua giurisdizione, che pretendono di essere vittime di una violazione, da uno Stato parte, delle disposizioni della Convenzione. Il Comitato non riceve alcuna comunicazione relativa ad uno Stato parte che non abbia fatto tale dichiarazione.

2. Il Comitato dichiara irricevibile qualsiasi comunicazione presentata in virtù del presente articolo che sia anonima o che esso consideri come abuso del diritto a sottoporre tali comunicazioni, o incompatibile con le disposizioni della presente Convenzione.

3. Fatte salve le disposizioni del paragrafo 2, il Comitato trasmette ogni comunicazione che gli venga sottoposta in virtù del presente articolo, all'attenzione dello Stato parte alla presente Convenzione che ha effettuato una dichiarazione in virtù del paragrafo 1 ed ha presumibilmente violato una qualsiasi delle disposizioni della Convenzione. Nei sei mesi successivi, detto Stato sottopone per iscritto al Comitato delle spiegazioni o dichiarazioni che chiariscono la questione e indicano, se del caso, i provvedimenti eventualmente adottati per porre rimedio alla situazione.

4. Il Comitato esamina le comunicazioni ricevute in virtù del presente articolo tenendo conto di tutte le informazioni che gli sono sottoposte da o per conto di un singolo individuo e dallo Stato parte interessato.

5. Il Comitato non esaminerà nessuna comunicazione di una persona individuale, in conformità al presente articolo, senza aver accertato che: a) la stessa questione non sia stata e non sia attualmente all'esame davanti ad un'altra istanza internazionale d'inchiesta o di regolamento; b) il singolo individuo abbia esaurito tutti i ricorsi interni disponibili; questa regola non si applica se le procedure di ricorso eccedono scadenze ragionevoli o se è poco probabile che darebbero soddisfazione alla persona che è vittima di una violazione della presente Convenzione.

6. Il Comitato, quando esamina le comunicazioni di cui al presente articolo, tiene le sue sedute a porte chiuse.

7. Il Comitato rende partecipe delle sue constatazioni lo Stato parte interessato ed il singolo individuo.

8. Le disposizioni del presente articolo entreranno in vigore allorché cinque Stati parti alla presente Convenzione avranno effettuato la dichiarazione prevista al paragrafo 1 del presente articolo. Detta dichiarazione è depositata dallo Stato

parte presso il Segretario generale dell'Organizzazione delle Nazioni Unite, che ne trasmette copia agli altri Stati parti. Una dichiarazione può essere ritirata in qualsiasi momento mediante una notifica indirizzata al Segretario generale. Tale ritiro non pregiudica l'esame di ogni questione che formi l'oggetto di una comunicazione gia trasmessa in virtù del presente articolo; nessun'altra comunicazione sottoposta da o per conto di un privato sarà ricevuta in virtù del presente articolo dopo che il Segretario generale abbia ricevuto notifica del ritiro della dichiarazione, a meno che lo Stato parte interessato non abbia effettuato una nuova dichiarazione.

Art. 23

I membri del Comitato ed i membri delle commissioni di conciliazione ad hoc che potrebbero essere nominati in base al comma e) del paragrafo 1 dell'articolo 21 hanno diritto alle facilitazioni, privilegi ed immunità riconosciuti agli esperti in missione per l'Organizzazione delle Nazioni Unite, così come sono enunciati nelle pertinenti sezioni della Convenzione sui privilegi e le immunità delle Nazioni Unite.

Art. 24

Il Comitato presenta agli Stati parti ed all'Assemblea generale dell'Organizzazione delle Nazioni Unite un rapporto annuale sulle attività che avrà intrapreso in applicazione della presente Convenzione.

Terza Parte

Art. 25

1. La presente Convenzione è aperta alla firma di tutti gli Stati.

2. La presente Convenzione è soggetta a ratifica. Gli strumenti di ratifica saranno depositati presso il Segretario generale dell'Organizzazione delle Nazioni Unite.

Art. 26

Tutti gli Stati possono aderire alla presente Convenzione. L'adesione avrà luogo mediante il deposito di uno strumento di adesione presso il Segretario generale dell'Organizzazione delle Nazioni Unite.

Art. 27

1. La presente Convenzione entrerà in vigore il trentesimo giorno successivo alla data del deposito presso il Segretario generale dell'Organizzazione delle Nazioni Unite del ventesimo strumento di ratifica o di adesione.

2. Per ogni Stato che ratificherà la presente Convenzione o vi aderirà dopo il deposito del ventesimo strumento di ratifica o di adesione, la Convenzione entrerà in vigore il trentesimo giorno dopo la data del deposito, da parte di questo Stato, del suo strumento di ratifica o adesione.

Art. 28

1. Ogni Stato potrà, al momento in cui firmerà o ratificherà la presente Convenzione, o vi aderirà, dichiarare che non riconosce la competenza conferita al Comitato in conformità all'articolo 20.

2. Ogni Stato parte che abbia formulato una riserva in conformità alle disposizioni del paragrafo 1 del presente articolo potrà, in qualsiasi momento, rimuovere detta riserva mediante una notificazione indirizzata al Segretario generale dell'Organizzazione delle Nazioni Unite.

Art. 29

1. Ogni Stato parte alla presente Convenzione potrà proporre un emendamento e depositare la sua proposta presso il Segretario generale dell'Organizzazione delle Nazioni Unite. Il Segretario generale comunicherà la proposta di emendamento agli Stati parte domandando loro di fargli conoscere se sono favorevoli alla organizzazione di una Conferenza di Stati parti in vista dell'esame della proposta e della sua messa ai voti. Se, nei quattro mesi successivi alla data di tale comunicazione, almeno il terzo degli Stati parti si pronuncia a favore dello svolgimento di detta Conferenza, il Segretario generale organizzerà la conferenza sotto gli auspici dell'Organizzazione delle Nazioni Unite. Ogni emendamento adottato dalla maggioranza degli Stati parti presenti e votanti alla Conferenza sarà sottoposto dal Segretario generale all'accettazione di tutti gli Stati parti.

2. Un emendamento adottato in base alle disposizioni del paragrafo 1 del presente articolo entrerà in vigore allorché i due terzi degli Stati parti alla presente Convenzione avranno informato il Segretario generale dell'Organizzazione delle Nazioni Unite che lo hanno accettato, in conformità alla procedura prevista dalle loro rispettive costituzioni.

3. Quando gli emendamenti entreranno in vigore, essi saranno cogenti per gli Stati parti che li abbiano accettati, gli altri Stati parti rimanendo vincolati dalle disposizioni della presente Convenzione e da ogni emendamento anteriore che avranno accettato.

Art. 30

1. Ogni controversia tra due o più Stati parti relativa all'interpretazione o all'applicazione della presente Convenzione che non possa essere composta per via di negoziato, verrà sottoposta ad arbitrato su domanda di uno di essi. Qualora, nei sei mesi successivi alla data della domanda di arbitrato, le parti non riescano ad accordarsi in merito all'organizzazione dell'arbitrato, una qualunque di esse può sottoporre la controversia alla Corte internazionale di giustizia, depositando una richiesta in conformità allo statuto della Corte.

2. Ogni Stato potrà, al momento in cui firmerà o ratificherà la presente Convenzione o vi aderirà, dichiarare che non si considera vincolato dalle disposizioni del paragrafo 1 del presente articolo. Gli altri Stati parti non saranno vin-

colati dalle suddette disposizioni verso qualsiasi Stato parte che abbia formulato una tale riserva.

3. Ogni Stato parte che abbia formulato una riserva in conformità alle disposizioni del paragrafo 2 del presente articolo potrà in qualsiasi momento rimuovere detta riserva mediante una notifica presentata al Segretario generale dell'Organizzazione delle Nazioni Unite.

Art. 31

1. Uno Stato parte potrà denunciare la presente Convenzione mediante notifica scritta indirizzata al Segretario generale dell'Organizzazione delle Nazioni Unite. La denuncia avrà effetto un anno dopo la data in cui la notifica sarà stata ricevuta dal Segretario generale.

2. Tale denuncia non libererà lo Stato parte dagli obblighi che gli spettano in virtù della presente Convenzione per quanto riguarda qualsiasi atto od ogni omissione commessa prima della data in cui la denuncia avrà effetto; essa non ostacolerà in alcun modo il proseguimento dell'esame di ogni questione di cui il Comitato sia gia stato investito alla data in cui la denuncia ha iniziato ad avere effetto.

3. Dopo la data in cui la denuncia da parte di uno Stato parte inizia ad avere effetto, il Comitato non intraprende l'esame di nessuna nuova questione concernente detto Stato.

Art. 32

Il Segretario generale dell'Organizzazione delle Nazioni Unite notificherà a tutti gli Stati Membri dell'Organizzazione delle Nazioni Unite, ed a tutti gli Stati che avranno firmato la presente Convenzione o vi avranno aderito, a) le firme, le ratifiche e le adesioni ricevute in applicazione degli articoli 25 e 26; b) la data di entrata in vigore della Convenzione in applicazione dell'articolo 27 e la data di entrata in vigore di ogni emendamento in applicazione dell'articolo 29; c) le denuncie ricevute in applicazione dell'articolo 31.

Art. 33

1. La presente Convenzione, i cui testi inglese, arabo, cinese, spagnolo, francese e russo fanno ugualmente fede, sarà depositata presso il Segretario generale dell'Organizzazione delle Nazioni Unite.

2. Il Segretario generale dell'Organizzazione delle Nazioni Unite provvederà a trasmettere a tutti gli Stati una copia autenticata conforme della presente Convenzione.

96 ratifiche: Afghanistan, Albania, Algeria, Antigua & Barbuda, Argentina, Armenia, Australia, Austria, Belize, Benin, Bielorussia, Bosnia-Erzegovina, Brasile, Bulgaria, Burundi, Cambogia, Cameroun, Canada, Capo Verde, Chad, Cile, Cina, Cipro, Colombia, Costa d'Avorio, Costa Rica, Croazia, Cuba, Danimarca, Egitto, Equador, Estonia, Etiopia, Filippine, Finlandia, Francia, Georgia, Ger-

mania, Giordania, Grecia, Guatemala, Guinea, Guyana, Israele, Italia, Jugoslavia, Kuwait, Lettonia, Libia, Liechtenstein, Lituania, Lussemburgo, Macedonia, Malawi, Malta, Marocco, Mauritius, Messico, Moldavia, Monaco, Namibia, Nepal, Norvegia, Nuova Zelanda, Paesi Bassi, Panama, Paraguay, Perù, Polonia, Portogallo, Regno Unito, Repubblica Ceca, Romania, Russia, Senegal, Seychelles, Slovacchia, Slovenia, Somalia, Spagna, Sri Lanka, Stati Uniti d'America, Sudan, Svezia, Svizzera, Tajikistan, Togo, Tunisia, Turchia, Ucraina, Uganda, Ungheria, Uruguay, Uzbekistan, Venezuela, Yemen.

Ratificata e resa esecutiva dall'Italia con legge 3 novembre 1988, n. 498.

11.1
Dichiarazione art. 22
(Competenza del Comitato contro la tortura ad esaminare comunicazioni individuali)

36 dichiarazioni: Algeria, Argentina, Australia, Austria, Bulgaria, Canada, Cipro, Croazia, Danimarca, Equador, Finlandia, Francia, Grecia, Italia, Jugoslavia, Lichtenstein, Lussemburgo, Malta, Monaco, Norvegia, Nuova Zelanda, Paesi Bassi, Polonia, Portogallo, Russia, Slovacchia, Slovenia, Spagna, Svezia, Svizzera, Togo, Tunisia, Turchia, Ungheria, Uruguay, Venezuaela.

APPENDICE II

Osservazioni generali del Comitato dei diritti umani – Nazioni Unite

Osservazione generale 6 (16)
378ª seduta, 27 luglio 1982. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

1. La questione del diritto alla vita, diritto enunciato all'art. 6 del Patto, è stata trattata in tutti i rapporti. È diritto fondamentale, per il quale nessuna deroga è autorizzata, neppure nel caso in cui un pericolo pubblico eccezionale minacci l'esistenza della nazione (art. 4). Il Comitato ha tuttavia notato che, in molti casi, le informazioni fornite a proposito dell'art. 6 non concernevano che un aspetto di questo diritto. È un diritto che non deve essere interpretato in senso restrittivo.

2. Il Comitato constata che la guerra e gli altri atti di violenza collettiva continuano ad essere un flagello dell'umanità ed a privare della vita, ogni anno, migliaia di esseri umani innocenti. La Carta delle Nazioni Unite vieta già il ricorso alla minaccia o all'impiego della forza, da parte di uno Stato contro un altro Stato, salvo nell'esercizio del diritto naturale di legittima difesa. Il Comitato ritiene che gli Stati hanno il dovere supremo di prevenire le guerre, gli atti di genocidio e gli altri atti di violenza collettiva che portano con sé la perdita arbitraria di vite umane. Tutti gli sforzi che essi dispiegano per scongiurare il pericolo di guerra, in particolare di guerra termonucleare, e per rafforzare la pace e la sicurezza internazionale costituiscono la condizione e la garanzia maggiore per la salvaguardia del diritto alla vita. A questo proposito il Comitato osserva in particolare che esiste una relazione tra l'art. 6 e l'art. 20, secondo il quale la legge deve proibire qualsiasi propaganda a favore della guerra (par. 1) o qualsiasi incitamento alla violenza (par. 2) quale descritti in detto articolo.

3. La protezione contro la privazione arbitraria della vita espressamente richiesta nella terza frase del par. 1 dell'art. 6, è di capitale importanza. Il Comitato considera che gli Stati parti devono prendere misure non solamente per prevenire e reprimere gli atti criminali che portano con sé la privazione della vita, ma anche per impedire che le loro forze di sicurezza uccidano arbitrariamente degli individui. La privazione della vita da parte dell'autorità dello Stato è una questione estremamente grave.

La legislazione deve dunque regolamentare e limitare strettamente i casi nei quali una persona può essere privata della vita ad opera di tali autorità.

4. Gli Stati parti devono anche prendere misure specifiche ed efficaci per impedire la scomparsa di individui, ciò che sfortunatamente è diventato troppo frequente e troppo sovente porta con sé la privazione arbitraria della vita. Inoltre gli Stati devono predisporre mezzi e procedure efficaci per condurre in-

chieste approfondite sui casi di persone scomparse in circostanze che possono implicare una violazione del diritto alla vita.

5. Di più. Il Comitato ha notato che il diritto alla vita era troppo spesso interpretato in termini restrittivi. L'espressione: «il diritto alla vita ... inerente alla persona umana» non può essere intesa in modo restrittivo e la protezione di questo diritto esige che gli Stati adottino misure positive. A questo proposito, secondo il Comitato, sarebbe auspicabile che gli Stati parti prendessero ogni misura possibile per diminuire la mortalità infantile e per accrescere la speranza di vita ed in particolare misure tali da permettere di eliminare la denutrizione e le epidemie.

6. Benché dai paragrafi 2 - 6 dell'art. 6 risulti che gli Stati parti non sono tenuti ad abolire totalmente la pena capitale, essi devono tuttavia limitarne l'applicazione e, in particolare, abolirla per tutto ciò che non entra nella categoria dei «delitti più gravi». Essi dovrebbero dunque prevedere di riesaminare la loro legislazione penale tenendo conto di questo dovere e, in tutti i casi, essi sono tenuti a limitare la pena di morte ai «delitti più gravi». In via generale, l'abolizione è evocata in questo articolo con formule che suggeriscono senza ambiguità (paragrafi 2 e 6) che l'abolizione è auspicabile. Il Comitato ne conclude che tutte le misure prese per abolire la pena di morte devono essere considerate come un progresso verso il godimento del diritto alla vita nel senso dell'art. 40 e devono, a questo titolo, essere segnalate al Comitato. Esso nota che un certo numero di Stati ha già abolito la pena di morte o sospeso la sua applicazione. Tuttavia, stando ai rapporti degli Stati, i progressi compiuti per abolire la pena di morte o limitarne l'applicazione sono insufficienti.

7. Il Comitato ritiene che l'espressione «i delitti più gravi» deve essere interpretata in modo restrittivo, nel senso che essa significhi che la pena capitale deve essere una misura assolutamente eccezionale. D'altra parte, è detto espressamente all'art. 6 che la pena di morte non può essere pronunciata se non conformemente alla legislazione in vigore al momento in cui il delitto è stato commesso, e non deve essere in contraddizione con le disposizioni del Patto. Le garanzie di ordine processuale prescritte nel Patto devono essere osservate, compreso il diritto ad un equo giudizio reso da un tribunale indipendente, la presunzione di innocenza, le garanzie minime della difesa ed il diritto di ricorrere ad un'istanza superiore. Questi diritti si aggiungono al diritto particolare di sollecitare la grazia o la commutazione della pena.

Osservazione generale 14 (24)
563ª seduta, 2 novembre 1984. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\-GEN\1\Rev.1 at 14 (1994)

1. Nella considerazione generale 6, adottata alla sua trecento settantottesima seduta il 27 luglio 1982, il Comitato dei diritti dell'uomo ha notato che il diritto alla vita enunciato al paragrafo 1 dell'art. 6 del Patto internazionale relativo ai diritti civili e politici è un diritto fondamentale per il quale nessuna deroga è autorizzata, neppure in caso di pericolo pubblico eccezionale. Questo stesso diritto alla vita è proclamato all'art. 3 della Dichiarazione universale dei diritti dell'uomo, che l'Assemblea generale delle Nazioni Unite ha adottato il 10 dicembre 1948. Esso è alla base di tutti i diritti dell'uomo.

2. Nella sua osservazione generale precedente, il Comitato ha anche notato che gli Stati hanno il supremo dovere di prevenire le guerre. La guerra e gli altri atti di violenza collettiva continuano ad essere un flagello per l'umanità e, ogni anno, a privare della loro vita migliaia di esseri umani innocenti.

3. Pur restando profondamente preoccupato delle perdite di vite umane causate dalle armi classiche nei conflitti armati, il Comitato ha notato che, durante diverse sessioni successive dell'Assemblea generale, rappresentanti appartenenti a tutte le regioni geografiche hanno espresso la loro crescente preoccupazione di fronte all'allestimento ed alla proliferazione di armi sempre più terrificanti di distruzione di massa che, oltre a minacciare vite umane, assorbono risorse che potrebbero essere utilizzate a fini economici e sociali di importanza vitale, in particolare a beneficio dei paesi in via di sviluppo, e così servire a promuovere e ad assicurare a tutti il godimento dei diritti dell'uomo.

4. Il Comitato condivide questa preoccupazione. È evidente che la ideazione, la sperimentazione, la fabbricazione, il possesso e lo sviluppo di armi nucleari costituisce una delle più gravi minacce contro il diritto alla vita che pesano oggi sull'umanità. Questa minaccia è aggravata dal rischio di una utilizzazione effettiva di queste armi non solo in caso di guerra, ma anche a seguito di un errore o di una deficenza umana o meccanica.

5. Ma soprattutto, l'esistenza stessa e la gravità di questa minaccia generano un clima di sospetto e di timore tra gli Stati che costituisce di per se stesso un ostacolo alla promozione del rispetto universale ed effettivo dei diritti dell'uomo e delle libertà fondamentali, conformemente alla Carta delle Nazioni Unite ed ai Patti internazionali relativi ai diritti dell'uomo.

6. La fabbricazione, la sperimentazione, il possesso, lo spiegamento e l'utilizzazione di armi nucleari dovrebbero essere vietati e qualificati come crimini contro l'umanità.

7. In conseguenza, nell'interesse dell'umanità, il Comitato rivolge un appello a tutti gli Stati, siano o non siano parti del Patto, affinché assumano urgentemente, in via unilaterale o tramite accordi multilaterali, le misure necessarie per liberare il mondo dalla minaccia della guerra nucleare.

APPENDICE III

Modulo-base per la presentazione delle comunicazioni individuali previste nel Primo Protocollo facoltativo al Patto internazionale sui diritti civili e politici

Communication to:

The Human Rights Committee
c/o Centre for Human Rights
United Nations Office
8-14 Avenue de la Paix
1211 Geneva 10
Switzerland

Date: ...

Submitted for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights

I. *Information concerning the author of the communication*

Name ...
First Name(s) ...
Nationality ...
Profession ...
Date and place of birth ...
Present Address ...
Address for exchange of confidential correspondence (if other than present address) ...
Submitting the Communication as:
(a) victim of the violation or violations set forth below
(b) representative of the alleged victim(s)
(c) other

Il the Author is submitting the communication as a representative of the alleged victim(s) he shoul clearly indicate in what capacity he is doing so: ...

If the author is naither the victim nor his/their representative, he should clearly indicate:
(a) his reasons for acting on behalf of the alleged victim(s): ...
(b) his reasons for believing that the victim(s) is (are) unable to submit a communication himself (themselves): ...
(c) his reasons for believing that the victim(s) would approve the author's acting on his (their) behalf: ...

II. *Information concerning the alleged victim(s). (If other than Author)* [1]

Name ...
First Name(s) ...
Nationality ...
Profession ...
Present Address or whereabouts ...

Name ...
First Name(s) ...
Nationality ...
Profession ...
Present Address or whereabouts ...

III. *State concerned/Articles violated/Domestic remedies/Other international procedures*

Name of the state party (country) to the International Covenant and the Optional Protocol against which the communication is directed: ...

Articles of the International Covenant on Civil and Political Rights allegedly violated: ...

Steps taken by or on behalf of the alleged victim(s) to exhaust domestic remedies (recourse to the courts or other public authorities, when and with what results – if possible, enclose copies of all relevant judicial and administrative decisions: ...

If domestic remedies have not bee exhausted, explain why: ...

Has the same matter been submitted for examination under another procedure of international investigation or settlement? If so, when and with what results?

IV. *Fact of the claim*

Detailed description of the facts of the alleged violation or violations (including relevant dates) [2].

Author's signature: _____

[1] List each victim individually and add as many pages as necessary to complete the list of victims.

[2] Add as many pages as needed for this description.

APPENDICE IV

Recapiti degli organismi internazionali considerati in questo volume

Commissione dei diritti dell'uomo delle Nazioni Unite

U.N. Human Rights Commission - Centre for Human Rights - United Nations Office - 8-14 Avenue de la Paix - 1211 Geneva 10 - Switzerland

A questo indirizzo sono raggiungibili, tra gli altri, i seguenti rapporteurs e gruppi di lavoro tematici:

Gruppi di lavoro
— Gruppo istituito dalla Convenzione per la soppressione dell'apartheid;
— sui diritti delle minoranze
— sulle sparizioni forzate o involontarie
— sui diritti degli "human rights defenders"

Relatori speciali
— esecuzioni sommarie o arbitrarie
— compravendita di minori
— mercenari
— diritto, individuale e collettivo, alla proprietà
— libertà di opinione e di espressione
— impunità
— diritto all'alloggio
— discriminazioni fondate sulla religione o il credo

Sottocommissione della lotta contro la discriminazione e per la tutela delle minoranze delle Nazioni Unite

U.N. Subcommission on Prevention of Discrimination and Protection of Minorities - Centre for Human Rights - United Nations Office - 8-14 Avenue de la Paix - 1211 Geneva 10 - Switzerland

A questo indirizzo sono raggiungibili, tra gli altri, i seguenti rapporteurs e gruppi di lavoro tematici:

Gruppi di lavoro
— popoli autoctoni
— detenzione
— forme contemporanee di schiavitù

Relatori speciali
— diritti umani e ambiente
— stati di eccezione
— povertà estrema
— indipendenza della magistratura e protezione degli avvocati

— equo processo
— beni culturali dei popoli indigeni
— pratiche tradizionali che compromettono la salute di donne e minori
— trasferimenti di popolazioni e politiche di colonizzazione

Commissione europea dei diritti dell'uomo

Council of Europe - Secretariat of the European Commission for Human Rights - B.P. 436 R6 - 67006 Strasbourg Cedex - France

Corte europea dei diritti dell'uomo

(stesso indirizzo della Commissione)

Commissione interamericana dei diritti umani

Inter-American Commission on Human Rights – Comisión Interamericana de los Derechos Humanos - Organization of American States - Washington, DC 20006 - USA

Corte interamericana dei diritti umani

Inter-American Court on Human Rights - Corte Interamericana de los Derechos Humanos - Secretary - PO Box 6906-1000 - San José - Costarica

Comitato dei diritti umani - The Human Rights Committee

c/o Centre for Human Rights - United Nations Office - 8-14 Avenue de la Paix - 1211 Geneva 10 - Switzerland

Comitato per l'eliminazione della discriminazione razziale - Committee on the Elimination of Racial Discrimination

c/o Centre for Human Rights - United Nations Office - 8-14 Avenue de la Paix - 1211 Geneva 10 - Switzerland

Comitato contro la tortura - Committee against Torture

c/o Centre for Human Rights - United Nations Office - 8-14 Avenue de la Paix - 1211 Geneva 10 - Switzerland

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