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How Far Will China's Criminal  
Justice System Go to  
Accommodate the ICCPR?

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# Abbreviations

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
CAT	The UN Convention against Torture
CCP	Chinese Communist Party
ECOSOC	Economic and Social Council of United Nations
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
GA	General Assembly
HRC	Human Rights Committee
NPC	National People's Congress
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
PRC	People's Republic of China
SPC	Supreme People's Court of China
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

The purpose of this thesis is to examine the current criminal legal system and practice of China from the view of international human rights law, so as to raise the human rights consciousness and accelerate the realization of criminal justice in China.

China has signed the International Covenant on Civil and Political Rights (thereafter referring to as ICCPR) on 5 October 1998, but has not yet ratified it. Before that, in fact, China partly conformed to the ICCPR by revising the Criminal Procedure Law of the PRC in 1996. For example, the 1996 amendment of the Criminal Procedure Law adopted some principles respecting and protecting human rights which are contained in the ICCPR, such as the right to be presumed innocent, the independence of court, and so on.

Furthermore, China has amended its constitution and introduced “protection and promotion of human rights” into the constitution in 2004. It is the first time for China to insert fundamental provision of human rights protection into constitution, which is a success to promote the human rights in China. Even though the recent commitment to human rights in the constitution fails to link the guarantee to international human rights law in that it only stipulates to respect and protect human rights, the change will hopefully contribute to narrowing the gap between international human rights law requirements for judicial justice and the current law and practice in China.

However, we must recognize that there is still a long way to go for China to realize the human rights protection and development. There are still many situations of human rights violations in China at present, both in legal system and in practice. Especially, many terrible cases violating the human rights continue to happen from time to time.

Thus, it is indispensable to study the standard of international human rights law, and correctly understand its principles, then, compare the current conditions in China with it, and try to identify the problems so as to be resolved. In this master thesis, I will focus the comparison between the Chinese criminal legal justice and the international human rights law, in particular, the ICCPR. In doing so, the relevant decisions of the Human Rights Committee will be carefully examined and studied. Though it is impossible for China to be member state of the European Convention of Human Rights, in this master thesis, however, some cases delivered by the European Court of Human Rights will also be examined and studied in order to identify the relevant international human rights standards, because the opinions expressed by the European Court of Human Rights in their cases have some nexus with the Human Rights Committee, which usually

use them as the evidence to interpret a provision of the ICCPR or to deliver a General Comment therein.

Before beginning of the prime objective of this thesis, which focuses on examining China's current criminal justice systems, it is necessary to provide some related background, especially with regard to the ICCPR, as an instructive model to this discussion, and to the HRC, which is the institution to interpret the ICCPR.

## **1.1 Brief Introduction of the ICCPR**

### **1.1.1 General Characteristics**

The ICCPR is one of the three key instruments that are known as the "International Bill of Rights".<sup>1</sup>

As you know, the ICCPR deals with the civil and political rights, which was adopted by the General Assembly of the UN in December 1966 and entered into force on 23 March 1976, three months after it had received its thirty-fifth ratification. Since the Covenant is of potentially worldwide application, it is occasionally referred to as one of the UN's universal instruments. As of November 2003, the ICCPR has received 151 ratifications.<sup>2</sup>

### **1.1.2 Major Content**

The ICCPR includes the right to life, to be free from torture or cruel, inhuman or degrading treatment or punishment and slavery, to liberty and security, freedom from arbitrary arrest or detention, to freedom of movement, association, thought, religion and expression, to equality before the law and due process guarantees in criminal and civil proceedings, to privacy, to equality within marriage, and to the enjoyment of culture. It prohibits all forms of discrimination in the enjoyment of these rights.

### **1.1.3 States Parties' Obligations**

Under article 2(1) of the Covenant, States parties assume the following obligation:

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<sup>1</sup> See A. Conte et al, *Defining Civil and Political Rights* (Ashgate Publishing Limited, England, 2004) P.1 "The ICCPR is one of three instruments which constitute what is sometimes known as the 'international Bill of Rights'. The other instruments which comprise the Bill are the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights."

<sup>2</sup> NGO Joint Statement, 'UN Commission on Human Rights 60 session ', *international movement against all forms of discrimination and racism*, 2004, <[www.imadr.org/geneva/2004/CHR.60th.HRM.html](http://www.imadr.org/geneva/2004/CHR.60th.HRM.html)>, visited on 5 August 2005.

Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to this provision, firstly, the obligation to respect and ensure the rights is owed to individuals within a State's territory and subject to its jurisdiction.

Secondly, individual must be within the State's territory or subject to its jurisdiction. This does not mean that all individuals are treated exactly the same for the purpose of the attribution of various rights, since there are inevitably certain limitations on the rights of aliens and those who are not lawfully present within the territory of the State.<sup>3</sup> In other respects, however, all individuals, be they citizens or non-citizens, are on an equal footing as far as they are the subjects of the relevant civil and political rights guaranteed by the ICCPR.<sup>4</sup> It is also possible that individuals who are not within a State's territory might also be subject to its jurisdiction. As a number of communications have demonstrated, the personal relationship between a States based on ties of nationality may operate to impose responsibility on a state where it has violated the rights of one of its citizens, even though that citizen may be residing abroad.

There is little doubt, according to the wording of article 2(1), that the primary obligation for ensuring the protection of rights is imposed upon the State, and in most circumstances there will be a more or less clear relationship between the organs of the State and the violation of human rights which imposes responsibility upon the State for that violation.<sup>5</sup> This can be described as a vertical relationship between the State and the citizen. The wording of article 2(1) also raises the question of whether the State has a legal responsibility to ensure that other private citizens do not violate the rights of its citizens. This may be called the enforcement of a horizontal relationship or State protection of third party rights. Certainly, there are particular rights protected by the ICCPR, which seems to imply the right of protection by the State from third parties. Article 6(1), for example, requires the right to life to be protected by law. This would suggest, therefore, that a State that failed to criminalize the homicidal behaviour of 'private' death squads would certainly be failing in its obligation to protect the right to life. It is also arguable that this would also be the case should the state fail to enforce the relevant criminal law or properly investigate unlawful deaths. Comments on third party rights within the HRC have been relatively sparse

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<sup>3</sup> *see*, for example, article 25, the application of which is limited to citizens of the state.

<sup>4</sup> Lillich, R. B. *The Human Rights of Aliens in Contemporary International Law*, Manchester: Manchester University Press, 1984, p 145. General Comment 15 states that **'the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens'**.

<sup>5</sup> M. Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, 2<sup>nd</sup> ed (N.P.Engel Verlag, Germany, 2005) pp. 38-9.

and weak. This is perhaps because the HRC has, on the whole, been concerned with situations in which there have been egregious violations primarily of civil rights rather than with the finer points of constitutional protection of rights. Indeed, while the HRC has, on the whole, coped admirably with situations involving substantial human rights violations, its jurisprudence on rather more complex and difficult questions involving discrimination, particularly indirect discrimination, has not enjoyed the same acclaim.

The final part of article 2(1) requires the rights recognized to be protected 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. This is a broad non-discrimination provision that forbids all types of non-justifiable differentiation of individuals in the protection of their rights. This broad prohibition between men and women in the enjoyment of all civil and political rights is set out in the ICCPR.

Under article 2(3) States are also required to take necessary legislative or other measures to give effect in their domestic law to the rights recognized in the ICCPR.

States are also required to provide effective remedies to other whose rights are violated. Such remedies may either be general or specifically designed to redress violations of the rights protected by the ICCPR.

## **1.2 The Human Rights Committee**

The ICCPR established the Human Rights Committee to monitor its implementation by considering periodic reports from the States parties. In certain circumstances, the HRC may consider complaints from other countries that have ratified the Covenant and from individuals who believe their rights under the Convention have been violated. The HRC also formulates General Comments that may help to clarify what countries must do to comply with the ICCPR.

The HRC consists of eighteen members who must be nationals of the States parties to the ICCPR. They must also be persons of high moral character and recognized competence in the field of human rights. Members of the Committee are elected for a four-year term by secret ballot from among nominations by the States parties, but that serve in their personal capacity, not as government representatives. To reinforce this, members must, upon taking office, make a declaration that they will fulfil their functions impartially and conscientiously.

There are some discussions regarding the nature of HRC, which is not of major relevance to this thesis, so we leave that aside, only stating its function to service the thesis' goal.

The HRC is charged with four major supervisory functions under the ICCPR and the Optional Protocol. These are: the consideration of periodic reports by States parties; the making of general comments; the management of the inter-State complaints procedures; and the management of the individual communication procedure.

Just via these functions of Committee, the HRC plays an important role to interpret the ICCPR, which make ICCPR more detail and in practice.

### **1.2.1 Periodic Reports**

Periodic reports are required from States parties on the measures they have adopted to give effect to the rights recognized in the ICCPR and the progress made by individuals in the enjoyment of those rights.<sup>6</sup>

Such reports must be submitted by each State within one year of becoming party to the Covenant<sup>7</sup> and at periods thereafter (normally about five years) which are determined by the HRC.<sup>8</sup> These reports are examined in public in the presence of a State party's representative. The Committee may request further details from a State party and may put questions to the state party's representative. The HRC holds three sessions of three weeks each year, and reports annually to the General Assembly via ECOSOC. On completion of the reporting process, the HRC issues concluding statements, which reflect the main areas of discussion. Here, the Committee may note its concerns regarding aspect of a State's implementation of its obligations or it may make suggestions and recommendations to the State indicating ways in which its obligations might be fulfilled more effectively.

### **1.2.2 General Comments**

General comments are statements made by the HRC in which it conveys to States parties its understanding of the meaning of the rights in the ICCPR.<sup>9</sup> Through its use of general comments, the HRC is able to develop its interpretation of the Covenant and therefore assist States further in the fulfilment of their obligations under the Covenant. Some of these general comments are quite detailed whereas others are exiguous and opaque.

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<sup>6</sup> Article 40(1) of the ICCPR.

<sup>7</sup> Article 40(1)(a) of the ICCPR.

<sup>8</sup> Article 40(1)(b) of the ICCPR.

<sup>9</sup> McGoldrick, D., *The Human rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford:Clarendon press, 1990) pp. 89-96.

### 1.2.3 Inter-State Complaints Procedure

The inter-State complaint machinery enables a State party to complain to the HRC that another party is failing to give effect to the provisions of the Covenant.<sup>10</sup>

It is noticeable that this refers not just to the failure to give effect to the substantive rights contained in the ICCPR, but any of its obligations under that instrument.

The inter-state complaint machinery is optional and depends upon reciprocal acceptance of the right of complaint by States.<sup>11</sup> It means State A may thus only bring a complaint against state B if both have accepted the optional procedure. The process for resolving inter-State disputes is conciliatory rather than adjudicative. Despite acceptance of this optional procedure by a number of States, it has never been used. The reason for this would appear to be the extreme political sensitivity, which would necessarily attach to such complaints. Given its lack of use, the utility of this process must inevitably be open to serious question.<sup>12</sup>

### 1.2.4 Individual Communications under the Optional Protocol

As its title suggests, the procedures contained in the Optional Protocol to the ICCPR are only applicable to those states that have become party to the instrument. Under the Optional Protocol States, which become party to the Protocol recognize the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be a victim of a violation of one or more of the rights set forth in the ICCPR.<sup>13</sup> The corollary of this is that the HRC cannot receive complaints from individuals in States that have not become party to the Optional Protocol and which, as a consequence, are not subject to the HRC's jurisdiction.<sup>14</sup>

When the HRC receives a communication from an individual subject to the jurisdiction of one of the States parties, it then deals with the communication in two stages: first, it must determine whether or not the communication is admissible, that is whether it satisfies the formal requirements prescribed in the Protocol.<sup>15</sup> If it determines that the communication is admissible, it then proceeds to the second stage of

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<sup>10</sup> Article 41 of the ICCPR. Nowak, pp. 500-603.

<sup>11</sup> Article 41 of the ICCPR.

<sup>12</sup> Leckie, s., *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospect or wistful Thinking?*(1988) 10 HRQ 249.

<sup>13</sup> Article 1 of the Optional Protocol.

<sup>14</sup> *Ibid.*

<sup>15</sup> Article 2, 3 and 5 of the Optional Protocol.

determining whether or not there has been a violation of any of the rights protected in the ICCPR.<sup>16</sup> In some circumstances the two stages are conflated, since it is impossible to separate the question of the merits of a communication with that of admissibility. This is particularly the case where there is some doubt about whether the ICCPR applies *ratione materiae*. Furthermore, while the process is a two stages procedure, the HRC usually deals with the questions of admissibility and the merits of communications at the same sitting.<sup>17</sup>

All proceedings before the HRC take place on the written evidence before it.<sup>18</sup> The normal procedure is for the applicants to lodge their complaints. There is a model complaint form by which this might be done, but it is not necessary to use this as long as the requisite information is made available to the HRC. The State party concerned is then asked for its response, which it must make within six months.<sup>19</sup> The applicant is then given the opportunity to comment on the State's response. This process might be extended to further replies and response until the HRC is satisfied that it has the information it requires. The entire process is concluded when the Committee issues its final views.<sup>20</sup> This is essentially a decision on the merit of the communication, but the precise legal status of final views is a matter of some ambiguity, perhaps deliberately so. Where a state is found in breach of its obligations it is normally required by the HRC to undertake remedial action, which may include modifying its domestic law and offering reparation to victims. In order to ensure compliance with its final views, the Committee has developed a follow-up procedure in which a *rapporteur* is appointed to investigate the measures which delinquent states have taken to remedy their breaches of the ICCPR.<sup>21</sup> While this procedure is, like most of the HRC's activities, heavily under funded, it has proved to be a useful measure of supervision. Another useful mode of supervision is the requirement that States, when making their periodic reports, indicate the measures that they have adopted to give effect to the HRC's final views in communications where they have been found to be in default of their obligations under the ICCPR.

In end, a further important mechanism that exists under the Protocol is the Rule 86 procedure under which the HRC has the power to order interim measures to avoid irreparable damage to an alleged victim of a violation of the rights protected by the ICCPR. This mechanism, which is similar to an injunction or interdict under domestic law, requires an individual to demonstrate *prima facis* satisfaction of the admissibility requirements contained in the Optional Protocol. This mechanism has been used, for example, in case in which individuals have been sentenced to death in order

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<sup>16</sup> Article 1 of the Optional Protocol.

<sup>17</sup> Rule 91, Rules of Procedure under the Optional Protocol.

<sup>18</sup> Article 2 and 5 of the Optional Protocol.

<sup>19</sup> Article 4(2) of the Optional Protocol.

<sup>20</sup> Article 5(4) of the Optional Protocol.

<sup>21</sup> Rule 95, Rules of Procedure under the Optional Protocol.

to delay the execution of the sentence until the question of whether it has been imposed pursuant to the due process requirements contained in the ICCPR has been satisfied.

## **1.3 Current Situation of Criminal Legal System and Human Rights Protection in China**

### **1.3.1 Criminal Legal System of China**

Briefly speaking, in China, the criminal legal system mainly consists of the Criminal Procedure Law of the PRC (revised in 1996 and entered into effect in 1997) and the Criminal Law of the PRC (revised in March 1997 and entered into effect in October 1997). Compared with the previous Criminal Procedure Law and Criminal Law, with regard of human rights respect and protection, these two revised laws have appeared to follow the trend of development of the human rights, although very limited. Certainly at that time, China had not yet signed the ICCPR, but it is not difficult to find some provisions in these two revised laws show the principle and idea of the ICCPR, even though some of them do not totally meet the demands of the ICCPR. For example, Article 12 of the Criminal Procedure Law of the PRC (1996) states:

No person shall be found guilty without being judged as such by a People's Court according to law.<sup>22</sup>

Article 12 vividly reflects the principle of paragraph 2 of article 14 of ICCPR, namely, the presumption of innocence until proved guilty according to law.<sup>23</sup>

Furthermore, some provisions of the Criminal Procedure Law (1996) provide some basic human rights protection, for instance, the right to defence, the right to a fair trial and so on.<sup>24</sup>

Even though these developments in statute, we must recognize that it is only the beginning of protection of human rights in theory, which is far from the real goal of the ICCPR, let alone terrible practice.

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<sup>22</sup> Article 12 of the Criminal Procedure Law of the PRC.

<sup>23</sup> See Article paragraph 2 of article 14 of ICCPR. 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.

<sup>24</sup> See Article 32-40 and 96 of the Criminal Procedure Law of the PRC.

### 1.3.2 Human Rights Protection in Constitution

The Constitution of the PRC in 1982 is still in place today, and its amendments have largely been concerned with adjusting the Constitution to reflect practice. During the spring session of the 2004 NPC of China Session, fundamental provisions on the protection of human rights were introduced into the Constitution. Article 33 of the Constitution has a third paragraph added:

“The State respects and preserves human rights.”<sup>25</sup>

This is the first time for China that it mentioned the word human rights in its Constitution, which points to the development of human rights in China.

President and CCP Secretary-General Hu Jintao has moreover reinvigorated the importance of the Constitution, and stated that the Constitution should be a legal weapon to safeguard citizens’ rights and for this purpose, education on the Constitution must be provided, especially at Party and cadre schools. No organization or individual is privileged to stand above the Constitution and other laws.<sup>26</sup>

With the introduction of a human rights provision into the Constitution and Hu’s expressed pledge to the same, commitment to international human rights law is a logical further development.<sup>27</sup>

### 1.3.3 Signature of the ICCPR

China has signed the ICCPR on 5 October 1998, and is now studying it for an earlier ratification.

Nowadays, it is commonly stated that international law in China is directly applicable, at least in so far as commercial aspects are concerned.

Internationally, China has also claimed in relation to international human rights law that:

Any convention acceded to by China becomes binding as soon as it entered into force. Furthermore, in the event of a discrepancy between provisions of an international instrument and domestic law, the latter was brought into line with the former. Where

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<sup>25</sup> See Paragraph 8 of Amendment Fourth of the Constitution of the PRC.

<sup>26</sup> Hu Jintao *Honor Constitution’s Guarantee for Citizens’ Rights*, Human Rights, No.3. May 2003, p. 2.

<sup>27</sup> J. Grimheden, *Themis V. Xiezh: Assessing Judicial Independence in the People’s Republic of China under International Human Rights Law* (Intellecta DocuSys, Lund, 2004) pp. 179-180.

subtle differences remained, international instruments took precedence over domestic law.<sup>28</sup>

China has been reiterating in its reports to the UN human rights machinery that treaty law becomes domestic law on ratification without any further transformation.<sup>29</sup>

Also, according to the president of the Supreme People's Court of China in the annual report to the NPC, the judiciary in China submits to international law:

The people's courts have...seriously honoured international conventions, treaties and agreements to which China is a signatory party.<sup>30</sup>

In theory, international law is applicable when domestic law is in conflict with treaty-commitments. In practice this has proven to be true in cases of civil disputes. In other types of disputes there are no such clear reference. So far there have not been overt references about the influence of international human rights law on domestic law by courts other than rhetorically. China's introduction of a general human rights guarantee in its Constitution and the pending ratification of the ICCPR may be the first step when it comes to establish the superiority of international human rights law over Chinese law.

Certainly, China has the right to make reservations when signing the ICCPR, however, according to the Vienna Convention on the Law of Treaties (article 18), to which China is a party, State party cannot take action counter to the object and purpose of the Convention, namely, it cannot make reservations violating the purpose of a treaty. Thus, although China has the right to make reservations, the basic principle of the ICCPR is not subject to reservations.

In conclusion, at the time of pending ratification of the ICCPR by China, it is obviously necessary to take a look at what the ICCPR says in criminal justice and what impacts it will place upon China's ratification. This thesis aims to make a linkage between China's criminal legal system and requirements of the ICCPR. In doing so, the thesis tries to point out the current problems linking the standard of the ICCPR at some major criminal judicial areas, such as death penalty, prohibition of torture, fair trial and independence of the judicial institutions and so on, and give suggestions to improve it, in the hope that future criminal legal systems in China will run more smoothly to achieve judicial fairness and justice.

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<sup>28</sup> Statement as reported, from the Chinese delegation, in dialogue with the UN Committee against Torture when scrutinizing state report under the Convention against Torture, CAT/C/SR.50 and 51, 27 April 1990, para. 487.

<sup>29</sup> E. g., HRI/CORE/1/Add.21/Rev.2, 11 June 2001, paras. 51-53.

<sup>30</sup> *China: Apparent Full Text of Supreme Court Work Report*, delivered 11 March 2003 by Xiao Yang, BBC, 11 March 2003, p. 4 as printed.

## 2 The Right to Life

The right to life enunciated in Article 6 of the ICCPR, states:

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

The right of life has properly been characterized as the supreme human right,<sup>31</sup> since without effective guarantee of this right, all other rights of human being would be devoid of meaning. This special significance of the right to life is underlined by the adjective “inherent”, which is only used in article 6(1) of the ICCPR, and by the use of the present tense “has” instead of “shall have”.<sup>32</sup>

Based on supreme human rights, the member states have the obligation to take positive measures to ensure the right to life, even the HRC consider that it would be desirable for states parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. From that, it is evident that the content of this right is very extensive.

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<sup>31</sup> As early as during the drafting of the Covenant, it was stressed in the HRC that the right to life was “the most fundamental of all rights”; *cf.* A/2929, 29; BOSSUYT 115. The committee has consistently held the right to life to be the “supreme right”; *cf.*, General Comment 6/16, § 1; General Comment 14/23, § 1.

<sup>32</sup> Nowak, *supra* note 5, p.123.

## 2.1 Definition of the Right to Life

As mentioned, the right to life has a broad definition, not only limited to death penalty. However, we will only focus on some relative parts except death penalty here.

### 2.1.1 Protection by Law and Prohibition of Arbitrary Deprivation of Life

Article 6 (1) of the ICCPR clearly states that the right to life is inherent, shall be protected by law and no one shall be arbitrarily deprived of his life.

Law shall protect this right. However as Fawcett rightly says: ‘it is not life, but the right to life, which is to be protected by law’.<sup>33</sup> The right to life does not afford a guarantee against all threat to life, but against intentional deprivation and careless endangering of life. The latter must be prohibited and made punishable by law except for those cases in which Article 6 permits such deprivation of life. The protection provided by the law, however, is a reality only if the law is implemented. Omission on the part of the authorities to trace and prosecute the offender in case of an unlawful deprivation of life is, therefore, in principle subject to review by the HRC.

To what extent are the authorities obliged to prevent deprivation of life by individuals? They can hardly put a bodyguard at the disposal of each citizen. Their task of guarding public security does involve, however, the duty to observe certain vigilance with respect to the lives of the individual citizens, but in this duty they cannot go so far that their obligations towards other citizens are jeopardized. Here the national authority will have to weigh these obligations against each other.<sup>34</sup>

We will briefly consider the necessity of death penalty, even though we will discuss death penalty in detail later in the thesis.

Many peoples think that criminological studies have shown that death penalty does not act as more of a deterrent than imprisonment, however, in my own opinion, it is not absolute. According to my working experience as a prosecutor in China, in some sense, death penalty has more deterrence. It means that sentence of death penalty will be helpful as a way to reduce some serious crimes.

Now that it is useful, it will be absurd to abolish the death penalty only to follow the trend of international community. Here, let’s ask how we could

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<sup>33</sup> J.E.C. Fawcett, *The Application of the European Convention on Human Rights*, 2<sup>nd</sup> ed (Oxford, 1987) p. 37.

<sup>34</sup> P.V. Dijk *et al.* *Theory and practice of the European Convention on Human Rights* 3<sup>rd</sup> ed. (Kluwer Law International, The Hague, 1998) PP. 297-8.

effectively protect the right of life of the victim whose life will be actually threatened and manifestly damaged without severe punishment to the offender? If a country where murder and manslaughter had not entirely disappeared were to grant impunity from prosecution for these crimes, this would be a manifest violation of the State obligation to protect pursuant to Article 6 (1).<sup>35</sup> So, I think, it is very reasonable and objective for the ICCPR to leave room for discretion to State parties in this respect to consider according to different social circumstance and legal tradition, and decide whether or not to abolish the death penalty in their domestic law.

The protection against arbitrary deprivation of life is of paramount importance. States parties are required to take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.<sup>36</sup> The HRC is of the opinion that Article 6(1) will be violated by a broad definition of the right of self-defense, according to which, e.g., police officers are granted a general statutory presumption of justification for combating certain offences.<sup>37</sup>

In the case of *Suarez de Giurrero v. Colombia*,<sup>38</sup> a judge of the 77<sup>th</sup> Military Criminal Court of investigation, himself a member of the police, ordered a raid to be carried out at a house in Bogota. The raid was ordered in the belief that the former ambassador of Colombia to France, who had been kidnapped some days earlier by a guerrilla organization, was being held in the house in question. In spite of the fact that the former ambassador was not found, the police hid in the house to await the arrival of the suspected kidnappers. They were killed as they arrived. The HRC found a violation of the right to life by Colombia because the killing was intentional, without warning and “disproportionate to the requirements of law enforcement.” Furthermore, the HRC noted that the victims were merely suspects and that the killings could not be justified by any of the generally recognized grounds (necessary use of force in connection with self-defense, emergency, arrest or prevention of escape). Thus, the HRC viewed the action of the police to be disproportionate to the requirements of law enforcement in the circumstance of the case and that the victims were arbitrarily deprived of life contrary to article 6 (1) of the ICCPR. Inasmuch as the police action was argued to be justifiable under Colombian law, the HRC considered that the law of Colombia did not adequately protect the right to life.<sup>39</sup>

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<sup>35</sup> Nowak, *supra* note 5, p.123.

<sup>36</sup> General Comment 6, para 3. *See also* *Barbato v. Uruguay* case, communication 84/1981, para 10(a) and *Chongwe v. Zambia* case, communication 821/1998, para 5.2.

<sup>37</sup> *Cf.*, No. 45/1979, §13.3. *Cf. also infra* para. 15. *see also*, in this sense, FROWEIN & PEUKERT 33, with respect to Article 2 of the ECHR.

<sup>38</sup> Communication R11.45/1979.

<sup>39</sup> *Ibid.*, at para. 13.2.

A further clear instance of arbitrary deprivation of life was found in *Burrell v. Jamaica*,<sup>40</sup> where Mr. Burrell died following the hostage taking of some warders at St. Catherine prison's death row section. Mr. Burrell was shot after the warders had been rescued and released and thus the HRC declared that the need for force no longer existed. The HRC concluded that the state party had failed in taking effective measures to protect Mr. Burrell's life, in violation of article 6(1) of the Covenant.<sup>41</sup>

The ECHR use another wordings to uphold the right of life not to be violated arbitrarily. Article 2 (2) of the ECHR states:

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

In the *Sunday Times* case, the European Commission interpreted Article 2(2) as the following: (1) 'necessary' implies a 'pressing social need'; (2) the 'necessary test' includes an assessment as to whether the interference with the Convention right was proportionate to the legitimate aim pursued; and (3) the qualification of the word 'necessary' in Article 2(2), by the adverb 'absolutely' indicated that a stricter and more compelling test of necessity must be applied. This led the Commission to the conclusion that Article 2(2) permits the use of force for the purpose enumerated in subparagraphs (a), (b) and (c) under the condition that the force employed is strictly proportionate to the achievement of the permitted purpose. In assessing whether this condition is fulfilled, regard must be had to 'the nature of the aim pursued, the dangers to life and limb inherent in the situation and the degree of risk that the force employed might result in loss of life'.<sup>42</sup>

The Commission followed the same line of reasoning in a case where a boy in Northern Ireland had been shot by soldiers as he attempted to drive round a vehicle checkpoint in a stolen car. In the circumstance of the case and having regard to the background of events in Northern Ireland, which was facing a situation in which killings had become a feature of life, the soldier had reasons to believe that they were dealing with terrorists. Therefore, the use of force was justified in terms of the second paragraph of Article 2.<sup>43</sup>

In the *McCann* Case the British, Spanish and Gibraltar authorities were aware that the Provisional IRA was planning a terrorist attack on Gibraltar. The intelligence assessment of the British and Gibraltar authorities was that an IRA unit (which had been identified) would carry out an attack by means

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<sup>40</sup> Communication 546/1993.

<sup>41</sup> *Ibid.*, at para. 9.5.

<sup>42</sup> *The Sunday Times v. the United Kingdom* (6538/74) [1979] ECHR.

<sup>43</sup> *Kwily v. the United Kingdom* (17579/90) [1993] ECHR.

of a car bomb, which would probably be detonated by a remote control device. It was decided that the three suspects should be arrested. Soldiers of the SAS in plain clothes were standing by for that purpose. Allegedly thinking that the three suspects were trying to detonate remote control devices, the soldiers shot them at close range. No weapons or detonator devices were found on the bodies of the three suspects. The car that had been parked by one of the suspects was revealed on inspection not to contain any explosive device or bomb. The court accepted that the soldiers believed that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived as absolutely necessary in order to safeguard innocent lives. The Court held that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at that time, but which subsequently turns out to be mistaken. Having regard to the dilemma confronting the authorities in the circumstances of the case, the Court found the reactions of the soldiers did not, in themselves, give rise to a violation of Article 2.<sup>44</sup>

In connection with the control and organization of the operation, the Court first observed that it had been the intention of the authorities to arrest the suspects at an appropriate stage and that evidence had been given at the inquest that arrest procedure had been practiced by the soldiers and that efforts had been made to find a suitable place to detain the suspect after their arrest. The Court questioned, however, why the three suspects had not been arrested at the border immediately on their arrival in Gibraltar and why the decision was not taken 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 mount an arrest operation. 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. The Court noted that the authorities had made a number of key assessments, in particular, that the terrorists would not use a blocking car; that the bomb would be detonated by a radio-controlled 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. In the event, all of these crucial assumptions, apart from the terrorists' intention to carry out an attack, turned out to be erroneous. In the Court's view, insufficient allowance appeared to have been made for other assumptions. The authorities told the soldiers as certainties, thereby making the use of force almost unavoidable, conveyed a series of working hypotheses. In the Court's view, the above failure to make provision for a margin of error had to be considered in combination with the training of the soldiers to continue

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<sup>44</sup> *McCann and others v. the United Kingdom* (18984/91) [1995] ECHR.

shooting once they opened fire until the suspect was dead. As noted by the coroner in the inquest proceedings, all four soldiers shot to kill the suspects. 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. This failure by the authorities suggested a lack of appropriate care in the control and organisation of the arrest operation. In sum, the Court was not persuaded that the killing of the three terrorists constituted a use of force that was no more than absolutely necessary in defense of persons from unlawful violence within the meaning of Article 2(2)(a). There thus had been a breach of Article 2.<sup>45</sup>

### **2.1.1.1 The Current Institution in China**

In fact, the Criminal Law of China also protects the right to life from being violated arbitrarily while acting in self-defense. Article 20 of the Criminal Law of the PRC stipulates:

Criminal responsibility is not to be borne for an act of legitimate defense that is undertaken to stop present unlawful infringement of the state's and public interest or the rights of the person, property or other rights of the actor or of other people and that causes harm to the unlawful infringer.

Criminal responsibility shall be borne where legitimate defense noticeably exceeds the necessary limits and causes great harm. However, consideration shall be given to imposing a mitigated punishment or to granting exemption from punishment.

Criminal responsibility is not to be borne for a defensive act undertaken against ongoing physical assault, murder, robbery, rape, kidnap, and other violent crimes that seriously endanger personal safety that causes injury or death to the unlawful infringer since such an act is not an excessive defense.

Here, paragraph 2 of Article 20 of the Criminal Law of the PRC emphasize that legitimate defense cannot exceed the necessary limits and causes great harm, which reflects the demand for respecting the right to life even while facing the unlawful infringement and upholds the right to life can not be violated arbitrarily, which is similar to the idea of the Article 6(1) of the ICCPR and the Article 2(2) of the ECHR. However, unfortunately, we cannot see the detail to guide the behavior of a state officer who has the special duty to protect state interest, even though, in principle, his behavior will follow the rule of Article 20 of the Criminal Law of the PRC. However, as special professional behaviors, especially, under the current circumstance that many police officers or other state officers have no strong human rights mentality in China, a clear guideline with this regard is very necessary. Hopefully, the statements of the HRC and case laws of the ECtHR will give us more inspiration in this respect.

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<sup>45</sup> *Ibid.*

## 2.1.2 The Death Penalty

The deprivation of life by the authorities of a state is a matter of the utmost gravity and, accordingly, the HRC has seen a need for a State's municipal law to strictly control and limit the circumstances in which a person may be deprived of life.

The HRC has taken the view that the wording of paragraphs 2 and 6 strongly suggests that abolition is desirable, although Article 6(2) to (6) of the ICCPR state that the death penalty are not obligated to abolish.<sup>46</sup> States are, however, obliged to limit its use and, in particular, to abolish it for other than "the most serious crimes". The expression "most serious crimes" must, according to the HRC, be read restrictively to mean that the death penalty should be a quite exceptional measure.<sup>47</sup> It also follows from the express terms of Article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime, and in a manner that is not contrary to the Covenant. This notion was expanded upon in Communication 16/1997,<sup>48</sup> where the Committee stated that Article 6(2) requires that both the substantive and procedural law in the proceedings leading to the imposition of death penalty was imposed in accordance with that law and therefore in accordance with the provisions of the Covenant.<sup>49</sup> Consequently, in that case, a failure by the State to afford the author appropriate rights in the determination of the charges against him (contrary to the requirements of Article 14(3) of the ICCPR led to a finding that the death sentence pronounced against the author was contrary to the provisions of the Covenant, and therefore in violation of Article 6(2).<sup>50</sup>

The procedural guarantees prescribed in the ICCPR must therefore be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantee for the defence, and the right to review by a higher tribunal.<sup>51</sup> These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence. The failure of States to observe the requirements of Article 14 (fair hearing) has repeatedly resulted in a finding of violation of Article 6 of the Covenant.<sup>52</sup> Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with Article 6 but it must be carried out in such a way as to

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<sup>46</sup> General Comment 6, para.6.

<sup>47</sup> *Ibid.*, para.7.

<sup>48</sup> *Mbenge v. Zaire*.

<sup>49</sup> See also *Henry v. Jamaica*, communication 230/1987, para. 8.5; *Morrison v. Jamaica*, communication 461/1991, para.10.6; and *Daley v. Jamaica*, communication 750/1997, para. 7.7.

<sup>50</sup> *Mbenge case*, *supra note* 48, para.17.

<sup>51</sup> See, for example, *McLawrence v. Jamaica*, communication 702/1996, para.5.13; and *Shaw v. Jamaica*, communication 704/1996, para.7.7.

<sup>52</sup> See, for example, *Hamilton v. Jamaica*, communication 333/1989, *Reid v. Jamaica*, communication 353/1988.

cause the least possible physical and mental suffering, in accordance with Article 7.<sup>53</sup>

In addition, Article 6(5) of the ICCPR notes that sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

### 2.1.2.1 Most Serious Crimes

Pursuant to Article 6(2) of the ICCPR, the death penalty may be provided for by law and imposed only for the most serious crimes. The HRC made it known that it would interpret the term “most serious crimes” restrictively and would recognize the imposition of the death penalty to be compatible with Article 6(2) only as an exceptional measure.<sup>54</sup> Especially, the HRC emphasized that in no event was the death penalty to be provided for crimes of property, economic crimes, political crimes or in general for offences not involving the use of force.<sup>55</sup>

In *Lubuto v. Zambia*, the HRC held that the mandatory death sentence for armed robbery in a case, in which the use of firearms did not produce the death or wounding of any person, violated the “most serious crime” requirement in Article 6(2).<sup>56</sup>

In *Kennedy v. Trinidad and Tobago*, the HRC concluded that the mandatory death sentence for “a felony involving personal violence and where this violence results even inadvertently in the death of the victim”, constitutes a violation of the right to life as “no room is left to consider the personal circumstances of the accused or the particular circumstances of the accused or the particular circumstances of the offence”.<sup>57</sup>

In *Thompson v. Saint Vincent and the Grenadines*, the HRC held that the mandatory death penalty in all cases of “murder” (intentional acts of violence resulting in the death of a person) deprived the author “of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case”.<sup>58</sup>

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<sup>53</sup> General Comment 20, para.6.

<sup>54</sup> General Comment 6/16.

<sup>55</sup> Cf. the references to the comments made by Committee members in studying State reports, in Dinstein, *The right to life, physical Integrity and Liberty*, p. 118; No. 806/1998MCGOLDRICK 323 f.; JOSEPH/SCHULTZ/CASTAN 120; SCHABAS 104 ff.

<sup>56</sup> No. 390/1990, § 7.2. Cf. also *piandong et al. v. the Philippines*, No. 869/1999, § 7.4 and interpretation of this obiter dictum by SCHABAS 110.

<sup>57</sup> No. 845/1998, § 7.3.

<sup>58</sup> No. 806/1998, § 8.2. *But see* the dissenting opinions of Lord Colville, Kretzmer, Amor, Yalden and Zakhia.

Although the jurisprudence of the HRC in individual cases primarily relates to mandatory capital punishment, the conclusion has been drawn that its interpretation of the term “most serious crime” in Article 6(2), above all in the State reporting procedure, might be confined to intentional killings and the intentional infliction of grievous bodily harm.<sup>59</sup>

### **2.1.2.2 Amnesty, Pardon or Commutation of the Death Penalty**

Pursuant to Article 6(2), the death penalty may be carried out only on the basis of a final judgment rendered by a competent court. Even after the judgment has become enforceable, execution may not take place immediately, since Article 6(4) grants all persons sentenced to death the right to seek pardon or commutation of the sentence.

The right of convicted persons guaranteed by the first sentence of Article 6(4) refers only to the seeking of pardon or commutation of sentence. The execution of the sentence of death must be postponed at least until the proper conclusion of the relevant procedure.

The second sentence of Article 6(4) is a requirement for the national legislature. It must provide the possibility of, and corresponding procedure for, granting amnesty, pardon and commutation of sentence for humanitarian reasons, and it must not exclude any possible application of the death penalty from these remedies. In short, in exercising this competence, the responsible organ must not be restricted by the legislature in such a way as to preclude the possibility of amnesty, pardon or commutation of sentence for certain persons for certain crimes sanctioned with the death penalty.<sup>60</sup>

### **2.1.2.3 The Death Penalty in China**

China is a country with death penalty, which does not violate the principle of the ICCPR, since abolition of death penalty is not a legal obligation, although the ICCPR encourage States parties to abolish the death penalty. Based on the present social circumstance in China, the retaining of the death penalty has reasonableness and necessity. Just like the Chinese Premier Wen Jiabao said in the press conference after the NPC session this year, “We will limit the application of death penalty and try our best to make sure the sentence of death penalty will be prudent and fair.”

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<sup>59</sup> SCHABAS 110; JOSEPH/SCHULTZ/CASTAN 120. *see also* Manfred Nowak, *The death Penalty under present International Law*, in Manfred Nowak/ Xin CHUNYING (Eds.), *EU-CHINA HUMAN RIGHTS DIALOGUE* (2000) (Vienna) 68 ff.

<sup>60</sup> Nowak, *supra* note 5, p.146.

Then, the question is how to make sure the sentence of death penalty is used with prudence and justice while the risk of an erroneous judgment could never be completely ruled out?

Above all, the death penalty must not be based on unjust law. It means that a law imposing the death penalty must be consistent with the rule of law in the substantive sense, as expressed by the ICCPR in its entirety. Such a law must not contravene the right of equality and the prohibition of discrimination set forth in Article 2(1) and 26 of the ICCPR. The connection between the doctrine of equality and Article 6(2) represents an essential substantive limitation to the death penalty, since every statutory authorization to impose the death penalty must fulfil the requirement of objectivity and reasonableness.<sup>61</sup>

Moreover, the death penalty should be guaranteed by the requirement of procedural sense. It follows that a sentence of death penalty may be imposed only by a competent, independent and impartial tribunal provided for by law and after a fair, public hearing that pays regard to the prohibition of discrimination, the presumption of innocence and the minimum rights of the accused guaranteed by Article 14(3) of the ICCPR (we will discuss subsequently). In addition, anyone convicted in the first instance has the right to appeal to a higher tribunal.

Frankly speaking, in practice, the guarantee of procedural fairness to death penalty has been ignored for a long time in China. So it is time to consider this problem while studying the ratification of the ICCPR. Hopefully, it will reflect this requirement while revising the Criminal Procedure Law of the PRC in the future.

Furthermore, the outstanding questions with regard of death penalty in China lie in the following three parts:

According to the current Criminal Law, convictions under more than 60 crimes may lead to capital punishment, especially, the application of the death penalty for committing economic crimes and property crimes, for instance, corruption and bribery, even theft ... not only limited to very serious force crimes. Article 264 of the Criminal Law of the PRC stipulates:

Those who steal relatively large amounts of public or private property and money or have committed several thefts are to be sentenced to three years or fewer in prison or put under criminal detention or surveillance, in addition to fines; or are to be fined. Those stealing large amounts of property and money or involving in other serious cases are to be sentenced to three to 10 years in prison, in addition to fines. Those stealing extraordinarily large amounts of property and money or involving in especially serious cases are to be sentenced to 10 years or more in prison or given life sentences, in addition to fines or confiscation of property. Those falling in one or more of the following cases are to be given life sentence or sentenced to death, in addition to confiscation of property:

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<sup>61</sup> *Ibid.* pp.140-1.

- (1) Those stealing extraordinarily large amounts of money and property from financial institutions;
- (2) Those committing serious thefts of precious cultural relics.

These provisions violate seriously the principle of the ICCPR. As mentioned, according to Article 6(2) of the ICCPR, death penalty could be imposed only for the most serious crimes. While elaborating “the most serious crimes”, the HRC emphasized, “[I]n no event, the death penalty was to be provided for crimes of property, economic crimes, political crimes or in general for offences not involving the use of force”.

Pursuant to Article 199 and 200 of the Criminal Procedure Law of the PRC, the SPC is the designated court to review and approve all death sentences rendered by lower courts across the country. Article 199 states, “Death sentences shall be subject to approval by the Supreme People’s Court”. Article 200 stipulates, “A case of first instance where an Intermediate People’s Court has imposed a death sentence and the defendant does not appeal shall be reviewed by a Higher People’s Court and submitted to the Supreme People’s Court for approval. If the Higher People’s Court does not agree with the death sentence, it may bring the case up for trial or remand the case for retrial”.

In China, intermediate courts are designated to try cases, which may possibly lead to death sentence. Provincial higher courts receive appeals while the SPC remains the sole court to review and approve death executions. However, since February 1980, the Standing Committee of the NPC has delegated the power of death sentence approvals under several crimes to higher courts at the provincial level. The 1980 decision has been enforced by other decisions of the same NPC Committee and the SPC itself, resulting in empowering provincial higher courts to review and approve death sentences under more and more categories of crimes. As a result, the provincial higher courts exercise their approvals of death sentence while being courts of appeals for death sentences, making the legal approval mechanism dysfunctional, and making the guarantee meaningless. Such delegation of power is in clear violation of both the Criminal Law and the Criminal Procedure Law passed by the highest power authority in China, the NPC. Furthermore, this power delegation poses inequality among convicts of death penalty. Due to the fact that provinces across the country can hardly use unilateral criteria in deciding on death penalty, a criminal who receives death penalty in one province might escape from it if the case were tried elsewhere. When death penalties for most crimes are approved by provincial higher courts while remaining ones are submitted to the SPC, there exist inequality and differences among crimes to which death penalty applies, thus damaging the uniformed implementation of criminal procedure law in China.

Therefore, in order to cautiously exercise death penalty to protect criminal justice, the SPC should withdraw its power delegation to provincial courts with respect to approvals of death penalty as prescribed by the Criminal Procedure Law. Shortage in human resource at the SPC and the need of

ongoing “strike hard” policy can hardly justify continuation of such power delegation. Revocation of the delegation will not only bring reviews and approvals of death penalty back in line with the existing Chinese law, but also observe provisions of the ICCPR, so as to achieve better protection of the right to life.

Moreover, the system of amnesty, pardon or commutation of the death penalty is not yet in place in China. Paragraph 4 of Article 6 of the ICCPR states, “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence may be granted in all cases.” In the Chinese Constitution, pardon exists but is not specially aimed at death sentence, and it is rarely applied. In the long run, it is perhaps necessary for the Chinese criminal justice system to embody amnesty, pardon and commutation specifically with respect to death sentence so as to align the system with the ICCPR provisions.

# 3 Prohibition of Torture

Article 7 of the ICCPR prohibits torture or cruel, inhuman or degrading treatment or punishment. The test of Article 7 allows no limitation and, even in situations of public emergency such as are envisaged by Article 4(1), this provision is non-derogable under Article 4(2) of the ICCPR. The aim of the provisions of Article 7 is to protect both the dignity and the physical and mental integrity of the individual.<sup>62</sup>

Article 7 of the ICCPR stipulates:

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

Here, we will discuss in detail the first paragraph of Article 7 and leave the second paragraph aside, since no necessary link of this thesis to the second paragraph.

## 3.1 In General

The prohibition of torture, i.e., the right to physical and spiritual integrity, has taken on a special status in the protection of human rights under international law. Not only is it non-derogable in the various regional universal treaties; it is also ensured without any restriction whatsoever.<sup>63</sup> Its unconditional recognition by the community of states justifies the view that torture is prohibited by customary international law and even ranks as *jus cogens* under international law, pursuant to Article 53 of the VCLT.<sup>64</sup>

The unanimous, universal rejection of torture has, however, failed to prevent this most horrifying and persistent phenomenon of state arbitrariness from experiencing a dubious renaissance in the second half of the 20<sup>th</sup> century and the beginning of the 21<sup>st</sup>, a period not infrequently characterized as the

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<sup>62</sup> Conte, *supra* note 1, p.93.

<sup>63</sup> Cf. Especially Article 5 of the UDHR; Article 3 of all four Geneva Red Cross Conventions of 1949; Article 3 in conjunction with Article 15(2) of the ECHR; Article 7 in conjunction with Article 4(2) of the ICCPR; Article 5(2) in conjunction with Article 27(2) of the ACHR; Article 5 of the ACHPR.

<sup>64</sup> Cf., in this sense, Dinstein, 'The Rights to Life, physical Integrity, and Liberty', in HENKIN 114, 122, with further references; Nowak, *Die UNO-Konvention gegen die Folter vom 10. Dezember 1984*, 1985 EUGRZ 109, 110; Lillich, in MERON at 127; Higgins, 1976/77 BYBIL at 282, Bruno Simma / Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 1992 Australian YBIL 82, with further references. Reservations to Article 7 seem, therefore, incompatible with the object and purpose of the Covenant and thus impermissible. But *see* the reservation of the United States. *See* further the Statement of the Lawyers Committee for Human Rights in 1993 HRLJ 126; General Comment 24/52, § 8; A/50/40, Vol. I, §§ 279 and 292.

age of torture. Because it represents a direct attack on the core of human dignity and personality, torture is particularly reprehensible. This, together with the fact that it is practiced – often systematically – in all corners of the world, has prompted the community of states to provide additional protection to the right to personal integrity by way of specialized conventions with refined implementation mechanisms.<sup>65</sup>

The UN Convention against Torture of 10 December 1984 provides at the inter-State level, in addition to the principle of “non-refoulement” (i.e., the obligation not to return a person to a state where he or she is likely to be tortured), for universal criminal jurisdiction over the offence of torture under the principle of *aut dedere aut judicare* and, at the international level, for the establishment of a Committee against Torture; the latter has been equipped with the traditional functions of considering state reports and individual and inter-State communications, as well as with a confidential inquiry jurisdiction.<sup>66</sup> The European Convention for the Prevention of Torture (ECPT) of June 1987 provides for a preventive system of unannounced, confidential visits to prisons and other closed facilities by the European Committee for the Prevention of Torture. This system, new in the field of international human rights protection, is oriented along the practice of the International Committee of the Red Cross and can be traced back to the initiative of the Swiss banker Jean-Jacques Gautier.<sup>67</sup> In 1985, the HRC established a Special Rapporteur with a broad mandate to investigate allegations of torture in all countries of the world; and in 2002, the General Assembly adopted an Optional Protocol to the CAT which also establishes a system of preventive visits to all places of detention, similar to the ECPT.<sup>68</sup>

## 3.2 Definition of the Torture

Article 1(1) of the CAT contains a definition of torture that, although not binding for Article 7 of the ICCPR, can be drawn upon as an interpretational aid. Torture is understood as acts of public officials that intentionally inflict severe physical or mental pain or suffering in order to fulfill a certain purpose, such as the extortion of information or confessions or the punishment, intimidation or discrimination of a person. Other actions or omissions are not considered to be torture but rather, depending on the kind, purpose and severity, cruel, inhuman or degrading treatment; in these cases, a certain minimum of pain or suffering is imposed, but one or several of the essential elements of the term torture are lacking: intent, fulfillment of a

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<sup>65</sup> Nowak, *supra* note 5, p.158.

<sup>66</sup> The UN Convention against Torture, GA, Res. 39/46 entered into force internationally on 26 June 1987.

<sup>67</sup> The European Convention for the prevention of Torture and Inhuman or Degrading Treatment or Punishment, reproduced in 1988 HRLJ 359, entered into force internationally on 1 February 1989.

<sup>68</sup> First Optional Protocol to the CAT, GA Res. A/RES/57/199 of 18 December 2002; not yet in force.

certain purpose and /or the intensity of severe pain. One is reminded of a notorious case involving an individual taken into custody in Austria. Forgotten by the supervisory authorities, he survived twenty days without food or water in constant fear of slowly starving to death.<sup>69</sup> In view of the severe physical and mental pain suffered by the prisoner at the hands of the state organs, this is a case of inhuman or cruel treatment, but three elements are lacking for the offence of torture: active undertaking, intent and purposefulness.<sup>70</sup> If one person intentionally mistreats another person severely without thereby pursuing some purpose (e.g., purely sadistically), then this is not torture but rather cruel treatment.<sup>71</sup> The imposition of severe pain for the sole reason of discrimination is, however, torture.<sup>72</sup>

Whereas Article 1(1) of the CAT only relates to acts that are committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”, the HRC has rightly rejected such a narrow approach and, as with other rights, has recognized horizontal effects from the very beginning: “[I]t is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.”<sup>73</sup>

Most difficult is the delineation of torture from cruel and inhuman treatment according to the degree of the severity of suffering inflicted. Whether physical or mental pain can be termed “severe” also depends on the victim’s subjective feelings.<sup>74</sup> This qualification can be made only in a given case by carefully balancing all circumstances, including the victim’s subjective pain tolerance. For instance, in the *Northern Ireland* case the ECtHR held that these inhuman treatments did not constitute a practice of torture since they did not occasion suffering of the particular intensity and cruelty implied by the word torture.

Most individual cases, in which the HRC has explicitly established that torture had been committed, relate to the former military dictatorship in Uruguay. The facts of these cases disclose that the victim, usually during interrogations in the initial period of “incommunicado” detention, had been subjected to a variety of most brutal torture methods, such as: systematic beatings, electric shocks to fingers, eyelids, nose and genitals when tied naked to a metal bed frame or in coiling wire around fingers and genitals.<sup>75</sup>

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<sup>69</sup> See the judgment of the Supreme Court of Austria of 20 May 1981.

<sup>70</sup> This is a typical case of inhuman treatment by omission. In contrast to Dinstein, *supra* note 64, at 124, the offence of inhuman treatment is satisfied by mere negligence; it has occasionally been criticized in the literature that grossly negligent conduct cannot also be torture.

<sup>71</sup> But see Dinstein, *supra* note 64, p. 123.

<sup>72</sup> Nowak, *supra* note 64, p. 112.

<sup>73</sup> General Comment 7/16, § 2.

<sup>74</sup> For the issue of the subjective element, *cf.* Dinstein, *supra* note 64, p. 123, with further reference.

<sup>75</sup> *Cf.*, e.g., the detailed description in *Rodríguez v. Uruguay*, No.322/1988, §2.1.

In another cases, torture was present in the forms of burnings with cigarettes, extended hanging from hand and/or leg chains, often combined with electric shocks, repeated immersion in a mixture of blood, urine, vomit and excrement, standing naked and handcuffed for great lengths, threats, simulated executions or amputations.<sup>76</sup> In many cases, these torture practices caused permanent damage to the health of the victims, which the HRC has taken into account in its decisions.<sup>77</sup> Most of these complaints against Uruguay have been submitted by family members of the victims, who had been fleeing the country, and the victim themselves usually did not survive this treatment, were killed or are still listed as disappeared persons.

### 3.3 State Obligations to Fulfill

The HRC does not distinguish between public and private torture: “it is duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”<sup>78</sup>

In its General Comments on Article 7 of the ICCPR, which corresponded in part to those set forth in the 1984 UN Convention against Torture and the 1992 UN Declaration on Enforced Disappearance, the HRC has stressed that in implementing this right, it is not sufficient to prohibit torture or to make it a crime. When read together with Article 2, there arises a duty on States parties to ensure effective protection through some machinery of control. Complaints about ill - treatment must be investigated effectively by competent authorities, torturers must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation.

The HRC has listed a number of *preventive duties* for the States to prevent torture: the prohibition of incommunicado detention, routine visits by physicians, attorneys and family members, centralized registration and information regarding all imprisoned persons, prohibition of the use of evidence obtained through torture, as well as corresponding training of law enforcement officials and medical personnel.<sup>79</sup>

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<sup>76</sup> Cf., the cases of *Grille Motta* (No. 11/1977), *Bleier* (No. 30/1978), *Sendic* (No. 63/1979), *Angel Estrella* (No. 74/1980), *Arzuaga Gilboa* (No. 147/1983), *Cariboni* (No. 159/1983), *Berterretche Acosta* (No. 162/1983). In some cases, the HRC did not explicitly refer to torture, but used other terms as “severe ill-treatment”, e.g. *Hiber Conteris v. Uruguay* (no. 139/1983).

<sup>77</sup> For example, in *Massera v. Uruguay* (No. 5/1977), the HRC found that the author had been tortured by being forced to remain standing with his head hooded for long periods, such that he lost his balance, fell and broke his leg.

<sup>78</sup> General Comment 20/44, § 2.

<sup>79</sup> Nowak, *supra* note 5, pp.179-180.

In its case law on individual complaints, the HRC has confirmed the respective statements in the General Comments. In particular, it emphasizes the obligation of states to investigate well-founded allegations of torture and other gross violations of human rights, and to bring the perpetrators to justice. In *Zelaya Blanco v. Nicaragua*, the HRC noted that violations of Article 7 and 10(1) are extremely serious and require prompt and impartial investigation by competent authorities of the States parties so as to make remedy effective.<sup>80</sup>

Other State obligations to fulfil arise from the special obligation of States parties towards detainees, a group of particularly vulnerable human beings, who are not in a position to satisfy their most basic needs by themselves, and who are subject to a high degree of violence, ill-treatment and humiliation by prison wardens and fellow inmates alike. In its General Comment on Article 10, the HRC observed; “Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to Article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.”<sup>81</sup>

### 3.4 The Torture in China

Although China is a party to the CAT, and its Criminal Procedure Law and internal guidelines governing the police and prosecution service’s conduct strictly prohibit torture, torture is currently not uncommon in practice.

In China, the power of criminal investigation vests in the police for ordinary criminal offences and in the prosecution service for crimes of embezzlement and bribery, of dereliction of duty, and of violations of citizen’s democratic rights. Most of inhuman and illegal treatments occur with the police who take the major responsibility in criminal investigation when it tries to obtain evidence from suspects.

During the police investigation period, there exists torture and other inhuman treatments prohibited not only by international treaties, but also by domestic laws in China. Mistreatment during interrogation ranges from beatings, to assault with electric baton, use of shackles and chains, suspension by the arms or feet, confinement in tiny and dark cells, deprivation of sleep and food, etc. Further, medical care is seldom given to those who have suffered torture during interrogation.

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<sup>80</sup> No.328/1988, § 10.6.

<sup>81</sup> General Comment 21/44, § 3.

One of the main reasons for torture and other inhuman treatment on suspects in China is that the police have been used to gather oral confessions from the criminal suspects over decades, if not centuries.

Another main reason for this is that many police officers still share the old mindset that any denials of suspected guilt from suspects should be punished. Of course, this is also due to the fact that human rights knowledge remains very weak with the police force in China.

Additionally, lack of valid supervision to investigation of police is also the relative. Although, Article 7 of the Criminal Procedure Law of the PRC stipulates, “[T]he People’s Procuratorates shall, in accordance with law, exercise legal supervision over criminal proceedings.” According to law, Prosecution services’ supervision to the investigation of police should extend to the whole criminal investigation process, however, in practice, its function is very limited. Generally, the supervision will begin while police for the approval of arrest of the suspect has filed the cases. In addition, mostly, prosecutors only check the files of cases, not interview the suspect, which makes the supervision only limited to the facial work, having no practical sense. In fact, it is a kind of malpractice of the prosecution service because prosecutors give up their duty to interview the suspect while deciding whether or not to approve the arrest. Based on this situation, relative laws should clearly stipulate that the prosecutor must interview the suspect while performing the duty of approving the arrest so as to find the question of the investigation earlier, especially torture, and better to protect the human rights and uphold the criminal justice.

Acknowledging the extent of torture in China, the central government has made great efforts in this regard. One of efforts made was to get the prosecution service involved in criminal investigation by the police with the aim that legal procedures are followed and malpractices of the police are reduced. However, such phenomenon has not improved the situation significantly.

Based on the current situation in China, the power of supervision from the prosecution service should be maintained, or even strengthened. However, two technical issues need to be resolved. First, detailed legal provisions are needed to make this supervision power effectively work in practice. Although illegal practices by the police have become less serious after the prosecution service began to get involved in police’s investigation about two years ago with the view to ensuring justice during this period, the prosecution service’s role, through earlier involvement, however, is just guiding, and thus very limited. The prosecution service’s involvement is mandated by its internal documents issued by the SPC. As a result, police officers are sometimes unwilling to accept prosecutors’ involvements because there is no similar instruction given by the Ministry of Public Security. Procuratorates’ supervision can only be realized when they successfully persuade the police on the grounds that both sides are jointly responsible for providing admissible evidence for court trials, therefore,

they need to cooperate to make sure that evidences are collected properly. In most cases, and as a routine practice, prosecution service's involvements in criminal investigation happen after cases are moved to the prosecution service for arrest approvals. After that, the case will be moved back once again to police, then the prosecution service will know nothing about its progress until the investigation finishes and is transferred to the prosecution service to exam whether or not to prosecute. The prosecution service hardly has any control during the investigation process. Malpractice by the police hardly is found before the investigation is over. Without clear procedures to be followed by the police and the prosecution service, furthermore, the prosecution service's current involvement sometimes brings negative impact on the police's investigation work with respect to its independence.

According to the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, "prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigation, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest." However, the current prosecution service's involvement into the police investigation work can hardly reduce torture and inhuman treatment cases significantly from its roots. Therefore, in order that the prosecution service continues to exercise the power of supervising the criminal investigation, an effective mechanism needs to be established by law with detailed procedures so that the prosecution service has the full picture of the case from the very beginning, and has necessary measures to guide and monitor each phase of the criminal investigation.

Secondly, while the prosecution service has the role of supervising the police, how to deal with torture and inhuman treatments with respect to cases under jurisdiction of the prosecution service remains an issue, even though the number of reported law violation cases is not as big as that of the police. According to the Guidelines on the Role of Prosecutors, prosecutors should "have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protection for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law." It furthermore states, "[P] prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." The prosecution service in China has strict regulations in criminal investigation. Nonetheless, cases of malpractices occur from time to time.

It seems that one possible way to achieve the objective of justice during the criminal investigation period is to put the police's criminal investigation

function directly under the prosecution service, a common practice adopted by many countries of the continental law tradition. In criminal justice system, both the police and the prosecution service share the same interest and responsibility of gathering evidence and indicting criminal suspects. It thus makes sense for the prosecution service to direct the criminal investigation process, both for ordinary crimes and those special crimes, which are currently under the jurisdiction of the prosecution service to investigate.<sup>82</sup>

To ultimately improve justice and human rights protection during the criminal investigation period also depends on bettering the channel for complaints by those affected parties. If the prosecution service and police combine their investigation function together to handle all criminal cases, courts should be empowered to hear cases concerning any possible malpractice of these two institutions. Laws, both substantive and procedural, should therefore be provided so that the affected parties could be able to lodge their complaints to seek remedies.

To prohibit the torture from the root and satisfy the standard of the ICCPR, an important means cannot be ignored, which is to stipulate the rule to exclude the evidence collected via the torture or inhuman treatment in law. Article 43 of the Criminal Procedure Law of the PRC only states that it shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means.<sup>83</sup> No specific provision to exclude the use of the evidence gathered by means of torture or inhuman treatment.

Firstly, prosecutor should refuse to use the evidence collected via torture or other illegal means while examining the cases for prosecution. Just like the Guidelines on the Role of Prosecutors states, “when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court

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<sup>82</sup> Zhang Jianwei, ‘Research of Reforming the Criminal Justice System’, in *Judicial Reform: Analysis and Expansion*, ed. Zhang Weiping, et al., (Law press, Beijing, 2003), pp. 384-385.

<sup>83</sup> *see* Article 43 of the Criminal Procedure Law of the PRC, “[J]udges, prosecutors and investigators must, in accordance with the legally prescribed process, collect various kind of evidence that can prove the criminal suspect’s or defendant’s guilt or innocence and the gravity of his crime. It shall be strictly forbidden to extort confession by torture and to collect evidence by threat, enticement, deceit or other unlawful means. Conditions must be guaranteed for all citizens who are involved in a case or who have information about the circumstances of a case to objectively and fully furnish evidence and, except in special circumstances, they may be brought in to help the investigation.

accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

Additionally, courts should establish a better rule of evidence to exclude those evidences obtained through torture or other inhuman means. As Article 15 of the Code of Conduct for Law Enforcement Officials provides, “[E]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” Although courts in China have been trying to move in this direction, more efforts need to be done in this regard.

# 4 Liberty of Person

Liberty is one of the oldest human rights. It is to be found in medieval charters, beginning with the Magna Charta Libertatum in 1215. At the same time, deprivation of personal liberty in the form of imprisonment or as a preventive measure has long represented the most common means used by the state to fight crime and maintain internal security. With the gradual displacement of other forms of punishment, such as the death penalty and corporal punishment, imprisonment has ever gained in significance over the last centuries. Since the realization of a society without prisons seems utopian, deprivation of personal liberty will be also in the future continue to be one of the legitimate means for exercising sovereign state authority.

Article 9 of the ICCPR provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## 4.1 Interpretation of Article 9

### 4.1.1 In General

In contrast to such absolute rights as the prohibitions of slavery and torture, as well as most of the other rights in the Covenant, the human right of personal liberty does not strive toward the ideal of a complete abolition of state measures that deprive liberty; rather, it merely represents a procedural guarantee. It is not the deprivation of liberty in and of itself that is disapproved of but rather which is arbitrary and unlawful. It obligates a state's legislature to define precisely the cases in which deprivation of liberty is permissible and the procedures to be applied and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or

executive officials. Although the right of liberty of person may be restricted in the case of a public emergency within the meaning of Article 4,<sup>84</sup> the HRC has taken the view that the requirement of court review over the lawfulness of detention forms a “non - derogable” element in Article 9. The right to personal liberty is not forfeitable pursuant to Article 5(1).<sup>85</sup>

The term “liberty of person” is quite narrow and must not be confused with that of liberty in general. All human rights ultimately serve the realization of human freedom, even when, in accordance with their object and purpose, they may be assigned differing dimensions of liberty. (In this context, it is possible to distinguish between the liberal, the domestic and the social dimensions of liberty, i.e., freedom from the state, towards the state, and by the state). Liberty of person, on the other hand, relates only to a very specific aspect of human liberty: the freedom of bodily movement in the narrowest sense.<sup>86</sup> An interference with personal liberty result only the forceful detention of a person at a certain, narrowly bounded location, such as a prison or some other detention facility, a psychiatric facility, a re-education, concentration or work camp, or a detoxification facility for alcoholics or drug addicts, as well as an order of house arrest. Only in these cases are the procedural guarantees under Article 9 (legality, prohibition of arbitrariness, rights to information, *habeas corpus* and compensation) applicable. In the event of arrest or detention in criminal proceedings, the special procedural guarantees under paras.2 and 3 are also applicable. All less grievous restrictions on freedom of bodily movement, such as limitations on domicile or residency, exile, confinement to an island or expulsion from State territory, do not fall within the scope of the right to personal liberty but instead under freedom of movement pursuant to Article 12 and 13.<sup>87</sup> Restrictions on other rights of liberty, such as freedom of

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<sup>84</sup> See Article 4 of the ICCPR: 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; 2. No derogation from article 6, 7, 8 (paragraph 1 and 2 ), 11, 15, 16 and 18 may be made under this provision; 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

<sup>85</sup> See Article 5 (1) of the ICCPR: Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

<sup>86</sup> see J. L. Murdoch (ed.), *Article 5 of the European Convention ON Human Rights: The Protection of Liberty And Security of Person* (Council of Europe, Strasbourg, 2002).

<sup>87</sup> In *Celepli v. Sweden*, the HRC considered the assigned residence of a Turkish citizen to a Swedish municipality for nearly seven years and his obligation to report to the police three

religion, association or assembly, come still less within the scope of personal liberty.

At this stage, a further limit on the scope of personal liberty should be mentioned. The traditional view is that it relates solely to the fact of deprivation of liberty and the observance of the minimum guarantees specifically formulated in the context, and not to the manner in which liberty is deprived. For example, if a person is arrested and not informed of the reasons, this is a violation of personal liberty; if he or she is mistreated in the process, this has nothing to do with personal liberty. The same applies to the conditions of detention and other related issues, such as denial of contact with an attorney.

Most of the provisions contained within Article 9 of the ICCPR are applicable only to persons against whom criminal charges are brought. It has been pointed out by the HRC, however, that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purpose, immigration control, or the like.<sup>88</sup>

## 4.1.2 Rights of Arrested or Detained Persons

### 4.1.2.1 Right to Be Informed

Article 9(2) contains two different rights to information that, for obvious reasons, relate only to the stage of arrest, i.e., not to the state of detention.<sup>89</sup> At the point at which one is deprived of personal liberty, every person who is arrested – i.e., not merely someone who is arrested or taken into custody on a criminal charge – must be informed of the reasons. When an arrest is made pursuant to criminal justice, the person arrested must be promptly informed of the charges lodged against him or her.<sup>90</sup> Once the person concerned has been charged with a criminal act, he or she is to be informed pursuant to Article 14(3)(a) “promptly and in detail in a language which he understands of the nature and the cause of the charge against him”.<sup>91</sup>

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times a week as an interference with his freedom of movement but not of his personal liberty: No. 456/1991, § 5.2., 6.1. *see* Art. 12, para. 13 of the ICCPR.

<sup>88</sup> General Comment 8, para. 1

<sup>89</sup> The word “arrest” refers to the act of depriving personal liberty and generally covers the period up to the point where the person is brought before the competent authority. The word “detention”, on the other hand, refers to the state of deprivation of liberty, regardless of whether this follows from an arrest (custody, pre-trial detention), a conviction (imprisonment), kidnapping or some other act.

<sup>90</sup> *Cf.* in this sense, General Comment 8/16 § 1: “It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought.”

<sup>91</sup> On the relationship between Article 9(2) and Article 14(3)(a) *see, e.g., Kelly v. Jamaica*, No. 253/1987, § 5.8

The right to be informed serves the legal interests of arrested persons concerned. Above all it is to put them in a position to make use of their right to remand pursuant to Article 9(4).

In *Griffin v. Spain*, the HRC provides a reasonable interpretation of the relationship between the two information duties in Article 9(2). A Canadian tourist was arrested at 11:30 p.m. after the police, in his presence, had searched his camper and discovered 68 kilograms of hashish:

“The police reports further reveal that the police refrained from taking his statement in the absence of an interpreter, and that the following morning the drugs were weighed in the presence of the author. He was then brought before the examining magistrate and, with the use of an interpreter, he was informed of the charge against him. The HRC observes that, although no interpreter was present during the arrest, it is wholly unreasonable to argue that the author was unaware of the reasons for his arrest. In any event, he was promptly informed, in his own language, of the charges held against him. The HRC therefore finds no violation of Article 9, paragraph 2, of the Covenant.”<sup>92</sup>

A written arrest warrant is not absolutely essential, since a motion to this effect by Liberia in the 3<sup>rd</sup> Committee of the GA was defeated by a clear majority.<sup>93</sup> In its case law, however, the HRC has indicated that the lack of a written arrest warrant might be an indication of an arbitrary arrest.<sup>94</sup>

Initial information must be provided at the time of arrest, but this may usually be limited to a general description of the reasons for arrest. Subsequent information, which is to be provided promptly, i.e., during the first interrogation at the latest, must contain the specific accusations in a legal sense, enabling the person concerned to submit a well-founded application for remand.

#### **4.1.2.2 Special Rights for Persons in Custody**

Article 9(3) of the ICCPR refer only to persons who have been arrested or detained for the purposes of criminal justice, i.e., to persons in custody and to pre-trial detainees.

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power, according to Article 9(3). What is meant by “promptly” has been left open. As emphasized by the Committee in its General Comment to Article 9, in many states, the length of custody is limited to 48 hours, in others, even to 24 hours. In no event may this last longer than “a few days”.<sup>95</sup>

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<sup>92</sup> *Griffin v. Spain*, No. 493/1992, § 9.2.

<sup>93</sup> *See also*, in this sense, Noor Muhammad, ‘Due process of Law for persons Accused of Crime’, in Henkin, Louis (Ed.), *The International Bill of Rights – The Covenant on Civil and Political Rights*, (Columbia University Press, New York, 1981) pp. 138, 140.

<sup>94</sup> *cf.*, e.g., *Luyeye v. Zaire*, No. 90/1981, § 8.

<sup>95</sup> General Comment 8/16, § 2.

In *McLawrence v. Jamaica*, the Committee held that the term “promptly” in Article 9(3) must be determined on a case-by-case basis. It explicitly referred to its “few days” rule in General Comment 8/16 and concluded that a delay of one week in a capital case cannot be deemed compatible with Article 9 (3).<sup>96</sup> One might conclude that the HRC might be willing to take exceptional conditions in particular countries into account, such as serious budgetary constraints. Such an approach underlines the principle of indivisibility of all human rights and the fact that the availability of financial resources is not only relevant for the realisation of economic, social and cultural rights.<sup>97</sup>

The requirement that a person be brought before a judge or other officer authorized by law to exercise judicial power corresponds literally to Article 5(3) of the ECHR, such that it seems justified to draw upon the criteria developed by the European Court of Human Rights in the following cases for the interpretation of this provision:

In the *Schiesser v. Switzerland*,<sup>98</sup> the court laid down the criteria for the determination of whether a person can be regarded as such an officer. It expressed that officer is not identical with the judge, but nevertheless must have some of the latter’s attributes. The first condition is independence of the executive and of the parties. This does not mean that the officer may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence. Secondly, there is a procedural requirement: the officer is obliged to himself hear the individual brought before him. Thirdly, there is a substantive requirement, which places the officer under the obligation to review the circumstance militating for or against detention, and to decide by reference to legal criteria, whether there are reasons to justify detention and, if this is not the case, to order the release of the person. In this case the complaint concerned the fact that the same authority that was charged in certain cases with the prosecution also had to decide on the lawfulness of the detention. The court concluded that the provision of paragraph 3 of Article 5 of the ECHR had not been violated. (Article 5(3) of the ECHR: Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.) It held in particular that in the case under consideration there had been no blending of functions, that the functionary had been able to proceed, and had proceeded independently, and that the procedural and substantive guaranteed had been observed.

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<sup>96</sup> No. 702/1996, § 5.6.

<sup>97</sup> Nowak, *supra* note 5, pp. 231-2.

<sup>98</sup> See *Schiesser v. Switzerland* (7710/76) [1979] ECHR.

In the *Skoogström* case, on the other hand, the commission concluded that the criteria were not fulfilled. Not only was the Public Prosecutor, when deciding about the continuation of the detention, not independent because of a lack of distinction between investigating and prosecuting tasks, but she also did not hear that detainee herself. The commission emphasized that the authorities mentioned in Article 5 (3) must perform the duties, ensuring from this article, themselves; a delegation of these powers is not permitted.<sup>99</sup>

In the *Pauwels* case the investigation and prosecution functions were both performed by one and the same auditeur-militair. The court held that although the auditeur-militair is hierarchically subordinate to the auditeur-generaal and the minister of justice, he is completely independent in the performance of his twin duties as a member of the public prosecutor's office and as a chairman of the Board of Inquiry. However, the fact that legislation entitled the auditeur-militair to perform investigation and prosecution functions in the same case and in respect of the same defendant, led the court to the conclusion that the auditeur-militair's impartiality could give rise to doubt.<sup>100</sup>

In two of the three cases against the Netherlands and to a lesser extent also in the *Pauwels* case the impartiality of the auditeur-militair was found open to doubt because he could also be in charge of prosecuting functions in the same case. With this reasoning, the court implicitly deviated from its judgment in the *Schiesser* case, where it was held that only the effective concurrent exercise of such function infringed Article 5 (3). This development is clearly confirmed by the *Huber* case and the *Brincat* case. In the latter case the Court held:

Only the objective appearance at the time of the decision are material: if it then appears that officer authorized by law to exercise judicial power may later intervene, in the subsequent proceedings, as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified.<sup>101</sup>

The development of Case laws with regard of this area seems to show that the ECtHR emphasized that the officer should be impartial completely from the parties of case. An independent prosecutor from the executive cannot be justified if he or she is charged with the duty to prosecute this same case even if this prosecutor has no function to investigate this case. If following this logic process, then, the impartiality of judge will also be doubted while one judge tried the same case after he or she approved the arrest of the defendant in the case since under this circumstance, the judge lose the role

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<sup>99</sup> Report of 15 July 1983, pp. 15-17. Because of the friendly settlement between the Swedish Government and the applicant the case was struck off the list by the ECtHR.

<sup>100</sup> *Pauwels v. Belgium* (10208/82) [1988] ECHR.

<sup>101</sup> See *Brincat v. Italy* (13867/88) [1992] ECHR; See also *Huber v. Switzerland* (12794/87) [1990] ECHR.

of impartiality from the accused once he or she has approved the arrest of the accused. It is evident that this reasoning is to be very absurd.

In addition, contrasting the wording of paragraph 4 of Article 5 which states: Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. It is evident that the “court” here is different from the “judge or other officer authorized by law to exercise judicial power” in paragraph 3, at least, these two judges should not be the same judge. Since if they are the same one, paragraph 4 will lose the purpose of its existence.

In case law of the HRC, *Kulomin v. Hungary* concerned the authorization and renewal of pre - trial detention by the public prosecutor. As regards the compatibility of the procedure with the requirements of Article 9, paragraph 3, the State party interprets the term “other officers authorized by law” as meaning officers with the same independence towards the executive as the Courts. In this connection, the State party notes that the law in force in Hungary in 1988 provided that the Chief Public Prosecutor was elected by and responsible to Parliament. All other public prosecutors were subordinate to the Chief Public Prosecutor. The State party concludes that the prosecutor's organization at the time had no link whatsoever with the executive and was independent from it. The State party therefore argues that the prosecutors who decided on the continued detention of Mr. Kulomin can be regarded as other officers authorized by law to exercise judicial power within the meaning of Article 9, paragraph 3, and that no violation of the Covenant has occurred.

The HRC observes, however, that Article 9(3), first sentence, is intended to bring the detention of a person charged with a criminal offence under judicial control and considered that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issue dealt with. In the circumstance of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an “officer authorized to exercise judicial power” within the meaning of Article 9(3). Thus, custody must end within a few days with either release or remand by a judge or judicial officers to pre - trial detention.

In the individual opinion, Committee member Nisuke Ando stated that:

I do not consider that the Committee's finding of a violation of article 9, paragraph 3, in the instant case (see paragraph 12) is sufficiently persuasive. The reason behind that finding is reflected in paragraph 11.3: in the circumstances of the instant case, the Committee is not satisfied that the Public Prosecutor could be regarded as an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3.

Article 9, paragraph 3, of the International Covenant on Civil and Political Rights stipulates: anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be

entitled to trial within a reasonable time or to release. The State party interprets the term "other officer authorized by law" as meaning an officer with the same independence towards the executive as a court. It also notes that the law in force in Hungary in 1988 provided that the Chief Public Prosecutor was elected by and responsible to Parliament and that all other public prosecutors were subordinate to the Public Prosecutor.

As a matter of fact, in the domestic law of many States parties, public prosecutors are granted certain judicial power, including the power to investigate and prosecute suspects in criminal cases. In the case of Hungarian law in 1988, this power included the power to extend the detention of suspects up to one year before they were committed to trial.

In my opinion, the pre-trial detention of suspects for the period of one year seems to be too long. In addition, while I do understand that under the Hungarian law of 1988 the Public Prosecutor who should decide on the extension of detention was to be different from the one who requested the extension, excessive detention was likely to occur in that type of system.

Nevertheless, I am unable to accept the categorical statement of the Committee, as quoted above, to the effect that in the Hungarian type of system the Public Prosecutor necessarily lacks the institutional objectivity and impartiality necessary to be considered as an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3. Even in that type of system, a prosecutor's decision on the extension of the detention of a particular suspect in a given case may well be impartial and objectively justifiable. To deny such impartiality and objectivity, the Committee needs to clarify the detailed circumstances of the instant case on which it bases its finding, but such clarification is totally lacking in the Committee's Views.<sup>102</sup>

So, in my opinion, considering the specific States parties' different legal tradition and social system is necessary when assessing the requirement of "other officer authorized by law to exercise judicial power", and the basic standard should follow the rule of *Schiesser* case, which are: such a judicial officer must be independent of the executive, personally hear the person concerned and be empowered to direct pre - trial detention or to release the person arrested.

While no blending function, it means, for example, a prosecutor did not perform investigation and prosecution functions in the same case and in respect of the same defendant, it cannot say it will violate the impartiality. Especially, when arrest power and prosecution power are divided into different apartment even if charged by the same prosecutor office. However, if showing the blending function, namely, a prosecutor performed investigation and prosecution functions in the same case and in respect of the same defendant, the impartiality will be doubted. Under this circumstance, division and balance should be considered.

#### **4.1.2.3 Special Rights for Pre - Trial Detention**

Stemming from a British draft in the HRC, Article 9(3) contains the principle, not set down in Article 5 of the ECHR or Article 7 of the ACHR,

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<sup>102</sup> *Kulomin v. Hungary*, No.521/1992, §11.3. See also the individual opinion of Ando.

that pre-trial detention may not become the general rule.<sup>103</sup> It is thus to be limited to essential reasons, such as danger of suppression of evidence, repetition of the offence and absconding, and should be as short as possible. Article 9(3) refers in this context to a reasonable time. Whether a time limit is appropriate can be evaluated only in light of all the circumstances of a given case.<sup>104</sup> It begins with the point at which an arrest is made or pre-trial detention is imposed, and it ends, according to the English version, with prosecution or, according to the French and Spanish versions, only with a judgment (of first instance). It is, however, shorter than the time limit provided for in Article 14(3)(c) (without undue delay), within which prosecution is to be initiated or a ruling is to be made against an accused. On the other hand, according to Article 10(2)(b), a judgment against juvenile pre-trial detainees must be made “as speedily as possible”, i.e., more quickly than “within a reasonable time”.

In *Koné v. Senegal*, the committee held that what constitutes “reasonable time” within the meaning of Article 9(3), must be assessed on a case-by-case basis. In the absence of special circumstances, such as impediments to investigations attributable to the accused or his or her representative, pre-trial detention of four years and four months has been considered to violate Article 9(3).<sup>105</sup>

Article 9(3) also contains an indirect entitlement to release from pre-trial detention in exchange for bail or some other guarantee. This results from the principle that pre-trial detention is an exception, together with the authority to make release dependent on the necessary guarantees. However, it must not be overlooked that in this regard States parties are provided with broad discretion, and a violation of the right to release on bail has only been found by the HRC in rare cases.

#### 4.1.2.4 Right to Habeas Corpus

All persons who have been deprived of their liberty of person are - regardless of the reasons - entitled to a right to have the detention reviewed in court without delay. This right, which stems from the Anglo-American

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<sup>103</sup> In this regard, the English version differs from the French and Spanish versions. The latter apply this principle to the entire period of detention until sentencing. The English version, on the other hand, only applies the principle to detention during preliminary court investigation (person awaiting trial). This distinction is also apparent in the first sentence of Article 9 (“entitled to trial within a reasonable time”). The HRC appears to follow the English version. See General Comment 8/16, § 3.

<sup>104</sup> *cf.* the detained case law of the Strasbourg organs, which in some cases have held pre-trial detention lasting six years to be consistent with the Convention.

<sup>105</sup> No. 386/1989, § 8.6. and 8.7. In *Bolaños v. Ecuador*, No. 238/1987, § 2.1, 8.3, 9, pre-trial detention exceeding five years was held to constitute unlawful detention in violation of Article 9(1) and (3). In *Shalto v. Trinidad and Tobago*, No. 447/1991, § 7.2, a period of four years between judgment of the Court of Appeal and the re-trial of the applicant in a death penalty case was considered a violation of Article 9(3).

legal principle of habeas corpus, exists regardless of whether deprivation of liberty is unlawful.

#### **4.1.2.5 Right to Compensation**

Article 9(5) guarantees a claim to compensation to all persons who have been unlawfully deprived of their liberty of person. This claim can be considered as a specific type of domestic remedy within the meaning of Article 2(3) relating to liberty of person.

## **4.2 The Power of Arrest Approval in China**

The text of the Article 9(3) of the ICCPR gives a framework regarding of the power of arrest approval.

In China, laws allow the police to exercise the power of arrest, while leaving the power of arrest approvals and decisions to the prosecution service and the judiciary respectively. When the police have good reasons to believe that a suspect has conducted a crime, it can file an application of arrest with the prosecution service, which then reviews and decides whether it grants the police an arrest warrant. Once the arrest warrant is issued by the prosecution service, the police can arrest the suspect who is normally under the police's custody already. In the case of the prosecution service's self-investigation, its arrest approval department can issue warrants once its investigation departments apply with good reasons. Apparently, the prosecution service enjoys a privilege to have an arrest warrant granted within its own organization, where arbitrary arrests may occur.

As mentioned above, according to the criteria of *Schiesser* case, which are: such a judicial officer must be independent of the executive, personally hear the person concerned and be empowered to direct pre - trial detention or to release the person arrested. In china, the prosecution service is an independent institution from the execution and General Prosecutor has been elected by NPC and other junior prosecutors have been elected by the NPC of different levels. In addition, according to the constitution of China, the Prosecution Service is a judicial agency that is equal to the Court, at the same time; the Prosecution Service is a one that is with the charge of the supervision to the court and the police station. Furthermore, under the Criminal Procedure Law of the PRC, while reviewing the case of filing of arrest, prosecutor have power to personally hear the person concerned and be empowered to direct pre - trial detention or to release the person arrested. From this angle, should say, the power of arrest approvals with respect to applications from the police will may maintain because no blending function happen within this process. However, as for cases investigated by the prosecution service itself, the power of the arrest approval should be removed to somewhere else, maybe the court, in order to avoid conflicts of interests. Thus, the power of arrest approval should rest with the court for the prosecution service's self-investigation cases, while the prosecution

service maintains its power of arrest approvals for those cases investigated by the police. Checks and balances prevail if such change takes place.

However, one factor should not be ignored. As discussed before, if move the power of arrest approval to the court, then, the impartial role of the court will be challenged while the court try this same case after its arrest approval. In addition, it will also conflict with the Article 9(4) of the ICCPR which states that the court will review the legality of deprivation of liberty by arrest or detention and will order the release if the detention is not lawful, just as mentioned above.

Therefore, in my own view, while the basic legal system keep steady and there are not new judicial agencies available, it looks an improvement if the procuratorate of a higher level is empowered to review the self-investigation cases of the prosecution service and approve the arrests of these kinds of cases.

Another important factor with respect to arrests is how criminal suspects can challenge lawfulness of arrests to satisfy with the demand of Article 9(4) of the ICCPR. In current china, taking account of the fact that serious arbitrary arrests and detentions take place from time to time, a similar mechanism followed to Article 9(4) ought to be installed within the legal system. To do so, in accordance with international law and common international practices, courts should be empowered to review legality of arrests whenever arrest and detention decisions are challenged. In other words, while approvals of arrest rest with the court and the prosecution service, as discussed earlier, for crimes of the two different natures, judicial reviews are needed with respect to legality of such approvals for two reasons. First, as it states in paragraph one of Article 9 of the ICCPR, “Everyone has the right to liberty and security of person [,]” people should be able to fully enjoy this right unless charges against them are serious enough to justify loss of liberty and security. Second, courts or prosecution service may make mistakes, and because such mistakes directly endanger a person’s fundamental right to freedom and liberty, arrests or detentions must be strictly scrutinized before their being approved, and must being reviewed by the court after their being approved once there are disagreements to such arrests. As an arrest agency, the prosecution service cannot make itself an appropriate organ to review lawfulness of arrests or detentions. Therefore, the court becomes a natural choice, which conforms to international practice. Of course, in the future, if a court is empowered to approve an arrest applied by the prosecution service for a case under investigation thereby, another court or tribunal shall be used for the judicial review over the arrest.

In addition, with regards of the pre-trial detention, as mentioned earlier, which is regarded as an exception by the HRC and lay down some special conditions to guarantee the judicial proceedings of pre-trial detention. It means that the release with conditions is absolute, but rather, the detention is exception. However, in China, this is totally the contrary. In the view of

most judicial officer, the pre-detention is a general rule, and the release with condition is exception. Certainly, it will depend on the specific legal situation in a country. Indeed, the HRC leave much more space to the States Parties that are provided with broad discretion in this regard. Even so, idea with this respect should be changed and the legal officer should realize that the liberty is a principle human right, and pre-detention is not absolute since it is to deprive the right of liberty.

In the end, as discussed before, a judgment against juvenile pre - trial detainees must be made “as speedily as possible”, i.e., more quickly than “within a reasonable time”. Compared to Chinese legal system, no law is clear to give this special treatment to the juvenile, which should be changed in the future so as to better protect the human rights of juvenile.

# 5 The Fair Trial

## - Procedural Guarantee in Criminal Trials

Articles 14 of the ICCPR try to provide the guarantee of procedure for fair trial to all types' trials, not only criminal matters, but also civil matters. Here, however, we pay our attention only to the criminal trials.

Article 14 of the ICCPR stipulates:

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

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

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

- a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- c) To be tried without undue delay;
- d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance, assigned to him, in any case where the interest of justice to require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- g) Not to be compelled to testify against himself or to confess guilt.

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

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

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

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

## 5.1 Interpretation of Article 14

### 5.1.1 In General

The adoption of an individual right to trial in court and detailed minimum guarantees of the accused in criminal proceedings is based on the *Anglo-Saxon common law* tradition of *due process of law*, which can be traced to the Magna Carta Libertatum of 1215.<sup>106</sup>

The wording and historical background of Article 14 appear that agreement was reached in a universal human rights treaty on a provision based on liberal principles of the separation of powers and the independence of the judicial *vis-à-vis* the executive. Although their legal systems were founded on the unity of powers, and democratic legitimacy was more important than judicial independence, none of the socialist states submitted reservations to Article 14. Instead, most reservations have been stemmed from western States.<sup>107</sup>

These far-reaching reservations reveal that problem of detailed procedural guarantees in international human rights treaties. When dealing with universal treaties, there is greater danger that national legal systems and their practical application may be inconsistent with the international obligations of these states.<sup>108</sup> By their very nature, procedural guarantees are not directed at requiring states parties to refrain from doing something but rather require them to undertake extensive positive measures to ensure these guarantees. The right of equal access to a court in Article 14(1) obliges States parties to set up independent, impartial courts and to give them such an institutional and financial structure that they are able to conduct a fair trial in all types of civil and criminal matters and to accord all accused persons the minimum rights guaranteed in Article 14(2) to (7).

These obligations are designed to point out the underlying problem and in no way to detract from the overriding importance of Article 14 for the entire area of domestic human rights protection, or even to call into question the direct applicability of this provision. On the contrary, inherent in these procedural guarantees is a far-reaching potential for a step-by-step adaptation of the differing national legal systems to a common minimum

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<sup>106</sup> Noor Muhammad, *supra* note 93, p.138.

<sup>107</sup> Nowak, *supra* note 5, p.306.

<sup>108</sup> *Cf.*, e.g., the criticism by Tomuschat, 1985 ZaöRV 564. *see also* the criticism voiced in 1959 by the Indian delegate Mehta in the 3<sup>rd</sup> Committee of the GA, A/C.3/SR.962, §7.

standard of the “rule of law” in civil and criminal trials.<sup>109</sup> The various rights shall be described systematically with reference to their historical background, the case law of the HRC and, to the extent necessary, Strasbourg case law on Article 6 of the ECHR. Resort to case law of ECHR source appears justified in light of the great similarity between the two provisions and their common historical background.<sup>110</sup>

### 5.1.2 Equality before the Courts

The right to equality before the courts in the first sentence of Article 14(1) is a specific manifestation of the general right of equality, which goes beyond equality before the law, referring to the specific application of laws by the judiciary. It is to be read in conjunction with the general prohibition of discrimination under Article 2(1). This means that all persons must be granted, without distinction as to race, religion, sex, property, etc., a right of equal access to a court.<sup>111</sup> Establishing separate courts for the groups of persons listed in Article 2(1) thus violate Article 14.<sup>112</sup> In addition, discriminatory criteria set forth in Article 2(1), may also lead to a violation of Article 14. However, the prosecutor and the accused in criminal cases have different rights does not violate this provision, so long as this does not contravene the principle of “equality of arms”.

The right of equal access to the court obliges States parties to take positive measures to organize the judicial system so that everybody can in fact turn to the courts for adjudication. Excessive court fees and cost burdens may effectively prevent people from resorting to the courts and, thereby, violate their right of equal access to the courts.

The right of equal access to the courts under Article 14(1), in conjunction with the right to an effective remedy against Covenant violation under Article 2(3), may also be violated, if a State party fails to make legal aid available for the purpose of pursuing essential domestic human rights remedies, such as a constitutional motion before a supreme or constitutional court. In *Currie v. Jamaica*, the HRC states “in such cases, the application of the requirement of a fair trial hearing in the Constitutional Court should be consistent with the principles in paragraph 3(d) of Article 14. It follows that where a convicted person seeking constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the

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<sup>109</sup> See, e.g., in this sense, the comments made in 1959 by the Yugoslav delegate Karapandza in the 3<sup>rd</sup> Committee of the GA, A/C.3/SR.962, § 23.

<sup>110</sup> See also, e.g., in this sense, Noor Muhammad, *supra* note 93, p. 145.

<sup>111</sup> The HRC emphasized the right of equal access to courts in its General Comment 13/21, § 3.

<sup>112</sup> Cf., e.g., in this sense, the comments of the Ukrainian delegate Nedbailo and the Soviet delegate Morozov, in A/C.3/SR.961, § 22, SR.965, § 15.

state. In the present case, the absence of legal aid has denied to the author the opportunity to test the regularities of his criminal trial in the Constitutional Court in a fair hearing, and is thus a violation of article 14, paragraph 1, and article 2, paragraph 3.”<sup>113</sup>

### **5.1.3 Right to a Fair and Public Hearing**

The right to a fair and public hearing before a tribunal in all suits at law and criminal matters pursuant to Article 14(1) is the core of “due process of law”. Article 14(1) contains an institutional guarantee that requires State parties to take extensive, positive measures to ensure this guarantee. They must set up by law independent, impartial tribunals and provide them with the competence to hear and decide on criminal charges and on rights and obligations in suits at law. Such hearings must be fair and public and, insofar as a criminal charge is involved, comport with the other provisions in Article 14 and 15. Finally, all decisions in criminal and civil matters must be pronounced publicly.

The term “criminal charge”, which corresponds literally to that in Article 6 of the ECHR, also requires an autonomous interpretation. Otherwise, States parties would be at liberty to avoid the application of Article 14 by transferring the decision over a criminal offence, including imposition of punishment, to administrative authorities. However, the question of which sanctions are to be qualified as punishment is as difficult as the definition of a suit at law, such that the case law of the Strasbourg organs is equally extensive and controversial in this area.

Not only the nature and severity of the threatened sanction but also the type of sanctioned offence are to be drawn upon in evaluating whether a criminal charge exists. When a sanction is not only of a preventive character but also of a retributive and or deterrent character, and when it is directed at the general public, then the ECtHR as punishment, regardless of its severity, qualifies it. On the other hand, the Court has refused to qualify as punishment disciplinary measures against certain groups of persons or professions that do not transcend a certain minimum of intensity. Similarly, the exclusion or extradition of aliens or dismissal from the police department was not viewed as punishment.

The claim to a fair trial in court on a criminal “charge” (“accusation”) does not arise merely upon the formal lodging of a charge but rather on the date on which state activities substantially affect the situation of the person concerned.<sup>114</sup> This is usually the first official notification of a specific accusation, but in certain cases, this may also be as early as arrest. As Article 6 of the ECHR states “The official notification given to an

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<sup>113</sup> No. 377/1989, §§ 3.3., 12.2., 13.3., 13.4.

<sup>114</sup> See Noor Muhammad, *supra* note 93, p. 145.

individual by the competent authority of an allegation that he has committed a criminal offence.” The notification marks the beginning of the applicability of Article.6, even if it is formulated in a language that the person concerned does not understand or if it did not reach him. In addition, some forms of measures to imply the allegation, such as, the search of the person’s home or the seizure of certain goods<sup>115</sup> ...

The rights guaranteed in Article 14 are applicable until termination of the criminal proceedings, regardless of whether by conviction, acquittal or discontinuance of the proceedings. These rights are also applicable to the appeal proceedings.

### 5.1.3.1 Hearing before a Tribunal

The primary institutional guarantee of Article 14 is that rights and obligations in civil suits and criminal charges are not to be heard and decided by political institutions or by administrative authorities subject to directives; rather, this is to be accomplished by a competent, independent and impartial tribunal established by law.

Tribunals must be competent and established by law. Both conditions are to ensure that the jurisdictional power of a tribunal is determined generally and independent of the given case, i.e., not arbitrarily by a specific administrative act. The term “law” is, as in other provisions in the Covenant, to be understood in the strict sense of a parliamentary statute or equivalent unwritten norm of common law, which must be accessible to all persons subject to it. A law of this sort must establish the tribunals and define the subject matter and territorial scope of their jurisdiction.<sup>116</sup>

In addition, tribunal must be independent. The requirement of independence relates primarily to the executive but also to a lesser extent to the legislative branch of the state. Judges or other members of a tribunal need not necessarily be appointed for life or be unimpeachable, but they must be appointed or elected for a relatively long period of time (at least several years) and may not be subject to directives or some other manner dependent on other state organs in the exercise of their office.<sup>117</sup> For instance, in *Bahamonde v. Equatorial Guinea*, which concerned the intimidation, arrest and persecution of a member of the opposition to the Government of president *Obiang*, the applicant contended that the president controls the judiciary in Equatorial Guinea. In finding a violation of Article 14(1), the HRC noted “ that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter

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<sup>115</sup> See P.V. Dijk *supra* note 34, pp. 407-8.

<sup>116</sup> Cf. A/2929, 42 (§ 77); A/4299, § 52; Noor Muhammad, *supra* note 93, p. 147.

<sup>117</sup> For the independence of the courts, *see also* the “Basic Principles on the Independence of the judiciary”, adopted in Milan in 1985 by the 7<sup>th</sup> UN Congress on Crime Prevention and reinforced by the GA in Res. 40/146 and 41/149: *see* ICJ-Review No. 37/1986,62.

is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal”.<sup>118</sup>

The criterion of independence goes beyond mere separation of state powers and is to ensure that tribunals are not overly influenced by powerful social groups. In certain cases, this may also lead to a duty on states parties to undertake positive measures to ensure this guarantee against excessive influence by the media, industry, political parties, etc.

The latter example demonstrates a further definitional feature of a tribunal: it must be impartial. Whereas independence relates to the appointment and impeachment of judges and other members of a tribunal, impartial aims at the specific holding in a given case. A judge is, e.g., not impartial when he or she is biased, i.e., when he or she has a personal interest in a given case. Moreover, a judge may not allow himself or herself to be excessively guided by emotions and political motives or to be influenced by “media justice”. Impartiality is also closely related to the guarantee of a fair trial and equality before the courts pursuant to the first sentence of Article 14(1). In *Karttunen V. Finland*, the HRC noted that impartiality of the court implied that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interest of one of the parties.<sup>119</sup>

### 5.1.3.2 The Principle of a Fair Trial

Article 14(1) guarantees a right to a fair hearing by a tribunal. This principle is at the centre of civil and criminal procedural guarantees and, with respect to criminal cases, is further developed by a number of concrete rights in Article 14 and 15. The right to a fair trial is, however, broader than the sum of these individual guarantees. This follows from Article 14(3), which expressly refers only to the accused’s minimum guarantees. Thus, although a criminal trial may fulfill all the requirements of Article 14(2) to (7) and Article 15, it may nevertheless conflict with the precept of fairness in Article 14(1).

The most important criterion of a fair trial is the principle of “equality of arms” between the plaintiff and respondent or the prosecutor and defendant. For instance, this principle is violated if the accused is excluded from an appellate hearing when the prosecutor is present or if a court expert takes such a dominating position that he is in effect a witness for the prosecution. In addition, procedural rights, such as inspection of records or submission of evidence, must be dealt with in a manner equal for both parties.<sup>120</sup>

The principle of a fair trial including “equality of arms” equally applies to suits at law. In *Jansen-Gielen V. The Netherlands*, the HRC held that the

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<sup>118</sup> No. 468/1991, § 9.4.

<sup>119</sup> No. 387/1989, § 7.2.

<sup>120</sup> Nowak, *supra* note 5, pp. 321-2.

principle of equality of arms required the courts to adjourn proceedings in order to provide equal opportunities to both parties to challenge documentary evidence.<sup>121</sup>

### 5.1.3.3 The Requirement of Publicity

As held by case laws of ECtHR, the requirement of publicity, which serves to make the administration of justice transparent, is an essential element of the right to a fair trial, particularly in democratic societies.<sup>122</sup> Just like, in the 3<sup>rd</sup> Committee of the GA, the French delegate *Bouquin* summarized that “Justice must not be secret”.

#### 5.1.3.3.1 Publicity of the Proceedings

The right to a public hearing means that all trials in civil and criminal matters must in principle be conducted orally and publicly.<sup>123</sup> In *Van Meurs v. the Netherlands*, the HRC stresses that this is “a duty upon the state that is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish”. This includes the duty to “make information on time and venue of the oral hearing available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made.”<sup>124</sup>

The principle of public hearing is thus not only a right of the parties to the proceedings, which can be waived by them, but also a right of the public in a democratic society. It applies, however, not to all stages of a trial but only to hearings, i.e., to the submission of the opposing parties on a specific matter. Parts of a trial that do not have to do with the determination of the facts, such as appellate proceedings limited to a question of law, thus need not be either oral or public. The general observation of the HRC in *R.M. v. Finland* “that the absence of oral hearing in the appellate proceedings raises no issue under article 14 of the Covenant” seems, however, not to be accordance with the wording of this provision. If appellate proceedings are of nature that they determine a criminal charge or rights and obligations in a suit at law, the right to a public hearing must be provided.<sup>125</sup> In *Bryhn V. Norway*, the HRC held that proceedings on leave to appeal might be

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<sup>121</sup> No. 846/1999, § 8.2. *See also* the concurring opinion of Kretzmer and Scheinin.

<sup>122</sup> *Cf.*, in particular, the *Axen, Pretto and Sutter* cases.

<sup>123</sup> It was essentially uncontested in the 3d Committee of the GA that the term “public hearing” required an oral hearing. *See* A/4299, § 53.

<sup>124</sup> No. 215/1986, §§ 6.1, 6.2.

<sup>125</sup> No. 301/1988, § 6.4. *But see* the correct view of the Committee in *Karttunen v. Finland*, No. 387/1989, § 7.3.

conducted without an oral hearing under the condition that such a screening proceeding provides for a full review of the judgment in accordance with Article 14(5).<sup>126</sup>

However, the public, including the media, can be excluded from all or parts of a trial for a variety of reasons, some of which are also found in other limitation clauses of the Covenant. Exclusion of the public in a given case follows by order of the tribunal concerned, but this requires – even though not expressly stated in Article 14 – a legal basis in the respective rules of procedure. The public can be excluded for reasons of morals in, e.g., a hearing regarding a sexual offence. Public order relates primarily to order within the courtroom, and national security, to the secrecy of important military facts, or for the protection of judges against terrorist attacks. The last two reasons may, however, only lead to exclusion of the public so long as the principles of a democratic society are observed.<sup>127</sup>

Furthermore, the public may be excluded when this is necessary in the interest of the private lives of the parties. This can include family matters, sexual offences or other cases in which publicity may violate the private and familial sphere of the parties or of the victim. Finally, the public may also be excluded in the interest of justice. However, this authority is valid only “in special circumstance” and only “to the extent strictly necessary in the opinion of the court”. Such exclusion of the public is thus permissible only in extraordinary cases, for instance, when continuation of the trial is endangered by the emotional reaction of the spectators.<sup>128</sup>

### **5.1.3.3.2 Public Pronouncement of the Judgment**

The HRC emphasize that certain factors may justify conducting a secret hearing, but not, however, keeping the judgment secret.

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

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<sup>126</sup> No. 789/1997, § 7.2.

<sup>127</sup> The restriction in a democratic society, inserted by the HRC in 1952 at the initiative of France following the model of Article 6(1) of the ECHR, was adopted by a narrow majority of 9:7, with 1 abstention, E/CN.4/L.154/Rev.2; E/CN.4/SR.323, 14. In the 3d Committee of the GA, it was criticized, *inter alia*, by the Indian representative, A/C.3/SR.962, § 7. Thereafter, the French representative noted that these words represented an indispensable restriction on the relatively vague authority to interfere for reasons of public order or national security, A/C.3/SR.964, § 20; A/4299, § 55. From a purely grammatical standpoint, the meaning of these words is somewhat unclear on account of the unusual sentence structure and the absence of a reference to the necessity of the restriction analogous to that in article 21 and 22(2). *Cf. also* A/C.3/SR.966, § 30.

<sup>128</sup> *See* Noor Muhammad, *supra* note 93, p. 149.

when judgments are made accessible only to a certain group of persons or when inspection of the judgment is made dependent on a specific interest.<sup>129</sup>

## 5.1.4 Minimum Guarantees of the Accused in Criminal Trials

### 5.1.4.1 Presumption of Innocence

Article 14(2) contains the presumption of innocence, an essential principle of a fair trial, which provides the right to be presumed innocent to everyone charged with a criminal offence.

In a criminal case, the prosecutor must prove the defendant's guilt; in cases of doubt, the accused must be found not guilty. The way in which guilt is to be proven is ultimately a question of national law. The judge or the jury thus may convict an accused only when there is no reasonable doubt of his or her guilt. Moreover, the judge must conduct the criminal trial without previously having formed an opinion on the guilt or innocence of the accused. Denial of bail to a pre-trial detainee, in principle, does not affect the presumption of innocence. In *Cagas et al. v. The Phillipines*, the HRC concluded, nevertheless, "The excessive period of preventive detention, exceeding nine years, does affect the right to be presumed innocent and therefore reveals a violation of article 14(2)".<sup>130</sup>

The obligations deriving from the presumption of innocence go beyond the conduct of the judges during the criminal trial itself. In its General Comment on Article 14, the HRC stressed the duty on all public authorities to "refrain from prejudging the outcome of a trial". In particular, ministers or other influential officials may, in this respect, commit a violation of Article 14(2). In the case of excessive "media justice" or the danger of impermissible influencing of lay or professional judges by other powerful social groups, the states is under a corresponding positive obligation to ensure the presumption of innocence. In *Gridin v. The Russian Federation*, the head of the police had announced that he was sure that the applicant was the feared "lift-boy murder", and this had been broadcast on television. Furthermore, the investigator had called upon the public to send social prosecutors, and during the trial the courtroom had been crowded with people who were screaming that Mr. Gridin should be sentenced to death, which is what actually happened to the applicant shortly thereafter. The Committee referred to its General Comment and, taking into account that the Supreme Court had not specially dealt with these allegations, found a

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<sup>129</sup> In this regard, the majority opinion of the ECtHR in the *Sutter* case, Series A No. 74 (1984), appears problematic.

<sup>130</sup> No. 788/1997, § 7.3.

violation of Article 14(2) as the authorities had failed to exercise the restraint that the presumption of innocence required of them.<sup>131</sup>

#### **5.1.4.2 Right to be Informed of the Charge**

The duty to inform under Article 14(3)(a) relates to the nature and cause of the charge or accusation, thus more precise and comprehensive than that for arrested persons under Article 9(2). Nature and cause of a criminal charge means not only the exact legal description of the offence but also the facts underlying it. This information must be sufficient to allow preparation of a defence pursuant to Article 14(3)(a).<sup>132</sup>

Additionally, a person should be informed promptly. Information must be provided with the lodging of the charge or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person.

Finally, the information must be provided to the accused in a language that he understands.

#### **5.1.4.3 Preparation of Defence**

The accused's right to have adequate time and facilities for the preparation of his or her defence stems from a British draft in the HRC in 1952 and is apparently based on Article 6(3)(b) of the ECHR.<sup>133</sup>

This right applies not only to accused persons but also to their defence attorneys, and it relates to all stages of the trial.

What adequate time means depends on the circumstances and complexity of the case, but a few days are normally insufficient. The word "facilities" means that the accused or his (her) defence counsel is granted access to the documents, records, etc. necessary for preparation of the defence. However, this does not give rise to a claim to be furnished with copies of all relevant documents.<sup>134</sup> If the accused does not understand the language used in court, he or she does not have the right to be furnished with translations of all relevant documents as long as these are made available to counsel with whom the accused can communicate (if necessary, with the assistance of an interpreter). The state is under an obligation to ensure that an accused in pre-trial detention is able to communicate with his or her lawyer in private.

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<sup>131</sup> No. 770/1997, §§ 3.5. and 8.3.

<sup>132</sup> Noor Muhammad, *supra* note 93, p. 152.

<sup>133</sup> E/CN.4/286; E/CN.4/SR.110, 5.

<sup>134</sup> This is the holding of the HRC in *O.F. v. Norway*, No. 158/1983, § 5.5.

The accused share the right to communicate with the defence counsel of his own choosing, which means that a defence attorney can not be appointed for the accused against his or her will. In addition, must guarantee the accused can communicate with the defence attorney.

#### **5.1.4.4 Claim to be Tried without Undue Delay**

As with most minimum rights in this provision, the time limit in Article 14(3)(c) begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him or her. It ends on the date of definitive decision, i.e., final and conclusive judgment or dismissal of the proceedings. What constitutes a reasonable time or undue delay depends upon the circumstances and complexity of the case. In addition, the specific budget conditions of a country have to be considered. Although the committee might wish to avoid acknowledging that even civil and political rights are subject to progressive implementation similar to economic, social and cultural rights with regard to the respective positive obligations to fulfil, the economic situation in a given country may well be taken into account when assessing whether the government is accountable for an undue delay. On the other hand, the Committee must, of course, be careful not to permit Government to misuse this argument.

#### **5.1.4.5 Right to Defence**

Right to defence can be divided into a lot of individual rights: to defend oneself in person; to choose one's own counsel; to be informed of the right to counsel; to receive free legal assistance, and to be tried in one's presence.

A systematic interpretation of this right tends to lead to the following result: All persons charged with a criminal offence have a primary, unrestricted right to be present at the trial and to defend themselves. However, they can forgo this right and instead make use of defence counsel, with the court being required to inform them of the right to counsel. In principle, they may select an attorney of their own choosing so long as they can afford to do so. Should they lack financial means, they have a right to appointment of defence counsel by the court at no cost, insofar as this is necessary in the interest of administration of justice. Whether the interest of justice require the state to provide for effective representation by counsel depends primarily on the seriousness of the offence and the potential maximum punishment. A capital case must be so, and last to every stage of the legal proceedings.

Although in principle accused persons have no influence on the selection of a counsel assigned to them under a legal aid scheme, they may at any time make use of the right to defend themselves when an ex-officio counsel is appointed against their will.<sup>135</sup>

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<sup>135</sup> Nowak, *supra* note 5, p. 339.

#### **5.1.4.6 Calling and Examining Witness**

The right of call, obtain the attendance of and examine witnesses under the same conditions as the prosecutor is an essential element of “equality of arms” and thus of a fair trial.<sup>136</sup>

The right of the accused to obtain the examination of witnesses on his or her behalf is, however, not absolute. As a result, the right of the accused to obtain the attendance and the examination of witnesses on his or her behalf is subject to the restriction that this is “under the same conditions as witnesses against him”. Criminal courts are thus provided with relatively broad discretion, but in summoning witnesses and experts, they must not violate the principle of fairness and equality of arms.

In capital punishment cases, the Committee applies a fairly strict standard of fairness, which also entails far-reaching positive obligations of states to ensure the attendance of witnesses on behalf of the accused. In *Grant v. Jamaica*, the girlfriend of the accused had contended in an affidavit that the accused had been with her during the whole night of the crime but had failed to appear in court because she had no money to travel. The HRC found a violation of Article 14(1) and 14(3)(e) and expressed the opinion that the judge should have adjourned the trial and issued a subpoena to secure her attendance in court, and that the police should have made transportation available to her.<sup>137</sup>

The right to examine, or have examined, witnesses for the prosecution is, on the contrary, formulated without restriction. Nevertheless, the Strasbourg organs have accorded the courts a certain amount of discretion in this regard too. The formulation “to examine or have examined” takes into account the distinction between the various legal systems, in particular, between accusatorial and inquisitorial trials. Of principle importance here is that the parties are treated equally with respect to the introduction of evidence by way of interrogation of witness.

#### **5.1.4.7 Prohibition of Self-Incrimination**

The prohibition of self-incrimination has its roots in English common law and today generally belongs to the essence of a fair trial, such that it must also be viewed as being covered by Article.6 of the ECHR. It relates only to the accused. Witnesses, on the other hand, may not refuse to testify. The term “to be compelled” refers to various forms of direct or indirect physical or psychological pressure, ranging from torture and inhuman treatment prohibited by Article 7 and 10 to various methods of extortion or duress and imposition of judicial sanctions in order to compel the accused to testify.

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<sup>136</sup> P.V. Dijk, *supra* note 34, p. 46.

<sup>137</sup> No.353/1988, § 8.5.

Although Article 14 does not expressly prohibit forced confessions or statements by the accused from being admissible as evidence in criminal trials, the Committee called upon States parties in its General Comment on Article 14 to set down in law corresponding prohibitions of the use of such evidence.

The law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. In *Kurbanov v. Tajikistan*, the mother of the victim, who had been sentenced to death by a military court, provided a fairly detailed description of beatings and other ill treatment that her son had been subjected to, including the names of the responsible police officers. The government confined itself to stating that these allegations had not been raised during the investigation or in court, although it did not provide a trial transcript. In the absence of any investigation of the author's allegations of torture, the HRC found violations of Article 7 and 14(3)(g), as the conviction was based on the victim's confession under duress.<sup>138</sup>

#### **5.1.4.8 Right to an Appeal**

The right to appeal a criminal conviction to a higher tribunal is one of the more recent human rights.

In *Perera v. Australia*, the Committee observed that Article 14(5) "does not require that a court of appeal proceed to a factual retrial, but that a court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial".<sup>139</sup> This jurisprudence was confirmed in *Domukovsky et al. v. Georgia*: the law apparently provided only for a judicial review on matters of law, and without a hearing. This was deemed to fall short of the requirements of Article 14(5), i.e. "a full evaluation of the evidence and the conduct of trial".<sup>140</sup> Similarly, in *Gomez Vazquez V. Spain*, the "lack of any possibility to fully reviewing the author's conviction and sentence" by review proceedings "limited to the formal or legal aspects of the conviction" was found out not to meet the requirements of Article 14(5).<sup>141</sup> On the other hand, in *Bryhn v. Norway*, the Committee accepted a system of leave to appeal before a three-judge court, which unanimously decided that the appeal had no possibility of leading to a lesser sentence and, consequently, dismissed the appeal without an oral hearing. In arriving at this decision, the Committee took into account that the three judges in fact had fully reviewed the judgment and all documents of the applicant.<sup>142</sup> Proceedings must take place before a higher tribunal. This leads to the conclusion that a trial in first

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<sup>138</sup> No. 1096/2002, § 7.4 and 7.5.

<sup>139</sup> No. 536/1993, § 6.4.

<sup>140</sup> Nos. 623, 624, 626, 627/1995, § 18.11

<sup>141</sup> No. 701/1996, § 11.1.

<sup>142</sup> No.789/1997, § 2.3., 4.1.-5., 7.2.

instance before the Supreme Court of a state party violates Article 14(5), as the Committee found in *Gelazauskas v. Lithuania*.<sup>143</sup>

In principle, review proceedings require a public hearing in accordance with Article 14(1). If the domestic law provides for a special screening system of leave to appeal, an oral hearing might not be necessary if the proceedings ensure a full review of the judgment of first instance and the grounds of appeal.

Controversial is whether the right to an appeal applies only to the case of a conviction in the first instance or also to the case of aggravation of sentence by the appellate court (for instance, as a result of nullity appeal by the prosecutor to confirm the law). For this reason, number of western European states whose legal systems allow aggravation of sentence at the appellate level submitted reservations following a recommendation by the Committee of experts of the Council of Europe. It is doubtful whether such a reservation is necessary, since Article 14(5) merely establishes the principle of two-level criminal proceedings. However, should a conviction be imposed first at the appellate level, the person convicted must be afforded a further appeal. When a person's conviction has been reversed or where he or she has been pardoned on the basis of new or newly discovered facts showing a miscarriage of justice under Article 14(6), no entitlement to a retrial arises.<sup>144</sup>

#### **5.1.4.9 The Principle of “Ne Bis in Idem”**

According to Article 14(7), the principle of “ne bis in idem” prohibits a person from being tried or punished again for an offence for which he or she has already been finally convicted or acquitted. (If a criminal trial is interrupted without reason for a long period or extends over many years, this is not in violation of Article 14(7), although it probably represents a violation of Article 14(3)(c).) The latter requirement, however, relates only to a conviction or acquittal in accordance with the law and penal procedure of each country. An acquittal in another state that does not correspond to the legal system of the state concerned thus does not lead to application of “ne bis in idem”. In *A.P. v. Italy*, the Committee interpreted the principle of “ne bis in idem” as having no effect whatsoever on proceedings in other states. However, this interpretation seems to be fairly general and too absolute.<sup>145</sup>

The US Government “understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constitutional unit, as is seeking a new trial for the same cause”. This

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<sup>143</sup> No. 836/1998, § 7.2 and 7.6.

<sup>144</sup> Nowak, *supra* note 5, pp. 351-2.

<sup>145</sup> No. 204/1986, §7.3.

“understanding” is in obvious contradiction to the wording of Article 14(7), in conjunction with Article 50, and must, therefore, be interpreted as a US reservation to Article 14(7).

In many states, a new criminal trial is permissible under extraordinary circumstances, even to the detriment of acquitted or already convicted persons. Reasons include, above all, serious procedural flaws (forgoing of documents, bribing of witnesses or the judge, etc) or the existence of new or newly discovered facts. For this reason, the Committee of Experts of the Council of Europe suggested that reservations be submitted here, which was complied with by several Western European States. An analogous restriction was adopted in Article 4(2) of the 7<sup>th</sup> AP to the ECHR. In its General Comment on Article 14, however, the HRC took the stance that a new criminal trial justified by exceptional circumstances does not represent a violation of the principle of “ne bis in idem”.<sup>146</sup> Nevertheless, any government has not yet followed its request that States reconsider their reservation in light of this interpretation.

## **5.2 The Fair Trial in China**

### **5.2.1 The Independence, Impartiality and Competence of Tribunal in China**

Article 14 demands the States parties must set up by law independent, impartial tribunals and provide them with the competence to hear and decide on criminal charges and on rights and obligations in suits at law, so as to practically guarantee the right of fair trial.

With the regards of the independence, impartiality and competence of the tribunal in China, regrettably, many problems appear in the present.

The Constitution of the PRC specifies the position and role of the courts. Article 126 of the Constitution of the PRC stipulate, “[T]he people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.” The Organizational Law of the PRC and the Criminal Procedure Law with this respect use the same formulation on independence of the court. However, at the same time, Article 3 of the Constitution states in part that, “All administration, judicial and procuratorial organs of the state are created by the people’s congresses to which they are responsible any by which they are supervised.” This provision guarantees the leadership of NPC to the court from the constitution, which means that the court will be subjected to the legislator since the NPC is the highest legislature organ in China. This kind of construction is the evident to violate the principle of

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<sup>146</sup> General Comment 13/21, § 19.

Article 14 of the ICCPR, which is that the tribunal should be independent from the legislature, as mentioned before.

However, this is not the major issue with this respect. The most important is the close linkage between the court and the party organ, namely the communist party organ.

The mandatory annual reporting of the courts to the corresponding level of congresses typically lists the courts as being “under the leadership of the CCP...”<sup>147</sup> The courts also make commitments to adhere to the Party’s basic line and basic principle. The wording in the report of the SPC to the Third Session of 10<sup>th</sup> NPC in March 2005 also followed the same scheme.

On the organizational level, the most obvious and frequent contact-point of the SPC with the Party is through the Central Political-Legal Committee which coordinates the administration of justice and sets nation-wide standards as well as leads political-legal committee at the various levels of government. The local political-legal committee’s influence is evidenced through implementing higher organizations’ directives or discussing difficult court cases, such as those related to Strike Hard campaigns, *Falun Gong*, or crimes involving local cadres or crime damaging the local economy.

In addition, the Organizational Department of the Central Party Committee that deals with ideology, education, policy, and more narrow personal issues, screens candidates to top judicial positions before the Standing Committee of the NPC actually appoints the judges. The party can through its influence reassign a judge from one court to another. The function is the same at the local level with the corresponding level of the party organizational department. The involvement of the Party in the appointment process is running counter to the independence of the court.

Although the Statute of the CCP stipulates that the Party has to function within the realm of the Constitution and the laws and this has also been reiterated by Party leaders. Still, many consider the degree of party influence on the judiciary substantial. In addition, the party is also influential through the party regulations for members, and deal with disciplinary matters.

Now, the most serious issue is regarding of the intervention of the Discipline Inspection Committee to the judiciary. The Discipline Inspection Committee is the Party’s own investigatory branch, which is concerned with high-ranking officials and at times, resorts to for example detaining

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<sup>147</sup> *Report on the work of the Shanghai High People’s Court*, 21 February 1997, Shanghai Liberation Daily (Shanghai Jiefang Ribao), 4 March 1997, the corresponding report from *the Report on the work of the Shanghai Municipal People’s Procuratorate* was also published in the same issue.

suspects. Recognizing the terrible corruption in China, the Party strengthen his intense to attack the corruption. However, the party use his directive and discipline to attack the corruption, not through the judicial means. Thus, the Discipline Inspection Committee have power to detain the officials who is suspect to bribe, corrupt or malpractice of his duty without the approval of the judicial organs, such as the courts or the prosecution services, without arrest warrant, without informing to the suspect's near relatives, even without the time limit, namely, period of detention is limitless until the Party think that the suspect have confessed all his or her issues. The party think itself empowered this super power according to the Party's discipline, ignoring the law and putting the basic human rights aside, let alone the independence of the judicial. Under this circumstance, the prosecution service, which is lacking of the independence from the Party, will have to investigate the case after the investigation of Discipline Inspection Committee and under the lead of Discipline Inspection Committee, also, will have to prosecute the suspect base on the evidence collected by the Discipline Inspection Committee. In the end, the Court, without the independence, will have to try and judge the guilty of the defendant through the confirming and application the evidences gathered by Discipline Inspection Committee via transferring these illegal evidences into the ones used by the Prosecutors.

This is a horrible judicial defeat. However, under the present social system, no independence from the Party will lead to this necessary consequence. Hopefully, the ratification of the ICCPR will be useful to root this circumstance out.

With regard of the internal constraint to the independence of the judge, we cannot forget system of the adjudicative committees. The role of "adjudicative committees" in the Chinese courts has been a hotly and debated topic throughout its existence. An adjudicative committee consists of senior judges, typically the court president and the heads of court - chambers. Article 11 of the Organizational Law of the Courts stipulates that the adjudicative committee is to be used to build expertise of the courts by gathering experience from the multitude of cases and consider large or complex cases, as well as for other issues.

When the committee convenes, the division head of the division concerned should take part, as should the judge in charge of the case. The latter presents a written report to the plenary. Members of the committee question the judge on details followed by a vote, with a simple majority decision, and with the possibility of recording the minority opinion. However, this record is secret and not open to the public.

The major problem with this system is that the adjudicative committee can change decisions given by judges. It means that the judge who is in charge of the case and listen the hearing cannot make the decision, however, the most members of the committee who did not attend the actual trial will make a collective judgment. So. It is evident that this system will

interference the independence of the judge, in addition, it will cause a passive influence to the public hearing and fair trial.

With respect of the competence of the court in China, we cannot ignore the professionalism of court. In China, the lack of judges with a good legal education is considered a major problem. Although this situation has been improved since the national judicial examination was introduced with a requirement that passage of this examination become a prerequisite for becoming a judge, lack of formal legal education still remain a bottlenecked problem for existing judges. In addition, corruption of judges is another issue to threaten the competence of the court so that some experts think an obstacle to the greater independence of judges is the perception that they are corrupt to the extent that it may not be possible to increase their independence. Under this circumstance, less professional capability and more corruption made people doubt much the competence of the court so that the public confidence to the judges and the judgment is very low in China and it is why someone even argue that one of the reasons for difficulties in enforcement of court decisions is that courts make wrong decisions from time to time.

## **5.2.2 Presumption of Innocence in China**

Article 14(2) contains the presumption of innocence, an essential principle of a fair trial, which provides the right to be presumed innocent to everyone charged with a criminal offence.

With regard of the right of presumption of innocence, although Article 12 of the Criminal Procedure Law of the PRC clearly stipulate that no person shall be found guilty without being judged as such by a People's Court. Under this provision, it is consistent with the principle of presumption of innocence. Unfortunately, according to the second paragraph of Article 142 of the Criminal Procedure Law of the PRC, which states, "with respect to a case that is minor and the offender need not be given criminal punishment or need be exempted from it according to the Criminal Law, the People's Procuratorate may decide not to initiate a prosecution." Only seen from the wording, it seems to follow the principle of presumption of innocence, however, in practice, this provision will be applied while the People's Procuratorate announcing the suspect is guilty. It means that the final legal decision will think this suspect is guilty although it is not be prosecuted. Even though the original meaning of this provision is to save the suit economy and avoid burdening the suit of the Court. However, its practical implement indeed violated the idea of presumption of innocence before the final trial of court. Perhaps, in the future, this provision will be abolished or amended to meet the demand of the ICCPR:

### 5.2.3 The Right of Appeal in China

In addition, regarding the right of appeal, the provision of Article 22 of the Criminal Procedure Law of the PRC deprive the defendant the right of appeal, and evidently violate the Article 14 of the ICCOR. According to Article 22, “The Supreme People’s Court shall have jurisdiction as the court of first instance over major criminal cases that pertain to the whole nation.” Since the Supreme People’s Court is the highest court in China, thus no appeal court is available for the case tried by the Supreme People’s Court, and its judgment will be automatically become the final judgment. So, the defendant will lose the right to appeal, which is clearly violate the principle of Article 14 of the ICCPR. As mentioned above, this also will be contrary to the conclusion that a trial in first instance before the Supreme Court of a state party violates Article 14(5), as the HRC found in *Gelazauskas v. Lithuania*.

### 5.2.4 Double Jeopardy in China

Article 14 prohibit the double jeopardy and states that no one shall be liable to be tried again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

However, according to the provisions of the Criminal procedure Law of the PRC, law in china allows practice of double jeopardy.

Based on the Procedure for Trial Supervision provisions as stipulates in Articles 203-207 of the Criminal Procedure Law of the PRC, retrials on finally convicted cases become possible. To initiate the process, “a party or his legal representative or his near relative may present a petition to a People’s Court or a People’s Procuratorate regarding a legally effective judgment or order”,<sup>148</sup> subject to meeting four conditions as set forth in Article 204 of the Criminal Procedure Law of the PRC. Retrial proceedings could also be commenced by courts’ own decisions, or by the prosecution service through “protest” or “prosecutorial opinions on retrials”. As Article 205 states, “If the president of a People’s Court at any level finds some definite error in a legally effective judgment or order of his court as to the determination of facts or application of law, he shall refer the matter to the judicial committee for handling. If the Supreme People’s Court finds some definite error in a legally effective judgment or order of a People’s Court at any lower level, or if a People’s Court at a higher level finds some definite error in a legally effective judgment or order of a People’s Court at a lower level, it shall have the power to bring the case up for trial itself or may direct a People’s Court at a lower level to conduct a retrial. If the Supreme People’s Procuratorate finds some definite error in a legally effective

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<sup>148</sup> See Article 203 of the Criminal Procedural Law of the PRC.

judgment or order of a People's Court at any level, or if a People's Procuratorate at a higher level finds some definite error in a legally effective judgment or order of a People's Court at a lower level, it shall have the power to present a protest to the People's Court at the same level against the judgment or order in accordance with the procedure for trial supervision. With respect to a case protested by a People's Procuratorate, the People's Court that has accepted the protest shall form a collegial panel for retrial; if the facts, on the basis of which the original judgment was made, are not clear or the evidence is not sufficient, it may direct the People's Court at the lower level to try the case again." According to these provisions, trials by appealing courts cannot reach final convictions. As a result, convicts may face retrials that normally lead to more severe punishments, or even death sentence.

Although according to General Comment on Article 14, the HRC considered that a new criminal trial justified by exceptional circumstances does not represent a violation of the principle of "ne bis in idem", however, as mentioned earlier, this exception only limit to serious procedural flaws, such as forging of documents, bribing of witnesses or the judge, etc or the existence of new or newly discovered facts. Based on these criteria, it is evident that Procedure for Trial Supervision of China is far beyond that, and goes far away from the standard of the ICCPR.

Under the provision of Article 204 of the Criminal Procedure Law of the PRC, the conditions to retry an effective and final judgment or order of court are the following four points: (1) There is new evidence to prove that the confirmation of the facts in the original judgment or order is definitely wrong; (2) The evidence upon which the condemnation was made and punishment meted out is unreliable and insufficient, or the major pieces of evidence for supporting the facts of the case contradict each other; (3) The application of law in making the original judgment or order is definitely incorrect; or (4) The judge in trying the case committed acts of embezzlement, bribery, or malpractices for personal gain, or bended the law in making judgment.

It should be noted that the third and the part of the second of conditions, especially, insufficient evidence or contradiction of major evidences, which are beyond the standard of the ICCPR, therefore they are not consistent with the principle of the prohibiting the double jeopardy.

Now, the problem lies not only in the inconsistency of provisions with Article 14 of the ICCPR, but also in the fact that such retrials leave both the court and the prosecution service tremendous discretionary powers in deciding on initiating retrial process which normally lead to unfavorable new punishments on convicts. In practice, it is uncommon for the prosecution service to lodge a protest in interests of criminal defendants. Very often, it does that in cases where courts have reached decisions of either acquittals or minor offences. Moreover, there are no clear and concrete conditions stipulated in the Law with respect to when the

prosecution service could protest. On the other hand, for those retrial requests made by an accused party or his legal representative or his near relative, they normally aim at new court decisions in favor of the party and their requests are subjected to approval from either the court or the prosecution service while protests or decisions on retrial process from either institution will normally make retrials happen with few exceptions.<sup>149</sup> Thus, this system has put three main parties in the criminal justice under an unequal footing, violating rights of criminal defendants.

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<sup>149</sup> Chen Ruihua , ‘Citizens’ Rights in Criminal Justice’, in *Judicial Justice and Rights Protection*, edited by the Human Rights Research Center of Beijing University Law School (China Legal System Press, Beijing, 2001), p. 290.

## 6 Concluding Remarks

The criminal system is at the stage of being developed just like its economy in China, many problems appear not only in law but also in practice. The voice of calling on the judicial reform is stronger. At the part of criminal justice, many reform measures are being experimented and the revision of the criminal procedure law and criminal law are the clear guarantee.

However, the reform of the legal system is not very easy and cannot go done in a very short time, since it will depend on many other factors, such as legal history, tradition, social system, and economical conditions...However, at the same time, we must recognize what problems are and what is correct. Thus, before the forthcoming ratification to the ICCPR in China, in this thesis, I select international and regional documents with respect of this area and connect with the relevant documents and practices in China to show comparative coverage. Hopefully, it will interpret the international standard and give some ideas to the reform of legal system tomorrow in China.

However, it is impossible in this master thesis to exhaust all problems regarding the criminal justice in China, and I only focus on the very hot and noticeable issues in the present, which are death penalty, torture, arrest or pre-detention and independence of judicial power. Under this construction, this thesis introduces the framework of the ICCPR and the working background of the HRC, defines and interprets the relevant provisions of the ICCPR, namely, Article 6, 7, 9 and 14. From the broad views, this thesis links not only the General Comments and communications of the HRC, but also much more focus on the case laws of the ECtHR.

Hopefully, this brief introduction will clarify some confusion and set up a standard with these respects. However, the international principle cannot be used directly in the real world in China. While considering these criterions, we must remember the specific current domestic conditions and objectively adsorb and apply these principles to serve the improvement of the criminal justice. Just like the HRC has to realize the fact that the availability of financial resources is not only relevant for the realisation of economic, social and cultural rights, inherent in these procedural guarantees of the ICCPR is a far-reaching potential for a step-by-step adaptation of the differing national legal systems to a common minimum standard of the “rule of law” in the State party.

International principles or uniform are not the aim in themselves, but means to the end of upholding human rights.

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