extended detention by a judge or other officer authorised by law to exercise judicial power was not possible or that a period of seven days' detention was necessary. They did not accept that the material required to satisfy a court of the justification for extended detention could be more sensitive than that needed in proceedings for habeas corpus. They and the Standing Advisory Commission on Human Rights also pointed out that the courts in Northern Ireland were frequently called on to deal with submissions based on confidential information – for example, in bail applications – and that there were sufficient procedural and evidential safeguards to protect confidentiality. Procedures also existed where judges were required to act on the basis of material which would not be disclosed either to the legal adviser or to his client. This was the case, for example, with claims by the executive to public interest immunity or application by the police to extend detention under the Police and Criminal Evidence (Northern Ireland) Order 1989 ...

56. On this point the Government responded that none of the above procedures involved both the non-disclosure of material to the detainee or his legal adviser and an executive act of the court. The only exception appeared in Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989 where *inter alia* the court may make an order in relation to the production of, and search for, special material relevant to terrorist investigations. However, paragraph 8 of Schedule 7 provides that, where the disclosure of information to the court would be too sensitive or would prejudice the investigation, the power to make the order is conferred on the Secretary of State and not the court ...

It was also emphasised that the Government had reluctantly concluded that, within the framework of the common-law system, it was not feasible to introduce a system which would be compatible with Article 5 para. 3 but would not weaken the effectiveness of the response to the terrorist threat. Decisions to prolong detention were taken on the basis of information the nature and source of which could not be revealed to a suspect or his legal adviser without risk to individuals assisting the police or the prospect of further valuable intelligence being lost. Moreover, involving the judiciary in the process of granting or approving extensions of detention created a real risk of undermining their independence as they would inevitably be seen as part of the investigation and prosecution process.

In addition, the Government did not accept that the comparison with habeas corpus was a valid one since judicial involvement in the grant or approval of extension would require the disclosure of a considerable amount of additional sensitive information which it would not be necessary to produce in habeas corpus proceedings. In particular, a court would have to be provided with details of the nature and extent of police inquiries following the arrest, including details of witnesses interviewed and information obtained from other sources as well as information about the future course of the police investigation.

Finally, Lords Shackleton and Jellicoe and Viscount Colville in their reports had concluded that arrest and extended detention were indispensable powers in combating terrorism. These reports also found that the training of terrorists in remaining silent under police questioning hampered and protracted the investigation of terrorist offences. In consequence, the police were required to undertake extensive checks and inquiries and to rely to a greater degree than usual on painstaking detective work and forensic examination ...

57. The Commission was of the opinion that the Government had not overstepped their margin of appreciation in this regard.

58. The Court notes the opinions expressed in the various reports reviewing the operation of the Prevention of Terrorism legislation that the difficulties of investigating and prosecuting

terrorist crime give rise to the need for an extended period of detention which would not be subject to judicial control ... Moreover, these special difficulties were recognised in its above-mentioned *Brogan and others* judgment (see Series A No. 145–B, p. 33, para. 61).

It further observes that it remains the view of the respondent Government that it is essential to prevent the disclosure to the detainee and his legal adviser of information on the basis of which decisions on the extension of detention are made and that, in the adversarial system of the common law, the independence of the judiciary would be compromised if judges or other judicial officers were to be involved in the granting or approval of extensions.

The Court also notes that the introduction of a 'judge or other officer authorised by law to exercise judicial power' into the process of extension of periods of detention would not of itself necessarily bring about a situation of compliance with Article 5 para. 3. That provision – like Article 5 para. 4 – must be understood to require the necessity of following a procedure that has a judicial character although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required ...

59. It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other (see the above-mentioned *Ireland* v. *United Kingdom* judgment, Series A No. 25, p. 82, para. 214, and the *Klass and others* v. *Germany* judgment of 6 September 1978, Series A No. 28, p. 23, para. 49). In the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the Government attach great importance.

60. In the light of these considerations it cannot be said that the Government have exceeded their margin of appreciation in deciding, in the prevailing circumstances, against judicial control.

(e) Safeguards against abuse ... 62. Although submissions have been made by the applicants and the organisations concerning the absence of effective safeguards, the Court is satisfied that such safeguards do in fact exist and provide an important measure of protection against arbitrary behaviour and incommunicado detention.

63. In the first place, the remedy of habeas corpus is available to test the lawfulness of the original arrest and detention. There is no dispute that this remedy was open to the applicants had they or their legal advisers chosen to avail themselves of it and that it provides an important measure of protection against arbitrary detention (see the above-mentioned *Brogan and others* judgment, Series A No. 145–B, pp. 34–35, paras. 63–65). The Court recalls, in this context, that the applicants withdrew their complaint of a breach of Article 5 para. 4 of the Convention ...

64. In the second place, detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. Both of the applicants were, in fact, free to consult a solicitor after this period ...

Moreover, within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear from judgments of the High Court in Northern Ireland that the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld ...

It is also not disputed that detainees are entitled to inform a relative or friend about their detention and to have access to a doctor.

65. In addition to the above basic safeguards the operation of the legislation in question has been kept under regular independent review and, until 1989, it was subject to regular renewal.

(f) Conclusion 66. Having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court takes the view that the Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.

In his 2002 opinion on the 2001 UK derogation from Article 5 para. 1 ECHR (see box 6.2.), the Commissioner for Human Rights of the Council of Europe provided the following appreciation of the above-cited derogation entered by the UK Government in December 2001:

Opinion of the Council of Europe Commissioner for Human Rights on certain aspects of the United Kingdom 2001 derogation from Article 5 para. 1 of the European Convention on Human Rights, Opinion 1/2002 of 28 August 2002, CommDH(2002)7, paras. 33–39:

33. Whilst acknowledging the obligation of governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown.

34. Even assuming the existence of a public emergency, it is questionable whether the measures enacted by the United Kingdom are strictly required by the exigencies of the situation.

35. In interpreting the strict necessity requirement, the Court has so far declined to examine the relative effectiveness of competing measures, preferring instead to allow such an assessment to fall within the margin of appreciation enjoyed by national authorities. This does not exclude the possibility, however, that demonstrable availability of more or equally effective non-derogating alternatives will not cast doubt on the necessity of the derogating measures. This might especially be the case where so important right as the right to liberty and security is at stake. It is, at any rate, not clear that the indefinite detention of certain persons suspected of involvement with international terrorism would be more effective than the monitoring of their activity in accordance with standard surveillance procedures.

36. The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of having links with an international terrorist organisation irrespective of its presenting a direct threat to public

security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

37. Another anomaly arises in so far as an individual detained on suspicion of links with international terrorist organisations must be released and deported to a safe receiving country should one become available. If the suspicion is well founded, and the terrorist organisation a genuine threat to UK security, such individuals will remain, subject to possible controls by the receiving state, at liberty to plan and pursue, albeit at some distance from the United Kingdom, activity potentially prejudicial to its public security.

38. It would appear, therefore, that the derogating measures of the Anti-terrorism, Crime and Security Act allow both for the detention of those presenting no direct threat to the United Kingdom and for the release of those of whom it is alleged that they do. Such a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation.

39. Whilst detention under the derogating powers of the Anti-terrorism, Crime and Security Act requires that the individual be an undeportable foreigner, it is triggered, ultimately, only on the suspicion of involvement with an international terrorist organisation. Though the reasonableness of the Home Secretary's suspicion is justiciable, it remains the case that the detention is effected without any formal accusation and subject only to a review in which important procedural guarantees are absent. The indefinite detention under such circumstances represents a severe limitation to the enjoyment of the right to liberty and security and gravely prejudices both the presumption of innocence and the right to a fair trial in the determination of ones rights and obligations or of any criminal charge brought against one. It should be recalled that an ill-founded deprivation of liberty is difficult, indeed impossible, to repair adequately.

The views of the UK government on the necessity of the derogation measure adopted in December 2001 are the following:

Comments by the Government of the United Kingdom of Great Britain and Northern Ireland on the reports of the United Kingdom (CCPR/CO/73/UK) and the Overseas Territories (CCPR/CO/73/UKOT) (CCPR/CO/73/UK/Add. 2 and CCPR/CO/73/UKOT/Add. 2, 4 December 2002):

(b) Are the measures strictly required by the exigencies of the situation? We believe that they are. This was something considered by the Special Immigration Appeals Commission [which] considered the argument on behalf of A and others that other, less intrusive, alternative measures were available to the Government. In the course of considering the lawfulness of the United Kingdom's derogation from article 15 of the European Convention on Human Rights and whether the measures taken were strictly required by the exigencies of the situation, the Commission, having considered the arguments, said: 'Bearing that guidance [of the European Court of Human Rights and of the Canadian Supreme Court] and noting and accepting the Government's assertion that there are individuals against whom the provisions (or proposed provisions) identified by the appellants would not be effective, the position is that, even applying the most intrusive scrutiny, we are satisfied that the existence of possible alternative measures does not of itself harm the Government's argument.' The Commission further confirmed that they accepted the submissions on behalf of the Government that the provisions

for judicial and democratic supervision contained within the Anti-terrorism, Crime and Security Act are both appropriate and sufficient …

3. Domestic law powers of detention

The Government has powers under the Immigration Act 1971 ('the 1971 Act') to remove or deport persons on the grounds that their presence in the United Kingdom is not conducive to the public good on national security grounds. Persons can also be arrested and detained under Schedules 2 and 3 to the 1971 Act pending their removal or deportation, including deportation on the grounds that their presence in the United Kingdom is contrary to the public good. The courts in the United Kingdom have ruled that this power of detention only persists for so long as the person's removal remains a real possibility. If there were no such real possibility (for example, because removal would result in torture or inhuman or degrading treatment) the power of detention would fall away. The person would have to be released, and would be at large within the United Kingdom.

4. Article 9(1) of the Covenant

Article 9 provides, amongst other things, that everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

It became clear, however, before, during and since the passage of the Anti-terrorism, Crime and Security Act 2001 ('the Act') that the balance between respecting these fundamental civil liberties and safeguarding them from exploitation by those who would destroy them for the wider public is profoundly delicate.

The Government was, and remains, of the view that the only practicable way to protect and maintain this equilibrium was to derogate from article 5(1) of the European Convention on Human Rights and from article 9(1) of the International Covenant on Civil and Political Rights in respect of the detention powers contained in the Act.

The measures in Part 4 of the Act were introduced in particular to deal with the situation where an alien would in normal circumstances be removed or deported from the United Kingdom in the exercise of immigration powers, on grounds that his presence here is contrary to the public good, but where removal or deportation to his country of origin would have given rise to a serious risk of torture or inhuman or degrading treatment. There are cases in which a suspected terrorist, even though not a United Kingdom national, cannot be removed from the United Kingdom. The measures were rigorously considered and scrutinized at the time and were and continue to be judged to be a necessary and proportionate response to the 'public emergency threatening the life of the nation'.

5. The Anti-terrorism, Crime and Security Act 2001

(a) Legislative powers Part 4 of the Act recognizes that a suspected terrorist should not be returned to a country where there is a serious risk that he might be tortured or killed, but at the same time he should not be allowed to be at large in the United Kingdom. Given the public emergency threatening the life of the nation, Part 4 of the Act strikes a balance between the interests of the individual suspected terrorist and the general community. It extends the period for which a suspected terrorist may be detained in the United Kingdom, in cases where his removal is precluded, so as to overcome the limitations discussed above on the powers to detain under the Immigration Act 1971.

Under section 21(1) of the Act, the Secretary of State may issue a certificate in respect of a person if the Secretary of State reasonably: (a) believes that the person's presence in the United Kingdom is a risk to national security; and (b) suspects that the person is a terrorist. Under section 22 of the Act, various immigration measures, for example, making a deportation order, may be taken in relation to a suspected international terrorist, notwithstanding that his actual removal will be incompatible with the United Kingdom's international obligations. By virtue of section 23(1) of the Act, a suspected international terrorist may be detained under the detention powers contained in the Immigration Act 1971 despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by a point of law relating to an international agreement or a practical consideration.

(b) Legislative safeguards This certificate is subject to an appeal to the Special Immigration Appeals Commission, established under the Special Immigration Appeals Commission Act 1997, which has the power to cancel it if it considers that the certificate should not have been issued. In addition, SIAC is obliged to review the certificate after six months after the appeal is finally determined (if there is one) or after the date on which the certificate was issued (if there is no appeal). Subsequent reviews will occur three monthly intervals thereafter (section 26 of the Act). There is the possibility of appeals from SIAC on points of law to the higher courts. SIAC is also able to grant bail, where appropriate, subject to conditions. It is open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

Sections 21–23 of the Act are temporary provisions which automatically expire after 15 months, subject to renewal for periods not exceeding one year at a time if both Houses of Parliament are in agreement (sect. 29(1)). This ensures periodic review by the legislature, in addition to continuing review by the executive. Further, the detention provisions will end with the final expiry of sections 21–23 of Part 4 of the Act on 10 November 2006 (sect. 29(7)). If, in the Government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by Order under section 29(2), discontinue the provision.

6. Review procedures and sunsets

The operation of the detention powers (sects. 21–23) in the Act are being reviewed specifically by Lord Carlile of Berriew QC, who is also the independent reviewer of the Terrorism Act 2000. He has been appointed by the Secretary of State under section 28 of the Act and is required to conduct a review of the operation of the detention powers not later than 14 months after the passing of the Act. He is required to send a report of his review as soon as is reasonably practicable to the Secretary of State, who is in turn required to lay the report before Parliament as soon as is reasonably practicable.

The provisions of the Act, as a whole, are being reviewed by a Committee of nine Privy Counsellors in accordance with sections 122 and 123. This Committee is obliged to provide a report on their findings and conclusions to the Secretary of State by 14 December 2003.

Although reasoning on the basis of Article 15 ECHR rather than on the basis of Article 4 ICCPR, the House of Lords disagreed when called upon to adjudicate the matter in 2004:

House of Lords (United Kingdom), *A. (F.C.) and others (F.C.) (Appellants)* v. *Secretary of State for the Home Department (Respondent), X. (F.C.) and another (F.C.) (Appellants)* v. *Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, leading opinion by Lord Bingham of Cornhill:

30. Article 15 requires that any measures taken by a member state in derogation of its obligations under the Convention should not go beyond what is 'strictly required by the exigencies of the situation'. Thus the Convention imposes a test of strict necessity or, in Convention terminology, proportionality. The appellants founded on the principle adopted by the Privy Council in *de Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80. In determining whether a limitation is arbitrary or excessive, the court must ask itself: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'. This approach is close to that laid down by the Supreme Court of Canada in *R* v. *Oakes* [1986] 1 SCR 103, paras 69–70, and in *Libman* v. *Attorney General of Quebec* (1997) 3 BHRC 269, para 38. To some extent these questions are, or may be, interrelated. But the appellants directed the main thrust of their argument to the second and third questions. They submitted that even if it were accepted that the legislative objective of protecting the British people against the risk of catastrophic Al-Qaeda terrorism was sufficiently important to justify limiting the fundamental right to personal freedom of those facing no criminal accusation, the 2001 Act was not designed to meet that objective and was not rationally connected to it. Furthermore, the legislative objective could have been achieved by means which did not, or did not so severely, restrict the fundamental right to personal freedom.

31. The appellants' argument under this head can, I hope fairly, be summarised as involving the following steps:

(1) Part 4 of the 2001 Act reversed the effect of the decisions in *Hardial Singh* [1984] 1 WLR 704 and *Chahal* (1996) 23 EHRR 413 and was apt to address the problems of immigration control caused to the United Kingdom by article 5(1)(f) of the Convention read in the light of those decisions.

(2) The public emergency on which the United Kingdom relied to derogate from the Convention right to personal liberty was the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters.

(3) While the threat to the security of the United Kingdom derived predominantly and most immediately from foreign nationals, some of whom could not be deported because they would face torture or inhuman or degrading treatment or punishment in their home countries and who could not be deported to any third country willing to receive them, the threat to the United Kingdom did not derive solely from such foreign nationals.

(4) Sections 21 and 23 did not rationally address the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters because (a) it did not address the threat presented by UK nationals, (b) it permitted foreign nationals suspected of being Al-Qaeda terrorists or their supporters to pursue their activities abroad if there was any country to which they were able to go, and (c) the sections permitted the certification and detention of persons who were not suspected of presenting any threat to the security of the United Kingdom as Al-Qaeda terrorists or supporters.

(5) If the threat presented to the security of the United Kingdom by UK nationals suspected of being Al-Qaeda terrorists or their supporters could be addressed without infringing their right to personal liberty, it is not shown why similar measures could not adequately address the threat presented by foreign nationals.
(6) Since the right to personal liberty is among the most fundamental of the rights protected by the European Convention, any restriction of it must be closely scrutinised by the national court and such scrutiny involves no violation of democratic or constitutional principle.
(7) In the light of such scrutiny, neither the Derogation Order nor sections 21 and 23 of the 2001 Act can be justified.

32. It is unnecessary to linger on the first two steps of this argument, neither of which is controversial and both of which are clearly correct. The third step calls for closer examination. The evidence before SIAC was that the Home Secretary considered 'that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals'. In para 95 of its judgment SIAC held:

'But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified – mostly in detention abroad – who fall within the definition of "suspected international terrorists", and it was clear from the submissions made to us that in the opinion of the [Home Secretary] there are others at liberty in the United Kingdom who could be similarly defined.'

This finding has not been challenged, and since SIAC is the responsible fact-finding tribunal it is unnecessary to examine the basis of it. There was however evidence before SIAC that 'upwards of a thousand individuals from the UK are estimated on the basis of intelligence to have attended training camps in Afghanistan in the last five years', that some British citizens are said to have planned to return from Afghanistan to the United Kingdom and that 'The backgrounds of those detained show the high level of involvement of British citizens and those otherwise connected with the United Kingdom in the terrorist networks.' It seems plain that the threat to the United Kingdom did not derive solely from foreign nationals or from foreign nationals whom it was unlawful to deport. Later evidence, not before SIAC or the Court of Appeal, supports that conclusion. The Newton Committee recorded the Home Office argument that the threat from Al-Qaeda terrorism was predominantly from foreigners but drew attention (para 193) to 'accumulating evidence that this is not now the case. The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ("the Shoe Bomber"), and recent arrests suggest that the threat from UK citizens is real. Almost 30% of Terrorism Act 2000 suspects in the past year have been British. We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals.'

33. The fourth step in the appellants' argument is of obvious importance to it. It is plain that sections 21 and 23 of the 2001 Act do not address the threat presented by UK nationals since they do not provide for the certification and detention of UK nationals. It is beside the point that other sections of the 2001 Act and the 2000 Act do apply to UK nationals, since they are not the subject of derogation, are not the subject of complaint and apply equally to foreign nationals. Yet the threat from UK nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals. It is also plain that sections 21 and 23 do permit a person certified and detained to leave the United Kingdom and go to any other country willing to receive him, as two of the appellants did when they left for Morocco and France respectively ... Such freedom to leave is wholly explicable in terms of immigration control: if the British authorities

wish to deport a foreign national but cannot deport him to country 'A' because of *Chahal* their purpose is as well served by his voluntary departure for country 'B'. But allowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country. It seems clear from the language of section 21 of the 2001 Act, read with the definition of terrorism in section 1 of the 2000 Act, that section 21 is capable of covering those who have no link at all with Al-Qaeda (they might, for example, be members of the Basque separatist organisation ETA), or who, although supporting the general aims of Al-Qaeda, reject its cult of violence. The Attorney General conceded that sections 21 and 23 could not lawfully be invoked in the case of suspected international terrorists other than those thought to be connected with Al-Qaeda, and undertook that the procedure would not be used in such cases … The appellants were content to accept the Attorney General's concession and undertaking. It is not however acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject should be governed by implication, concession and undertaking …

35. The fifth step in the appellants' argument permits of little elaboration. But it seems reasonable to assume that those suspected international terrorists who are UK nationals are not simply ignored by the authorities. When G, one of the appellants, was released from prison by SIAC on bail (*G* v. *Secretary of State for the Home Department* (SC/2/2002, Bail Application SCB/10, 20 May 2004), it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.

36. In urging the fundamental importance of the right to personal freedom, as the sixth step in their proportionality argument, the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day … In its treatment of article 5 of the European Convention, the European Court also has recognised the prime importance of personal freedom. In *Kurt* v. *Turkey* (1998) 27 EHRR 373, para 122, it referred to 'the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities' and to the need to interpret narrowly any exception to 'a most basic guarantee of individual freedom' … The authors of the Siracusa Principles, although acknowledging that the protection against arbitrary detention (article 9 of the ICCPR) might be limited if strictly required by the exigencies of an emergency situation (article 4), were nonetheless of the opinion that some rights could never be denied in any conceivable emergency and, in particular (para 70 (b)), 'no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge; ….'

37. … the Attorney General … submitted that as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European Court allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere … This is an important submission, properly made, and it calls for careful consideration.

38. Those conducting the business of democratic government have to make legislative choices which, notably in some fields, are very much a matter for them, particularly when (as is often the case) the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole …

39. While any decision made by a representative democratic body must of course command respect, the degree of respect will be conditioned by the nature of the decision …

40. The Convention regime for the international protection of human rights requires national authorities, including national courts, to exercise their authority to afford effective protection …

41. Even in a terrorist situation the Convention organs have not been willing to relax their residual supervisory role … In *Aksoy* v. *Turkey* (1996) 23 EHRR 553, para 76, the Court, clearly referring to national courts as well as the Convention organs, held: ‘The Court would stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law’ …

42. It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General’s submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the [1998 Human Rights Act] to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected

(section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate …

43. The appellants' proportionality challenge to the Order and section 23 is, in my opinion, sound, for all the reasons they gave and also for those given by the European Commissioner for Human Rights and the Newton Committee. The Attorney General could give no persuasive answer. In a discussion paper Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society (Cm 6147, February 2004) the Secretary of State replied to one of the Newton Committee's criticisms in this way: '32. It can be argued that as suspected international terrorists their departure for another country could amount to exporting terrorism: a point made in the Newton Report at paragraph 195. But that is a natural consequence of the fact that Part 4 powers are immigration powers: detention is permissible only pending deportation and there is no other power available to detain (other than for the purpose of police enquiries) if a foreign national chooses voluntarily to leave the UK. (Detention in those circumstances is limited to 14 days after which the person must be either charged or released.) Deportation has the advantage moreover of disrupting the activities of the suspected terrorist.'

This answer, however, reflects the central complaint made by the appellants: that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that the Order and section 23 are, in Convention terms, disproportionate is in my opinion irresistible …

It is clear from its judgment delivered on 19 Febuary 2009 in *A. and others* v. *United Kingdom* that this is also the position of the European Court of Human Rights. The relevant excerpts are presented in section 3 below, which discusses the condition of non-discrimination, because the Court rightly considers that one of the reasons why the measures adopted by the United Kingdom are disproportionate is because they unjustifiably make a distinction on grounds of nationality.

The requirement of necessity has been detailed by the Inter-American Court of Human Rights in the following terms:

Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87 of 30 January 1987, Series A No. 8:

19. The starting point for any legally sound analysis of Article 27 [ACHR] and the function it performs is the fact that it is a provision for exceptional situations only. It applies solely 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party'. And even then, it permits the suspension of certain rights and freedoms only 'to the extent and for the period of time strictly required by the exigencies of the situation'. Such measures must also not violate the State Party's other international legal obligations, nor may they involve 'discrimination on the ground of race, color, sex, language, religion or social origin' …

22. Since Article 27(1) envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to 'the exigencies of the situation', it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures …

24. The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law' …

38. If, as the Court has already emphasized, the suspension of guarantees may not exceed the limits of that strictly required to deal with the emergency, any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful notwithstanding the existence of the emergency situation.

39. The Court should also point out that since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power.

The Court could test the notion of necessity/arbitrariness of suspension measures in the *Castillo-Petruzzi et al.* v. *Peru* case. The case concerns the detention, trial and life sentence convictions of three Chilean nationals by a Peruvian 'faceless' military tribunal (*tribunal sin rostro*) under counter-terrorist laws adopted during a state of emergency. In the following passage, only the denial of *habeas corpus* is under discussion:

Inter-American Court of Human Rights, case of *Castillo-Petruzzi et al.* v. *Peru*, merits, reparations and costs, judgment of 30 May 1999, Series C No. 52:

109. In the instant case, the detention occurred amid a terrible disruption of public law and order that escalated in 1992 and 1993 with acts of terrorism that left many victims in their wake. In response to these events, the State adopted emergency measures, one of which was to allow

those suspected of treason to be detained without a lawful court order. As for Peru's allegation that the state of emergency that was declared involved a suspension of Article 7 of the Convention, the Court has repeatedly held that the suspension of guarantees must not exceed the limits strictly required and that 'any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would … be unlawful'. The limits imposed upon the actions of a State come from 'the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it'.

110. As to the State's alleged violation of Article 7(5) of the Convention, the Court is of the view that those Peruvian laws that allow the authorities to hold a person suspected of the crime of treason in preventive custody for 15 days, with the possibility of a 15-day extension, without bringing that person before a judicial authority, are contrary to the provision of the Convention to the effect that '[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power' …

111. Applying the laws in force to this specific case, the State held Mr Mellado Saavedra, Mrs Pincheira Sáez and Mr Astorga Valdez in custody, without judicial oversight, from October 14, 1993, to November 20, 1993, the date on which they were brought before a military court judge. Mr Castillo Petruzzi, for his part, was detained on October 15, 1993, and brought before the judge in question on November 20 of that year. This Court finds that the period of approximately 36 days that elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority is excessive and contrary to the provisions of the Convention.

112. The Court therefore finds that the State violated Article 7(5) of the Convention.

3 THIRD CONDITION: THE NON-DISCRIMINATION REQUIREMENT

The condition of non-discrimination is stipulated explicitly only in Article 4 ICCPR and in Article 27 ACHR. According to Article 27 ACHR, the measures derogating from the guarantees of this instrument may not involve discrimination 'on the ground of race, color, sex, language, religion, or social origin'. Article 4 para. 1 ICCPR uses a more ambiguous wording, stating as one of the conditions for the justifiability of any derogation from the Covenant that the measures taken 'do not involve discrimination *solely* on the ground of race, colour, sex, language, religion or social origin' (emphasis added). Some commentators have read this in terms very generous to the State:

Scott Davidson, 'Chapter 8: Equality and Non-Discrimination', in A. Conte, S. Davidson and R. Burchill, *Defining Civil and Political Rights* (London: Ashgate, 2004), p. 161:

The reason for [the wording in the ICCPR] is that very often during war or national emergency it is permissible to discriminate against enemy aliens and their property. Furthermore it would seem justifiable for a state, in the interests of the greater social good, to be able to discriminate

against those who hold political opinions which might be injurious to the well-being of society during times of war or national emergency. The drafting of article 4(1) also suggests that there will be occasions on which it is permissible for a state to discriminate against those of a particular race, colour, sex, language, religion or a particular social origin. This view is tenable since the prohibition of the discrimination in question is conditioned by the use of the word 'solely' which seems to indicate that as long as the discrimination is not disproportionate to the end to be achieved, it will be justifiable. Such a situation may occur, for example, where there is civil unrest in a part of a state where the population is of a particular ethnic origin.

In reality, Article 4(1) ICCPR prohibits in clear terms all differences of treatment directly based on the listed grounds. However, what it does not prohibit are measures making differences of treatment on grounds of nationality, national origin or political opinion – none of which grounds is among those listed in Article 4(1) – or measures which are indirectly discriminatory against the members of a group characterized by one of the enumerated grounds – as in the example of a state of emergency declared in a region where a particular ethnic group is predominant (see also, for instance, the first 'understanding' appended by the United States to their ratification of the International Covenant on Civil and Political Rights on 8 June 1992, discussed above in chapter 1, section 4.5.). There is no such thing, however, as a 'discrimination [which] is not disproportionate', since a discrimination is disproportionate by definition – only differences of treatment may not be disproportionate, in which case they are not discriminatory.

In contrast to the ICCPR and to the ACHR, Article 15 ECHR is silent about the condition of non-discrimination. However, any discriminatory measure adopted under a derogation would be invalid, since it would be in violation of the other international obligations of the State concerned. In addition, the non-discrimination requirement may be seen as implicit in the condition of 'necessity'. The decisions of the House of Lords and of the European Court of Human Rights in the *Belmarsh Detainees* cases are illustrative:

House of Lords (United Kingdom), *A. (F.C.) and others (F.C.) (Appellants)* v. *Secretary of State for the Home Department (Respondent), X. (F.C.) and another (F.C.) (Appellants)* v. *Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, leading opinion by Lord Bingham of Cornhill:

Discrimination ...

46. The appellants complained that in providing for the detention of suspected international terrorists who were not UK nationals but not for the detention of suspected international terrorists who were UK nationals, section 23 unlawfully discriminated against them as non-UK nationals in breach of article 14 of the European Convention ...

54. ... The undoubted aim of the relevant measure, section 23 of the 2001 Act, was to protect the UK against the risk of Al-Qaeda terrorism ... that risk was thought to be presented mainly by non-UK nationals but also and to a significant extent by UK nationals also. The effect of the

measure was to permit the former to be deprived of their liberty but not the latter. The appellants were treated differently because of their nationality or immigration status ...

57. In Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe held that 'The combat against terrorism must be carried out in compliance with national and international law and respecting human rights.' The Committee of Ministers of the Council of Europe on 11 July 2002 adopted 'Guidelines on human rights and the fight against terrorism'. These recognised the obligation to take effective measures against terrorism, but continued: 'All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment.' ...

In its General Policy Recommendations published on 8 June 2004, the European Commission against Racism and Intolerance, a Council of Europe body, considered it the duty of the state to fight against terrorism; stressed that the response should not itself encroach on the values of freedom, democracy, justice, the rule of law, human rights and humanitarian law; stressed that the fight against terrorism should not become a pretext under which racial discrimination was allowed to flourish; noted that the fight against terrorism since 11 September 2001 had in some cases resulted in the adoption of discriminatory legislation, notably on grounds of nationality, national or ethnic origin and religion; stressed the responsibility of member states to ensure that the fight against terrorism did not have a negative impact on any minority group; and recommended them 'to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or group of persons, notably on grounds of 'race', colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation.' ...

66. SIAC concluded that section 23 was discriminatory and so in breach of article 14 of the Convention. It ruled, in paras 94–95 of its judgment: '94. If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists – and we can see powerful arguments in favour of such a derogation – the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as [counsel for the appellants] contends, the threat stems exclusively or almost exclusively from that alien section ...

95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified – mostly in detention abroad – who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined. In those circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin'.

European Court of Human Rights (GC), *A. and others* v. *United Kingdom* (Appl. No. 3455/05), judgment of 19 February 2009:

Whether the measures were strictly required by the exigencies of the situation

182. Article 15 provides that the State may take measures derogating from its obligations under the Convention only 'to the extent strictly required by the exigencies of the situation'.

… [T]he Court considers that it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants' detention, unless it can be shown that the national court misinterpreted the Convention or the Court's case law or reached a conclusion which was manifestly unreasonable. It will consider the Government's challenges to the House of Lords' judgment against this background.

183. The Government contended, first, that the majority of the House of Lords should have afforded a much wider margin of appreciation to the executive and Parliament to decide whether the applicants' detention was necessary. A similar argument was advanced before the House of Lords, where the Attorney General submitted that the assessment of what was needed to protect the public was a matter of political rather than judicial judgment …

184. When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were 'strictly required'. In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse … The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time. In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament.

185. The Government also submitted that the House of Lords erred in examining the legislation in the abstract rather than considering the applicants' concrete cases. However, in the Court's view, the approach under Article 15 is necessarily focussed on the general situation pertaining in the country concerned, in the sense that the court – whether national or international – is required to examine the measures that have been adopted in derogation of the Convention rights in question and to weigh them against the nature of the threat to the nation posed by the emergency. Where, as here, the measures are found to be disproportionate to that threat and to be discriminatory in their effect, there is no need to go further and examine their application in the concrete case of each applicant.

186. The Government's third ground of challenge to the House of Lords' decision was directed principally at the approach taken towards the comparison between non-national and national suspected terrorists. The Court, however, considers that the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the

potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.

187. Finally, the Government advanced two arguments which the applicants claimed had not been relied on before the national courts. Certainly, there does not appear to be any reference to them in the national courts' judgments or in the open material which has been put before the Court. In these circumstances, even assuming that the principle of subsidiarity does not prevent the Court from examining new grounds, it would require persuasive evidence in support of them.

188. The first of the allegedly new arguments was that it was legitimate for the State, in confining the measures to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Government has not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. In this respect the Court notes that the system of control orders, put in place by the Prevention of Terrorism Act 2005, does not discriminate between national and non-national suspects.

189. The second allegedly new ground relied on by the Government was that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In this connection, again the Court has not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. Indeed, the Court notes that the national courts, including SIAC, which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.

190. In conclusion, therefore, the Court, like the House of Lords, and contrary to the Government's contention, finds that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. It follows there has been a violation of Article 5 §1 in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants.

4 FOURTH CONDITION: COMPLIANCE WITH OTHER INTERNATIONAL OBLIGATIONS

The relevant provisions of the ICCPR (Art. 4), of the ECHR (Art. 15), and of the ACHR (Art. 27), all state that the measures derogating from these instruments may only be allowed to the extent that they are not inconsistent with the other obligations of the State concerned under international law. This does not only mean that a measure allowed once a State has notified its intention to derogate from its obligations under those instruments may nevertheless, under international law, be in violation with other obligations of the State, and therefore still not be allowed to the State: rather, it means that, as a condition of acceptability under the derogation provisions themselves, the measures concerned should fully comply with the other obligations of the State under international law. This is important, since a number of widely ratified universal or regional treaties – including the Convention on the Rights of the Child or the International Covenant on Economic, Social and Cultural Rights – do not provide for

the possibility of a derogation in times of war or other public emergency. Therefore, any measure presented as covered by a derogation under the ICCPR, the ECHR or the ACHR will not be considered acceptable under these treaties if they do not comply with those other instruments. Moreover, the Human Rights Committee insisted that 'States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations', mentioning in this regard for instance the Paris Minimum Standards of Human Rights Norms in a State of Emergency (International Law Association, 1984) and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Human Rights Committee, General Comment No. 29, *Derogations during a State of Emergency* (Art. 4), UN Doc. CCPR/C/21/Rev.1/Add. 11 (2001), para. 10 and note 6). This significantly restricts the margin of manoeuvre for States acting under these derogation provisions. It also places the Human Rights Committee, the European Court of Human Rights or the Inter-American Court of Human Rights in the awkward situation of having to decide whether a State has complied with other international obligations than those stated in the instrument which these bodies in principle are set up to monitor:

European Court of Human Rights, *Brannigan and McBride* v. *United Kingdom* (Appl. Nos. 14553/89 and 14554/89), judgment of 25 May 1993:

67. The Court recalls that under Article 15 para. 1 measures taken by the State derogating from Convention obligations must not be 'inconsistent with its other obligations under international law' ...

68. In this respect, before the Court the applicants contended for the first time that it was an essential requirement for a valid derogation under Article 4 of the 1966 United Nations International Covenant on Civil and Political Rights ..., to which the United Kingdom is a Party, that a public emergency must have been 'officially proclaimed'. Since such proclamation had never taken place the derogation was inconsistent with the United Kingdom's other obligations under international law. In their view this requirement involved a formal proclamation and not a mere statement in Parliament.

69. For the Government, it was open to question whether an official proclamation was necessary for the purposes of Article 4 of the Covenant, since the emergency existed prior to the ratification of the Covenant by the United Kingdom and has continued to the present day. In any event, the existence of the emergency and the fact of derogation were publicly and formally announced by the Secretary of State for the Home Department to the House of Commons on 22 December 1988. Moreover there had been no suggestion by the United Nations Human Rights Committee that the derogation did not satisfy the formal requirements of Article 4 ...

71. The relevant part of Article 4 of the Covenant states:

'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ...'

72. The Court observes that it is not its role to seek to define authoritatively the meaning of the terms 'officially proclaimed' in Article 4 of the Covenant. Nevertheless it must examine whether there is any plausible basis for the applicant's argument in this respect.

73. In his statement of 22 December 1988 to the House of Commons the Secretary of State for the Home Department explained in detail the reasons underlying the Government's decision to derogate and announced that steps were being taken to give notice of derogation under both Article 15 of the European Convention and Article 4 of the Covenant. He added that there was 'a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom ...' ...

In the Court's view the above statement, which was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation. It therefore considers that there is no basis for the applicants' arguments in this regard.

5 FIFTH CONDITION: RIGHTS WHICH ARE NOT SUBJECT TO DEROGATION

Certain rights cannot be derogated from, under whichever circumstances (on the question of whether this should be interpreted as signalling a hierarchy within human rights and for a comparison with the notions of core human rights, human rights imposing *erga omnes* obligations, and *jus cogens* norms, see T. Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights', *European Journal of International Law*, 12, No. 5 (2001), 917–41). The most recent of the three human rights instruments providing for the possibility of derogations, the American Convention on Human Rights, contains the longest list of non-derogable rights. Only four rights – the right to life, the prohibition of torture or cruel, inhuman or degrading treatments or punishments, the prohibition of slavery or involuntary servitude, and the prohibition of retroactive criminal law – are excluded from derogation under all three instruments (see box 6.1.). However, the list contained in the relevant provisions in not necessarily finite, as made clear by the Human Rights Committee (see also, for instance, C. Olivier, 'Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Times of Public Emergency', *Leiden Journal of International Law*, 17, No. 2 (2004), 405–19 (arguing in favour of the non-derogable character of the right to a fair trial, as this right constitutes a guarantee necessary to the effective enjoyment of all human rights, the preservation of legality in a democratic society, and the effectiveness of the principle of separation of powers)):

Human Rights Committee, General Comment No. 29, *Derogations during a State of Emergency* (Art. 4), (CCPR/C/21/Rev.1/Add. 11) (24 July 2001), paras. 11–16:

11. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non–derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory

nature of some fundamental rights ensured in treaty form in the Covenant (e.g. arts. 6 [right to life] and 7 [prohibition of torture or cruel, inhuman or degrading treatment or punishment]). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g. arts. 11 [no imprisonment for inability to fulfil a contractual obligation] and 18 [freedom of religion]). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

12. In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant [see articles 6 (genocide) and 7 (crimes against humanity) of the Statute … While many of the specific forms of conduct listed in article 7 of the Statute are directly linked to violations against those human rights that are listed as non–derogable provisions in article 4, paragraph 2, of the Covenant, the category of crimes against humanity as defined in that provision covers also violations of some provisions of the Covenant that have not been mentioned in the said provision of the Covenant. For example, certain grave violations of article 27 [rights of minorities] may at the same time constitute genocide under article 6 of the Rome Statute, and article 7, in turn, covers practices that are related to, besides articles 6, 7 and 8 of the Covenant, also articles 9, 12, 26 and 27].

13. In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4.

Some illustrative examples are presented below.

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.
(b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.
(c) The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the inclusion of a non-discrimination clause in article 4 itself (paragraph 1), as well as in the non-derogable nature of article 18.

(d) As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity. The legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.

(e) No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

14. Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

15. It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

As with other human rights instruments, the American Convention on Human Rights establishes a set of rights that cannot be suspended under any circumstances. The ACHR goes further than other human rights treaties by prohibiting the suspension of the 'judicial guarantees essential for the protection of (non-derogable) rights'. The nature of this additional procedural guarantee is developed by the Court as follows:

Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8:

21. It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions – those laid down in Article 27(1) – are met. Moreover, even when these conditions are satisfied, Article 27(2) provides that certain categories of rights may not be suspended under any circumstances …

23. Article 27(2), as has been stated, limits the powers of the State Party to suspend rights and freedoms. It establishes a certain category of specific rights and freedoms from which no derogation is permitted under any circumstances and it includes in that category 'the judicial guarantees essential for the protection of such rights'. Some of these rights refer to the physical integrity of the person, such as the right to juridical personality (Art. 3); the right to life (Art. 4); the right to humane treatment (Art. 5); freedom from slavery (Art. 6) and freedom from ex post facto laws (Art. 9). The list of non-derogable rights and freedoms also includes freedom of conscience and religion (Art. 12); the rights of the family (Art. 17); the right to a name (Art. 18); the rights of the child (Art. 19); the right to nationality (Art. 20) and the right to participate in government (Art. 23) …

27. As the Court has already noted, in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that 'the judicial guarantees essential for (their) protection' remain in force. Article 27(2) does not link these judicial guarantees to any specific provision of the Convention, which indicates that what is important is that these judicial remedies have the character of being essential to ensure the protection of those rights.

28. The determination as to what judicial remedies are 'essential' for the protection of the rights which may not be suspended will differ depending upon the rights that are at stake. The 'essential' judicial guarantees necessary to guarantee the rights that deal with the physical integrity of the human person must of necessity differ from those that seek to protect the right to a name, for example, which is also non-derogable.

29. It follows from what has been said above that the judicial remedies that must be considered to be essential within the meaning of Article 27(2) are those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment.

30. The guarantees must be not only essential but also judicial. The expression 'judicial' can only refer to those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.

31. The Court must now determine whether, despite the fact that Articles 25 and 7 are not mentioned in Article 27(2), the guarantees contained in Articles 25(1) [right to an effective remedy, or 'amparo'] and 7(6) [right to habeas corpus], which are referred to in the instant advisory opinion request, must be deemed to be among those 'judicial guarantees' that are 'essential' for the protection of the non-derogable rights.

32. … the procedural institution known as 'amparo', which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the

States Parties and by the Convention. Since 'amparo' can be applied to all rights, it is clear that it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations.

33. In its classical form, the writ of habeas corpus, as it is incorporated in various legal systems of the Americas, is a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered …

35. In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment …

37. A further question that needs to be asked, and which goes beyond the consideration of habeas corpus as a judicial remedy designed to safeguard the nonderogable rights set out in Article 27(2), is whether the writ may remain in effect as a means of ensuring individual liberty even during states of emergency, despite the fact that Article 7 is not listed among the provisions that may not be suspended in exceptional circumstances.

38. If, as the Court has already emphasized, the suspension of guarantees may not exceed the limits of that strictly required to deal with the emergency, any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful notwithstanding the existence of the emergency situation.

39. The Court should also point out that since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power.

40. If this is so, it follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance …

42. From what has been said before, it follows that writs of habeas corpus and of 'amparo' are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society.

43. The Court must also observe that the Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of habeas corpus or of 'amparo' in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.

The Court, in a later advisory opinion, determined that the right to due process contained in Article 8 of the Convention, although not among its non-derogable provisions, was the framework under which the 'essential judicial guarantees' of Articles 7(6) and 25(1) were to be exercised in states of emergency (Inter-American Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights).* Advisory Opinion OC-9/87 of 6 October 1987, Series A No. 9).

6 SIXTH CONDITION: INTERNATIONAL NOTIFICATION

Human Rights Committee, General Comment No. 29, *Derogations during a State of Emergency* (Art. 4), (CCPR/C/21/Rev.1/Add. 11) (24 July 2001), para. 17:

A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary–General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation. These obligations have not always been respected: States parties have failed to notify other States parties, through the Secretary-General, of a proclamation of a state of emergency and of the resulting measures of derogation from one or more provisions of the Covenant, and States parties have sometimes neglected to submit a notification of territorial or other changes in the exercise of their emergency powers. Sometimes, the existence of a state of emergency and the question of whether a State party has derogated from provisions of the Covenant have come to the attention of the Committee only incidentally, in the course of the consideration of a State party's report. The Committee emphasizes the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.

Article 27(3) of the American Convention on Human Rights similarly imposes an obligation to notify the Organization of American States (OAS) General Secretary and the Contracting Parties. This is not a mere formality. The case of *Zambrano Vélez et al.* v. *Ecuador* involves a series of extra-judicial killings that occurred in Ecuador in 1993, a period characterized by the suspension of guarantees and the widespread use of military force for police enforcement activities. Although the State of Ecuador accepted

its international responsibility for the killings, including a violation of Article 27, the Court decided to clarify the extent of the obligation under the said Article:

Inter-American Court of Human Rights, case of *Zambrano Vélez et al.* v. *Ecuador*, judgment of 4 July 2007, Series C, No. 166 (unofficial translation):

69. … [I]t has been accepted by the State that, at the moment in which it issued Decree No. 86 of September 3, 1992, the State did not inform the other Contracting Parties of the Convention, by the intermediary of the Secretary-General of the Organization of American States (hereinafter, OAS), of the provisions of the Convention the application of which was suspended, of the reasons that justified the suspension and of the date at which the suspension's effects would be terminated, as required by Article 27(3) of the Convention. In this respect, the Court assesses positively the statement by Ecuador, to the effect that:

… [T]he States of the region must be conscious [of the requirements of] Article 27(3) of the American Convention … obligation which is often ignored by the states and which, in this case, was ignored by the Equatoran State …

70. The Court considers that the international obligation owed by the State Parties under Article 27(3) of the American Convention constitutes a mechanism in the framework of the notion of collective guarantee established by this treaty, the objective and finality of which is the protection of the human being. Furthermore, it constitutes a safeguard to prevent the abuse of the exceptional powers of suspension of rights and allows other States Parties to observe whether the extent of these measures complies with the provisions of the Convention. Finally, failure to comply with this duty to inform implies the failure to comply with the obligation contained in Article 27(3). Still regarding this final issue, the State is not excused from the need to justify the existence of a situation of emergency and the conformity of the measures adopted in response to it, in the terms identified previously.

In the absence of a proclamation of emergency powers, or in the absence of the OAS Secretary-General being notified of this suspension, the Inter-American Court has rejected the invocation by the State concerned of arguments of necessity or emergency, including cases involving counter-terrorist activities (see, for instance, case of *Baena Ricardo et al.* v. *Panama*, decision on the merits of 2 February 2001, Series C, No. 72, paras. 92–4).

6.1. Questions for discussion: the State's margin of appreciation and derogation in times of emergency

1. Why does Article 4 of the International Covenant on Civil and Political Rights insist on the need for the state of emergency to be 'officially proclaimed'? Was Mr Alvaro Gil Robles, the Commissioner for Human Rights of the Council of Europe, right in taking the view in August 2002 that despite the absence of a similar requirement in Article 15 ECHR, derogations under this instrument should be subjected to parliamentary scrutiny by the national parliament concerned?

2. How should the 'necessity' requirement imposed on measures derogating from human rights be evaluated by international bodies, whether judicial or non-judicial? Should the degree of scrutiny depend on whether a parliamentary body has been involved in adopting the measures that are taken in order to meet the exigencies of the situation? Should it depend on whether domestic courts have a possibility to control whether these measures meet the test of necessity? How is this linked to the prohibition imposed under the American Convention on Human Rights to suspend 'judicial guarantees essential for the protection of (non-derogable) rights'? Should such a prohibition extend to other human rights instruments?
3. Leaving aside the special case of rights that are absolute and, yet, may be subject to a derogation, why should a State suspend human rights in the face of a situation of emergency, when such rights can be restricted in normal circumstances? Does the derogation clause provide any additional flexibility to the State concerned?

The Prohibition of Discrimination

INTRODUCTION

It is one of the purposes of the United Nations to 'promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 1, para. 3 of the UN Charter; see also Article 55(c), in chapter IX on international economic and social co-operation). The Universal Declaration on Human Rights (UDHR) reflects this emphasis on the prohibition of discrimination, by stating that '[a]ll human beings are born free and equal in dignity and rights' (Art. 1, first sentence), and by providing: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (Article 2, first para.). Article 7 of the UDHR, which extends the scope of the requirement of non-discrimination beyond the enjoyment of the rights listed in the Declaration, also clearly imposes a positive obligation in this regard on the Member States of the United Nations: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' In addition, a number of rights of the UDHR refer to equal treatment among its different components: for example, Article 10 states that everyone 'is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'; under Article 16, men and women 'are entitled to equal rights as to marriage, during marriage and at its dissolution'; the participatory rights listed in Article 21 include the right of everyone to 'equal access to public service in his country' and to 'universal and equal suffrage'; Article 26 para. 2 mentions the right of everyone, without any discrimination, to equal pay for equal work.

Thus, the requirements of equality and non-discrimination have been at the centre of international human rights law since its origins (for general comments on the non-discrimination requirement in international human rights law, in particular as embodied in Article 26 of the International Covenant on Civil and Political

Rights (ICCPR), see Lord Lester of Herne Q.C. and S. Joseph, 'Obligations of Non-Discrimination' in D. Harris and S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995), p. 563; T. Opsahl, 'Equality in Human Rights Law. With Particular Reference to Article 26 of the International Covenant on Civil and Political Rights' in *Festschrift für Felix Ermacora: Fortschritt im Bewußtsein der Gruhnd- und Menschenrechte* (Kehl am Rhein: N. P. Engel Verlag, 1988), at pp. 51–65; B. Ramcharan, 'Equality and Non-Discrimination' in L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), at pp. 246–68; W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp-Oxford: Intersentia-Hart, 2005)). This chapter first offers a brief overview of the most important provisions which prohibit discrimination in international human rights law (see box 7.1.). In section 1, it discusses the scope of application of those provisions, i.e. the situations to which they apply. Section 2 then examines the different obligations imposed on States, following the structure of Article 26 ICCPR. Section 3 considers the notion of discrimination itself, and the various forms it may take. The final section relates the non-discrimination requirement to the protection of minority rights and to the right of self-determination, which – notwithstanding the highly distinctive status it has acquired in international human rights law – to a significant extent may be seen as an implication of the principle of non-discrimination. While Article 26 ICCPR, which has the widest scope of application, will constitute the main focus of the discussion in this chapter and inspires the structure of presentation followed, references will also be made to other instruments where they go beyond the requirements of the ICCPR, as well as to the case law of the bodies which have offered authoritative guidance on this issue.

1 THE SCOPE OF THE REQUIREMENT OF NON-DISCRIMINATION

The non-discrimination provisions summarized in box 7.1. fall into two categories. Some of them stipulate that the human rights they codify will be guaranteed to all without discrimination. Such clauses are not independent: they may only be invoked in combination with the other substantive provisions of the treaties concerned. Others, on the contrary, have an independent status: they protect from discrimination in all fields, and not only in the implementation of human rights listed in the instruments in which they appear. This section reviews the debates which the determination of the scope of application of non-discrimination clauses has led to under the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the European Social Charter, and the American Convention on Human Rights.

1.1 The International Covenant on Civil and Political Rights

Like the Universal Declaration on Human Rights, the ICCPR contains separate clauses prohibiting discrimination in the enjoyment of the Covenant rights and generally: the provisions concerned, Articles 2(1) and 26 of the ICCPR, have been reproduced in

Box 7.1. Equality and non-discrimination under the main human rights instruments

The UN Charter and the Universal Declaration on Human Rights already express a consensus on the need to combat discrimination, especially discrimination on grounds of race. Both of the Covenants adopted in 1966 in order to implement the UDHR into legally binding treaties also contain provisions relating to discrimination. Article 2(1) ICCPR provides that '[e]ach 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'. This prohibition is further reinforced in the ICCPR by Article 3 (prohibiting sex discrimination), Article 4(1) (prohibiting discrimination in relation to derogations), Article 23(4) (imposing on States parties to 'take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'), Article 24 (in relation to the rights of the child), or Article 25 (in relation to rights of political participation). Similarly, under Article 2(2) of the International Covenant on Economic, Social and Culturual Rights (ICESCR), the States Parties 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The significance of this provision has been detailed by the Committee on Economic, Social and Cultural Rights in its General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights* (Art. 2, para. 2 of the Covenant) (E/C.12/GC/20, 20 May 2009).

However, only the ICCPR includes a general non-discrimination clause, which may be invoked independently of any other substantive guarantee. Article 26 ICCPR reads: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The Human Rights Committee expanded on the meaning of this requirement in its General Comment No. 18, *Non-discrimination*, which it adopted in 1989 (HRI/GEN/1/Rev.7).

In a context characterized by decolonization and the emergence of the non-aligned movement, this consensus was further strengthened by the adoption of the Convention against Discrimination in Education (adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 December 1960), and of the International Convention on the Elimination of All Forms of Racial Discrimination by UN General Assembly Resolution 2106 (XX) of 21 December 1965. More recently, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (opened for signature on 18 December 1979) and the Convention on the Rights of Persons with Disabilities (opened for signature on 30 March 2007), which also have non-discrimination as their central concern, albeit for the specific grounds concerned.

Similar non-discrimination provisions exist under regional human rights instruments. Within the Council of Europe, both the European Convention on Human Rights and the European Social Charter contain non-discrimincation clauses. Article 14 of the European Convention on Human Rights provides that: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' Although this provision only applies in combination with other rights recognized under the Convention or under one of its Protocols (it thus does not apply independently from such other rights), an Additional Protocol (No. 12) to the Convention was adopted in 2000, which does include such an independent non-discrimination provision for the States parties. The European Social Charter (ESC) of 1961 does not contain an explicit provision on equal treatment or non-discrimination, with the exception of Article 4(3) which recognizes 'the right of men and women workers to equal pay for work of equal value'. However, the Preamble to the ESC does mention that 'the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin', and the European Committee of Social Rights (ECSR) has accordingly read Article 1(2) of the ESC (according to which States parties undertake to 'protect effectively the right of the worker to earn his living in an occupation freely entered upon') as prohibiting all forms of discrimination in employment (see, e.g. Concl. 2002, pp. 22–8 (France)). In order to comply with para. 2 of Article 1 of the Charter, States which have accepted that provision should therefore 'take legal measures to safeguard the effectiveness of the prohibition of discrimination', ensuring to all the persons covered by the ESC that they will have access to employment and be treated in occupation without discrimination; they also should ensure that the legal framework will be effective, a requirement from which the ECSR has derived a number of supplementary requirements; and they should take policy measures promoting the professional integration of certain target groups. The adoption of the Revised European Social Charter (ESCRev) in 1996 further strengthened the prohibition of discrimination, since Article E was included in Part V of the Revised Charter: like Article 14 ECHR, Article E prohibits any discrimination in the enjoyment of the rights set forth in the ESCRev.

The American Convention on Human Rights contains two provisions concerning non-discrimination: Article 1(1) provides that States must ensure the enjoyment of the convention rights without discrimination, whereas Article 24 provides for equal treatment before the law. In addition, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities was adopted on 7 June 1999.

The African Charter on Human and Peoples' Rights of 27 June 1981 contains two non-discrimination provisions. Article 2 provides that 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' Article 3 guarantees that every individual shall be equal before the law (para. 1) and shall be entitled to equal protection of the law (para. 2). In addition, Article 15 embodies the principle of equal pay for equal work.

box 7.1. In its 1989 General Comment on *Non-discrimination*, the Human Rights Committee confirmed that:

Human Rights Committee, General Comment No. 18, *Non-discrimination* (1989) (HRI/GEN/1/Rev.7, at 146):

While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

Although it was implied by the very wording of the ICCPR (see M. Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme* (Brussels: Bruylant, 1976), p. 89), this interpretation was only formally adopted by the Human Rights Committee ten years after its entry into force, in two decisions concerning the Netherlands. The *Broeks* case concerned the application of section 13(1) of the Dutch Unemployment Benefits Act (WWG), which, at the material time, laid down that WWV benefits could not be claimed by those married women who were neither breadwinners nor permanently separated from their husbands. As explained by the Human Rights Committee: 'whether a married woman was deemed to be a breadwinner depended, *inter alia*, on the absolute amount of the family's total income and on what proportion of it was contributed by the wife. That the conditions for granting benefits laid down in section 13, subsection 1(1), of WWV applied solely to married women and not to married men is due to the fact that the provision in question corresponded to the then prevailing views in society in general concerning the roles of men and women within marriage and society. Virtually all married men who had jobs could be regarded as their family's breadwinner, so that it was unnecessary to check whether they met this criterion for the granting of benefits upon becoming unemployed.' However, Ms Broeks argued that an unacceptable distinction was thereby made on the grounds of sex and status: if she were a man, married or unmarried, the law in question would not deprive her of unemployment benefits; however, because she is a woman, and was married at the time in question, the law excludes her from continued unemployment benefits. In the following excerpts of the *Broeks* decision, the Human Rights Committee answers, in particular, the Dutch Government's argument that Article 26 ICCPR only

prohibits discrimination in the areas not covered under the International Covenant on Economic, Social and Cultural Rights.

Human Rights Committee, *S. W. M. Broeks* v. *Netherlands*, Communication No. 172/ 1984 (CCPR/C/OP/2 at 196 (1990)), final views adopted on 9 April 1987:

12.1. The State party contends that there is considerable overlapping of the provisions of article 26 with the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights. The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two Covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of article 26 of the International Covenant on Civil and Political Rights.

12.2. The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant *travaux préparatoires* of the International Covenant on Civil and Political Rights, namely, the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a 'supplementary means of interpretation' (art. 32 of the Vienna Convention on the Law of Treaties) … The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below.

12.3. For the purpose of determining the scope of article 26, the Committee has taken into account the 'ordinary meaning' of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4. Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5. The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands, but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination.

13. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

14. It therefore remains for the Committee to determine whether the differentiation in Netherlands law at the time in question and as applied to Mrs Broeks constituted discrimination within the meaning of article 26. The Committee notes that in Netherlands law the provisions of articles 84 and 85 of the Netherlands Civil Code impose equal rights and obligations on both spouses with regard to their joint income. Under section 13, subsection 1(1), of the Unemployment Benefits Act (WWV), a married woman, in order to receive WWV benefits, had to prove that she was a 'breadwinner' – a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable; and this seems to have been effectively acknowledged even by the State party by the enactment of a change in the law on 29 April 1985, with retroactive effect to 23 December 1984 ...

15. The circumstances in which Mrs Broeks found herself at the material time and the application of the then valid Netherlands law made her a victim of a violation, based on sex, of article 26 of the International Covenant on Civil and Political Rights, because she was denied a social security benefit on an equal footing with men.

16. The Committee notes that the State party had not intended to discriminate against women and further notes with appreciation that the discriminatory provisions in the law applied to Mrs Broeks have, subsequently, been eliminated. Although the State party has thus taken the necessary measures to put an end to the kind of discrimination suffered by Mrs Broeks at the time complained of, the Committee is of the view that the State party should offer Mrs Broeks an appropriate remedy.

Although, in retrospect, this outcome appears entirely predictable, the *Broeks* case and its companion case, *Zwaan-de Vries* (see the decision adopted on the same day in *F. H. Zwaan-de Vries* v. *Netherlands*, Communication No. 182/1984, CCPR/C/29/D/182/1984) were met with great hostility. The Netherlands themselves considered denouncing the Covenant and immediately ratifying it again with a reservation on Article 26, before renouncing the idea (see M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, second edn (Kehl am Rhein: N. P. Engel, 2005), at p. 601). Other States, such as Switzerland or Liechtenstein, included such a reservation in their ratification instrument respectively in 1992 and 1998. The principle of the independent application of the non-discrimination clause is nevertheless firmly established in the case law of the Human Rights Committee, which has applied Article 26 ICCPR to

a variety of social and economic rights such as retirement benefits (Communication No. 786/97, *J. Vos* v. *Netherlands*, final views of 19 July 1999, CCPR/C/66/D/786/1997 (1999); Communication No. 415/90, *Pauger* v. *Austria*, final views of 16 March 1992, CCPR/C/44/D/415/1990 (1992)), compensation for being dismissed from employment in the public sector (Communication No. 309/1988, *Carlos Orihuela Valenzuela* v. *Peru*, final views of 14 July 1993, *Selection of Decisions*, vol. 5, p. 25), disability benefits (Communication No. 218/1986, *Hendrika S. Vos* v. *Netherlands*, final views of 29 March 1989, Supp. No. 40 (A/44/40), at 232 (1989)), aids to education (Communication No. 191/1985, *Blom* v. *Sweden*, final views of 4 April 1988, Supp. No. 40 (A/43/40), at 211 (1988)), or family benefits (Communication Nos. 406/1990 and 426/1990, *Oulajin and Kaiss* v. *Netherlands*, final views of 23 October 1992, CCPR/C/46/D/406/1990 and 426/1990 (1992)). However, in areas such as taxation or social security, a wide margin of appreciation is granted to the States parties. In the case of *Sprenger* v. *Netherlands*, in which the Committee concluded that the differentiation between married and unmarried persons in the Health Insurance Act did not constitute discrimination prohibited under Article 26 ICCPR, three members of the Committee argued as follows:

Human Rights Committee, *Sprenger* v. *Netherlands*, Communication No. 395/1990, UN Doc. CCPR/C/44/D/395/1990 (1992), individual opinion of Messrs Nisuke Ando, Kurt Herndl and Birame Ndiaye:

While it is clear that article 26 of the Covenant postulates an autonomous right to non-discrimination, we believe that the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

We note, firstly, that the determination whether prohibited discrimination within the meaning of article 26 has occurred depends on complex considerations, particularly in the field of economic, social and cultural rights. Social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. While the aims of social justice vary from country to country, they must be compatible with the Covenant. Moreover, whatever distinctions are made must be based on reasonable and objective criteria. For instance, a system of progressive taxation, under which persons with higher incomes fall into a higher tax bracket and pay a greater percentage of their income for taxes, does not entail a violation of article 26 of the Covenant, since the distinction between higher and lower incomes is objective and the purpose of more equitable distribution of wealth is reasonable and compatible with the aims of the Covenant.

Surely, it is also necessary to take into account the reality that the socio-economic and cultural needs of society are constantly evolving, so that legislation – in particular in the field of social security – may well, and often does, lag behind developments. Accordingly, article 26 of the Covenant should not be interpreted as requiring absolute equality or non-discrimination in that field at all times; instead, it should be seen as a general undertaking on the part of the States parties to the Covenant to regularly review their legislation in order to ensure that it corresponds to the changing needs of society. In the field of civil and political rights, a State party is required to respect Covenant rights such as the right to a fair trial, to freedom of expression and freedom of religion, immediately from the date of entry into force

of the Covenant, and to do so without discrimination. On the other hand, with regard to rights enshrined in the International Covenant on Economic, Social and Cultural Rights, it is generally understood that States parties may need time for the progressive implementation of these rights and to adapt relevant legislation in stages; moreover, constant efforts are needed to ensure that distinctions that were reasonable and objective at the time of enactment of a social security provision are not rendered unreasonable and discriminatory by the socio-economic evolution of society. Finally, we recognize that legislative review is a complex process entailing consideration of many factors, including limited financial resources, and the potential effects of amendments on other existing legislation.

It has been argued that the extension to all fields of the requirement of non-discrimination, including in particular the area of social security, has a 'creative effect', by obliging the States parties to the Covenant to extend to certain disadvantaged categories advantages which had hitherto been reserved to a privileged segment of the population (M. Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme* (Brussels: Bruylant, 1976), at p. 219). However, the restriction a stand-alone non-discrimination requirement imposes to the freedom of the State concerned to define at what speed it should progressively realize socio-economic rights should not be exaggerated. While a State may not allocate benefits on the basis of criteria which amount to a discrimination, it may in principle choose to deny those benefits altogether; when it is found to have committed a discrimination, it may deprive the privileged from the advantages which were unjustifiably reserved to them, instead of aligning the situation of the disadvantaged with that of the privileged.

Human Rights Committee, *Arieh Hollis Waldman* v. *Canada*, Communication No. 694/1996 (CCPR/C/67/D/694/1996), final views of 5 November 1999:

[The author of the communication, a Canadian citizen residing in the province of Ontario, is a father of two school-age children and a member of the Jewish faith who enrols his children in a private Jewish day school. In the province of Ontario Roman Catholic schools are the only non-secular schools receiving full and direct public funding. Other religious schools must fund through private sources, including the charging of tuition fees. This situation has its source in a constitutional compromise reached in 1867, at a time when Catholics represented 17 per cent of the population of Ontario, while Protestants represented 82 per cent and all other religions combined represented 0.2 per cent of the population. In order to avoid the new province of Ontario being controlled by a Protestant majority that might exercise its power over education to take away the rights of its Roman Catholic minority, the Roman Catholics were guaranteed their rights to denominational education: section 93 of the 1867 Canadian Constitution contains explicit guarantees of denominational school rights, thus limiting in this respect the exclusive jurisdiction of each province in Canada to enact laws regarding education; in Ontario, the section 93 power is exercised through the Education Act, which provides that every separate school is entitled to full public funding, and defines separate schools as Roman Catholic schools. As a

result of this system, Roman Catholic schools are the only religious schools entitled to the same public funding as the public secular schools. Thus, in 1994, Mr Waldman paid $14,050 in tuition fees for his children to attend Bialik Hebrew Day School in Toronto, Ontario, an amount which was reduced by a federal tax credit system to $10,810.89; in addition, the author is required to pay local property taxes to fund a public school system he does not use. In his communication to the Committee, Mr Waldman claims to be a victim of a violation of article 26, and articles 18(1), (4) and 27 taken in conjunction with article 2(1).]

10.2 The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in a religious school, constitutes a violation of the author's rights under the Covenant.

10.3 The State party has argued that no discrimination has occurred, since the distinction is based on objective and reasonable criteria: the privileged treatment of Roman Catholic schools is enshrined in the Constitution; as Roman Catholic schools are incorporated as a distinct part of the public school system, the differentiation is between private and public schools, not between private Roman Catholic schools and private schools of other denominations; and the aims of the public secular education system are compatible with the Covenant.

10.4 The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.

10.5 With regard to the State party's argument that it is reasonable to differentiate in the allocation of public funds between private and public schools, the Committee notes that it is not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. In the instant case, the author has sent his children to a private religious school, not because he wishes a private non-Government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith. On the basis of the facts before it, the Committee considers that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective.

10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of nondiscrimination laid down in the Covenant. The Committee does not take issue with this argument but notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools. It has also noted the author's submission that the public school system in Ontario would have greater resources if the Government would cease funding any religious schools. In this context, the Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party

chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

[In 2006, Canada had still not adopted the measures required by the *Waldman* decision: see Human Rights Committee, Concluding Observations on the fifth periodic report of Canada (CCPR/C/CAN/2004/5) (CCPR/C/CAN/CO/5, 20 April 2006), at para. 21.]

7.1. Question for discussion: is non-discrimination applied to social rights 'legislating social rights from the bench'?

The Committee on Economic, Social and Cultural Rights considers that 'any deliberately retrogressive measures [in the realization of the rights of the ICESCR] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' (General Comment No. 3, *The Nature of States Parties' Obligations* (1990), para. 9; see also General Comment No. 13, *The Right to Education* (Art. 13) (1999), para. 45; General Comment No. 14, *The Right to the Highest Attainable Standard of Health* (Art. 12) (2000), para. 32; General Comment No. 15, *The Right to Water* (Arts. 11 and 12 of the Convenant) (2002), para. 19). Is the implication that the independent application of the non-discrimination requirement of Article 26 ICCPR in fact does oblige States parties to the ICCPR to make progress towards the realization of economic and social rights faster than they would have otherwise, following the domestic decision-making processes, resulting in the 'creative effect' feared by M. Bossuyt?

1.2 The European Convention on Human Rights

A similar discussion concerning the scope of the non-discrimination clause has taken place under the ECHR. Article 14 of the European Convention on Human Rights does not create an independent protection from discrimination. It may only be invoked in combination with another substantive provision of the ECHR or of one of its additional Protocols: it is only when discrimination is found to exist *in the enjoyment of the rights and freedoms set forth in the Convention* that it will come into play. This is not to say that Article 14 ECHR has no autonomous function to fulfil in the system of the Convention. On the contrary, it supplements all the other substantive provisions by adding the requirement that they be applied and implemented without discrimination.

European Court of Human Rights, *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium'* v. *Belgium ('Belgian Linguistics Case')*, judgment of 23 July 1968, Series A No. 6, pp. 33–4, para. 9:

[Article 2 of Additional Protocol No. 1 to the ECHR states that 'No person shall be denied the right to education.' Although the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from this provision,] nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14. [Thus, similarly,] Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions. In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention.

Thus, the application of Article 14 ECHR does not presuppose a breach of another right or freedom of the Convention: a violation of the non-discrimination clause may be found even if, considered independently from that clause, the provision it is combined with is not violated. Nevertheless, in order for Article 14 ECHR to come into play, it is still required for the discrimination to occur 'within the ambit of' one or more other rights of the Convention. The European Court of Human Rights formulates this restriction by stating that 'Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter' (see, e.g. Eur. Ct. H.R., *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, 28 May 1985, Series A No. 94, p. 35, §71; Eur. Ct. H.R., *Inze* v. *Austria*, judgment of 28 October 1987, Series A No. 126, p. 17, §36; *Karlheinz Schmidt* v. *Germany*, 18 July 1994, Series A No. 291–B, p. 32, §22; Eur. Ct. H.R., *Van Raalte* v. *Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997–I, p. 184, §33; Eur. Ct. H.R., *Petrovic* v. *Austria*, 27 March 1998, *Reports of Judgments and Decisions* 1998–II, p. 585, §22; Eur. Ct. HR, *Haas v. Netherlands* (Appl. No. 36983/97), judgment of 13 January 2004, §41).

In recent years, this condition has been interpreted as allowing the invocation of Article 14 ECHR in two situations: first, when the alleged discrimination occurs in

the enjoyment of a right protected under the European Convention on Human Rights; second, when the discrimination is on a ground which corresponds to the exercise of a right protected under the Convention (see R. Wintemute, '"Within the Ambit": How Big *Is* the "Gap" in Article 14 European Convention on Human Rights?', *European Human Rights Law Review* (2004), 366 at 371). The applicability of Article 14 ECHR to this second type of situation has been affirmed by the European Court of Human Rights for the first time in the 2000 case of *Thlimmenos* v. *Greece*, in which the non-discrimination clause was invoked successfully in combination with Article 9 ECHR by a Jehovah's Witness denied access to the profession of chartered accountant because of a past criminal conviction for having refused to serve in the army for religious motives (Eur. Ct. H.R. (GC), *Thlimmenos* v. *Greece* (Appl. No. 34369/97), judgment of 6 April 2000, §42). But Article 14 ECHR may also be presumed to apply (whichever the nature of the disadvantage inflicted or of the advantage which is denied), for example, where the discrimination penalizes persons for having sought to defend their rights before a court (Art. 6 ECHR), for having chosen a sexual orientation or a particular lifestyle or for being in a particular family status (Art. 8 ECHR), for opinions they have expressed (Art. 10 ECHR), for having joined an association or having refused to join an association (Art. 11 ECHR), or for having married or refused to enter into a marital relationship (Art. 12 ECHR).

Despite these limitations to its scope of application, Article 14 ECHR has been successfully invoked in a wide range of situations involving, for instance, the right to social security benefits considered as part of the right to property (Eur. Ct. H.R., *Gaygusuz* v. *Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996–IV, p. 1141; Eur. Ct. H.R. (2nd section), *Koua-Poirrez* v. *France* (Appl. No. 40892/98), judgment of 30 September 2003), or the granting of a parental leave allowance, which the Court links to the enjoyment of the right to respect for private and family life (Eur. Ct. H.R., *Petrovic* v. *Austria* (Appl. No. 20458/92), judgment of 27 March 1998, §§26–7), This extension is not without limits, however. For example, most instances of discrimination in access to employment would not be considered to fall under the scope of application of Article 14 ECHR, although in certain extreme cases where across-the-board prohibitions are imposed, the individual's inability to have access to certain professions may constitute an interference with the right to respect for private life (see Eur. Ct. H.R. (2nd sect.), *Sidabras and Dziautas* v. *Lithuania* (Appl. Nos. 55480/00 and 59330/00), judgment of 27 July 2004, §48). And the European Court of Human Rights has considered that public authorities were not obliged under Article 8 ECHR to take measures in order to facilitate the social or professional integration of persons with disabilities, for instance by ensuring the accessibility of private sea resorts (Eur. Ct. H.R., *Botta* v. *Italy*, judgment of 24 February 1998) or public buildings to persons with limited mobility (Eur. Ct. H.R., *Zehlanova and Zehnal* v. *Czech Republic*, decision of 14 May 2002 (Appl. No. 38621/97)) or by providing them with certain equipment which would diminish their dependency on others (Eur. Ct. H.R., *Sentges* v. *Netherlands*, decision of 8 July 2003 (Appl. No. 27677/02)). The Court

concluded that, because Article 8 ECHR was inapplicable in such cases, Article 14 ECHR could not be invoked either.

The restricted scope of application of Article 14 ECHR is partly compensated for by the European Court of Human Rights' recognition that where it attains a certain level of severity, discrimination based on race or ethnic origin (see the report adopted on 14 December 1973 by the Commission under former Art. 31 ECHR in *East African Asians* v. *United Kingdom* (*Decisions and Reports* 78–A, p. 62)), sex (see Eur. Ct. H.R., *Abdulaziz, Cabales and Balkandali* v. *United Kingdom,* Series A No. 94, at p. 42, §91), religion (Eur. Ct. H.R. (GC), *Cyprus* v. *Turkey* (Appl. No. 25781/94), judgment of 10 May 2001, §309) or sexual orientation (Eur. Ct. H.R. (3rd sect.), *Smith and Grady* v. *United Kingdom* (Appl. Nos. 33985/96 and 33986/96), judgment of 27 September 1999, §121) may constitute a degrading treatment prohibited in absolute terms (i.e. without the possibility of justification) under Article 3 ECHR. Despite these qualifications, and the possible further extension in the future of the scope of application of Article 14 ECHR in combination especially with Article 8 ECHR and Article 1 of Protocol No. 1 ECHR, the prohibition of discrimination under the ECHR remains limited to 'the enjoyment of the rights and freedoms' recognized in the ECHR. An additional Protocol No. 12 to the ECHR was drafted in order to extend the discrimination protection in the Convention; the Protocol was opened for signature on 4 November 2000 and entered into force on 1 April 2005. Article 1 of Protocol No. 12 to the ECHR contains a general prohibition of discrimination:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Although Article 1 of Protocol No. 12 to the ECHR concerns only the 'enjoyment of any right set forth by law', the protection from discrimination thus afforded by the Protocol goes beyond that afforded by Article 14 ECHR (see generally, J. Schokkenbroek, 'A New European Standard Against Discrimination: Negotiating Protocol No. 12 to the European Convention on Human Rights' in J. Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden: Martinus Nijhoff, 2004), pp. 61–79). Social security matters being covered under Article 1 of Additional Protocol No. 1 to the ECHR since *Gaygusuz*, the areas concerned by this extension shall be, in particular, access to public places, access to goods, provision of services, access to nationality, and in certain cases access to employment. Where the discrimination is based on other grounds than the exercise of rights protected under the ECHR, the European Court of Human Rights might rely on Protocol No. 12 in order to extend its jurisdiction to those situations which, presently, are not covered under Article 14 ECHR.

7.2. Question for discussion: the role of international courts in implementing the principle of equality

The Member States of the Council of Europe already are bound by a non-discrimination requirement, whether this follows from an equality clause in their domestic constitutions or from their ratification of the International Covenant on Civil and Political Rights. In this respect, the ratification of Protocol No. 12 to the ECHR essentially amounts to transferring, from the domestic courts to the European Court of Human Rights, the task of assessing whether regulations adopted in areas such as taxation, social security, or land planning, are compatible with the prohibition of discrimination. Is this transfer desirable? Which arguments can be presented in favour of such a transfer?

1.3 The European Social Charter

In contrast to the original version of the European Social Charter, the 1996 revised European Social Charter contains a provision (Art. E) specifically prohibiting discrimination in the enjoyment of the rights recognized by the other substantive provisions of the Charter. In its decision on the merits of Collective Complaint No. 13/2002 directed by the non-governmental organization Autism-Europe against France, the European Committee of Social Rights concluded that France had violated Articles 15 para. 1 (obligation to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes whenever possible) and 17 para. 1 (right to education by the provision of institutions and services sufficient and adequate) of the revised ESC, either alone or in combination with Article E (non-discrimination), because the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled, and because of the chronic shortage of care and support facilities for autistic adults. In adopting that decision, the Committee underlined that 'the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein'. It considered that this provision should be read per analogy with Article 14 ECHR – the wording of which it replicates – as protecting from discrimination in the enjoyment of the substantive rights of the Charter, on all grounds not limited to those explicitly enumerated in that provision. This decision is presented below in greater detail (see also, for a comment by the Member of the Committee acting as Rapporteur on the case, G. Quinn, 'The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose' in G. de Búrca and B. de Witte (eds.), *Social Rights in Europe* (Oxford University Press, 2005), p. 279 at pp. 293–99).

1.4 The American Convention on Human Rights

As already noted in box 7.1., the ACHR – in line with the ICCPR – contains two provisions concerning non-discrimination: Article 1(1) provides that States must ensure the enjoyment of the convention rights without discrimination, whereas Article 24 provides for equal treatment before the law. The Inter-American Commission and Court have interpreted these two provisions in roughly the same manner as the UN Human Rights Committee (see also the Inter-American Commission's *Report on the Status of Women in the Americas* of 13 October 1998 [OEA/Ser.L/V/II.100 Doc. 17]).

Inter-American Court of Human Rights, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984 [Series A No. 4]:

53. Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein 'without any discrimination' …

54. Article 24 of the Convention, in turn, reads as follows: … All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law. Although Articles 24 and 1(1) are conceptually not identical – the Court may perhaps have occasion at some future date to articulate the differences – Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.

2 THE RANGE OF STATES' OBLIGATIONS

Although it is not explicit in this regard, Article 26 ICCPR in fact contains four separate norms, imposing on the States parties both negative and positive obligations. These obligations are that States shall (1) guarantee equality before the law; (2) guarantee the equal protection of the law; (3) prohibit any discrimination; and (4) guarantee to all persons equal and effective protection against discrimination. This latter obligation may impose on States to adopt positive action measures in situations of structural discrimination, where certain social groups are permanently excluded from integration factors such as employment, housing, or education, so that the prohibition of individual discriminatory acts appears insufficient to protect them effectively from marginalization. Taken together, these four norms have been presented as corresponding to the different stages through which the concept of non-discrimination has made progress (T. Opsahl, 'Equality in Human Rights Law. With Particular Reference to

Article 26 of the International Covenant on Civil and Political Rights' in *Festschrift für Felix Ermacora: Fortschritt im Bewußtsein der Gruhnd- und Menschenrechte* (Kehl am Rhein: N.P. Engel Verlag, 1988), at pp. 51–65). They are examined in turn in the following paragraphs. Each norm is illustrated not only through the Human Rights Committee's jurisprudence, but also through the case law of other bodies applying the same norms, while not necessarily relying on the same typology.

2.1 Equality before the law

This norm is addressed to law enforcement authorities, whether they belong to the executive or to the judiciary. It formulates at a general level a requirement which Article 14(1) ICCPR specifies in the context of judicial procedures, where it states that all persons 'shall be equal before the courts and tribunals'. The following case offers an example:

Human Rights Committee, *Kavanagh* v. *Ireland*, Communication No. 819/1998 (CCPR/C/71/D/819/1998), final views of 4 April 2001:

[Article 38(3) of the Irish Constitution provides for the establishment by law of Special Courts for the trial of offences in cases where it may be determined, according to law, that the ordinary courts are 'inadequate to secure the effective administration of justice and the preservation of public peace and order'. On 26 May 1972, the Government exercised its power to make a proclamation pursuant to section 35(2) of the Offences Against the State Act 1939 which led to the establishment of the Special Criminal Court for the trial of certain offences. By virtue of section 47(1) of the Act, a Special Criminal Court has jurisdiction over a 'scheduled offence' (i.e. an offence specified in a list) where the Attorney General 'thinks proper' that a person so charged should be tried before the Special Criminal Court rather than the ordinary courts. The Special Criminal Court also has jurisdiction over non-scheduled offences where the Attorney General certifies, under section 47(2) of the Act, that in his/her opinion the ordinary courts are 'inadequate to secure the effective administration of justice in relation to the trial of such person on such charge'. The Director of Public Prosecutions (DPP) exercises these powers of the Attorney General by delegated authority. In contrast to the ordinary courts of criminal jurisdiction, which employ juries, Special Criminal Courts consist of three judges who reach a decision by majority vote. The Special Criminal Court also utilizes a different procedure from that of the ordinary criminal courts, including that an accused cannot avail himself/herself of preliminary examination procedures concerning the evidence of certain witnesses.]

10.1 The author claims a violation of article 14, paragraph 1, of the Covenant, in that, by subjecting him to a Special Criminal Court which did not afford him a jury trial and the right to examine witnesses at a preliminary stage, he was not afforded a fair trial. The author accepts that neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily render a trial unfair, but he claims that all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair. In the Committee's view, trial before courts other than the ordinary courts is not necessarily, *per se*, a violation of the entitlement to a fair hearing and the facts of the present case do not show that there has been such a violation.

10.2 The author's claim that there has been a violation of the requirement of equality before the courts and tribunals, contained in article 14, paragraph 1, parallels his claim of violation of his right under article 26 to equality before the law and to the equal protection of the law. The [Director of Public Prosecutions'] decision to charge the author before the Special Criminal Court resulted in the author facing an extra-ordinary trial procedure before an extra-ordinarily constituted court. This distinction deprived the author of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts. Within the jurisdiction of the State party, trial by jury in particular is considered an important protection, generally available to accused persons. Under article 26, the State party is therefore required to demonstrate that such a decision to try a person by another procedure was based upon reasonable and objective grounds. In this regard, the Committee notes that the State party's law, in the Offences Against the State Act, sets out a number of specific offences which can be tried before a Special Criminal Court at the DPP's option. It provides also that any other offence may be tried before a Special Criminal Court if the DPP is of the view that the ordinary courts are 'inadequate to secure the effective administration of justice'. The Committee regards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ('thinks proper'), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be 'proper', or that the ordinary courts are 'inadequate', and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.

10.3 The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under article 26 to equality before the law and to the equal protection of the law has been violated. In view of this finding with regard to article 26, it is unnecessary in this case to examine the issue of violation of equality 'before the courts and tribunals' contained in article 14, paragraph 1, of the Covenant.

This first implication of Article 26 ICCPR, if read extensively, could have the potential of requiring that any individual decision adopted by the public authorities be justified, since in the absence of such a justification it might be denounced as arbitrary and, thus, discriminatory. Consider the following case:

Human Rights Committee, *Robert W. Gauthier* v. *Canada*, Communication No. 633/1995 (CCPR/C/65/D/633/1995), final views of 5 May 1999:

[Mr Gauthier is the publisher of the National Capital News, a newspaper founded in 1982. He applied for membership in the Parliamentary Press Gallery, a private association that administers the accreditation for access to the precincts of Parliament, but was denied

permanent membership. He was provided instead with a temporary pass that gave only limited privileges. Repeated requests for equal access on the same terms as other reporters and publishers were denied. In his communication to the Committee, he claims that the denial of equal access to press facilities in Parliament constitutes a violation of his rights under Article 19 of the Covenant. Since, in its admissibility decision of 10 July 1997, the Committee considered that the case could also raise a question under Articles 22 (freedom of association) and 26 (non-discrimination) of the Covenant, the author subsequently commented under that provision that the difference in treatment between him and journalist members of the Press Gallery was unreasonable, and that he had been arbitrarily denied equal access to media facilities. Although he accepts that the State party may limit access to press facilities in Parliament, he submits that such limits must not be unduly restraining, must be administered fairly, must not infringe on any person's right to freedom of expression and the right to seek and receive information, and must be subject to review.]

13.2 With regard to the author's claims under articles 22 and 26 of the Covenant, the Committee ... considers that the author had not substantiated, for purposes of admissibility, his claim under the said articles. Nor has he further substantiated it, for the same purposes, with his further submissions. In these circumstances, the Committee concludes that the author's communication is inadmissible under article 2 of the Optional Protocol, as far as it relates to articles 22 and 26 of the Covenant. In this regard, the admissibility decision is therefore repealed.

13.3 The issue before the Committee is thus whether the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: 'In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.' [General Comment No. 25, para. 25, adopted by the Committee on 12 July 1996.] Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.

13.5 In the present case, the State party has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organisation, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery. On occasion he has held temporary membership which has given him access to some but not all facilities of the organisation. When he does not hold at least temporary membership he does not have access to the media facilities nor can he take notes of Parliamentary proceedings.

The Committee notes that the State party has claimed that the author does not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public. The State party argues that he can report on proceedings by relying on broadcasting services, or by observing the proceedings. In view of the importance of access to information about the democratic process, however, the Committee does not accept the State party's argument and is of the opinion that the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information. The question is whether or not this restriction is justified under paragraph 3 of article 19. The restricion is, arguably, imposed by law, in that the exclusion of persons from the precinct of Parliament or any part thereof, under the authority of the Speaker, follows from the law of parliamentary privilege.

13.6 The State party argues that the restrictions are justified to achieve a balance between the right to freedom of expresssion and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members, and that the State party is in the best position to assess the risks and needs involved. As indicated above, the Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal. However, since the accreditation system operates as a restriction of article 19 rights, its operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary. The Committee does not accept that this is a matter exclusively for the State to determine. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of article 19(2) of the Covenant.

13.7 In this connection, the Committee notes that there is no possibility of recourse, either to the Courts or to Parliament, to determine the legality of the exclusion or its necessity for the purposes spelled out in article 19 of the Covenant. The Committee recalls that under article 2, paragraph 3 of the Covenant, States parties have undertaken to ensure that any person whose rights are violated shall have an effective remedy, and that any person claiming such a remedy shall have his right thereto determined by competent authorities. Accordingly, whenever a right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation of his rights.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

Individual opinion by members Lord Colville, Elizabeth Evatt, Ms Cecilia Medina Quiroga and Mr Hipólito Solari Yrigoyen (partly dissenting) [A virtually identical position was adopted

in his individual opinion (partly dissenting) by Committee member Prafullachandra N. Bhagwati. Therefore five members of the Committee in total were of the opinion that Article 26 ICCPR had been violated in this case.]

In regard to paragraph 13.2 of the Committee's Views, our opinion is that the claims of the author under articles 22 and 26 of the Covenant have been sufficiently substantiated and that there is no basis to [consider these claims as non-admissible].

Article 26 of the Covenant stipulates that all persons are equal before the law. Equality implies that the application of laws and regulations as well as administrative decisions by Government officials should not be arbitrary but should be based on clear coherent grounds, ensuring equality of treatment. To deny the author, who is a journalist and seeks to report on parliamentary proceedings, access to the Parliamentary press facilities without specifically identifying the reasons, was arbitrary. Furthermore, there was no procedure for review. In the circumstances, we are of the opinion that the principle of equality before the law protected by article 26 of the Covenant was violated in the author's case.

In regard to article 22, the author's claim is that requiring membership in the Press Gallery Association as a condition of access to the Parliamentary press facilities violated his rights under article 22. The right to freedom of association implies that in general no one may be forced by the State to join an association. When membership of an association is a requirement to engage in a particular profession or calling, or when sanctions exist on the failure to be a member of an association, the State party should be called on to show that compulsory membership is necessary in a democratic society in pursuit of an interest authorised by the Covenant. In this matter, the Committee's deliberations in paragraph 13.6 of the Views make it clear that the State party has failed to show that the requirement to be a member of a particular organisation is a necessary restriction under paragraph 2 of article 22 in order to limit access to the press gallery in Parliament for the purposes mentioned. The restrictions imposed on the author are therefore in violation of article 22 of the Covenant.

Individual opinion by Committee member David Kretzmer (partly dissenting)

I do not share their view that a violation of article 26 has also been substantiated. In my mind, it is not sufficient, in order to substantiate a violation of article 26, merely to state that no reasons were given for a decision. Furthermore, it seems to me that the author's claim under article 26 is in essence a restatement of his claim under article 19. It amounts to the argument that while others were allowed access to the Press Gallery, the author was denied access. Accepting that this constitutes a violation of article 26 would seem to imply that in almost every case in which one individual's rights under other articles of the Covenant are violated, there will also be a violation of article 26. I therefore join the Committee in the view that the author's claim of a violation of article 26 has not been substantiated. The Committee's decision on admissibility should be revised and the claim under article 26 be held inadmissible.

The result that, as expressed in his dissent, Mr D. Kretzmer wanted to avoid was firmly established under the case law of the Inter-American Court of Human Rights, as ever since the *Velasquez-Rodriguez* case, the Court has found that a violation of any substantive right in the ACHR entails a violation of Article 1(1), the obligation to respect and ensure rights without discrimination (IACtHR, case of *Velasquez-Rodriguez* v. *Honduras*, decision on the merits of 29 July 1988, Series C-04, paras. 162–88).

However, the question of equality before the law has also been addressed explicitly within the ACHR. The Inter-American System has long held that the impartiality and non-discriminatory character of judicial decisions are fundamental requirements of the right to justice (Arts. 8 and 25, combined, read with Art. 1(1)). This issue was raised in the following Advisory Opinion, in which the Court suggests that the prohibition of arbitrary treatment by judicial authorities may require positive measures be taken to counterbalance the vulnerability of the situation of certain criminal defendants.

Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999 (Series A No. 16):

[Mexico had requested an Advisory Opinion by the Court on the issue of whether the 'right to consular assistance' established by Article 36 of the Vienna Convention on Consular Relations of 1963 (596 U.N.T.S. 261) was to be considered an element of the 'due process' guarantees established by both the American Convention and Declaration on Human Rights. This opinion predates the landmark judgment delivered on 27 June 2001 by the International Court of Justice (ICJ) in the *LaGrand* case *(Germany* v. *United States)*, in which the ICJ held that the Vienna Convention grants rights to individuals on the basis of its plain meaning, and that domestic laws may not limit the rights of the accused under the Convention, but only specify the means by which those rights were to be exercised. Mexico and other States were concerned about the validity of convictions of their nationals involving the use of the death penalty.]

117. In the opinion of this Court, for 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added ...

119. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages ...

121. In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person ...

123. The inclusion of this right in the Vienna Convention on Consular Relations – and the discussions that took place as it was being drafted – are evidence of a shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions – sometimes decisive repercussions – on enforcement of the accused' other procedural rights.

124. In other words, the individual's right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused.

Another illustration of the requirement of equality before the law is provided by the judgment adopted by the UK House of Lords in a case concerning the screening of Roma at Prague Airport by British immigration officers. These officers were temporarily posted to Prague Airport to 'pre-clear' all passengers before they boarded flights for the United Kingdom, in accordance with an agreement concluded in February 2001 between the Czech Republic and the United Kingdom. While most of the argument in this case was about the applicability to such a situation – where potential asylum-seekers have not left their national territory – of the 1951 Geneva Convention on the Status of Refugees, the excerpts presented here concern the allegation that the Roma seeking to leave Prague were victims of discrimination.

House of Lords (United Kingdom), *R.* v. *Immigration Officer at Prague Airport and another (Respondents), ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55

Leading judgment, Lord Bingham of Cornhill

1. At issue in this appeal is the lawfulness of procedures adopted by the British authorities and applied to the six individual appellants at Prague Airport in July 2001. All these appellants are Czech nationals of Romani ethnic origin ('Roma'). All required leave to enter the United Kingdom. All were refused it by British immigration officers temporarily stationed at Prague Airport. Three of these appellants stated that they intended to claim asylum on arrival in the UK. Two gave other reasons for wishing to visit the UK but were in fact intending to claim asylum on

arrival. One (HM) gave a reason for wishing to visit the UK which the immigration officer did not accept: she may have been intending to claim asylum on arrival in the UK or she may not. The individual appellants, with the first-named appellant ('the [European Roma Rights] Centre' (ERRC), a non-governmental organisation, based in Budapest, devoted to protection of the rights of Roma in Europe), challenge the procedures applied to the individual appellants as incompatible with the obligations of the UK under the Geneva Convention (1951) and Protocol (1967) relating to the Status of Refugees and under customary international law. They also challenge the procedures as involving unjustifiable discrimination on racial grounds.

[On the question of whether the treatment of the Roma seeking to embark for the United Kingdom at Prague Airport was discrimination, the leading judgment refers to the other opinions expressed by the Lords. Excerpts follow:]

Lord Steyn

32. In this appeal many significant issues have been debated. But surely the most important issue is whether the operation mounted by immigration officers at Prague Airport under the authority of the Home Secretary in 2001 and 2002 discriminated against Roma on grounds of their race. It is unlawful for public authorities, such as the Home Secretary and an immigration officer, to discriminate on racial grounds in carrying out any of their functions. The appellants put forward a case of direct discrimination on the grounds of race under the Race Relations Act 1976. The Home Secretary and the immigration officers strenuously denied that any discrimination had taken place. Mr Howell, who appeared on behalf of the Home Secretary and the immigration officer, invited the House of Lords to regard the allegations as very serious. He submitted that the case of the appellants should be viewed with an initial scepticism that the United Kingdom could have put in place a system of discrimination on the grounds of race. That is how I will approach the matter.

33. The operation at Prague Airport is unique in the history of the immigration service. It was the first time such a procedure had been undertaken. And it has not been repeated. But the decision of the House transcends the particular circumstances of the case: it has implications for the responsibility of government not only for immigration policy but also for race relations policy generally.

34. The essential features of the operation can be stated quite simply. It was designed as a response to an influx of Czech Roma into the United Kingdom. The immigration officers knew that the reason why they were stationed in Prague was to stop asylum seekers travelling to the United Kingdom. They also knew that almost all Czech asylum seekers were Roma, because the Roma are a disadvantaged racial minority in the Czech Republic. Thus there was from the outset a high risk that individuals recognised as Roma would be targeted by specially intrusive and sceptical questioning. There was a striking difference in treatment of Roma and non-Roma at the hands of immigration officers operating at Prague Airport. The statistics show that almost 90% of Roma were refused leave to enter and only 0.2% of non-Roma were refused leave to enter. Roma were 400 times more likely than non-Roma to be refused permission. No attempt was made by the Home Office to explain by the evidence of immigration officers the difference in treatment of Roma and non-Roma. Although the Home Office was from the beginning on notice of the high risk of discrimination on grounds of race, no attempt was made to guard against discrimination.