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EUROPEAN COMMISSION OF HUMAN RIGHTS

PREPARATORY WORK ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Information Document
prepared by the Secretariat of the Commission

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1. Article 6 of the European Convention on Human Rights is worded as follows:

Article 6

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

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strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

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

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

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

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

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

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

2. The Universal Declaration of Human Rights, adopted on 10th December, 1948, by the General Assembly of the United Nations, includes an Article 10 and an Article 11, para. 1, worded as follows:

Article 10

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

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Article 11

"1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2."

3. In August, 1949, when the Consultative Assembly of the Council of Europe had obtained the inclusion in its Agenda of "measures for the fulfilment of the declared aim of the Council of Europe in accordance with Article 1 of the Statute in regard to the safeguarding and further realisation of Human Rights and Fundamental Freedoms", M. Teitgen, the Rapporteur, laid before the Committee on Legal and Administrative Questions certain proposals including, in particular, this passage:

"The Convention and the procedure to be determined later by the Committee will guarantee the fundamental rights and freedoms listed below to all persons residing within the metropolitan territory of a Member State:

.....

Immunity from all arrest, detention or arbitrary exile, in accordance with Articles 9, 10 and 11 of the Declaration of the United Nations." (1) (Doc. A.116) (2).

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(1) The drafts of the European Movement, by which the Consultative Assembly was considerably influenced (cf. Official Report of the Consultative Assembly, 1949, II, page 410), simply mentioned "freedom from arbitrary arrest, detention and exile", without expressly referring to Articles 10 and 11 of the Universal Declaration. Doc. INF (2) E, February 1949, and Doc. INF (5) E/R, June 1949, Article 1b, page 67.

(2) Translation: original English text unavailable.

At the meeting of the Committee on 29th August, 1949, M. Wolter (Luxembourg) suggested substituting the words "arbitrary arrest, sentence, detention or exile" for the words "arrest, detention or arbitrary exile". This amendment was negatived by 12 votes to 3 with 2 abstentions. Another amendment, moved by M. Persico (Italy), to insert after "arbitrary exile" the words "or other measures or sentences" met with the same fate. Finally, the Committee agreed, by 13 votes to 3 with 1 abstention, to an amendment by M. Rolin (Belgium) and M. Teitgen (France) to replace "or arbitrary exile" by "exile or other arbitrary measures" (Doc. A 142).

4. Article 2, para. 3, of the draft submitted to the Consultative Assembly by the Committee on 5th September, 1949, was worded as follows:

"In this Convention, the Member States shall undertake to ensure to **every person** residing within their territories:

.....

3. Freedom from arbitrary arrest, detention, exile, and other measures, in accordance with Articles 9, 10 and 11 of the United Nations Declaration" / Doc. AS (1) 77, page 204; cf. also Doc. A 290⁽¹⁾, page 10, and Doc. B 22, page 107.⁽²⁾

This text did not give rise to any particular discussion in the Assembly and was embodied without change in the Assembly's Recommendation of 8th September, 1949 / Doc. AS (1) 108, Article 2, para. 3, page 2617.

The debate did, however, make it clear how far the Assembly thought that decisions of national courts might be subjected to control by the organs responsible for putting

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(1) In Doc. A 290 the passage reads: "Immunity from all arrest, detention, exile and other arbitrary measures, in accordance with Articles 9, 10 and 11 of the Declaration of the United Nations."

(2) Article 9 of the Universal Declaration corresponds to Article 5 of the Convention.

the Convention into effect. This question seems of some interest for the interpretation of Article 6. The Secretariat of the Commission has therefore decided to reproduce in the present document the relevant extracts from the Report of the sitting of 8th September, 1949:

"M. DÜSÜNSEL (Turkey): (Translation)

.....If the acts which are considered to be contrary to the principles which we have laid down are the acts of regularly constituted and independent tribunals; if the case has been taken to the Court of Appeal and even if this latter has rejected a request for retrial or has terminated this re-trial in a manner unfavourable to the plaintiff, will this case, which has been tried with all regularity in one country, come within the competence of the European Court?

I should never accept that. If the tribunals are completely independent; if they have no connection with the political and internal power, when they have finally judged the act which is considered to be contrary to the declarations of law, will the plaintiff be able to take the case before the European Court?....."(1)

"M. TEITGEN (France): (Translation)

.....Are the verdicts of the ordinary courts of a State subject to a Court of Appeal to the International organ of guarantee?

The answer is clear In Article 24, (2) ./.

(1) Reports 1949, page 1174.

(2) This article, which corresponded to the present Article 50 of the Convention, provided that "the jurisdiction of the (European) "Court" (of Human Rights) "shall extend to all violations of the obligations defined by the Convention Nevertheless, where objection is taken to a judicial decision, that decision cannot be impugned unless it was given in disregard of the fundamental rights defined in Article 2 by reference to Articles 9, 10 and 11 of the United Nations Declaration". It should be remembered that these three articles correspond to the present Articles 5, 6 and 7 of the Convention.

we have explained that a verdict can only be submitted to the machinery of collective guarantee in cases where it has been delivered under such conditions that the fundamental rights set out in our Declaration have thereby been violated. The complaint shall be irreceivable if it is directed against a verdict of the Turkish Supreme Court or of the French Cour de Cassation, simply because the plaintiff alleges that an error of fact or of law has been committed by the judge. If the verdict has been given in a regular manner by a court regularly constituted, after the plaintiffs have made use of the normal channels which the laws of their country guarantee them, then no request is receivable by the international organ.

For the claim against a judgment to be considered receivable, it is necessary that the court which has delivered judgment be a sort of court of fact, adjudicating against the fundamental guarantees, applying retroactive laws; in short, committing a breach of the fundamental rights set out in our Resolution

"M. DÜSÜNSEL: (Translation)

Mr. President, I think that Article 12⁽²⁾ is in formal contradiction of the explanations given this morning by the Rapporteur.

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This morning we agreed with the Rapporteur in considering that any person or corporate body which might consider itself to be the victim of an act contrary to Human Rights, might bring the case before the independent courts of his country and even take it up to appeal.

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(1) Reports 1949, pp. 1174 and 1176.

(2) This Article corresponded to Articles 25 and 26 of the Convention.

If the matter under jurisdiction is in conformity with the independent spirit of the courts, and if the independent legal authority has said its last word, no further recourse is possible. Such recourse is only possible in the case where there has been a travesty of justice; that is to say, if the courts have adjudicated in a manner completely contrary to the spirit of the constitution of the country - a constitution which contains the principles and the individual rights defined in the United States and in Europe in the Declarations of Rights.

It is only, I repeat, if tribunals are created which perform travesties of justice, that it will be possible to have recourse to the International Court provided for in this Report. We must be very explicit on this point

We must not create confusion between the courts of each country and an international court.

We are about to agree that the decisions of the courts of each country shall be respected. If not, a case will be considered by a court, will pass to appeal, and will at the same time come before an international court. It is not therefore the State which will be tried, but the courts of each country.

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....." (1)

"Sir David MAXWELL-FYFE (United Kingdom):

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I should like to answer M. Düsünzel because he has raised that matter once again. I want to make the position perfectly clear. This is not an appeal or a method of appeal from a national court. The only way in which the position of a national court could come in would be when the law was so arbitrary, so contrary to

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(1) Reports 1949, pp. 1268 and 1270.

all these rights which we have approved, that the national court was prevented from giving a judgment which would really be the satisfactory judgment of a court. In that case there would be an appeal, and only in that case would it include a reflection on the fact that the national court had been forced to put into effect arbitrary and undemocratic laws....⁽¹⁾

5. The Committee of Ministers of the Council of Europe then submitted the Assembly's Recommendation to a Committee of Experts on Human Rights which it had decided to convene (November, 1949).

The Committee's terms of reference stated that: "due attention should be paid to the progress which has been achieved in this matter by the competent organs of the United Nations". [Doc. AS (1) 116, para. 6, pp. 288 and 289.]

(1) Reports 1949, page 1272. It should be mentioned that the present Article 50 of the Convention does not include the same limitations as Article 24 of the Assembly's Recommendation (cf. supra, page 5, footnote 2):

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention....."

M. Teitgen expressed himself on the subject as follows: (this Article) "seems to assume that the principal duties of the Court will lie in the control of judicial decisions. But that is precisely the view that we have unanimously rejected. What we are afraid of in our countries is not judicial errors. These certainly occur in all our countries: judges are not infallible, but these judicial errors are the exception, the minute exception. We had not, therefore, thought of guaranteeing Europeans against the judicial errors of their courts. We simply desired to secure for them freedom of defence, and procedural safeguards, because those safeguards are the very expression of individual liberty and of individual rights. But the Committee of Ministers is now inserting at the head of the list of powers of the European Court this control of judicial decisions, and it does so without any further explanation - a fact which might lead to regrettable confusion." (Reports 1950, page 512).

6. The "draft International Covenant on Human Rights" prepared by the United Nations Commission on Human Rights at its Fifth Session, held at Lake Success from 9th May to 20th June, 1949, included an Article 13 worded as follows:

"1. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone is entitled to a fair and public hearing, by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security, or where the interest of juveniles or incapacitated persons so require.

2. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law. In the determination of any criminal charge against him, everyone is entitled to the following minimum guarantees in full equality:

(a) to be informed promptly of the nature and cause of the accusation against him;

(b) to defend himself in person or through legal assistance which shall include the right to legal assistance of his own choosing, or, if he does not have such, to be informed of his right and, if unobtainable by him, to have legal assistance assigned;

(c) to examine, or have examined, the witnesses against him and to obtain compulsory attendance of witnesses in his behalf;

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

3. Everyone who has undergone punishment as a result of an erroneous conviction of crime shall have an enforceable right to compensation. This right shall accrue to the heirs of a person executed by virtue of an erroneous sentence." (Doc. E/1371, page 20)(1)

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(1) The Representative of the United States had requested the deletion of this last paragraph (Doc. E/1371, page 35).

7. The Secretariat-General of the Council of Europe had prepared for the Committee of Experts on Human Rights a "Preparatory Report on the draft Convention of Collective Guarantee of Human Rights". In Part II of the Report, devoted to a "comparison between the draft International Covenant on Human Rights and the draft of the Consultative Assembly", there were the following comments on Article 13 of the draft Covenant of 1949:

"With the exception of paragraph 3, all the provisions of this Article, apart from some slight differences, are covered by Articles 10 and 11 (paragraph 1) of the Universal Declaration to which paragraph 3 of Article 2 of the Resolution refers, subject to the guarantees on procedure which are not provided for in the Universal Declaration. Article 6 of the Resolution⁽¹⁾ covers the last part of the second sentence, paragraph 1 of Article 13 of the draft Covenant.

It should be mentioned that a discussion took place in the Commission on the subject of the words 'of a civil character'. The common law countries had remarked that the 'civil rights and obligations', as they were recognised by the administrative bodies, are not the subject of a guarantee under administrative law. For this reason, the difference between 'common law' countries and 'civil law' countries is important. Again, the words 'in a suit of law' (at variance in the French text) would permit administrative suits to deviate from the sphere of application of the Convention." (Doc. B.22, page 19).

8. The Committee of Experts on Human Rights was also called upon to consider the "comments of the Government of the United Kingdom received by the Secretary-General" (of the United Nations) "on 4th January, 1950".

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(1) That is, the Recommendation adopted by the Consultative Assembly on 8th September, 1949. Article 6 was in the nature of a general clause limiting the listed rights and freedoms (recognition of and respect for the rights and freedoms of others; just requirements of public morality, order and security in a democratic society).

In this document the British Government made the following comments on the terms of Article 13, quoted above, of the draft Covenant of 1949:

Article 13

"His Majesty's Government consider that paragraph 2(b) of this Article requires clarification. In particular, the meaning of the word 'assigned' is obscure. If it is intended to mean 'assigned free of cost' His Majesty's Government are unable to accept it. The right of a person charged with a penal offence to legal assistance is unquestioned; His Majesty's Government, however, do not consider that such a person has in all cases a right to free legal assistance. Nor do His Majesty's Government believe that there are many States members of the United Nations who would be able to guarantee the enjoyment of this right without qualification to their citizens. They believe that the United Kingdom has a system of free legal aid as comprehensive in scope as that provided by the government of any State; but, subject to due regard for the interests of justice, the right to this aid is limited by practical considerations in the case of trivial offences, though it is available to those charged with serious penal offences. His Majesty's Government therefore suggest that this paragraph should be amended to read:

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

2. Nor can His Majesty's Government accept paragraph 3 of this Article. They could not agree to the proposition that a person whose conviction had been quashed on appeal should have an enforceable right to compensation in respect of any punishment (e.g. imprisonment) inflicted in consequence of the original conviction.

3. His Majesty's Government believe that the enforceable right to compensation for the illegal detention of a person against his will is a fundamental human right. They therefore approve of the inclusion in the Covenant

of a provision such as paragraph 6 of Article 9 of the present draft(1). Paragraph 3 of Article 13 may perhaps have commended itself to the Commission by analogy, which His Majesty's Government believe to be false, from Article 9, 6. For the reasons stated above, His Majesty's Government do not consider the two rights analogous and they will oppose the inclusion in the final text of a provision such as this." (Council of Europe ref. Doc. A.770, p.4, and U.N. ref. Doc. E/CN 4/353/Add.2).

9. At its first meeting (Strasbourg, 2nd to 8th February, 1950), the Committee of Experts on Human Rights also had before it an amendment proposed by M. de la Vallée Poussin (Belgium) and worded as follows:

Article 7⁽²⁾

"Add the following Article after Article 7:

A list of international lawyers should be compiled, to whom any plaintiff may refer, when he is indicted before the courts of his country.

The international lawyers shall enjoy full freedom of action and private communication with the defendant during all phases of the procedure.

The list of these international lawyers shall be drawn up by the Committee of Ministers and approved by the Consultative Assembly. The list shall contain a minimum number of three lawyers for each country."
(Doc. A.804)(3) ./.

(1) This provision corresponded to that in paragraph 5 of Article 5 of the European Convention.

(2) Article 7 of the Assembly's recommendation contained a general reference to the "general principles of law as recognised by civilised nations".

(3) The adoption of the amendment would apparently have completed the procedural safeguards granted to accused persons by Article 6, para. 3, of the Convention.

10. The preliminary draft Convention prepared by the Committee of Experts at its first meeting provided, in Article 2, para. 3(b) and (c), which was strictly identical with Articles 10 and 11, para. 1, of the Universal Declaration, that:

"(b) 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.

(c) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" (Doc. A.833, page 2; cf. also Doc. A.809, Article 3, para. 3(b) and (c), page 3).

The preliminary draft Report of the Committee of Experts gave no details about these two paragraphs. It did, however, contain the following remarks on Article 6(1) of the preliminary draft Convention:

"..... The Committee added to the number of higher interests, the demands of which might justify the limitation of Human Rights, two further ideas for consideration:

(a) national security and integrity;

(b) the functioning of administration and justice.

.....

The second was introduced at the request of the Swedish representative, in order to make provision for the fact that the interests of administration and justice of a State sometimes required that certain information should be kept secret" (Doc. CM/WP I (50) 1, page 13)⁽²⁾.

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(1) General clause limiting the listed rights and freedoms.

(2) Cf. the concept of "the interests of justice", which appears at the end of para. 1 and in para. 3(c) of Article 6 of the Convention.

A little further on, the preliminary draft Report explained the reasons why the Committee of Experts had been unable to agree to M. de la Vallée Poussin's proposal⁽¹⁾:

".....In order to remedy this danger,⁽²⁾ the Belgian representative had proposed that an international list of lawyers should be drawn up, on which all those under European jurisdiction could call for the defending of their fundamental rights.

The Committee felt, however, that this system did not constitute an adequate guarantee against all measures of intimidation or suchlike on the part of Governments, and preferred to delete the clause requiring individuals to direct their requests to a lawyer"⁽³⁾ (Doc. CM/WP (50) I, page 19).

11. At its second meeting (Strasbourg, 6th to 10th March, 1950), the Committee of Experts on Human Rights had before it a British amendment worded as follows: (4)

"1. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or

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(1) Cf. supra, page 12.

(2) The danger that during periods of political pressure it might be difficult for individuals to find lawyers willing to defend them.

(3) To submit a matter to the European Commission of Human Rights (whereas Article 12 of the Assembly's draft required individual applications to be presented through legal channels).

(4) The alterations made in the wording of Article 13 of the 1949 draft Covenant (supra, page 9) are underlined.

national security, or where the interest of juveniles or incapacitated persons so requires.

2. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law. In the determination of any criminal charge against him, everyone is entitled⁽¹⁾

(a) to be informed promptly of the nature and cause of the accusation against him;

(b) to defend himself in person or through legal assistance⁽²⁾ of his own choosing and, if he has not sufficient means to pay for such assistance, to be given it free when the interests of justice so require;⁽³⁾

(c) to examine or have examined the witnesses against him and to obtain compulsory attendance of witnesses on his behalf;

(d) to have⁽⁴⁾ free assistance of an interpreter if he cannot understand or speak the language used in court"⁽⁵⁾ (CM/WP I (50) 2, page 4).

This text was in general clearly inspired by Article 13 of the draft Covenant of 1949.

12. The British amendment was submitted to a Drafting Committee consisting of Sir Oscar Dowson and Mr. Le Quesne ./.

(1) Deletion of the words "to the following minimum guarantees in full equality".

(2) Deletion of the words "which shall include the right to legal assistance".

(3) Cf. the British amendment to the corresponding paragraph of Article 13 of the 1949 draft Covenant (supra, page 11).

(4) Deletion of the word "the".

(5) Deletion of the whole of paragraph 3 of Article 13 of the 1949 draft Covenant (right to compensation in case of judicial error). On this subject, cf. the British Governments' comments (supra, pages 11 - 12).

(United Kingdom), M. Dons Moeller (Denmark) and M. Salen (Sweden). The Committee re-worded it as follows: (1)

"1. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press or public may be excluded from all or part of the trial to the extent strictly necessary in the opinion of the court, in the interests of morals, public order or national security, or where, in the special circumstances of the case, publicity would prejudice the interests of justice.

2. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone is entitled: (2)

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

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

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

(d) to examine or have examined the witnesses against him and to obtain compulsory attendance of witnesses on his behalf;

(e) to have free assistance of an interpreter if he cannot understand or speak the language used in court" (Doc. CM/WP I (50) 10, pages 2 and 3; cf. also Doc. CM/WP I (50) 14, Alternative A, Article 7, pages 4 and 5).

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(1) The changes made in the above-quoted British amendment are underlined.

(2) This sentence now became a separate paragraph.

13. The draft Convention finally submitted to the Committee of Ministers by the Committee of Experts contained two articles corresponding to the present Article 6.

Article 2 [para. 3(b) and (c)] in Alternatives A and A/2 (method of enumeration of rights and freedoms to be safeguarded), was merely a repetition of Articles 10 and 11, para. 1, quoted above⁽¹⁾, of the Universal Declaration (Doc. CM/WP I (50) 15 Appendix, page 1; cf. also Doc. CM/WP I (50) 14, Alternative B, page 9).

Article 7 in Alternatives B and B/2 (method of precise definition of rights and freedoms to be safeguarded) provided that:⁽²⁾

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

2. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone is entitled:

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

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

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(1) Cf. supra, pages 2 - 3.

(2) The change made in the text of the Drafting Committee quoted above (pages 15 - 16), is underlined.

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

(d) to examine or have examined the witnesses against him and to obtain compulsory attendance of witnesses on his behalf;

(e) to have free assistance of an interpreter if he cannot understand or speak the language used in court" (Doc. CM/WP I (50) 15 appendix, pages 7 and 8).

The report of the Committee of Experts made the following comments on this last article:

Article 7, paragraph 1

"The word 'special' in the last sentence of this paragraph is intended to underline the fact that such circumstances are an exception to the normal rule stated in the first sentence of the paragraph. It is not intended to bear the additional meaning that such circumstances should be of any particular degree of infrequency.

It was further agreed that the phrase 'the interests of justice' included cases in which the interests of one of the two parties or a third party would be manifestly prejudiced by publicity" (Doc. CM/WP I (50) 15, pages 21 and 22).

The report also contained a passage relating to the amendment proposed by M. de la Vallée Poussin:⁽¹⁾

"The following are the reasons for this amendment. Preventive measures are better than subsequent compensation in the matter of the protection of Human Rights. In States where the political situation might endanger the legal principles of democratic society, the presence of international lawyers possessing great moral authority could provide an immediate and effective safeguard for the victims of arbitrary governmental

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(1) Quoted above, page 12.

or administrative action. They would be immediate and authoritative witnesses of any brutal or insidious attempts to violate Human Rights. The possibility of seeing eminent persons giving evidence which could not be contradicted would cause certain Governments to hesitate and to fear that public opinion in their own countries might revolt against illegal procedure, denounced by such eminent authorities.

The Belgian representative also considered that, in order to further the integration of European nations into a wider community, it would be desirable to increase the possibilities for citizens to be able to exercise their profession throughout the whole of European territory.

The suggestion of the Belgian representative was not accepted by the Committee, largely because some experts considered that it would conflict with certain laws in force in their respective countries" (Doc. CM/WP I (50) 15, pages 23 and 24).

The Committee of Experts had agreed that it was not competent to decide between Alternatives A, A/2, B and B/2 of its draft Convention, since such a choice "depended on considerations of a political character" (Doc. AS (2) 8, para. 58, page 571).

14. In these circumstances, the Committee of Ministers decided at its third Session (Strasbourg, 30th March to 1st April, 1950) "to convene a meeting of senior officials, who, on the instructions of their Governments, would have the task of preparing the ground for the Ministers' decision from the political point of view" (Doc. AS (2) 8, para. 59, page 571).

15. The Conference of Senior Officials (Strasbourg, 8th to 17th June, 1950) succeeded in "amalgamating Alternatives A and B of Section I of the Committee of Experts' draft Convention", while adopting Alternative B (method of precise definition) as the basis of its work (Doc. CM/WP 4 (50) 19, page 13).

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Agreement was reached on a text worded as follows:

Article 6⁽¹⁾

"1. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law⁽²⁾. Judgment shall be pronounced publicly but the press or public may be excluded from all or part of the trial to the extent strictly necessary in the opinion of the court in the interests of morals, public order or national security in a democratic society,⁽³⁾ or where, in the special circumstances of the case, publicity would prejudice the interests of justice.

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

3. In the determination of any criminal charge against him, everyone is entitled to the following minimum guarantees:

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

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

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(1) The alterations made to the text of the Committee of Experts (supra, pages 17 and 18) are underlined.

(2) In Doc. CM/WP 4 (50) 9 (New draft of Alternatives B and B/2, Article 8, page 4) and Doc. CM/WP 4 (50) 16 Appendix (draft Convention, Article 6, page 4), the wording of this first sentence was the same as in the text adopted by the Committee of Experts (supra, pages 17 and 18).

(3) On the concept of a "democratic society", cf. Doc. DH (56) 12, page 7, footnote (1) - cf. also Doc. A. 1690, pages 1 - 2.

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

(d) to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (1)

(e) to have free assistance of an interpreter if he cannot understand or speak the language used in court" (Doc. CM/WP 4 (50) 19 Appendix, pages 4 and 5; cf. also Doc. CM/WP 4 (50) 9, Article 8, page 4, and Doc. CM/WP 4 (50) 16 Appendix, Article 6, pages 4 and 5).

The Report of the Conference of Senior Officials to the Committee of Ministers contained the following comments on this text:

Article 6, paragraph 1

"The Italian delegate considered that the drafting of this paragraph did not bring out the fact that courts dealing with penal cases should be constituted prior to the commission of the offence.

Other delegates considered that it might be possible to admit exceptions to this rule.

Article 6, paragraph 3(c)

The French and Italian delegates considered that this paragraph made a discrimination between those persons who had the means of paying for a defence counsel and those who had not. The latter are therefore given the right, in any case, to have legal assistance of their own choosing, while the others are only entitled to the service of a defence counsel when the interests of justice so require.

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(1) In Doc. CM/WP 4 (50) 9 (New draft of Alternatives B and B/2, Article 8, page 4) and Doc. CM/WP 4 (50) 16, Appendix (Draft Convention, Article 6, page 5), the wording of this paragraph was the same as in the text adopted by the Committee of Experts (supra, pages 17 and 18).

These delegates considered that this rule was contrary to the principle of non-discrimination contained in Article 13, para. 1(1).

Article 6, paragraph 3(d)

The purpose of this paragraph is to place the accused on a footing of equality with the public prosecutor, as regards the hearing of witnesses. It is obviously not a question of giving the accused the right to summon witnesses without any restriction" Doc. CM/WP 4 (50) 19, pages 15 and 16).

16. The Report and draft Convention adopted by the Conference of Senior Officials were laid before the Committee of Ministers of the Council of Europe, which decided, on 3rd August, 1950, that a Committee of Governmental Experts should meet next day to revise the text of the draft, having regard to proposals received and the documentation already available (Documents of the Committee of Ministers, 5th Session, page 26).

17. The United Kingdom delegation made the following observations with regard to paragraph 1 of Article 6 of the draft Convention:

Article 6, paragraph 1

"The present text of this Article leaves to the discretion of the court the exclusion of the press or public in a number of cases where, under English law, exclusion is enjoined by statute. Nor does it make provision for the cases in which the public may, under English law, be excluded from the hearing and determination by a court of summary jurisdiction of domestic proceedings, as well as cases concerning juveniles.

H.M. Government therefore propose that the second sentence of this paragraph be amended to read:

'The press and public may be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, or where the interests of juveniles or the parties to proceedings concerning their domestic

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(1) This provision corresponded to present Article 14 of the Convention.

relationships so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but the judgment shall be pronounced publicly except where the interests of juveniles or of the parties to proceedings concerning their domestic relationships otherwise require" (Doc. CM 1 (50) 6, page 2).

The Sub-Committee on Human Rights accordingly amended the second sentence of para. 1 as follows: (1)

"Judgment shall be pronounced publicly⁽²⁾ but the press and public may be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, or where the interests of juveniles or the parties to proceedings concerning their domestic relationships so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice" (Doc. CM. 1 (50) 9, page 2).

The Sub-Committee also proposed that para. 3(a) be reworded as follows:

"To be informed promptly, in a language which he understands, of the nature and details of the accusation against him⁽¹⁾" (Doc. CM. 1 (50) 9, page 2).

18. On 7th August, 1950, the Committee of Ministers agreed upon the text of a "draft Convention of Protection of Human Rights and Fundamental Freedoms", which it decided to send to the Consultative Assembly for opinion.

Article 6 of the draft was worded as follows:

Article 6⁽¹⁾

"1. In the determination of any criminal charge against him or of his rights and obligations in a suit at law,
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(1) The alterations made to the text prepared by the Conference of Senior Officials (supra, pages 20 and 21) are underlined.

(2) This text, in regard to the pronouncement of judgments, appears to be more strict than the U.K. amendment quoted above pages 22 and 23.

everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the parties to proceedings concerning their domestic relationships so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

3. In the determination of any criminal charge against him, everyone is entitled to the following minimum guarantees:

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

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

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

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

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court" (Doc. CM (50) 52, pages 4 and 5; cf. also Doc. AS (2) 11, Appendix A, Article 6, page 605).

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19. In its Recommendation of 25th August, 1950, regarding the draft Convention for the Protection of Human Rights and Fundamental Freedoms, the Consultative Assembly proposed no change in Article 6, which received no particular mention during the debate. (1) (Doc. As (2) 104, Article 6, pp.1031 & 1032)

20. On 3rd November, 1950, a Committee of Legal Experts carried out a final examination of the text of the Convention and introduced a number of corrections of form and translation (Doc. CM/Adj. (50) 3 Rev., para. 6).

On that occasion, Article 6 underwent five alterations (2) and thus received its final form, confirmed next day by the signing of the Convention.

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(1) Cf. supra p. 8, footnote (1).

(2) :

1. First sentence of para. 1: "in the determination of his civil rights and obligations or of any criminal charge..." instead of "in the determination of any criminal charge against him or of his rights and obligations in a suit at law" (on this subject, cf. supra, page 10).
2. Second sentence of para. 1: "the protection of private life of the parties.." (instead of "the parties to proceedings concerning their domestic relationships...").
3. Para. 2: "shall be..." (instead of "has the right to be...").
4. First sentence of para. 3: "Everyone charged with a criminal offence has the following minimum rights" (instead of "In the determination of any criminal charge against him, everyone is entitled to the following minimum guarantees").
5. Para. 3. (c): "of his own choosing or ..." (instead of "of his own choosing and...").

A study of the preparatory work on the Convention reveals certain affinities between Article 6 of the Convention and Article 14 of the draft International Covenant on Civil and Political Rights⁽¹⁾.

The Secretariat of the Commission has accordingly deemed it useful to attach to this document the corresponding extract from the Annotation on draft Covenants prepared by the Secretary-General of the United Nations in 1955 at the request of the United Nations General Assembly. (Doc. A/2929, p.p. 132 to 139; Appendix)⁽²⁾

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(1) Article 13 until 1949; Article 10 in 1950 and 1951; Article 12 in 1952; Article 14 since 1953.

(2) On this subject cf. Doc. DH (56) 4, pp. 10 and 11.

A P P E N D I X

ARTICLE 14

Fair Trial

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

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

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

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

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

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

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

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

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

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

73. The importance of article 14 was emphasised since, in the last analysis, the implementation of all the rights in the Covenant depended upon the proper administration of justice.^{24/}

74. While paragraphs 2, 3 and 4 were meant to relate to criminal proceedings, all the provisions of paragraph 1 were intended to apply to both criminal and civil proceedings.^{25/}

Equality before the Courts and Tribunals^{26/}

75. The inclusion of the provision that all persons shall be equal before the courts and tribunals was supported on the ground that arbitrary distinctions especially those based on race or wealth should be prohibited. It was opposed in the light of the fact that Article 24 of the draft covenant contained the principle of equality before the law.

^{24/} E/CN.4/SR.153 and 323.

^{25/} See especially E/CN.4/SR.155, Part II, and E/CN.4/SR.156.

^{26/} E/CN.4/SR.107, 109, 110, 318 and 323, E/CN.4/L.124, E/CN.4/253 and 284 and GA (IX), 3rd Com., 580th mtg., para. 13.

76. It was proposed to add a provision aimed at ensuring that legal proceedings would be based on democratic principles, in order to guarantee that justice would not be administered on lines of social privilege, chauvinism and racial inequality. This proposal was rejected after it had been argued that it might weaken the more precise guarantees provided for the accused later in the article.

Right to a fair and public hearing^{27/}

77. The use of the word "competent" before "independent and impartial tribunal" in paragraph 1 was intended to ensure that all persons were tried in courts whose jurisdiction had been previously established by law, and arbitrary action so avoided.

78. There was some discussion of the extent to which secrecy was permissible or desirable in judicial proceedings. It was observed that, in most countries, publicity had been introduced as a safeguard against arbitrary action by the courts. The text adopted reflects the view that some of the factors which might justify a secret hearing would not justify delivery of judgment in private.

79. It was argued, unsuccessfully, that the words "public order" should be replaced by "the prevention of disorder" because the latter represented what was intended, whereas the English expression "public order" and the French "ordre public" did not have the same meaning.^{28/} The words "in a democratic society" taken from article 29, paragraph 2, of the Universal Declaration of Human Rights were regarded as representing a salutary safeguard; their inclusion was unsuccessfully opposed on the grounds that they were ambiguous and might be differently interpreted.

80. When the inclusion of the words "or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice" was under consideration, reference was made to the desirability in

^{27/} E/CN.4/SR.106, 107, 109, 110, 153, 155, Part II, 156, 199, 318 and 323, E/CN.4/L.142 and L.154, E/CN.4/170, 232 and Corr.1, 253, 279, 281, 282, 283, 286, 353/Add.10 and 11, 365, 414, 426 and 694/Add.7, ESC (XIII), suppl. 9, Annex III, Section A and GA (IX) 3rd Com., 566th mtg., para.20, 568th mtg., para. 8, 570th, para. 3 and 571st, para. 38.

^{28/} See also annotation under article 18, paras. 112-114.

some instances of keeping the subject matter of litigation secret, for instance where secret industrial processes were involved, and to the special position of legally incapable persons and first offenders.

81. When, at a later point, the use of the words "the interest of the private lives of the parties" was being discussed, reference was made to proceedings involving matrimonial disputes or the guardianship of children and to the requirements of the interests of juveniles; the view was expressed that it would have been safer to refer to the interest of juveniles instead of the interest of the private lives of the parties.

82. When the inclusion of the words "or the proceedings concern matrimonial disputes or the guardianship of children" was being discussed it was observed that this would signify that judgment would be pronounced in the presence of the family and friends of the parties and in the presence of the press, but that the general public would be excluded. It was also pointed out that the reasons for excluding the public from the judgments in cases involving guardianship of children were not limited to the interests of juveniles.^{29/}

Rights of the Accused^{30/}

83. In justification of the retention of both article 9, paragraph 2, and article 14, paragraph 2 (a), in the covenant, it was observed that the former did not protect a person charged of an offence but not arrested, or cover wrongfully inflicted punishment other than deprivation of liberty.

84. It was argued that the statement in paragraph 2 (c), that the accused had not only the right to defend himself in person or through legal assistance of his own choosing, but also the right, if he did not have legal assistance, to be informed of that right, was self-evident and, because of its unsatisfactory formulation, illusory, since it conferred no worthwhile substantive right on an accused person. On the

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^{29/} E/CN.4/SR.323.

^{30/} E/CN.4/SR.106, 107, 109, 110, 155, Part II, 156, 157, 159, 167, 199, 318, and 323, E/CN.4/L.124 and L.142, E/CN.4/232 and Corr.1, 253, 279, 281, 284, 286, 365, 422/Rev.1, 428 and 528, para. 151 and ESC (XIII), suppl. 9, Annex III, Section A.

other hand, the view was expressed that in many countries the right of an accused person to be informed that he could defend himself or be represented by counsel was a valuable procedural right, if not a substantive right, and constituted a surer guarantee for the safeguarding of other rights connected with criminal proceedings.

85. It was recognised that it might be difficult in practice to inform an accused of his right, under this paragraph, to have legal assistance of his own choosing assigned to him free of charge if he did not have the means to pay for it.

86. In sub-paragraph (d), the statement that an accused person should have the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," was preferred to the granting of the right "to obtain compulsory attendance of witnesses in his behalf who are within the jurisdiction and subject to the process of the tribunal." It was said that the latter wording (which was proposed with a view to safeguarding the special rights and privileges of certain categories of persons in foreign territories, for example, members of the diplomatic corps) appeared to guarantee what was not always possible. All that could properly be expected was that both the prosecution and the defence should have equal access to the process of the court to obtain the attendance and examination of such witnesses as each desired. There was disagreement as to whether or not the formulation adopted might have the effect of making the exercise of the right by the accused in a particular case dependent upon its exercise by the prosecution in that case.

87. The view was expressed that the wording of sub-paragraph (e) did not adequately provide for the rights of accused persons who did not understand the language used by the court. It was not sufficient that the accused should be entitled to the free assistance of an interpreter during the proceedings in court; it was necessary that he should also have that assistance in acquainting himself with all the documentary evidence that might exist in the case.

88. When sub-paragraph (f) was originally adopted in the form of the provision "No one shall be compelled to testify against himself or to confess guilt," the following additional words were rejected: "or be induced to make such a confession by a promise of reward or immunity."

The position of juveniles^{31/}

89. While there was no objection to the principle contained in paragraph 3, some doubt was expressed as to whether it should appear in the covenant, or at least in article 14.

Compensation for miscarriage of justice^{32/}

90. There was a difference of opinion as to whether the principle of compensation for miscarriage of justice should be included in the covenant. It was argued on the one hand that the payment of compensation was a matter for the exclusive discretion of the executive and that national approaches varied considerably; and on the other hand that the right to compensation of a person having suffered miscarriage of justice was basic and should be made enforceable against the State, as was the right dealt with in article 9, paragraph 5, of the covenant.

91. The question was asked whether paragraph 4 had successfully excluded the possibility that the States parties might be obliged to grant compensation in cases where decisions had been reversed on appeal.^{33/}

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^{31/} E/CN.4/SR.157, 166, 167, 199, 318 and 323, E/CN.4/L.142 and E/CN.4/363, 441, 445, 448 and 449.

^{32/} E/CN.4/SR.106, 107, 109, 110, 157, 158, 159, 199, 318, 323 and 324, E/CN.4/L.133 and L.154 and Rev. 1 and 2 and E/CN.4/232 and Corr.1, 253, 365, 430, 431 and 694/Add.6, para. 9, ESC (IX), suppl.10, annex II and ESC (XI), suppl.5, annex II.

^{33/} At an earlier stage it was agreed to regard the words "final decision" as signifying that all ordinary methods of review and appeal must have been exhausted and that all waiting periods must have expired (E/CN.4/SR.158 paragraphs 51 and 54 and E/CN.4/SR.159, paragraph 7). This interpretation was given, however, in relation to the following text:

"In any case where by a final decision a person has been convicted of a criminal offence and where subsequently a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated."

92. A further provision that the compensation mentioned in paragraph 4 shall be awarded to the heirs of a person executed by virtue of an erroneous sentence was excluded from the paragraph since, at least in some legal systems, the expression "heirs" would not necessarily refer to the person who suffered because of the death of the victim of a miscarriage of justice. On the other hand, it was argued that if the provision were not included injustice would be caused since the children of a person wrongfully executed would not be legally entitled to compensation for their parent's death.

DOCUMENTATION

<u>Organ and Session</u>	<u>Records of Discussion</u>	<u>Other documents</u>	<u>Article number</u>
CHR (II)	E/CN.4/AC.1/SR.3, 4 and 10, E/CN.4/AC.3/SR.5 and 9 and E/CN.4/SR.36	E/CN.4/AC.1/4, Annex I, Article 12, E/CN.4/AC.1/9, E/CN.4/21, paragraphs 11 and 18, Annex A, Articles 26-7, Annex C, Articles 9-10 and Annex G, Article 6, E/CN.4/37, Article 10, E/CN.4/56, paragraph 7 and Chapter II, article 12 and ESC (VI) suppl. 1, paragraphs 23-4, and Annex B, part I article 13 and part II	
DC (II)	E/CN.4/AC.1/SR.25, 30, 32, 33 and 43	E/CN.4/AC.1/24/Rev.1, E/CN.4/AC.1/24/Rev.1/Add.1, E/CN.4/85 and E/CN.4/95, paragraph 10 and Annex B, Article 13	13
CHR (III)		E/CN.4/82/Adda.7, 8 and 12, E/CN.4/85 and 170 and ESC (VII), suppl. 2, paragraph 14 and Annex B, Article 13	13
CHR (V)	E/CN.4/SR.106, 107, 109 and 110	E/CN.4/170, 232 and Corr.1, 253, 279, 281, 282, 283, 284 and 286 and ESC (IX), suppl. 10, Annex I, Article 13 and Annex II	13
CHR (VI)	E/CN.4/SR.153, 155, Part II, 156, 157, 158, 159, 166, 167 and 199	E/CN.4/L.4/Rev.1, L.10, paras. 38-55, and L.16, E/CN.4/353/Add.10 and 11, 365, 414, 422/Rev.1, 426, 428, 430, 431, 441, 445, 448 and 449, E/CN.4/NGO/7, para. 5, and ESC (XI) suppl. 5, para. 51 and Annex I, Article 10 and Annex II	13

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<u>Organ and Session</u>	<u>Records of Discussion</u>	<u>Other documents</u>	<u>Article number</u>
ESC (VI)	E/AC.7/SR.148, 149 and 153	E/L.68, paras. 58-73	10
GA (V)	3rd Com., 290th mtg., paras. 43 and 67 and 291st mtg., paras. 4, 56 and 62	Annexes, a.i.63, A/C.3/ 534, para. 15	10
ESC (XII)		E/C.2/285	10
CHR (VII)		E/CN.4/523, para. 7, 524, paras. 31-5, 528, paras. 138-60 and 552, E/CN.4/ NGO.21, section III and ESC (XIII), suppl. 9, Annex III, Section A	10
CHR (VIII)	E/CN.4/SR.318, 323 and 324	E/CN.4/528/Add.1, paras. 86-95, E/CN.4/660, paras. 34-5 E/CN.4/L.124, L.133, L.142 and L.154 and Rev.1 and 2, E/CN.4/NGO/39 and ESC (XIV), suppl. 4, paras. 205-23 and Annex I, Part B, Article 12.	10
CHR (IX)		E/CN.4/674, paras. 38-46	12
CHR (X)		E/CN.4/694/Add.6, para. 9 and Add.7 and E/CN.4/702, Communication Nos. IX and XV	14
GA (IX)	3rd. Com., 565th mtg., para. 28, 566th, para. 20, 568th, paras 8 and 10 and 580th, para. 13.		14

