Chapter 7
THE RIGHT TO A FAIR TRIAL: PART II – FROM TRIAL TO FINAL JUDGEMENT

Learning Objectives

- *To familiarize course participants with some of the international legal rules concerning the rights of persons charged with criminal offences throughout the trial stage, and the application of these rules by international monitoring organs;*
- *To sensitize participants to the importance of applying these legal rules in order to protect a broad range of human rights in a society based on the rule of law;*
- *To create an awareness among the participating judges, prosecutors and lawyers of their primordial role in enforcement of the rule of law, including the right to a fair trial in all circumstances, including crisis situations.*

Questions

- *Are you already conversant with the international legal rules relating to a fair trial?*
- *Do these rules already form part of the national legal system within which you are working?*
- *If so, what is their legal status and have you ever been able to apply them?*
- *In the light of your experience, do you have any particular concerns – or have you experienced any specific problems – when ensuring a person's human rights at the pre-trial or trial stage?*
- *If so, what were these concerns or problems and how did you address them, given the legal framework within which you work?*

Questions (cont.d)

- *Which issues would you like to have specifically addressed by the facilitators/trainers during this course?*
- *Would you have any advice to give to judges, prosecutors and lawyers exercising their professional responsibilities in difficult situations, in order to help them secure the application of fair trial rules?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- Statute of the International Criminal Court, 1998

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- Guidelines on the Role of Prosecutors, 1990
- Basic Principles on the Role of Lawyers, 1990

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- European Convention on Human Rights, 1950

1. Introduction

This chapter, which is a logical continuation of Chapter 6, which dealt with some of the fundamental human rights that must be guaranteed at the stage of criminal investigations, will be devoted to the international legal rules that apply to the trial stage. It will also deal with some important related issues, such as the limits on punishment, the right to appeal, the right to compensation in the event of miscarriage of justice, and the question of fair trial and special tribunals. A brief reference will also be made to the right to a fair trial in public emergencies, a subject that will be considered in further depth in Chapter 16.

What is important to bear in mind throughout this chapter, however, are the two fundamental rules that were dealt with in Chapter 6, namely, ***the right to equality before the law and the right to presumption of innocence***, which also condition the trial proceedings from their beginning to the delivery of the final judgement.

Lastly, some issues considered in Chapter 6 will again surface in the present chapter, owing to the fact that the pre-trial and trial stages are intrinsically linked. However, overlapping has been kept to a strict minimum.

2. The Legal Provisions

The major legal provisions on fair trial are to be found in article 14 of the International Covenant on Civil and Political Rights, article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights and article 6 of the European Convention on Human Rights. The relevant provisions of these articles will be dealt with below under the appropriate headings. Additional rules to which reference will be made below are, among others, the Guidelines on the Role of Prosecutors, the Basic Principles of the Role of Lawyers and the Statutes of the International Criminal Court and the International Criminal Tribunals for Rwanda and the former Yugoslavia.

3. Human Rights during Trial

3.1 The right to be tried by a competent, independent and impartial tribunal established by law

The right to be tried by an independent and impartial tribunal must be applied at all times and is a right contained in article 14(1) of the International Covenant on Civil and Political Rights, which provides that "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"(emphasis added). Although article 7(1) of the African Charter on Human and Peoples' Rights speaks only of a "competent" (art. 7(1)(b)) or "impartial" (art. 7(1)(d)) court or tribunal, article 26 of the Charter imposes a legal duty on the States parties also "to guarantee the independence of the Courts". Article 8(1) of the American Convention refers to "a competent, independent, and impartial tribunal, previously established by law", and article 6(1) of the European Convention on Human Rights to "an independent and impartial tribunal established by law". Lastly, article 40 of the Statute of the International Criminal Court provides that "the judges shall be independent in the performance of their functions" and that they "shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence". However, since the question of independence and impartiality of tribunals is considered in some depth in Chapter 4, it will not be further examined here.

3.2 The right to a fair hearing

The notion of a "***fair***" hearing is contained both in article 14(1) of the International Covenant on Civil and Political Rights and in article 6(1) of the European Convention on Human Rights, while article 8(1) of the American Convention on Human Rights speaks of "***due guarantees***" (emphasis added). The African Charter on Human and Peoples' Rights provides no specification in this respect, but it should be pointed out that, according to article 60 of the Charter, the African Commission on Human and Peoples' Rights "shall draw inspiration" from other international instruments for the protection of human and peoples' rights, a provision that enables the Commission to be inspired, inter alia, by the provisions of article 14 of the International Covenant on Civil and Political Rights when interpreting the trial guarantees laid down in article 7 of the Charter. Articles 20(2) and 21(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both provide that the accused shall be entitled to a fair and public hearing in the determination of charges against him or her, although with the proviso that the protection of victims and witnesses may require measures which "shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity" (arts. 21 and 22 of the respective Statutes). The rights of the accused as contained in these Statutes are heavily inspired by article 14 of the International Covenant.

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With regard to the minimum guarantees contained in article 14(3) of the Covenant with respect to criminal proceedings, the Human Rights Committee has pointed out in General Comment No. 13 that their observance "is not always sufficient to ensure the fairness of a hearing as required by paragraph 1"[1] of article 14, which may thus impose further obligations on the States parties. In particular, when it comes to cases in which a capital sentence may be imposed, "the obligation of States parties to observe rigorously ***all*** the guarantees for a fair trial set out in article 14 of the Covenant ***admits of no exception***".[2]

Below, a few examples from universal and regional jurisprudence will show the diversity of situations in the course of trial proceedings that may amount to a violation of the right to a fair hearing. More details as to the fairness of hearings will be given in subsection 3.2.2 regarding "The right to equality of arms and adversarial proceedings".

The right to a fair trial in article 14(1) of the Covenant was violated in a case where the trial court failed "to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present" the author's defence. Although the Supreme Court referred to this issue, it "failed to specifically address it when it heard the author's appeal".[3] The right to a fair trial under article 14(1) was further violated in a case where the prosecutor entered a *nolle prosequi* plea in a trial after the author had pleaded guilty to manslaughter. The Committee considered that, in the circumstances of the case, the "purpose and effect" of the *nolle prosequi* "were to circumvent the consequences" of the author's guilty plea, in that rather than using it to discontinue the proceedings against the author, it enabled the prosecution to bring a fresh prosecution against the author immediately on exactly the same charge.[4]

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[1] *United Nations Compilation of General Comments*, p. 123, para. 5.

[2] Communication No. 272/1988, *A. Thomas v. Jamaica* (Views adopted on 31 March 1992), in UN doc. *GAOR*, A/47/40, p. 264, para. 13.l; emphasis added.

[3] Communication No. 770/1997, *Gridin v. Russian Federation* (Views adopted on 20 July 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 176, para. 8.2. The author alleged inter alia that the court room was crowded with people who were screaming that he should be sentenced to death; ibid., p. 173, para. 3.5.

[4] Communication No. 535/1993, *L. Richards v. Jamaica* (Views adopted on 31 March 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 43, para. 7.2.

The "Street Children" case: Fairness from the point of view of the victims

The so-called *"Street Children"* case against Guatemala concerned the abduction, torture and murder of four "street children", the killing of a fifth, and the failure of State mechanisms to deal appropriately with these violations and provide the victims' families with access to justice. Criminal proceedings were instituted but nobody was punished for the crimes committed. The Inter-American Court of Human Rights concluded that the relevant facts constituted a violation of article 1(1) of the American Convention on Human Rights "in relation to its article 8", since the State had "failed to comply with the obligation to carry out an effective and adequate investigation of the corresponding facts", i.e. the abduction, torture and murder of the victims.[5] According to the Court, the domestic proceedings had "two types of serious defect": ***first***, "investigation of the crimes of abduction and torture was completely omitted", and, ***second***, "evidence that could have been very important for the due clarification of the homicides was not ordered, practised or evaluated".[6] It was thus "evident" that the domestic judges had "fragmented the probative material and then endeavoured to weaken the significance of each and every one of the elements that proved the responsibility of the defendants, item by item", and that this contravened "the principles of evaluating evidence, according to which, the evidence must be evaluated as a whole, ... taking into account mutual relationships and the way in which some evidence supports or does not support other evidence".[7] In this case the Court also importantly emphasized that

> "it is evident from article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation".[8]

As can be seen, the due process guarantees thus also condition the very procedure whereby domestic authorities investigate and prosecute human rights violations.

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The right to be heard in person: The right to a fair trial as guaranteed by article 6(1) of the European Convention on Human Rights was violated in the case of *Botten*, where the Supreme Court of Norway gave a new judgement, convicting and sentencing the applicant, in spite of not having summoned or heard him in person. This was so, although the proceedings before the Court had included a public hearing at which the applicant was represented by counsel. In the view of the European Court, the "Supreme Court was under a duty to take positive measures" to "summon the applicant and hear evidence from him directly before passing judgement".[9]

[5] *I-A Court HR, Villagrán Morales et al. Case (The "Street Children" Case) v. Guatemala, judgment of November 19, 1999, Series C, No. 63*, p. 198, para. 233.

[6] Ibid., p. 196, para. 230; for more details see ibid., pp. 196-198, paras. 231-232.

[7] Ibid., p. 198, para. 233.

[8] Ibid., p. 195, para. 227.

[9] *Eur. Court HR, Case of Botten v. Norway, judgment of 19 February 1996, reports 1996-I*, p. 145, para. 53.

The right to a fair trial was further violated in the *Bricmont* case, where the applicant had been convicted on several criminal charges with the Court of Appeal relying on accusations of the civil party, a member of the royal family, who had joined the criminal prosecution in order to seek damages. However, on some of the charges on which the Court of Appeal found the applicant guilty, the latter was convicted after proceedings which violated his defence rights as guaranteed by article 6; indeed, the applicant had had no "opportunity, afforded by an examination or a confrontation, to have evidence taken from the complainant, in his presence, on all the charges", there having been confrontation only in respect of one count.[10]

The right to a fair trial can be violated in many ways, but as a general principle it has always to be borne in mind that the accused person must at all times be given a genuine possibility of answering charges, challenging evidence, cross-examining witnesses, and doing so in a dignified atmosphere.

Failures and shortcomings at the stage of criminal investigations may seriously jeopardize the right to fair trial proceedings and thereby also prejudice the right to be presumed innocent.

3.2.1 The right of access to a court or tribunal

With regard to the right of access to the courts, the European Court of Human Rights has ruled that article 6(1) "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal"; where a prisoner was refused permission by the United Kingdom Home Secretary to consult a solicitor in order to bring a civil action for libel against a prison officer, this refusal constituted a violation of the applicant's "right to go before a court as guaranteed by" article 6(1).[11] The same issue arose in the case of *Campbell and Fell* where the applicants complained of a delay by the prison authorities in granting them permission to seek legal advice for injuries they had sustained during an incident in a prison. Although they were eventually granted the permission they sought, the Court emphasized that "for evidentiary and other reasons speedy access to legal advice is important in personal-injury cases" and that "hindrance, even of a temporary character, may contravene the Convention".[12]

It is also of interest to point out that in cases where administrative authorities decide administrative offences which amount to a "criminal charge" under article 6(1) of the European Convention – such as cases of speeding on motorways – and, if the decisions taken by the administrative authorities do not themselves satisfy the requirements of article 6(1) of the Convention, they "must be subject to subsequent control by a 'judicial body that has full jurisdiction'".[13] This means that the judicial body must have "the power to quash in all respects, on ***questions of law and fact***", the

[10] *Eur. Court HR, Bricmont Case, judgment of 7 July 1989, Series A, No. 158*, pp. 30-31, paras. 84-85.

[11] *Eur. Court HR, Golder Case v. the United Kingdom, judgment of 21 February 1975, Series A, No. 18*, p. 18, para. 36 and p. 19, para. 40 at p. 20.

[12] *Eur. Court HR, Case of Campbell and Fell, judgment of 28 June 1984, Series A, No. 80*, p. 46, para. 107.

[13] *Eur. Court HR, Case of Palaoro v. Austria, judgment of 23 October 1995, Series A, No. 329-B*, p. 40, para. 41.

decision of the lower authority.[14] If in these circumstances a Constitutional Court can examine only points of law, it does not fulfil the requirements of article 6(1), and, similarly, if the Administrative Court has no power to quash the decision "on questions of fact and law", it cannot, in the view of the European Court, be considered as a "tribunal" for the purposes of article 6(1).[15]

In numerous other cases which will not be examined here, the European Court has also found a violation of the right of access to courts to have one's civil rights and obligations, including property rights and the right of access to one's child, determined.[16]

Lastly, it should briefly be recalled here that the right of access to the courts also means, for instance, that men and women must have equal access thereto and that this equality might require the granting of legal aid for the purposes of securing the effectiveness of this right (cf. case-law under art. 14(1) of the International Covenant and art. 6(1) of the European Convention as explained in Chapter 6).[17]

The right of access to the courts means that no one must be hindered either by law, administrative procedures or material resources from addressing himself or herself to a court or tribunal for the purpose of vindicating his or her rights.

Women and men are entitled to equal access to the courts.

3.2.2 The right to equality of arms and adversarial proceedings

The notion of ***equality of arms*** is an essential feature of a fair trial, and is an expression of the balance that must exist "between the prosecution and the defence".[18] With regard to the concept of "fair trial" in article 14(1) of the International Covenant, the Human Rights Committee has explained that it "must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings", and that "these requirements are not respected where ... the accused is denied the opportunity personally to attend the proceedings, or where he is unable properly to instruct his legal representative". In particular, "the principle of equality of arms is not respected where the accused is not served a properly motivated indictment".[19]

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[14] Ibid., p. 41, para. 43; emphasis added.

[15] Ibid., loc. cit.

[16] *Eur. Court HR, Case of Allan Jacobsson v. Sweden, judgment of 25 October 1989, Series A. No. 163*, pp. 19-21, paras. 65-77 (property right); and *Eur. Court HR, Case of Eriksson v. Sweden, judgment of 22 June 1989, Series A, No. 156*, pp. 27-29, paras. 73-82 and p. 31, paras. 90-92 (question of access to children) .

[17] See also Chapter 15 of this Manual with regard to the availability of effective domestic remedies for violations of human rights and fundamental freedoms.

[18] Communication No. 307/1988, *J. Campbell v. Jamaica* (Views adopted on 24 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 44, para. 6.4.

[19] Communication No. 289/1988, *D. Wolf v. Panama* (Views adopted on 26 March 1992), in UN doc. *GAOR*, A/47/40, pp. 289-290, para. 6.6.

The African Commission on Human and Peoples' Rights has held that "the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all". The Commission added that "***the right to equal treatment by a jurisdiction***, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial". They must, in other words, be able to "argue their cases ... on an equal footing". Secondly, "it entails the equal treatment of all accused persons by jurisdictions charged with trying them". Although "this does ***not*** mean that identical treatment should be meted out to all accused", the response of the Judiciary should be similar "when objective facts are alike".[20] Where, in a death penalty case, the Ngozi Court of Appeal in Burundi refused to accede to the accused person's plea for an adjournment of the proceedings in the absence of a lawyer, although it had earlier accepted an adjournment requested by the prosecutor, the African Commission concluded that the Court of Appeal had "violated the right to equal treatment, one of the fundamental principles of a right to a fair trial".[21]

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The European Court of Human Rights has explained the principle of equality of arms as "one of the features of the wider concept of a fair trial" as understood by article 6(1) of the European Convention, which implies that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent"; in this context, "importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice".[22]

The principle of equality of arms was thus violated where, in his observations to the Supreme Court, the Attorney-General had stated that he opposed the applicant's appeal; these observations were never served on the defence, which could not comment on them.[23] The European Court noted that "the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality", and that "it is a matter for the defence to assess whether a submission deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defence".[24]

However, rather than referring to the principle of equality of arms, the European Court has sometimes instead emphasized ***the right to adversarial proceedings in both criminal and civil proceedings***, a right which "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of

[20] *ACHPR, Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi, Communication No. 231/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000*, paras. 26-27 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/231-99.html (emphasis added).

[21] Ibid., para. 29.

[22] *Eur. Court HR, Case of Bulut v. Austria, judgment of 22 February 1996, Reports 1996-II*, p. 359, para. 47.

[23] Ibid., para. 49.

[24] Ibid., pp. 359-360, para. 49.

and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision".[25] In the words of the Court, "various ways are conceivable in which national law may secure that this requirement is met", but ***"whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon".***[26]

Consequently, in the *Lobo Machado* case, which concerned proceedings regarding social rights, the Deputy Attorney-General advocated in an opinion – to which the applicant had no access – that the appeal to the Supreme Court be dismissed; this constituted a breach of article 6(1) which was "aggravated by the presence of the Deputy Attorney-General at the Supreme Court's private sitting".[27]

The case of Brandstetter

In the case of *Brandstetter,* which concerned defamation proceedings, the Vienna Court of Appeal had relied on submissions of the Senior Public Prosecutor which had not been sent to the applicant and of which he and his lawyer were not even aware. For the Court, it did not help in this case that the Supreme Court had subsequently quashed the relevant appeal court judgement: in its view an "indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgement can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution". Furthermore, "the Supreme Court did not remedy this situation by quashing the first judgment since its decision was based on a ground entirely unrelated to the matter in issue".[28]

The right to ***equality of arms*** *or the right to* ***truly adversarial proceedings*** *in civil and criminal matters forms an intrinsic part of the right to a fair hearing and means that there must at all times be a fair balance between the prosecution/plaintiff and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-à-vis his or her opponent.*

[25] *Eur. Court HR, Case of Lobo Machado v. Portugal, judgment of 20 February 1996, Report 1996-I*, para. 31 at p. 207.

[26] *Eur. Court HR, Case of Brandstetter v. Austria, judgment of 28 August 1991, Series A, No. 211*, pp. 27-28, para. 67; emphasis added.

[27] *Eur. Court HR, Case of Lobo Machado v. Portugal, judgment of 20 February 1996, Report 1996-I*, pp. 206-207, paras. 31-32.

[28] *Eur. Court HR, Case of Brandstetter v. Austria, judgment of 28 August 1991, Series A, No. 211*, p. 28, para. 68.

3.2.3 The detention of witnesses

The question of equality of arms arose under article 14 of the International Covenant in the case of *Campbell*, where the author complained that he had not had a fair trial and where his ten-year-old son had been detained to ensure that he would testify. The author was charged with assaulting his wife in connection with a marital dispute, and at the trial his son at first testified that he had not seen his father. According to the account given by the author, his son did not change his story, and at the end of the first day of the trial he was therefore taken to the police station, where he stayed overnight. The next day, he finally "allegedly broke down and testified against his father".[29] However, after the end of the court proceedings, the son retracted his testimony in a written statement.

For the Human Rights Committee this was "a grave allegation", and it emphasized "that the detention of witnesses in view of obtaining their testimony is an exceptional measure, which must be regulated by strict criteria in law and in practice".[30] In this case it was "not apparent from the information ... that special circumstances existed to justify the detention of the author's minor child", and, moreover, "in the light of his retraction, serious questions" arose "about possible intimidation and about the reliability of the testimony obtained under these circumstances". The Committee therefore concluded that "the author's right to a fair trial was violated".[31]

Under article 14(1) of the International Covenant it is only lawful to resort to the detention of witnesses in exceptional circumstances. It is uncertain to what extent such a measure would be acceptable under the other treaties.

3.2.4 Judge's instructions to the jury

Several cases brought before the Human Rights Committee have concerned the alleged inadequacy of judges' instructions to the jury. In these cases the Committee has consistently held that "it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case", and it is not, therefore, "in principle", for it

> "to review specific instructions to the jury by the judge in a trial by jury, ***unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality***".[32]

[29] Communication No. 307/1988, *J. Campbell v. Jamaica* (Views adopted on 24 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 42, para. 2.3.

[30] Ibid., p. 44, paras. 6.3-6.4.

[31] Ibid., p. 44, para. 6.4.

[32] Communications Nos. 226/1987 and 256/1987, *M. Sawyers and M. and D. McLean v. Jamaica* (Views adopted on 11 April 1991), in UN doc. *GAOR*, A/46/40, p. 233, para. 13.5; emphasis added.

The Committee has however observed that "the judge's instructions to the jury must meet particularly high standards as to their thoroughness and impartiality in cases in which a capital sentence may be pronounced on the accused", and that "this applies, *a fortiori*, to cases in which the accused pleads legitimate self-defence".[33]

In most cases the Committee has found no evidence that the trial judge's instructions were arbitrary to the extent of amounting to a denial of justice,[34] in particular when it appears clear that "the trial judge put the respective versions of the prosecution and the defence fully and fairly to the jury".[35] However, in the case of *Wright*, who was convicted and sentenced to death for murder, the judge's omission was so serious as to amount to a ***denial of justice*** contrary to article 14(1) of the Covenant. In this case, a post-mortem showed that the shot from which the victim died had in fact been fired at a time when the author was already in police custody; this expert conclusion was not challenged and was available to the court.[36] Given "the seriousness of its implications", the Committee was of the view that the Court should have brought this information "to the attention of the jury, even though it was not mentioned by counsel".[37]

In trials by jury, the judge's instruction to the jury must be impartial and fair in that both the case of the prosecutor and that of the defence must be presented in such a way as to ensure the right to a fair hearing, which must be free from arbitrariness. A violation of this essential duty amounts to a denial of justice.

3.3 The right to a public hearing

The right to a public hearing in both civil and criminal cases is expressly guaranteed both by article 14(1) of the International Covenant on Civil and Political Rights and by article 6(1) of the European Convention on Human Rights, although the press and public "may be excluded from all or part of" a trial for certain specified reasons, namely, in the interest of morals, public order or national security in a democratic society, in the interest of the parties' private lives, or where the interest of justice otherwise so requires. To this the European Convention also specifically adds "the interest of juveniles" as a ground for holding court proceedings *in camera*. Article 8(5) of the American Convention on Human Rights provides this right only with regard to criminal proceedings, which "shall be public, except insofar as may be necessary to protect the interests of justice". Rule 79(A) in the identical versions of the Rules of

[33] Communication No. 232/1987, *D. Pinto v. Trinidad and Tobago* (Views adopted on 20 July 1990), in UN doc. *GAOR* A/45/40 (vol. II), p. 73, para. 12.3.

[34] See e.g. ibid., loc. cit. and Communication No. 283/1988, *A. Little v. Jamaica* (Views adopted on 1 November 1991), in UN doc. *GAOR*, A/47/40, p. 282, para. 8.2.

[35] Communication No. 232/1987, *D. Pinto v. Trinidad and Tobago* (Views adopted on 20 July 1990), in UN doc. *GAOR* A/45/40 (vol. II), p. 73, para. 12.4.

[36] Communication No. 349/1989, *C. Wright v. Jamaica* (Views adopted on 27 July 1992), in UN doc. *GAOR*, A/47/40, p. 315, para. 8.3.

[37] Ibid., loc. cit.

Procedure and Evidence of the International Criminal Tribunals for Rwanda and the former Yugoslavia also refers to the possibility of the Trial Chamber going into closed session for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75, or for the protection of the interests of justice. However, "the Trial Chamber shall make public the reasons for its order" (Rule 79(B)).

In General Comment No. 13, on article 14 of the Covenant, the Human Rights Committee emphasized that "the publicity of hearings is an important safeguard in the interest of the individual and of society at large". Apart from the "exceptional circumstances" provided for in article 14(1), " a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons".[38] Notwithstanding the non-publicity of the trial itself, "the judgement must, with certain strictly defined exceptions, be made public" under article 14 of the Covenant.[39]

The duty to hold suits of law in public under article 14(1) is incumbent on the State, and "is not dependent on any request, by the interested party ... Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish".[40] This duty further implies that

> "Courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing."[41]

The principle of publicity means that trials taking place in secret are contrary to article 14(1), such as in the case of eight former Zairian parliamentarians and one businessman whose trial – among other shortcomings – was not held in public and who were sentenced to fifteen years' imprisonment, with the exception of the businessman, who received a five-year prison sentence.[42]

Article 14(1) has naturally been violated in cases where the hearing has taken place *in camera* when the State party has failed to justify this measure in accordance with the terms of the Covenant.[43]

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[38] *United Nations Compilation of General Comments*, pp. 123-124, para. 6.

[39] Ibid., para. 6 at p. 124.

[40] Communication No. 215/1986*, G. A. van Meurs v. the Netherlands* (Views adopted on 13 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 59, para. 6.1.

[41] Ibid., p. 60, para. 6.2.

[42] Communication No. 138/1983*, N. Mpandanjila et al. v. Zaire* (Views adopted on 26 March 1986*)*, in UN doc. *GAOR*, A/41/40, p. 126, para. 8.2.

[43] Communication No. 74/1980*, M. A. Estrella v. Uruguay* (Views adopted on 29 March 1983), in UN doc. *GAOR*, A/38/40, p. 159, para. 10.

The African Commission on Human and Peoples' Rights has held that, regardless of the fact that the right to a public trial is not expressly provided for in the African Charter, it is empowered by articles 60 and 61 of the Charter "to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognized by the African States as well as legal precedents and doctrine". In support of the notion of publicity of hearings, the Commission then invoked the above-quoted terms of the Human Rights Committee's General Comment No. 13 on article 14(1) of the Covenant.[44] The African Commission next noted that the "exceptional circumstances" which might justify exceptions to the principle of publicity under article 14(1) of the Covenant are "exhaustive".[45] Where the respondent Government had made only "an omnibus statement in its defence", without specifying which exact circumstances prompted it to exclude the public from a trial, the Commission concluded that the right to a fair trial as guaranteed by article 7 of the African Charter had been violated.[46]

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The principle of public proceedings as guaranteed by article 8(5) of the American Convention on Human Rights was at issue in the case of *Castillo Petruzzi et al.*, where "all the proceedings in the case, even the hearing itself, were held out of the public eye and in secret", thus resulting in "a blatant violation of the right to a public hearing recognized in the Convention"; indeed, "the proceedings were conducted on a military base off limits to the public".[47]

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Under article 6(1) of the European Convention, proceedings must, with the exceptions mentioned above, be held in public. However, the application of this provision "to proceedings before appellate courts depends on the special features of the proceedings involved", and "account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein".[48] The Court has thus consistently held that

> "provided that there has been a public hearing at first instance, the absence of 'public hearings' at a second or third instance may be justified by the special features of the proceedings at issue. Thus proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even when the appellant was not given an opportunity of being heard in person by the appeal or cassation court."[49]

[44] *ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000*, para. 51 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/224-98.html.

[45] Ibid., para. 52.

[46] Ibid., paras. 53-54.

[47] *I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 211, paras. 172-173

[48] *Eur. Court HR, Case of Bulut v. Austria, judgment of 22 February 1996, Reports 1996-II*, p. 357, para. 40.

[49] Ibid., p. 358, para. 41.

Applying this interpretation in the case of *Bulut*, the European Court found no violation although the Supreme Court used summary proceedings unanimously to refuse consideration of an appeal for lacking merit. The European Court was not satisfied that the grounds of nullity formulated by the applicant "raised questions of fact bearing on the assessment of [his] guilt or innocence that would have necessitated a hearing".[50] Nor did the absence of a public hearing violate article 6(1) in the *Axen* case, where the German Federal Court had decided to dispense with a hearing since it unanimously considered the appeal on points of law to be ill-founded; before taking its decision it had however "duly sought the views of the parties".[51]

The case of Weber

The right to a public hearing was however violated in the *Weber* case concerning breach of confidentiality of judicial investigation, where the President of the Criminal Cassation Division of the Vaud Cantonal Court in Switzerland – and then the Cassation Division itself – gave a judgement without such a hearing. It was not sufficient in this case that the subsequent proceedings in the Federal Court were public, since that Court "could only satisfy itself that there had been no arbitrariness" and was not competent to "determine all the disputed questions of fact and law".[52]

3.3.1 The right to a public judgement

Article 14(1) *in fine* of the International Covenant provides that "any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children". Article 6(1) of the European Convention stipulates that judgement "shall be pronounced publicly". Article 8(5) of the American Convention refers only to the publicity of the proceedings as such, while article 7 of the African Charter is silent on both issues. Articles 22(2) and 23(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide for the delivery "in public" of the judgement of the Trial Chamber. Finally, according to article 74(5) of the Statute of the International Criminal Court, the "decisions or a summary thereof shall be delivered in open court".

As observed by the European Court, the object pursued by article 6(1) with regard to the publicity of judgements is "***to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial***".[53] However, the Court has not adopted a literal interpretation of the words "judgement shall be pronounced publicly" but has instead taken into account, in its case-law, the "long-standing

[50] Ibid., para. 42.

[51] *Eur. Court HR, Case of Axen v. Federal Republic of Germany, judgment of 8 December 1983, Series A, No. 72*, p. 12, para. 28.

[52] *Eur. Court HR, Case of Weber v. Switzerland, judgment of 22 May 1990, Series A, No. 177*, p. 20, para. 39.

[53] *Eur. Court HR, Case of Pretto and Others v. Italy, judgment of 8 December 1983, Series A, No. 71*, para. 27 at p. 13; emphasis added.

tradition" of many States of the Council of Europe in making public the decisions of some or all of their courts; such traditions may thus not necessarily imply the reading out loud of the judgements concerned, but can consist in depositing the judgements in a registry accessible to the public.[54] The European Court considers, therefore, "that in each case the form of publicity to be given to the 'judgement' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose" of article 6(1).[55]

The case of Pretto and Others

In the case of *Pretto and Others,* where the Italian Court of Cassation had made a ruling in civil proceedings which was not pronounced publicly, the European Court took account "of the entirety of the proceedings conducted in the Italian legal order and of the Court of Cassation's role therein", noting that its role was "confined to reviewing in law the decision of the Venice Court of Appeal". The Court of Cassation "could not itself determine the suit, but only, on this occasion, dismiss the applicant's appeal or, alternatively, quash the previous judgment and refer the case back to the trial court".[56] After holding public hearings, the Court of Cassation dismissed the appeal, whereupon the Appeal Court's judgement became final; the consequences for the applicant remained unchanged. Although the judgement dismissing the appeal on points of law was not delivered in open court, anyone could consult and obtain a copy thereof on application to the court registry.[57] In the opinion of the European Court the object of article 6(1) to ensure public scrutiny of the Judiciary was

> "at any rate as regards cassation proceedings, no less achieved by a deposit in the court registry, making the full text of the judgement available to everyone, than by a reading in open court of a decision dismissing an appeal or quashing a previous judgement, such reading sometimes being limited to the operative provisions".[58]

It followed that the absence of public pronouncement of the Court of Cassation's judgement did not constitute a breach of article 6(1) of the Convention.[59]

[54] Ibid., p. 12, paras. 25-26.

[55] Ibid., para. 26.

[56] Ibid., pp. 12-13, para. 27.

[57] Ibid., para. 27 at p. 13.

[58] Ibid., loc. cit.

[59] Ibid., p. 13, para. 28. See also *Eur. Court HR, Sutter case v. Switzerland, judgment of 22 February 1984, Series A, No. 74*, pp. 14-15, paras. 31-34.

As a minimum, every person charged with a criminal offence has the right to public proceedings in the court of first instance and at all levels of appeal proceedings if the appeal concerns an assessment of both facts and law including the question of guilt.

A judgement in a criminal case must be made public except in exceptional circumstances. At the appeal stage, the duty to make a public pronouncement of judgements may in some cases be satisfied by making the relevant judgements available to the public at the court registry (Europe).

3.4 The right to be tried "without undue delay" or "within a reasonable time"

According to article 14(3)(c) of the International Covenant and articles 20(4)(c) and 21(4)(c) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, every person facing a criminal charge shall have the right "to be tried ***without undue delay***" (emphasis added). In the words of article 7(1)(d) of the African Charter, article 8(1) of the American Convention and article 6(1) of the European Convention, everyone has the right to be heard "***within a reasonable time***" (emphasis added).

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What it means to be tried "without undue delay": In General Comment No. 13, the Human Rights Committee stated that the right to be tried without undue delay is a guarantee that ***"relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place 'without undue delay'***. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."[60] This view has been further emphasized in the Committee's jurisprudence, according to which article 14(3)(c) and (5) "are to be read together, so that the right to review of conviction and sentence must be made available without delay".[61]

It is noteworthy that the Committee has also made it clear that "the difficult economic situation" of a State party is not an excuse for not complying with the Covenant, and it has emphasized in this respect "that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe".[62]

[60] *United Nations Compilation of General Comments*, p. 124, para. 10; emphasis added.

[61] Communications Nos. 210/1986 and 225/1987*, E. Pratt and I. Morgan v. Jamaica* (Views adopted on 6 April 1989), in UN doc. *GAOR*, A/44/40, p. 229, para. 13.3.

[62] Communication No. 390/1990*, B. Lubuto v. Zambia* (Views adopted on 31 October 1995), in UN doc. *GAOR*, A/51/40 (vol. II), p. 14, para. 7.3.

It is in principle for the State party concerned to show that the complexity of a case is such as to justify the delay under consideration by the Committee,[63] although a mere affirmation that the delay was not excessive is not sufficient;[64] the Committee will also examine whether the delay, or part of it, can be attributed to the authors, for instance when they decide to change lawyers.[65]

The case of Pratt and Morgan

In the case of *Pratt and Morgan*, the authors were unable to proceed to appeal to the Privy Council because it took the Court of Appeal almost three years and nine months to issue a written judgement. The Committee did not accept the explanation of the State party that this delay "was attributable to an oversight and that the authors should have asserted their right to receive earlier the written judgement"; on the contrary, it considered that the responsibility for this delay lay with the judicial authorities, a responsibility that "is neither dependent on a request for production by the counsel in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused".[66] In reaching its conclusion that this delay violated both article 14(3)(c) and (5), the Committee stated that "it matters not in the event that the Privy Council affirmed the conviction of the authors", since "in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be".[67]

The Human Rights Committee has examined numerous other cases involving alleged violations of this right, and only a few examples of its jurisprudence will be highlighted here. In one case, the Committee concluded that a delay of ***29 months*** from arrest to trial was contrary to article 14(3)(c); the mere affirmation by the State party that such a delay was not contrary to the Covenant did not constitute a sufficient explanation.[68] A delay of ***two years*** between arrest and trial was also considered to violate article 14(3)(c) (and article 9(3)) of the Covenant, and it was therefore not necessary for the Committee to "decide whether the further delays in the conduct of the trial [were] attributable to the State party or not".[69] *A fortiori*, proceedings that have

[63] Communication No. 336/1988, *A. Fillastre v. Bolivia* (Views adopted on 5 November 1991), in UN doc. *GAOR*, A/47/40, p. 306, para. 6.6.

[64] Communication No. 639/1995, *W. Lawson Richards and T. Walker v. Jamaica* (Views adopted on 28 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 189, para. 8.2.

[65] Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 17, para. 12.4.

[66] Ibid., p. 230, para. 13.4.

[67] Ibid., para. 13.5.

[68] Communication No. 564/1993, *J. Leslie v. Jamaica* (Views adopted on 31 July 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 28, para. 9.3.

[69] Communication No. 672/1995, *C. Smart v. Trinidad and Tobago* (Views adopted on 29 July 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 149, para. 10.2.

lasted ***six***[70] or ***about ten years*** [71] to complete have been considered to violate article 14(3)(c). The outcome was the same in a case where there was a delay of ***31 months*** between conviction and appeal.[72]

On the other hand, a delay of ***eighteen months*** from the arrest to the opening of the author's trial for murder was not considered to constitute an "undue delay" in the case of *Kelly*, there being "no suggestion that pre-trial investigations could have been concluded earlier, or that the author complained in this respect to the authorities".[73] However, in the same case, article 14(3)(c) and (5) was violated since it took the Court of Appeal almost five years to issue a written judgement, thereby effectively preventing the author from petitioning the Privy Council.[74]

In a case concerning the author's request to be reinstated in the Guardia Civil in Peru, a "seemingly endless sequence of instances and repeated failure to implement decisions" resulted in a delay of seven years that was considered "unreasonable" by the Committee, thereby violating "the principle of a fair hearing" in article 14(1) of the Covenant. This case was not considered under article 14(3)(c).[75]

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Under article 6(1) of the European Convention on Human Rights, the start of the period to be taken into consideration can be the day a person is either charged, arrested, or committed for trial,[76] for instance, and the end of this period is normally when the judgement acquitting or convicting the person or persons concerned becomes final.[77]

On the question of reasonableness of the length of the proceedings, whether civil or criminal, the European Court has consistently held that

> "it is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the ***complexity of the case, the applicant's conduct and that of the competent authorities***".[78]

[70] Communication No. 159/1983*, Cariboni v. Uruguay* (Views adopted on 27 October 1987), in UN doc. *GAO*R, A/43/40, p. 184 and pp. 189-190, paras. 9.2 and 10.

[71] Ibid., loc. cit.

[72] Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997*)*, in UN doc. *GAOR*, A/52/40 (vol. II), p. 232, para. 5.11.

[73] Communication No. 253/1987, *P. Kelly v. Jamaica* (Views adopted on 8 April 1991), in UN doc. *GAO*R, A/46/40, p. 248, para. 5.11.

[74] Ibid., para. 5.12.

[75] Communication No. 203/1986, *R. T. Muñoz Hermoza v. Peru* (Views adopted on 4 November 1988*)*, in UN doc. *GAO*R, A/44/40, p. 204, para.11.3.

[76] *Eur. Court HR*, *Case of Kemmache v. France, judgment of 27 November 1991, Series A, No. 218*, p. 27, para. 59 (date of charge); and *Eur. Court HR, Case of Yağci and Sargin v. Turkey, judgment of 8 June 1995, Series A, No. 319-A*, p. 20, para 58 (date of arrest); *Eur. Court HR, Case of Mansur v. Turkey, judgment of 8 June 1995, Series A, No. 319-B*, p. 51, para. 60 (committal for trial).

[77] See e.g. *Eur. Court HR, Case of Yağci and Sargin v. Turkey, judgment of 8 June 1995, Series A*, *No. 319-A*, p. 20, para 58.

[78] *Eur. Court HR., Case of Kemmache v. France, judgment of 27 November 1991, Series A, No. 218*, p. 20, para. 50 (criminal); and *Eur. Court HR, Martins Moreira Case v. Portugal, judgment of 26 October 1988, Series A, No. 143*, p. 17, para. 45 (civil); emphasis added.

As to ***the conduct of the applicant***, it is worthy of note that the European Court has held that article 6 "does not require a person charged with a criminal offence to cooperate actively with the judicial authorities", and that, further, it does not blame the applicant for taking "full advantage of the resources afforded by national law in their defence", although this may slow down the proceedings to some extent.[79] The case might however be different if there is evidence showing that the applicant and his counsel have displayed a "determination to be obstructive".[80]

The judicial authorities were, however, responsible for the unreasonable delay of the proceedings contrary to article 6 in the case of ***Yağci and Sargin***, where, contrary to national law, the courts had held only an average of one hearing per month, and where they waited for almost six months before acquitting the applicants on the basis of newly repealed articles of the Criminal Code which had constituted part of the basis of the criminal charges against them. In all, the proceedings lasted a little less than four years and eight months.[81]

It does not help in this respect that Governments invoke their international responsibility to look carefully into all matters in serious cases of drug trafficking in order to justify delays. In this respect the Court has unequivocally held that it "***is for the Contracting States to organize their legal systems in such a way that their courts can meet" the requirement of reasonableness.***[82]

Similarly, in civil proceedings, it is no defence for the State concerned to argue that its Code of Civil Procedure leaves the initiative to the parties, who are expected to carry out the procedural steps in the manner and within the time prescribed. The European Court has held in this respect that such a rule does not "dispense the courts from ensuring compliance with Article 6 as to the 'reasonable time' requirement".[83] The national judge does, in other words, have an obligation to intervene when necessary to expedite proceedings so as not to jeopardize the "effectiveness and credibility" of the administration of justice.[84]

Every person charged with a criminal offence has the right to be tried without undue delay/within a reasonable time. All States have a duty to organize the Judiciary in such a way that this right can be effectively ensured.

The accused cannot be blamed for delays caused by his or her making use of the right not to speak or to cooperate with the judicial authorities. Judicial delays can only be attributed to the accused in cases of deliberate obstructive behaviour.

[79] *Eur. Court HR, Case of Yağci and Sargin v. Turkey, judgment of 8 June 1995, Series A*, No. 319-A, p. 21, para. 66.

[80] Ibid., loc. cit.

[81] Ibid., p. 22, paras. 67-70.

[82] *Eur. Court HR, Case of Mansur v. Turkey, judgment of 8 June 1995, Series A, No. 319-B*, p. 53, para. 68; emphasis added.

[83] *Eur. Court HR, Vernillo Case v. France, judgment of 20 February 1991, Series A, No. 198*, para. 30 at p. 13.

[84] Cf. ibid., p. 14, para. 38 read in conjunction with p. 14, para. 36. Owing inter alia "to the parties' responsibilities in the conduct of the trial" the relevant periods in this case were not so long as to constitute a violation of the requirement of reasonableness, see ibid., p. 15, para. 39.

3.5 The right to defend oneself in person or through a lawyer of one's own choice

Article 14(3)(d) of the International Covenant, article 7(1)(c) of the African Charter on Human and Peoples' Rights, article 8(2)(d) of the American Convention on Human Rights and article 6(3)(c) of the European Convention on Human Rights all guarantee the right of anyone charged with a criminal offence to defend himself in person or through legal assistance of his own choice. So do articles 20(4)(d) and 21(4)(d) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia.

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In its General Comment No. 13 on article 14, the Human Rights Committee emphasized that

> "the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary".[85]

The right of access to legal assistance must be *effectively* available, and, where this has not been the case, the Human Rights Committee has concluded that article 14(3) has been violated.[86] This was the case where a person did not have access to legal assistance during the first ten months of his detention and, in addition, was not tried in his presence.[87] Where the domestic law has not authorized the author to defend himself in person, the Committee has also found a violation of article 14(3)(d), which allows the accused to choose whether he or she wishes to defend him or herself – be it through an interpreter – or to have the defence conducted by a lawyer.[88]

The right to have a lawyer of one's own choice was violated in the case of *López Burgos* where the victim was obliged to accept the *ex officio* appointment of a colonel as his legal counsel.[89] On the other hand, the right to choose under article 14(3)(d) "does not entitle the accused to choose counsel provided free of charge", but, in spite of this restriction, "measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice", this including "consulting with, and informing, the accused if he intends to withdraw an appeal or to argue, before the appellate instance, that the appeal has no merit".[90] Although counsel

[85] *United Nations Compilation of General Comments*, p. 125, para. 11.

[86] See among many cases, Communication No. R.2/8, *B. Weismann Lanza and A. Lanza Perdomo v. Uruguay* (Views adopted on 3 April 1980), in UN doc. *GAOR*, A/35/40, p. 118, para. 16; and Communication No. R.1/6, *M. A. Millán Sequeira v. Uruguay, (Views adopted on 29 July 1980), ibid.*, p. 131, para. 16.

[87] Communication No. R.7/28, *I. Weinberger v. Uruguay* (Views adopted on 29 October 1980), in UN doc. *GAOR*, A/36/40, p. 119, para. 16.

[88] Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 18, para. 14.2.

[89] Communication No. R.12/52, *S. R. López Burgos v. Uruguay* (Views adopted on 29 July 1981), in UN doc. *GAOR*, A/36/40, p. 183, para. 13.

[90] Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 89, para. 8.2.

is entitled to recommend that an appeal should not proceed, he should continue to represent the accused if the latter so wishes. Otherwise, the accused should have the opportunity to retain counsel at his own expense.[91] It is thus essential under article 14(3)(d) that the domestic court "should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice", and the Committee will itself examine whether there are any indications to show that the lawyer "was not using his best judgement in the interests of his client".[92]

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The Inter-American Court of Human Rights concluded that article 8(2)(c), (d) and (e) had been violated in the case of *Suárez Rosero*, where the victim had been held in *incommunicado* detention for 36 days, during which time he was unable to consult any lawyer. After the end of his *incommunicado* detention he was allowed to receive visits from his lawyer although he was "unable to communicate with him freely and privately", the interviews being conducted in the presence of police officers.[93] Article 8(2)(d) was also violated in the case of *Castillo Petruzzi* where "the victims were not allowed legal counsel between the time of their detention and the time they gave their statements" to the police, when they "were assigned court-appointed lawyers". When they were finally allowed "legal counsel of their choosing, the latter's role was peripheral at best" and they were only allowed to have access to the case file the day before the ruling of the court of first instance.[94]

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With regard to article 6(1) taken in conjunction with article 6(3)(c) of the European Convention, the European Court has held that "it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses".[95] Accordingly, the "legislature must ... be able to discourage unjustified absences".[96] Without deciding "whether it is permissible in principle to punish such absences by ignoring the right to legal assistance", the Court concluded in the *Poitrimol* case that there was a breach of article 6, since the applicant had been deprived of his right to appeal to the Court of Appeal because he had provided no valid excuse for not attending the hearing. In the view of the European Court, the suppression of the right to legal assistance "was disproportionate in the circumstances", in which the applicant was not even allowed to be represented by his legal counsel.[97] In conclusion it can be said that, under article

[91] Ibid., loc. cit. See also Communication No. 461/1991*, G. Graham and A. Morrison v. Jamaica* (Views adopted on 25 March 1996), in UN doc. *GAOR*, A/51/40 (vol. II), pp. 48-49, para. 10.5.

[92] Communication No. 708/1996*, N. Lewis v. Jamaica* (Views adopted on 17 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 251-252, para. 8.4.

[93] *I-A Court HR, Suárez Rosero case v. Ecuador, judgment of November 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *1997 Annual Report I-A Court HR*, p.301, para. 83 read in conjunction with p. 292, para. 34.g and h.

[94] *I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, pp. 203-204, paras. 146-149 read in conjunction with p. 202, para. 141.

[95] *Eur. Court HR, Case of Poitrimol v. France, judgment of 23 November 1993, Series A, No. 277-A*, p. 15, para. 35.

[96] Ibid., loc. cit.

[97] Ibid.

6(3)(c) of the European Convention, an accused who deliberately avoids appearing in person still retains his or her right to be defended by a lawyer.[98]

Moreover, in the *Pelladoah* case the Court emphasized that "everyone charged with a criminal offence has the right to be defended by counsel", but that "for this right to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so".[99]

The case of Kamasinski

In the case of *Kamasinski*, where the applicant had a legal aid counsel appointed to represent him in court proceedings concerning fraud and misappropriation, the European Court observed that "'a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes'", and that it "follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed". In the view of the Court "the competent national authorities are required under article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some way".[100] In this case, the Court carefully examined the applicant's complaints concerning his legal aid counsel but concluded that there was "no indication ... that in the pre-trial stage the Austrian authorities had cause to intervene as concerns the applicant's legal representation" and that it could not be found on the evidence before the Court that the domestic authorities had "disregarded the specific safeguard of legal assistance" under article 6(3)(c) "or the general safeguard of a fair trial under paragraph 1".[101] However, during the trial itself a dispute occurred between the applicant and his lawyer with the result that the latter asked the court to be discharged from the case, a request the court refused. Although "the Austrian judicial authorities were thus put on notice that, in Mr Kamasinski's opinion, the conditions for the conduct of the defence were not ideal", the European Court concluded that article 6(1) and (3)(c) had not been violated.[102]

[98] *Eur. Court HR, Case of Pelladoah v. the Netherlands, judgment of 22 September 1994, Series A, No. 297-B*, para. 40 at p. 35 and *Eur. Court HR, Case of van Geyseghem v. Belgium, judgment of 21 January 1999, Reports 1999-I*, pp. 140-141, paras. 35-36.

[99] *Eur. Court HR, Case of Pelladoah v. the Netherlands, judgment of 22 September 1994, Series A, No. 297-B*, p. 35, para. 41.

[100] *Eur. Court HR, Kamasinski Case, judgment of 19 December 1989, Series A, No. 168*, pp. 32-33, para. 65.

[101] Ibid., p. 34, para. 69.

[102] Ibid., paras. 70-71.

3.5.1 The right to effective legal assistance in death penalty cases

As consistently held by the Human Rights Committee, it is "axiomatic that legal representation must be made available in capital cases", and this not only "at the trial in the court of first instance, but also in appellate proceedings". Moreover, the "legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice".[103] According to the Committee's jurisprudence under article 14(3)(d):

> "The court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel."[104]

In the case of *Morrison*, the author should consequently "have been informed that legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him". Since this was not done, article 14(3)(d) was violated.[105]

Article 14(3)(d) was violated in the similar *Reid* case where the author had a court-appointed lawyer but had indicated that he wanted to be present himself during the appeal proceedings. This possibility was denied him since he had a lawyer; however, his lawyer subsequently decided that there was no merit in the author's appeal and advanced no legal arguments in favour of it being granted, "thus effectively leaving him without legal representation".[106] In the view of the Committee, and considering that this was "a case involving the death penalty", the State party "should have appointed another lawyer for [the author's] defence or allowed him to represent himself at the appeal proceedings".[107] In the *McLeod* case, the legal aid representative had in fact consulted with the author prior to the appeal, but, unbeknown to him, had decided that he would argue no grounds of appeal. There was no indication in this case that the Appeal Court had taken any steps to ensure that the author's right to be duly informed was respected, and the Committee therefore concluded that his rights under both article 14(3)(b) and article 14(3)(d) had been violated.[108]

[103] Communication No. 232/1987, *D. Pinto v. Trinidad and Tobago* (Views adopted on 20 July 1990), in UN doc. *GAOR*, A/45/40, p. 73, para.12.5.

[104] Communication No. 663/1995, *M. Morrison v. Jamaica* (Views adopted on 3 November 1998), in UN doc. *GAOR*, A/54/40 (vol. II), p. 155, para. 8.6.

[105] Ibid., loc. cit. For a similar case, see also Communication No. 572/1994, *H. Price v. Jamaica* (Views adopted on 6 November 1996), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 155-156, para. 9.2.

[106] Communication No. 250/1987, *C. Reid v. Jamaica* (Views adopted on 20 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 91, para. 11.4.

[107] Ibid., loc. cit.

[108] Communication No. 734/1997, *A. McLeod v. Jamaica* (Views adopted on 31 March 1998), in UN doc. *GAOR*, A/53/40 (vol. II), pp. 216-217, para. 6.3. See also e.g. Communication No. 528/1993, *M. Steadman v. Jamaica* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 26-27, para. 10.3.

Article 14(3)(d) was further violated in a capital case where the author had indicated that he wished to be present in person during the appeal proceedings and that he did not want legal aid. This wish was ignored and the appeal was pursued in the presence of a legal aid attorney, who argued the appeal on a ground that the author had not wished to pursue. The Committee noted "with concern that the author was not informed with sufficient advance notice about the date of the hearing of his appeal", a delay that "jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer, whose identity he did not know until the day of the hearing itself". His "opportunities to prepare the appeal were further frustrated by the fact that the application for leave to appeal was treated as the hearing of the appeal itself, at which he was not authorized to be present".[109]

Failure of lawyer to appear in court: The case of Robinson

This situation arose in the *Robinson* case, where the trial had been postponed several times because the prosecution had problems locating its chief witness. When the witness was finally located and the trial began, the author's lawyers were not present in court, yet the trial was allowed to proceed and the author had to defend himself. He was convicted of murder and sentenced to death.[110] The Committee based itself on the terms of article 14(3)(d), according to which everyone shall have legal assistance assigned to him, in any case where the interests of justice so require.[111] It reiterated that "it is axiomatic that legal assistance be available in capital cases", and that this is so "even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings"; moreover, this "requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel".[112] It followed that in this case "the absence of counsel constituted unfair trial".[113]

[109]Communication No. 338/1988, *L. Simmonds v. Jamaica* (Views adopted on 23 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 82, para. 8.4. See also a case where the lawyer failed to follow the accused's instructions: Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992, in UN doc. *GAOR*, A/47/40, p. 247, para. 6.6.

[110]Communication No. 223/1987, *F. Robinson v. Jamaica* (Views adopted on 30 March 1989), in UN doc. *GAOR*, A/44/40, pp. 244-245, para. 10.2.

[111]Ibid., p. 245, para. 10.3.

[112]Ibid., loc. cit.

[113]Ibid.

The case of Domukovsky et al.

In the case of *Domukovsky et al.*, the four authors complained that they had not had a fair hearing after they had been removed from the court room and were subsequently absent from the proceedings, which ended in a death sentence being imposed in two cases; they were also refused lawyers of their choice. The Committee considered that article 14(3)(d) had been violated in respect of each author, emphasizing that

> "at a trial in which the death penalty can be imposed, which was the situation for each author, the right to a defence is ***inalienable and should be adhered to at every instance and without exception.*** This entails the right to be tried in one's presence, to be defended by counsel of one's own choosing, and not to be forced to accept ex-officio counsel."[114]

Since the State party had not in this case shown that it had taken "all reasonable measures to ensure the authors' continued presence at the trial, despite their alleged disruptive behaviour", and considering that it had not ensured "that each of the authors was at all times defended by a lawyer of his own choosing", the Committee concluded that article 14(3)(d) had been violated.[115]

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The African Commission on Human and Peoples' Rights concluded that Burundi had violated the right to a defence in article 7(1)(c) of the African Charter on Human and Peoples' Rights in a case where the courts had refused to designate a defence lawyer to an accused person who was eventually sentenced to death. The Commission "emphatically" recalled that "the right to legal assistance is a fundamental element of the right to fair trial", in particular in cases "where the interests of justice demand it". Given "the gravity of the allegations brought against the accused" person in this case "and the nature of the penalty he faced, it was in the interests of justice for him to have the benefit of the assistance of a lawyer at each stage of the case".[116] Article 7(1)(c) of the African Charter was also violated in a death penalty case against Nigeria where the defence counsel for the seven complainants "was harassed and intimidated to the extent of being forced to withdraw from the proceedings. In spite of this forced withdrawal of counsel, the tribunal proceeded to give judgement in the matter, finally sentencing the accused to death". In the view of the Commission the defendants were thus "deprived of their right to defence, including their right to be defended by counsel of their choice" contrary to article 7(1)(c) of the African Charter.[117]

[114] Communications Nos. 623, 624, 626, 627/1995, *V. P. Domukovsky et al. v. Georgia* (Views adopted on 6 April 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 111, para. 18.9; emphasis added.

[115] Ibid., loc. cit.

[116] *ACHPR, Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi, Communication No. 231/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000*, para. 30 of the text of the decision as published at the following web-site: http://www1.umn.edu/humanrts/africa/comcases/231-99.html.

[117] *ACHPR, Constitutional Rights Project (on behalf of Zamani Lekwot and six Others) v. Nigeria, Communication No. 87/93, decision adopted during the 16th session, October 1994*, para. 29 of the text of the decision as published at the following web-site: http://www.up.ac.za/chr/ahrdb/acomm_decisions.html.

3.5.2 The right to free legal aid

Article 14(3)(d) provides that in the determination of any criminal charge, everyone shall be entitled "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". Article 6(3)(c) of the European Convention on Human Rights also provides for the right of a person not having "sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". Article 8(2)(e) of the American Convention refers back to the provisions of national law in this respect, while the African Charter on Human and Peoples' Rights is silent on the question of free legal aid. Articles 20(4)(d) and 21(4)(d) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia have provisions similar to article 14(3)(d) of the International Covenant.

For the granting of free legal aid, article 14(3)(d) of the International Covenant and article 6(3)(c) of the European Convention set two conditions: ***first***, the unavailability of sufficient funds to pay for a lawyer and, ***second***, that the interests of justice require such aid. As seen in the preceding subsection, the interests of justice would require the granting of legal aid in capital punishment cases where the accused wishes for such aid and cannot pay for it himself. Other less dramatic cases involving the interests of justice may of course also require the granting of free legal aid.

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In a case concerning a constitutional appeal, the Human Rights Committee thus held that "where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so [require], legal assistance should be provided by the State"; such review would require a fair hearing and consistency with article 14(3)(d) of the Covenant.[118] Consequently, article 14 was violated in a case where "the absence of legal aid ... denied the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court in a fair hearing".[119]

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The European Court has observed with respect to article 6(3)(c) of the European Convention that "the right of an accused to be given, in certain circumstances, free legal assistance constitutes one aspect of the notion of a fair trial in criminal proceedings".[120] In determining whether the interests of justice require the granting of free legal aid, the European Court has regard to various criteria, such as "***the seriousness of the offence***" committed, ***"the severity of the sentence***" the accused person risks and "***the complexity of the case***".[121] Where the maximum sentence was

[118] Communication No. 707/1996, *P. Taylor v. Jamaica* (Views adopted on 14 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 241, para. 8.2.

[119] Ibid., loc. cit.

[120] *Eur. Court HR, Case of Quaranta v. Switzerland, judgment of 24 May 1991, Series A, No. 205*, p. 16, para. 27.

[121] Ibid., p. 17, paras. 32-34; emphasis added.

three years' imprisonment for a drug offence, the Court concluded that "free legal assistance should have been afforded by reason of the mere fact that so much was at stake".[122] Since the alleged offence had occurred when the applicant was on probation, an additional factor was "the complexity of the case", the domestic Court having "both to rule on the possibility of activating the suspended sentence and to decide on a new sentence".[123] Consequently, there was a breach of article 6(3)(c) of the Convention.

The European Court has held, furthermore, that the manner in which article 6(1) and (3)(c)of the European Convention

> "... is to be applied in relation to ***appellate or cassation courts*** depends upon the special features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein".[124]

The case of *Granger*, where legal aid had been refused, concerned appeal proceedings against a conviction for perjury following which the applicant was sentenced to five years' imprisonment. As noted by the European Court, there could "thus be no question as to the importance of what was at stake in the appeal".[125] After having examined the proceedings before the appeal court, the European Court also found that the applicant had not been "in a position fully to comprehend the pre-prepared speeches submitted to" the High Court of Justiciary by the Solicitor General, "or the opposing arguments submitted to the court", and that it was "also clear that, had the occasion arisen, he would not have been able to make an effective reply to those arguments or to questions from the bench".[126] As it turned out, one of the grounds for appeal "raised an issue of complexity and importance" that was in fact so difficult that the High Court had to adjourn its hearing "and called for a transcript of the evidence given at the applicant's trial, so as to be able to examine the matter more thoroughly".[127]

In the light of this situation, the European Court of Human Rights concluded that "some means should have been available to the competent authorities, including the High Court of Justiciary in exercise of its overall responsibility for ensuring the fair conduct of the appeal proceedings, to have the refusal of legal aid reconsidered". In the view of the Court "it would have been in the interests of justice for free legal assistance to be given to the applicant" at least at the stage following the adjournment of the proceedings, since such a course "would in the first place have served the interests of justice and fairness by enabling the applicant to make an effective contribution to the proceedings", and, secondly, would have enabled that Court to have "the benefit of hearing ... expert legal argument from both sides on a complex issue".[128] The Court concluded, consequently, that there had been a violation of article 6(3)(c) taken together with article 6(1) of the Convention.

[122] Ibid., para. 33.

[123] Ibid., para. 34.

[124] *Eur. Court HR, Case of Granger v. the United Kingdom, judgment of 28 March 1991, Series A, No. 174*, p. 17, para. 44; emphasis added.

[125] Ibid., p. 18, para. 47.

[126] Ibid., loc. cit.

[127] Ibid.

[128] Ibid., para. 47 at p. 19.

The Pakelli *case*

In the case of *Pakelli*, article 6(3)(c) was violated since the applicant was refused legal aid in order to be represented in the Federal Court which was going to hold an oral hearing in his case, a course it took only in exceptional cases. In the view of the European Court the personal presence of the applicant could not compensate for the lack of a legal practitioner to examine the legal issues arising, which inter alia concerned the application of a new version of the Code of Criminal Procedure. Consequently, the applicant was deprived of "the opportunity of influencing the outcome of the case".[129]

It is noteworthy that, in the view of the European Court, "the existence of a violation is conceivable even in the absence of prejudice", and that to require proof that the lack of effective assistance prejudiced the applicant in interpreting article 6(3)(c) "would deprive it in large measure of its substance".[130]

Lastly, it is important to note that the available legal assistance must be "effective", and that consequently it is not sufficient for the purposes of complying with article 6(3)(c) that a legal counsel has been merely nominated.[131]

3.5.3 The right to privileged communications with one's lawyer

The right to privileged communications with one's lawyer was dealt with in section 6.4 of Chapter 6 concerning "The right to legal assistance". This right is of course also applicable at the stage of trial and appeal proceedings, during which the accused must be ensured adequate time and facilities for consulting with his or her lawyer confidentially.

Everyone has the right to defend himself or herself in person or to appoint a lawyer of his or her own choice in order to ensure an efficient defence.

The right to legal assistance must be effectively available, in particular in capital punishment cases. The domestic courts have a duty to ensure that the accused enjoys an effective defence.

***Incommunicado** detention violates the right to effective access to one's lawyer.*

[129] *Eur. Court HR, Case of Pakelli v. Federal Republic of Germany, judgment of 25 April 1983, Series A, No. 64*, p. 18, para. 39.

[130] *Eur. Court HR, Case of Artico v. Italy, judgment of 13 May 1980, Series A, No. 37*, para. 35 at p. 18.

[131] Ibid., para. 33 at p. 16.

If lacking sufficient means to pay for a lawyer, and if the interests of justice so require, a person accused of a criminal offence has the right to free legal aid. The interests of justice relate to such aspects as the severity of the crimes and potential sentence that might be imposed and the complexity of the case.

The accused must have adequate time and facilities to communicate with his or her legal counsel. Their communications are privileged and must be confidential.

3.6 The right to be present at one's trial

Article 14(3)(d) of the Covenant on Civil and Political Rights, and articles 20(4)(d) and 21(4)(d) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide that everyone has the right to "be tried in his [or her] presence". Where the State party has failed to substantiate its denial of the alleged violation of this right by, for instance, submitting a copy of the trial transcript, the Committee has concluded that this right has been violated.[132]

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While article 6(1) of the European Convention on Human Rights does not expressly mention a person's right to participate in his or her trial, the European Court of Human Rights has held that the existence of this right is "shown by the 'object and purpose of the article taken as a whole'".[133] Where there was no evidence that the applicant had intended to waive his right to participate in his trial and where, inter alia, the President of the Savona Regional Court had not sought to notify him in person of the summons to appear before his court so that he was tried *in absentia*, it found that the trial had not been fair within the meaning of article 6(1) of the Convention.[134]

3.6.1 *Trials* in absentia

Although the international monitoring organs have not yet developed any theory around trials *in absentia*, it appears that they might accept that such trials may be held in special circumstances. This is at least clear with regard to the International Covenant on Civil and Political Rights, from the Committee's General Comment No. 13 on article 14, which states that "when exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary".[135] Consequently, while such trials do not ipso facto constitute a violation of article 14 of the Covenant, the basic requirements of a fair trial must be maintained; a trial *in absentia* is thus only compatible with article 14 when the accused has been

[132] Communication No. 289/1988, *D. Wolf v. Panama* (Views adopted on 26 March 1992), in UN doc. *GAOR*, A/47/40, p. 289, para. 6.5.

[133] *Eur. Court HR, Brozicek Case v. Italy, judgment of 19 December 1989, Series A, No. 167*, p. 19, para. 45.

[134] Ibid., p. 19, paras. 45-46.

[135] *United Nations Compilation of General Comments*, p. 125, para. 11.

summoned "in a timely manner and informed of the proceedings against him" and the State party itself "must" in such cases show that the principles of a fair trial were respected.[136] Where the State party merely "assumed" that the author had been summoned in a timely manner, the Committee considered that this was "clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused *in absentia*"; it was "incumbent on the court that tried the case to verify that the author had been informed of the pending case before the proceeding to hold the trial" in his absence, but, failing any evidence that the court did so, the Committee concluded "that the author's right to be tried in his presence was violated".[137]

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As noted above, the European Court of Human Rights has emphasized that "the object and purpose" of article 6 of the European Convention "taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing".[138] In the case of *Colozza and Rubinat*, the Italian authorities had held a trial by default since they were unable to trace the applicant who had moved without leaving his address. He was eventually classified as a *latinante*, i.e. a person who is wilfully evading the execution of a warrant issued by a court. A court-appointed lawyer failed to appear at the trial, which had to be postponed, a procedure repeated since the second court-appointed lawyer also failed to appear. The trial was eventually concluded after the court had appointed, during the sitting, another official defence lawyer. The applicant was convicted and sentenced to six years' imprisonment. A few months later he was arrested at his home in Rome. He filed a "late appeal" that was dismissed. The European Court agreed with the Government that

> "the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice. However, in the circumstances of the case, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' who is in Mr. Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge."[139]

The Court importantly added that "the resources available under domestic law must be shown to be effective and a person 'charged with a criminal offence' who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*".[140]

[136] Communication No. 699/1996, *A. Maleki v. Italy* (Views adopted on 15 July 1999), in UN doc. *GAOR*, A/54/40 (vol. II), p. 183, paras. 9.2-9.3.

[137] Ibid., pp. 183-184, para. 9.4.

[138] *Eur. Court HR, Case of Colozza v. Italy, judgment of 12 February 1985, Series A, No. 89*, p. 14, para. 27.

[139] Ibid., p. 15, para. 29.

[140] Ibid., para. 30 at p. 16.

An accused person has the right to be present at his or her trial. Trials in absentia may be acceptable in special circumstances but must preserve the rights of an effective defence. Once an accused who has not wilfully tried to avoid justice is aware of the proceedings, he or she should be entitled to a new determination of the merits of the charge.

3.7 The right not to be compelled to testify against oneself or to confess guilt

The prohibition on self-incrimination was dealt with in subsection 6.5 of Chapter 6 in view of its specific importance during criminal investigations. However, the right not to be compelled to testify against oneself does of course remain equally valid throughout the judicial proceedings. It is recalled that article 14(3)(g) of the International Covenant provides that "in the determination of any criminal charge against him", every person has the right "not to be compelled to testify against himself or to confess guilt". According to article 8(2)(g) of the American Convention, everyone has "the right not to be compelled to be a witness against himself or to plead guilty", and article 8(3) further specifies that "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind". While the African Charter and the European Convention contain no similar provision, both article 55(1)(a) of the Statute of the International Criminal Court and articles 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia contain protection against self-incrimination.

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In its General Comment No. 13 on article 14 of the International Covenant, the Human Rights Committee stated that, in considering this safeguard contained in subparagraph (3)(g), articles 7 and 10(1) of the Covenant "should be borne in mind",[141] these articles respectively outlawing torture and other cruel, inhuman or degrading treatment and stipulating that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". As emphasized by the Committee, "in order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should", however, "require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable".[142] Moreover, "judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution".[143] It is recalled in this respect that Guideline 16 of the Guidelines on the Role of Prosecutors also provides that prosecutors shall refuse evidence that has been obtained by recourse to unlawful methods.[144]

[141] *United Nations Compilation of General Comments*, p. 125, para. 14.

[142] Ibid., loc. cit.

[143] Ibid., para. 15.

[144] See Principle 16 quoted *in extenso* in Chapter 6 above, subsection 6.2.

The Committee has further held that the guarantee "that no one shall be 'compelled to testify against himself or to confess guilt', must be understood in terms of ***the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt***".[145] The Committee has thus found violations of article 14(3)(g) in cases where the persons accused have been compelled to sign statements incriminating themselves,[146] or where attempts have been made – including through recourse to torture or duress – to compel them to do so.[147]

However, where various issues relating to alleged self-incrimination under duress have not been brought to the attention of the trial judge either by the author himself or his privately retained lawyer, the Committee has concluded that the State party could not be held responsible under article 14(1) [*sic*] for the purportedly negative outcome of this failure.[148]

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With regard to article 8(3) of the American Convention on Human Rights, the American Court of Human Rights found in the case of *Castillo Petrzzi et al.* that it had not been proven that this provision had been violated. Although it was clear that the accused "were urged to tell the truth" during the preliminary testimony before the Judge of the Special Military Court of Inquiry, nothing in the record suggested "that any punishment or other adverse legal consequence was threatened if they did not tell the truth"; nor was there "any evidence to suggest that the accused were required to testify under oath or to swear to tell the truth, either of which would have violated their right to choose between testifying and not testifying".[149]

3.7.1 Prohibition on the use of evidence obtained through unlawful means/treatment

In Chapter 6 reference was made to Guideline 16 of the Guidelines on the Role of Prosecutors, according to which prosecutors shall refuse to use evidence which they "know or believe on reasonable grounds" to have been "obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights", in particular when such methods have involved recourse to torture or other human rights abuses.

[145]Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 28, para. 11.7; emphasis added.

[146]Communication No. R.12/52, *S. R. López Burgos v. Uruguay* (Views adopted on 29 July 1981), in UN doc. *GAOR*, A/36/40, p. 183, para. 13; and Communication No. R.18/73, *M. A. Teti Izquierdo v. Uruguay* (Views adopted on 1 April 1982), in UN doc. *GAOR*, p. 186, para. 9.

[147]Communication No. 74/1980, *M. A. Estrella v. Uruguay* (Views adopted on 29 March 1983), in UN doc. *GAOR*, A/38/40, p. 159, para. 10; and Communication No. 328/1988, *R. Z. Blanco v. Nicaragua* (Views adopted on 20 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 18, para. 10.4.

[148]Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 27, para. 11.3.

[149]*I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 210, paras. 167-168.

Other pertinent international provisions on this issue are to be found in article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 10 of the American Convention to Prevent and Punish Torture. The former provides that "each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". With a similar proviso, the latter provision also declares inadmissible, "as evidence in a legal proceeding", evidence obtained through torture.

Article 69(7) of the Statute of the International Criminal Court is drafted in less categorical terms in that "evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

> (a) The violation casts substantial doubt on the reliability of the evidence; or
>
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

It is not yet possible to know how this provision will be interpreted by the International Criminal Court, but it would in any event appear to provide a possibility for it to consider evidence obtained by unlawful means, provided there was no doubt as to the reliability of such evidence and its admission would not be "antithetical to" the integrity of the proceedings. In the light of the clear statements elsewhere, inter alia in article 15 of the Convention against Torture, it might, however, be presumed that evidence obtained by torture would be an example *par excellence* of evidence that is unreliable, the use of which would indeed be antithetical to the integrity of the proceedings.

Lastly, it is important to note in this context that the Human Rights Committee has stated that "it is important for the discouragement of violations under article 7 [of the International Covenant] ***that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment***".[150]

> *The right of an accused not to be compelled to testify against himself or herself remains valid throughout the trial proceedings. It means that there must be an absence of both direct and indirect physical or psychological pressure from the investigating authorities for the purposes of obtaining a confession. An accused who has confessed guilt after such undue pressure must bring the matter before the competent authorities, including the judge(s) in the trial court, failing which he or she runs the risk of not having this undue compulsion considered in connection with the determination of the criminal charge.*

[150] See General Comment No. 20, in *United Nations Compilation of General Comments*, p. 141, para. 12; emphasis added.

Judges and prosecutors must be attentive to any sign of unlawful compulsion related to confessions and are not allowed to invoke such confessions against the accused.

The use of evidence and confessions obtained by torture is unlawful and should be expressly prohibited by national law.

3.8 The right to call, examine, or have examined, witnesses

Article 14(3)(e) of the International Covenant provides that, in the determination of any criminal charge against him, everyone shall be entitled 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". Article 6(3)(d) of the European Convention on Human Rights contains an identically worded provision, while article 8(2)(f) of the American Convention on Human Rights contains the "right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts". Article 20(4)(e) and article 21(4)(e) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both also have wording similar to the International Covenant in this respect.

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According to the Human Rights Committee, article 14(3)(e) "does not provide an unlimited right to obtain the attendance of witnesses requested by the accused or his counsel", and where there is no evidence that the court's refusal to call a certain witness does not violate the principle of equality of arms – for instance, if the evidence is not part of the case under consideration – there has been no violation of article 14(3)(e).[151]

As to the question whether the State party can be held responsible for a defence lawyer's failure to call witnesses, the Committee has held that it "cannot be held accountable for alleged errors made by [the lawyer] ***unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice".***[152]

In a case where it was "uncontested that no effort was made to have three potential alibi witnesses testify on the author's behalf during the trial", the Committee noted that it was "not apparent from the material before [it] and the trial transcript that counsel's decision not to call witnesses was not made in the exercise of his professional judgement". In these circumstances, the failure to examine witnesses on the author's

[151]Communication No. 237/1987, *D. Gordon v. Jamaica* (Views adopted on 5 November 1992), in doc. *GAOR*, A/48/40 (vol. II), p. 10, para. 6.3.

[152]Communication No. 610/1995*, Henry v. Jamaica* (Views adopted on 20 October 1998), in UN doc. *GAOR*, A/54/40 (vol. II), p. 50, para. 7.4; emphasis added.

behalf could not be attributed to the State party and there was no violation of article 14(3)(e).[153]

In general, it can be said that, where (1) there is no indication that either the author or his or her legal counsel has complained to the trial judge that the time or facilities for the preparation of the defence have been inadequate, and (2) there is no evidence "that counsel's decision not to call witnesses was not in the exercise of his professional judgement, or that, if a request to call witnesses was made, the judge disallowed it", the Committee is reluctant to conclude that either article 14(3)(b) or (e) has been violated.[154]

The case of Reid

In the case of *Reid*, the State party had "not denied the author's claim that the court failed to grant counsel sufficient minimum time to prepare his examination of witnesses" and the Committee thus found a violation of article 14(3)(e). The author had alleged that the legal aid attorney was only assigned to him on the day his trial opened and that the trial judge refused a postponement to enable the lawyer to discuss the case with his client; according to the author, the lawyer "was wholly unprepared" and had told him "that he did not know which questions to pose to the witnesses".[155]

Article 14(3)(e) and (5) of the Covenant was also violated in a case where the domestic court had refused "to order expert testimony of crucial importance to the case".[156]

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Invoking the case-law of the European Court of Human Rights, the Inter-American Court of Human Rights has held that "one of the prerogatives of the accused must be the opportunity 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".[157] Thus, in the case of *Castillo Petruzzi et al.*, article 8(2)(f) of the American Convention was violated since the law applied in the legal proceedings concerned "did not allow cross-examination of the witnesses whose testimony was the basis for the charges brought against the alleged victims. The problem created by disallowing cross-examination of the police and military agents was

[153]Communication No. 615/1995, *B. Young v. Jamaica* (Views adopted on 4 November 1997), in UN doc. *GAOR*, A/53/40 (vol. II), pp. 74-75, para. 5.5.

[154]Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), pp. 88-89, para. 8.1.

[155]Communication No. 250/1987, *C. Reid v. Jamaica* (Views adopted on 20 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 91, para. 11.3 as read in conjunction with p. 87, para. 4.

[156]Communication No. 480/1991, *J. L. García Fuenzalida v. Ecuador* (Views adopted on 12 July 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 55, para. 9.5.

[157]I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52, p. 205, para. 154; for the European case-law see *Eur. Court HR, case of Barberà, Messegué and Jabardo, judgment of 6 December 1998, Series A, No. 146* and *Eur. Court HR, Bönisch case, judgment of 6 May 1985, Series 92.*

compounded ... by the fact that the suspects were not allowed the advice of counsel until they had made their statements to the police", a situation that "left the defence attorneys with no means to refute the evidence compiled and on record in the police investigation report".[158]

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With regard to article 6(3)(d) of the European Convention on Human Rights, the European Court held in the *Delta* case that

> "In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings...".[159]

Consequently, in the *Delta* case, where the applicant was convicted on the basis of testimony given by witnesses at the police-investigation stage whose credibility neither the applicant nor his legal counsel had been able to challenge, the European Court found a violation of the right to a fair trial in article 6(1) and (3)(d) of the Convention.[160]

The case of Unterpertinger

In the case of *Unterpertinger*, the applicant had been convicted of causing bodily harm to his step-daughter and former wife in two separate incidents. Both victims refused to give evidence in court although their statements were read out during the trial. The European Court observed that, although the reading out of their statements was not inconsistent with article 6(1) and (3)(d) of the Convention, "the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of article 6 to protect". This was especially so since the applicant had "not had an opportunity at any stage in the earlier proceedings to question the persons whose statements [were] read out at the hearing".[161] Since the applicant was prevented from having his former wife and step-daughter examined, or from having them examined on their statements in order to challenge their credibility, and given that the Court of Appeal treated their statements "as proof of the truth of the accusations made by the women", the applicant did not have a fair trial and there was a breach of both article 6(1) and 3(d) of the Convention.[162]

[158] *I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 205, paras. 153 and 156.

[159] *Eur. Court HR, Delta Case v. France, judgment of 19 December 1990, Series A, No. 191-A*, p. 16, para. 36.

[160] Ibid., para. 37.

[161] *Eur. Court HR, Case of Unterpertinger v. Austria, judgment of 24 November 1986, Series A, No. 110*, pp. 14-15, para. 31.

[162] Ibid., p. 15, paras. 32-33.

However, where the reading out of witness statements did not constitute the only item of evidence on which the national court based its decision, the Court has found that the applicant was not deprived of a fair trial contrary to article 6(1) and (3)(d) taken together.[163]

It is noteworthy that, according to the jurisprudence of the European Court, the term "witness" in article 6(3)(d) is "to be given an autonomous interpretation", and can thus also comprise, for instance, statements given to police officers by people who do not give "direct evidence" in court.[164]

An accused person has the right to call and examine or have examined witnesses against him or her under the same conditions as the prosecution. Consequently, in order to guarantee a fair trial the domestic court must provide for the possibility of adversarial questioning of witnesses.

The right to call witnesses does not mean that an unlimited number of witnesses may be called. Witnesses to be called must be likely to be relevant to the case.

Domestic courts must give the accused and his or her lawyer adequate time to prepare for the questioning of witnesses.

The national judge must be attentive to manifest deficiencies in the defence lawyer's professional conduct, and, where necessary, intervene in order to ensure the right to a fair trial, including equality of arms.

3.8.1 Anonymous witnesses

The issue of anonymous witnesses is not regulated in the human rights treaties considered in this Manual, but Rule 69 of the Rules of Procedure and Evidence of the International Criminal Tribunals for Rwanda and for the former Yugoslavia deals with "Protection of Victims and Witnesses". In the case of the Rwanda Tribunal, Rule 69 reads:

> "(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit.
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence."

[163] *Eur. Court HR, Asch Case v. Austria, judgment of 26 April 1991, Series A, No. 203*, p. 11, paras. 30-31.

[164] See e.g. *Eur. Court HR, Windisch Case v. Austria, judgment of 27 September 1990, Series A, No. 186*, pp. 9-10, para. 23.

Rule 69 of the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia is slightly differently worded:

> "(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
>
> (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Section.
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence."

Rule 75(A) of the Rules of Procedure of the Court for the former Yugoslavia concerns "Measures for the Protection of Victims and Witnesses", and allows a Judge or a Chamber "*proprio motu* or at the request of either party, or of the victims or witness concerned, or of the Victims and Witnesses Section [to] order appropriate measures for the ***privacy and protection*** of victims and witnesses, ***provided that the measures are consistent with the rights of the accused***" (emphasis added). Rule 75(A) of the Rwanda Court is almost identical, but instead refers to the ***"privacy and security"*** of the victims and witnesses (emphasis added). Paragraph (B) of Rule 75 in each case deals with measures that the Court may adopt *in camera* for the purpose of protecting the right to privacy and protection/security of the victims and witnesses. Such measures include:

- the deletion of names and identifying information from the Chamber's/Tribunal's public records;
- the non-disclosure to the public of any records identifying the victim;
- the giving of testimony through image- or voice- altering devices or closed-circuit television;
- the assignment of a pseudonym;
- closed sessions; and
- appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed-circuit television.

As can be seen from the Rules of Procedure of these two Tribunals, the guiding principle is that measures for the protection of victims and witnesses must be "consistent with the rights of the accused", and that, to this end, they do not foresee permanent anonymity either of victims or of witnesses as between the parties themselves, their identity having to be disclosed in sufficient time prior to the trial to allow adequate time for the preparation of the trial. The approach adopted by the International Criminal Tribunals provides an interesting solution to difficult problems of security, while at the same time safeguarding to right to an effective defence.

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Recourse to anonymous witnesses was to the fore in the case of *Kostovski* examined under article 6(1) and (3)(d) of the European Convention on Human Rights, where two such witnesses had been heard by the police and, in one case, also by the examining magistrate, but were not heard at the applicant's trials. Not only were the witnesses "not heard at the trials but also their declarations were taken ... in the absence of Mr Kostovski and his counsel" and, therefore, "at no stage could they be questioned by him or on his behalf".[165] The defence had, inter alia, the possibility of submitting written questions "indirectly through the examining magistrate", but "the nature and scope of the questions it could put ... were considerably restricted by reason of the decision that the anonymity of the authors of the statements should be preserved".[166] This fact "compounded the difficulties facing the applicant", because, "if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable". In the view of the European Court, "the dangers inherent in such a situation are obvious".[167]

Another aspect was that "each of the trial courts was precluded by the absence of the said anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability".[168] The applicant, who had a long criminal record, was convicted of holding up a bank, and the Government defended the use of anonymous witnesses by citing the need to balance the interests of society, the accused and the witnesses themselves, in view of the increasing frequency of intimidation of witnesses in the Netherlands. In this particular case, the authors of the statements on which the applicant's conviction was based "had good reason to fear reprisals".[169]

Although the Court admitted that the Government's line of argument was "not without force", it was "not decisive", and it went on to make the following statement, which merits quoting *in extenso*:

> "Although the growth in organized crime doubtless demands the introduction of appropriate measures, the Government's submissions appear to the Court to lay insufficient weight on what the applicant's counsel described as 'the interest of everybody in a civilised society in a controllable and fair judicial procedure'. The right to a fair administration of justice holds so prominent a place in a democratic society ... that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the Government accepted that the applicant's conviction was based 'to a decisive extent' on the anonymous statements."[170]

[165] *Eur. Court HR, Kostovski Case v. the Netherlands, judgment of 20 November 1989, Series A, No. 166*, p. 20, para. 42.

[166] Ibid., loc. cit.

[167] Ibid.

[168] Ibid., para. 43.

[169] Ibid., p. 21, para. 44.

[170] Ibid., loc. cit.

It followed that article 6(3)(d) taken together with article 6(1) of the European Convention had been violated in this case.

Testimony of anonymous victims and witnesses during trial is unlawful, but can in exceptional cases be used in the course of criminal investigations. The identity of anonymous victims and witnesses must be disclosed in sufficient time prior to the beginning of the court proceedings to ensure a fair trial.

3.9 The right to free assistance of an interpreter

According to article 14(3)(f) of the Covenant and article 6(3)(e) of the European Convention, everyone shall be entitled to "have the free assistance of an interpreter if he cannot understand or speak the language used in court". Article 8(2)(a) of the American Convention guarantees "the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court". Articles 20(4)(f) and 21(4)(f) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia also provide for the right to "free assistance of an interpreter" of an accused not understanding or speaking the language of these Tribunals.

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In the words of the Human Rights Committee, the free assistance of an interpreter is a right that is "of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence" and it is moreover a right that "is independent of the outcome of the proceedings and applies to aliens as well as to nationals".[171] However, the services of an interpreter must be available only "if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language".[172] It is not a violation of article 14 that the States parties make provision for the use of only *one* official court language, and the requirement of a fair hearing does not "mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language".[173]

It follows that neither the right to a fair trial in article 14 nor article 14(3)(f) had been violated where a French citizen of Breton mother tongue, but who also spoke French, was refused the services of an interpreter during court proceedings against him in France. In this case, the author had "not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French".[174] The

[171] General Comment No. 13 (Article 14), in *United Nations Compilation of General Comments*, p. 125, para. 13.

[172] Communication No. 219/1986, *D. Guesdon v. France* (Views adopted on 25 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 67, para. 10.2.

[173] Ibid., loc. cit.

[174] Ibid., para. 10.3.

Committee explained that the right to a fair trial in article 14(1) as read in conjunction with article 14(3)(f) of the Covenant "does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease"; on the contrary, "if the court is certain", as it was in this case, "that the accused is sufficiently proficient in the court's language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language".[175]

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The European Court of Human Rights has held with regard to article 6(3)(e) of the European Convention that the term "free" denotes "once and for all exemption or exoneration".[176] In its view, "it would run counter not only to the ordinary meaning of [the term] free", but also "to the object and purpose" of article 6, and in particular of article 6(3)(e), "if this latter paragraph were to be reduced to the guarantee of a right to provisional exemption from payment – not preventing the domestic courts from making a convicted person bear the interpretation costs –, since the right to a fair trial which Article 6 seeks to safeguard would itself be adversely affected".[177] Article 6(3)(e) as construed in the context of the right to a fair trial as guaranteed by article 6(1), consequently

> "signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial".[178]

Consequently, where the courts of the Federal Republic of Germany had attributed the costs of the interpretation to the applicants, article 6(3)(e) of the Convention was found to have been violated.[179]

An accused person not able to speak and understand the language used by the authorities in the course of the criminal proceedings against him or her has the right to free interpretation and translation of all documents in these proceedings. This right is independent of the final outcome of the trial.

[175] Ibid., loc. cit.

[176] *Eur. Court HR, Case of Luedicke, Belkacem and Koç, judgment of 28 November 1978, Series A, No. 29*, para. 40 at p. 17.

[177] Ibid., para. 42 at p. 18.

[178] Ibid., p. 20, para. 48.

[179] Ibid., pp. 20-21, paras. 49-50.

3.10 The right to a reasoned judgement

Although not expressly mentioned in the four main human rights treaties, the right to a reasoned judgement is inherent in the provisions regarding a "fair trial", including the right to a public judgement. Article 22(2) and article 23(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both stipulate that the judgements of these Tribunals "shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended". According to article 74(5) of the Statute of the International Criminal Court, the decisions of the Trial Chamber "shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's finding on the evidence and conclusions".

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The Human Rights Committee has examined numerous complaints concerning the failure of courts to issue a reasoned judgement. These complaints have been examined under article 14(3)(c) and (5) of the Covenant, which "are to be read together, so that the right to review of conviction and sentence must be made available without delay". According to the Committee's case-law under article 14(5),

> "a convicted person is entitled to have, ***within reasonable time, access to written judgements, duly reasoned, for all instances of appeal*** in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law".[180]

In the case of *Francis*, for instance, where the author had received a death sentence, the Court of Appeal had failed to issue a written judgement more than nine years after it dismissed his appeal, a delay that quite evidently was not reasonable and violated article 14(3)(c) and (5) of the Covenant.[181] The delay in the submission of written judgements has in many cases implied that prisoners in Jamaica have not been able to pursue their right to appeal to the Privy Council.

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According to the established case-law of the European Court of Human Rights, which reflects "a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based". However, the "extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case".[182] Furthermore, although article 6(1) of the European Convention on Human Rights "obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument".[183]

[180] Communication No. 320/1988, *V. Francis v. Jamaica* (Views adopted on 24 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 66, para. 12.2; emphasis added.

[181] Ibid., loc. cit. See also e.g. Communication No. 282/1988, *L. Smith v. Jamaica* (Views adopted on 31 March 1993), ibid., p. 35, para. 10.5.

[182] *Eur. Court HR, Case of García Ruiz v. Spain, judgment of 21 January 1999, Reports 1999-I*, p. 97, para. 26.

[183] Ibid., para. 26 at p. 98.

Consequently, a court may thus, "in dismissing an appeal, ... simply endorse the reasons for the lower court's decision".[184] In the case of *García Ruiz*, the applicant complained that the Madrid *Audiencia Provincial* failed to give him any reply to his arguments. However, the European Court noted that the applicant "had the benefit of adversarial proceedings" and that, at the various stages of those proceedings "he was able to submit the arguments he considered relevant to his case"; thus both the "factual and legal reasons for the first-instance decision dismissing his claim were set out at length".[185] As to the judgement on appeal of the *Audiencia Provincial*, it "endorsed the statement of the facts and the legal reasoning set out in the judgment at first instance in so far as they did not conflict with its own findings" and, consequently, the applicant could not "validly argue that this judgment lacked reasons, even though in the present case a more substantial statement of reasons might have been desirable".[186]

In a case that was examined under article 6(1) and (3)(b) of the European Convention on Human Rights, the applicant complained that he did not have available a copy of the complete written judgement of the first-instance court at the time when he had to decide whether or not to lodge an appeal. The European Court of Human Rights concluded that this failure did not violate the Convention. A copy of the judgement in abridged form was available for inspection at the registry of the Regional Court, and a copy would have been made available to the defence had it so requested; at least the operative part of the judgement was read out in public in the presence of the applicant's defence counsel. The Court expressed no views on the practice as such in the Netherlands with regard to judgements in abridged form which would be supplemented with an elaborated version only if an appeal was lodged. In the circumstances of the present case it concluded basically that the issues on which the applicant based his defence were addressed in the judgement in its abridged form (a fact that the applicant had not denied) and that it could not therefore be said that the applicant's defence rights had been "unduly affected by the absence of a complete judgment".[187]

3.10.1 The lack of a reasoned judgement and capital punishment cases

The Human Rights Committee has consistently affirmed "that in all cases, and especially in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of the judicial proceedings may turn out to be",[188] and, as seen above, where the lack of a reasoned judgement had prevented the author from proceeding with his appeal, article 14(3)(c) and (5) was found to have been violated. The violation of these provisions has the further consequence of violating the right to life as protected by article 6 of the Covenant, since, according to General Comment No. 6, it follows from the express terms of article 6 that the death penalty

[184] Ibid., loc. cit.

[185] Ibid., p. 99, para. 29.

[186] Ibid., loc. cit.

[187] *Eur. Court HR, Case of Zoon v. the Netherlands, judgment of 7 December 2000,* paras. 39-51 of the text of the judgment as published on the Court's web-site: http://www.echr.coe.int/.

[188] Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 89, para. 8.3.

> "... can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence."[189]

Consequently, where "the final sentence of death" has been "passed without having met the requirements" of article 14, there is also a violation of article 6 of the Covenant, which provides in its second paragraph that a sentence of death may not be imposed "contrary to the provisions of the present Covenant".[190]

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The African Commission on Human and Peoples' Rights has likewise held that the execution of 24 soldiers constituted an "arbitrary deprivation" of their right to life as guaranteed by article 4 of the African Charter on Human and Peoples' Rights, since their trial had violated the due process guarantees laid down by article 7(1)(a) of the Charter.[191]

Courts must at all times give reasons for their decisions, although they may not have to answer each argument made by the accused.

The convicted person is entitled to receive a reasoned judgement within a reasonable time; such judgement is essential for the purpose of lodging appeals.

The strict enforcement of these rights is particularly important in capital punishment cases.

3.11 Freedom from ex post facto laws/ The principle of *nullum crimen sine lege*

Article 15(1) of the International Covenant, article 7(2) of the African Charter, article 9 of the American Convention, article 7(1) of the European Convention and article 22 of the Statute of the International Criminal Court all guarantee – in slightly different terms – the right not to be held guilty on account of any act or omission that did not constitute a criminal offence at the time it was committed. Article 15(1) of the Covenant and article 7(1) of the European Convention refer to "national and international law" in this respect, while article 9 of the American Convention speaks

[189] *United Nations Compilation of General Comments*, pp. 115-116, para. 7. See also Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 89, para. 8.4.

[190] Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 89, para. 8.4.

[191] *ACHPR, Forum of Conscience (on behalf of 24 soldiers) v. Sierra Leone, Communication No. 223/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000*, para. 19 of the text of the decision published at http://www1.umn.edu/humanrts/africa/comcases/223-98.html.

only of "the applicable law". Article 22 of the Statute of the International Criminal Court relates to crimes "within the jurisdiction of the Court".

The prohibition on retroactivity of criminal law is fundamental in a society governed by the rule of law, one aspect of which is to ensure ***legal predictability or foreseeability,*** and thus, legal security for individuals. Experience shows that, in the course of severe crisis situations, there has often been a temptation to penalize certain behaviour retroactively, but, as can be seen in article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention, the right to freedom from ex post facto laws has been made non-derogable, and must therefore apply with full force even in the direst of emergencies.

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The Human Rights Committee found a violation of article 15(1) of the Covenant in a case where the author had been sentenced to eight years' imprisonment for "subversive association", although the acts concerned were lawful when committed.[192]

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In the case of *Media Rights Agenda and Others* against Nigeria, the African Commission on Human and Peoples' Rights had to consider the compatibility of Newspaper Decree No. 43 of 1993 with article 7(2) of the African Charter. This Decree, which had retroactive effect, inter alia made it an offence punishable with a heavy fine and/or a long term of imprisonment for a person to own, publish or print a newspaper not registered under the Decree. The Commission condemned "the literal, minimalist interpretation" of the Charter provided by the Government, which had argued that there had been no violation of article 7(2) since the retroactive aspect of the Decree had not been enforced. In the view of the Commission, however, article 7(2)

> "... must be read to prohibit not only condemnation and infliction of punishment for acts which did not constitute crimes at the time they were committed, but retroactivity itself. It is expected that citizens must take the laws seriously. If laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal. For a law-abiding citizen, this is a terrible uncertainty, regardless of the likelihood of eventual punishment."[193]

[192] Communication No. R.7/28, *I. Weinberger v. Uruguay* (Views adopted on 29 October 1980), in UN doc. *GAOR*, A/36/40, p. 119, para. 16.

[193] *ACHPR, Media Rights Agenda and Others v. Nigeria, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998*, paras. 58-59 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152_96.html.

The Commission added, furthermore, that "unfortunately" it could not be totally confident that no person or newspaper had as yet suffered under the retroactivity of Decree No. 43. In its view potential "prosecution is a serious threat" and "an unjust but un-enforced law undermines ... the sanctity in which the law should be held". Consequently, Decree No. 43 violated article 7(2) of the African Charter.[194]

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The European Court has dealt with a number of varied cases under article 7(1). However, only the basic principles of the Court's interpretation of this article can be dealt with here. To the European Court, article 7(1) not only prohibits "the retrospective application of the criminal law to an accused's disadvantage" but also "embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), as well as the principle that the criminal law must not be extensively construed to an accused's detriment, for instance, by analogy".[195] This important qualification implies that "an offence must be clearly defined in law", a condition which is "satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable".[196] The Court has also held that, where new provisions of a Criminal Code had been applied to the *advantage* rather than the *detriment* of the accused person, article 7(1) of the Convention had not been violated.[197]

3.12 The principle of *ne bis in idem,* or prohibition of double jeopardy

Article 14(7) of the International Covenant contains the prohibition of double jeopardy, or the principle of *ne bis in idem*, according to which "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country". Article 8(4) of the American Convention guarantees this principle in the following words: "An accused person ***acquitted*** by a nonappealable judgement shall not be subjected to a new trial for the same cause" (emphasis added). Protocol No. 7 to the European Convention provides in its article 4(1) that "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". However, according to article 4(2) of the Protocol, these provisions "shall not prevent the re-opening of the case ... if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which would affect the outcome of the case". The principle of *ne bis in idem* is non-derogable under the European Convention (cf. art. 4(3) of Protocol No. 7).

[194] Ibid., para. 60.

[195] *Eur. Court HR, Case of Kokkinakis v. Greece, judgment of 25 May 1993, Series A, No. 260-A*, p. 22, para. 52.

[196] Ibid., loc. cit.

[197] *Eur. Court HR, Case of G. v. France, judgment of 27 September 1995, Series A, No. 325-B*, p. 38, paras. 24-26.

Lastly, articles 9 and 10 of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, as well as article 20 of the Statute of the International Criminal Court, also provide protection against double jeopardy for crimes within the jurisdiction of the respective courts. However, under the Statutes of the Tribunals for Rwanda and the former Yugoslavia, exceptions exist for persons having been tried by national courts for an act characterized as "an ordinary crime" rather than a "serious" violation of international humanitarian law and, further, if "the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted" (see art. 9(2) and art. 10(2) of the respective Statutes). Article 20(3) of the Statute of the International Criminal Court also provides for exceptions for such other court proceedings which had the "purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court", or if such proceedings were otherwise "not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

Article 14(7) of the Covenant – like the European Convention – only prohibits double jeopardy "with regard to an offence adjudicated in a given State"; it does not guarantee *ne bis in idem* "with regard to the national jurisdictions of two or more States".[198]

It is clear that, when a domestic appellate court has already quashed a second indictment, thus vindicating the principle of *ne bis in idem*, there has been no violation of, for instance, article 14(7) of the Covenant.[199]

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With regard to the principle of *ne bis in idem* as guaranteed by article 8(4) of the American Convention on Human Rights, the Inter-American Court of Human Rights has explained that it "is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause", but, unlike "the formula used by other international rights protection instruments, ... the American Convention uses the expression '*the same cause*', which is a much broader term in the victim's favour".[200] This means, for instance, that, if a person has been acquitted by military courts on charges of treason, it is contrary to article 8(4) of the Convention subsequently to try that person in the civil courts, on the same facts, albeit with a different qualification such as terrorism.[201] Indeed, in the case of *Loayza Tamayo*, the Court also held that the Decree Laws containing the crimes of "terrorism" and "treason" were in themselves contrary to article 8(4), since they referred "to actions not

[198] Communication No. 204/1986, *A. P. v. Italy* (Decision adopted on 2 November 1987), in UN doc. *GAOR*, A/43/40, p. 244, para. 7.3.

[199] Communication No. 277/1988, *Teran Jijón v. Ecuador* (Views adopted on 26 March 1992), *GAOR*, A/47/40, p. 272, para. 5.4.

[200] *I-A Court HR, Loayza Tamayo Case v. Peru, judgment of September 17, 1977*, OAS doc. OAS/Ser.L/V/III.39, doc. 5, *1997 Annual Report I-A Court HR*, p. 213, para. 66.

[201] Ibid., pp. 213-215, paras. 66-77.

strictly defined" which could be "interpreted similarly within both crimes" as was done in that particular case.[202] In other words, they gave rise to unacceptable legal insecurity.

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The principle of *ne bis in idem* in article 4 of Protocol No. 7 to the European Convention was violated in the case of *Gradinger*, concerning an applicant who had already been convicted by an Austrian Regional Court for causing death by negligence while driving his car. According to the Regional Court, which based itself on the Criminal Code, the applicant's alcohol level was not such that it would have constituted an aggravating factor.[203] However, the District Attorney disagreed with the conclusion and, invoking the Road Traffic Act, imposed a fine on the applicant "with two weeks' imprisonment in default, for driving under the influence of drink".[204] The European Court was of the view that, although the Criminal Code and the Road Traffic Act differed both as to "the designation of the offences" and "their nature and purpose", "the impugned decisions were based on the same conduct" thereby constituting a violation of the principle of *ne bis in idem*.[205]

In the case of *Oliveira*, however, the outcome was different. The applicant had been driving on a road covered with ice and snow when her car veered onto the other side of the road, hitting one car and colliding with a second car whose driver was seriously injured. A police magistrate subsequently convicted the applicant on the basis of Sections 31 and 32 of the Federal Road Traffic Act of "***failing to control her vehicle***, as she had not adapted her speed to the road conditions"; she was sentenced to a fine of 200 Swiss francs (CHF).[206] Subsequently, the District Attorney's Office issued a penal order fining the applicant CHF 2000 "for ***negligently causing physical injury***" contrary to article 125 of the Swiss Criminal Code; on appeal this fine was reduced to CHF 1,500, and, after deduction of the first fine of CHF 200, to CHF 1,300.[207] Before the European Court of Human Rights, the applicant complained of a violation of article 4 of Protocol No. 7, arguing that the same incident had led to her being convicted twice, first for failing to control her vehicle and then for negligently causing physical injury.[208]

In the view of the European Court this is "a typical example of a single act constituting various offences (*concours idéal d'infractions*)", and the "characteristic feature of this notion is that a single criminal act is split up in two separate offences"; in such cases "the greater penalty will usually absorb the lesser one".[209] In the view of the Court, however,

[202] Ibid., p. 213, para. 68.

[203] *Eur. Court HR, Case of Gradinger v. Austria, judgment of 23 October 1995, Series A, No. 328-C*, p. 66, para. 55.

[204] Ibid., p. 55, para. 9.

[205] Ibid., p. 66, para. 55.

[206] *Eur. Court HR, Case of Oliveira v. Switzerland, judgment of 30 July 1998, Reports 1998-V*, p. 1994, para. 10; emphasis added.

[207] Ibid., paras. 11-12; emphasis added.

[208] Ibid., p. 1996, para. 22.

[209] Ibid., p. 1998, para. 26.

> "there is nothing in that situation which infringes article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concours idéal d'infractions*) one criminal act constitutes two separate offences".[210]

The Court added, however, that it "would admittedly have been more consistent with the principles governing the proper administration of justice for sentence in respect of both offences, which resulted from the same criminal act, to have been passed by the same court in a single set of proceedings"; however, the fact that this was not done in this case was "irrelevant as regards compliance with" article 4 of Protocol No. 7, "since that provision does not preclude separate offences, even if they are part of a single act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater".[211] The *Oliveira* case was "therefore distinguishable from the case of Gradinger, ... in which two different courts came to inconsistent findings on the applicant's blood alcohol level".[212] There had not, consequently, been a violation of article 4 of protocol No. 7 in this case.

Everyone has the right not to be convicted for conduct that did not constitute a criminal offence at the time it was committed. This right applies ***at all times*** *and can never be derogated from.*

The prohibition of ex post facto laws is essential in order to ensure ***legal predictability****, which means that laws must be clear enough to guide the conduct of the individual, who must be able to know, possibly with some legal help, what conduct is criminal and what is not.*

The right not to be tried twice for the same criminal offence is guaranteed by international law, as a minimum within one and the same State. In Europe, the principle of ne bis in idem does not rule out a person's being tried for separate offences originating in a single criminal act.

[210] Ibid., loc. cit.

[211] Ibid., para. 27.

[212] Ibid., para. 28. For other cases concerning the principle of *ne bis in idem* see e.g. *Eur. Court HR, Case of Franz Fischer v. Austria, judgment of 29 May 2001*; for the text see http://hudoc.echr.coe.int; and *Eur. Court HR, Ponsetti and Chesnel v. France, decision of 14 September 1999, Reports 1999-VI.*

4. Limits on Punishment

4.1 The right to benefit from a lighter penalty

Article 15(1) of the International Covenant and article 9 of the American Convention outlaw the imposition of a penalty heavier than the one that was applicable at the time when the criminal offence was committed, and provide that if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit therefrom. These provisions cannot be derogated from even in public emergencies (cf. article 4(2) of the International Covenant and article 27(2) of the American Convention). The African Charter is silent on these questions, while article 7(1) of the European Convention is limited to the proscription of recourse to penalties that are heavier than those applicable at the time the crime was committed; this provision too is non-derogable (cf. art. 15(2) of the European Convention).

The question of preventive measures: The case of Welch

The case of *Welch* was examined under article 7(1) of the European Convention and concerned an applicant who had received a long prison sentence for drug offences and who, in addition, had been the subject of a confiscation order based on a law that had entered into force *after* the commission of the offences concerned. Failure to pay the money would have made the applicant liable to serve a consecutive sentence of two years' imprisonment. Recalling that the term "penalty" is an "autonomous" notion under the Convention and "looking behind appearances to the realities of the situation", the European Court concluded that article 7(1) had been violated in this case, since "the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted".[213] This conclusion did not mean that the Court opposed the recourse to severe confiscatory measures "in the fight against the scourge of drug trafficking", only that it stigmatized the ***retroactive*** application thereof.[214]

4.2 Consistency with international legal standards

Other limits on the right to impose penalties in connection with criminal convictions flow from the terms of international human rights law in general, and concern, most particularly, the prohibition on corporal punishment and the severe restrictions on, and outlawing of, recourse to capital punishment.

[213] *Eur. Court HR, Case of Welch v. the United Kingdom, judgment of 9 February 1995, Series A, No. 307-A,* p. 14, para. 35.

[214] Ibid., pp. 14-15, para. 36.

4.2.1 Corporal punishment

It will be recalled that inter alia article 7 of the International Covenant, article 5 of the African Charter, article 5(2) of the American Convention and article 3 of the European Convention all outlaw recourse to torture, cruel and/or inhuman or degrading treatment or ***punishment***. This prohibition is valid at all times and allows for no limitations.

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The Human Rights Committee has observed that the prohibition in article 7 "relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim" and that, moreover,

> ***"the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure".***[215]

It is not clear, however, what the Committee here means by "excessive chastisement"; but to judge from the Committee members' questions and recommendations to the States parties in connection with consideration of the periodic reports, they regard the use of corporal punishment as an inappropriate form of chastisement that is contrary to article 7 and should be abolished.[216]

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The case of *Tyrer* brought under the European Convention on Human Rights concerned the imposition of three strokes with a cane on an adolescent, a punishment ordered by a juvenile court in the Isle of Man. The caning "raised, but did not cut, the applicant's skin and he was sore for about a week and a half afterwards".[217] The European Court concluded that "the element of humiliation attained the level inherent in the notion of 'degrading punishment'" and was therefore contrary to article 3 of the European Convention.[218] The Court expressed its view on judicial corporal punishment in the following terms:

> "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. ... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power

[215] General Comment No. 20 (Art. 7) , *United Nations Compilation of General Comments*, p. 139, para. 5; emphasis added.

[216] See recommendations as to the Jamaican Flogging Regulation Act, 1903 and the Jamaican Crime (Prevention of) Act, 1942, *GAOR*, A/53/40 (vol. I), p. 17, para. 83; as to flogging, amputation and stoning in the Sudan, see ibid., p. 23, para. 120. See also questions asked with regard to Australia, in UN doc. *GAOR*, A/38/40, p. 29, para. 144; and, as to Saint Vincent and the Grenadines, *GAOR*, A/45/40 (vol. I), p. 61, para. 280.

[217] *Eur. Court HR, Case of Tyrer v. the United Kingdom, judgment of 25 April 1978, Series A, No. 26*, p. 7, para. 10.

[218] Ibid., p. 17, para. 35.

> of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity."[219]

4.2.2 Capital punishment

In international human rights law, recourse to capital punishment is surrounded by numerous safeguards aimed at limiting and eventually abolishing its use. For instance, article 6(2) of the International Covenant on Civil and Political Rights allows the imposition of the death penalty only "for the most serious crimes", a provision that has led the Human Rights Committee to conclude that, where the death penalty was imposed for a conviction of aggravated robbery, the mandatory death sentence violated article 6(2); this was so since the domestic court could not take into consideration mitigating circumstances such as the fact that the use of firearms in this case "did not produce the death or wounding of any person".[220] Other safeguards contained in article 6 of the Covenant relate to the prohibition both on imposing death sentences "for crimes committed by persons below eighteen years of age" and on the carrying out of such sentences on pregnant women. Further, as described above, according to article 6(2) of the Covenant, death sentences cannot be imposed "contrary to the provisions of the ... Covenant", which means that all the due process guarantees must have been respected in the trial leading to the death sentence.

The Second Optional Protocol to the Covenant aims at the abolition of the death penalty and entered into force on 11 July 1991. As of 8 February 2002 there were 46 States parties to this Protocol.[221]

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Article 4 of the American Convention also contains safeguards against abusive recourse to capital punishment and it cannot, for instance, "be reestablished in states that have abolished it" (art. 4(3)). Further, "in no case shall capital punishment be inflicted for political offences or related common crimes", a limitation that is particularly important in public emergencies. In addition, the penalty shall not be inflicted on persons who committed the crime below the age of eighteen or over seventy years of age, nor shall it be carried out on pregnant women. On 8 June 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted and, as of 9 April 2002, it had eight ratifications.[222] According to article 2 of this Protocol the States parties may, however, when ratifying or acceding to the Protocol, "declare that they reserve the right to apply the death penalty in wartime, in accordance with international law, for extremely serious crimes of a military nature".

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[219] Ibid., p. 16, para. 33.

[220] Communication No. 390/1990, *B. Lubuto* (Views adopted on 31 October 1995), in UN doc. *GAOR*, A/51/40 (vol. II), p. 14, para. 7.2.

[221] UN doc. *GAOR*, A/55/40 (vol. I), p. 8, para. 5.

[222] See the OAS web-site: http://www.oas.org/juridico/english/treaties.html.

The European Convention on Human Rights per se allows for the death penalty; this follows from article 2(1), which provides that "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law". However, according to article 1 of Protocol No. 6 to the Convention, "the death penalty shall be abolished" and "no one shall be condemned to such penalty or executed". Yet article 2 of the Protocol makes provision for the use of the death penalty "in respect of acts committed in time of war or of imminent threat of war". Once into force, Protocol No. 13 to the Convention will, however, outlaw the death penalty ***at all times***. Signed on 3 May 2002 in Vilnius, Protocol No. 13 had, as of 14 May 2002, 3 of the 10 ratifications required for its entry into force.[223]

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Neither the International Criminal Court nor the International Criminal Tribunals for Rwanda and the former Yugoslavia can impose the death penalty (see art. 77 of the Statute of the International Criminal Court and arts. 23 and 24 of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia).

Under international human rights law, a heavier penalty cannot be imposed than that applicable at the time of the commission of the offence. If a lighter penalty has been introduced since the commission of the offence, the convicted person shall, however, benefit therefrom.

Punishments must be consistent with international human rights standards. They must in no circumstances amount to torture, inhuman, cruel or degrading treatment or punishment. Corporal chastisement is unlawful to the extent that it amounts to such treatment. Such chastisement is in general considered inappropriate by the international monitoring organs.

The use of the death penalty is strictly circumscribed under international human rights law; if permissible at all, it is limited to the most serious crimes; and cannot be imposed for crimes committed by persons under eighteen years of age. Many countries are now legally committed not to resort to the use of capital punishment in times of peace.

[223] See http://conventions.coe.int/.

5. The Right of Appeal

Article 14(5) of the Covenant provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The existence of a right to appeal is a right guaranteed by the Covenant itself and its existence is thus not in theory dependent on domestic law; the reference to "according to law" refers here exclusively to "the modalities by which the review by a higher tribunal is to be carried out".[224] Article 7(1)(a) of the African Charter on Human and Peoples' Rights provides that "every individual shall have the right to have his cause heard", a right which includes "the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force". Article 8(2)(h) of the American Convention on Human Rights stipulates that in criminal proceedings "every person is entitled, with full equality [to] the right to appeal the judgment to a higher court". Article 6 of the European Convention does not, per se, guarantee a right of appeal,[225] but this right is contained in article 2 of Protocol No. 7 to the Convention, although it "may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in first instance by the highest tribunal or was convicted following an appeal against acquittal" (art. 2(2) of the Protocol).

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The African Commission on Human and Peoples' Rights has held that the "foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates" article 7(1)(a) of the African Charter. In the view of the Commission, the lack of appeal in such cases also falls short of the standard contained in paragraph 6 of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, which provides that "anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction ...".[226] Article 7(1)(a) was thus also violated where the Nigerian Government had passed the Civil Disturbances Act whereby it excluded any review by any court of law of the "validity of any decision, sentence, judgment ... or order given or made, ... or any other thing whatsoever done under this Act".[227] In the particular case involving the *Constitutional Rights Project* acting on behalf of seven men sentenced to death, the fundamental rights involved were the rights to life and to liberty and security as guaranteed by articles 4 and 6 of the African Charter. The Commission held that, while "punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any

[224] Communication No. R.15/64, *C. Salgar de Montejo v. Colombia* (Views adopted on 24 March 1982), in UN doc. *GAOR*, A/37/40, p. 173, para. 10.4.

[225] *Eur. Court HR, Case of Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, Series A, No. 316-B*, para. 59 at p. 79.

[226] *ACHPR, Civil Liberties Organisation and Others v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001*, para. 33 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/218-98.html; the relevant United Nations resolution was approved by Economic and Social Council resolution 1984/50 of 25 May 1984.

[227] *ACHPR, Constitutional Rights Project, (on behalf of Zamani Lekwot and six Others) v. Nigeria, Communication No. 87/93, decision adopted during the 16th session, October 1994*, paras. 26-27 of the text of the decision as published at: http://www.up.ac.za/chr/.

avenue of appeal to 'competent national organs' in criminal cases bearing such penalties clearly violates" article 7(1)(a) of the Charter, "and increases the risk that even severe violations may go unredressed".[228] In the case of *Forum of Conscience* concerning the trial and subsequent execution of 24 soldiers, the Commission concluded that the deprivation of the right to appeal constituted a violation of article 7(1)(a) and that this failure to provide due process amounted to an arbitrary deprivation of their lives contrary to article 4 of the Charter.[229]

The right to appeal in article 7(1)(a) of the African Charter does not, however, appear to be limited to criminal proceedings as such in that it allows for appeals "to competent national organs" against acts violating one's "fundamental rights" in general.

5.1 The right to full review

The Human Rights Committee has made it clear that, regardless of the name of the remedy or appeal in question, "it must meet the requirements for which the Covenant provides",[230] which implies that the review must concern both the ***legal and material aspects of the person's conviction and sentence***. In other words, in addition to pure questions of law, the review must provide "for a full evaluation of the evidence and the conduct of the trial".[231]

In the case of *Gómez*, the author complained of a violation of article 14(5); since the Spanish Supreme Court could not re-evaluate evidence, his judicial review had thus been incomplete. The State party was not able to refute this allegation and the Committee consequently concluded that "the lack of any possibility of fully reviewing the author's conviction and sentence, ... the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met".[232] In yet another case against Spain, the same provision was violated since there was no lawyer available to submit any grounds of appeal and, therefore, the authors' appeal "was not effectively considered by the Court of Appeal".[233]

With regard to ***leave to appeal***, the Committee has however accepted that "a system not allowing for automatic right to appeal may still be in conformity with" article 14(5) of the Covenant "as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of

[228] Ibid., para. 28.

[229] *ACHPR, Forum of Conscience (on behalf of 24 soldiers) v. Sierra Leone, Communication No. 223/98, decision adopted during the 28th Ordinary Session, 23 October – 6 November 2000*, para. 19 of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/223-98.html.

[230] Communication No. 701/1996, *Gómez v. Spain* (Views adopted on 20 July 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 109, para. 11.1.

[231] Communications Nos. 623, 624, 626, 627/1995, *V. P. Domukovsky et al. v. Georgia* (Views adopted on 6 April 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 111, para. 18.11.

[232] Communication No. 701/1996, *Gómez v. Spain* (Views adopted on 20 July 2000), in UN doc. A/55/40 (vol. II), p. 109, para. 11.1.

[233] Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 18, para. 14.3.

the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case".[234]

5.2 The availability of a judgement

As seen in subsections 3.10 and 3.10.1 above, for the right of appeal to be ***effectively*** available, a convicted person is entitled to have, within a reasonable time, access to duly reasoned written judgements; failing the availability of such judgement, article 14(5) of the International Covenant has been violated. Article 14(5) has also been violated in cases where the defence lawyers have abandoned all grounds of appeal, and where the domestic court has not ascertained that this was done in accordance with the wishes of the client. However, this jurisprudence does not apply to cases where it appears that the relevant domestic court "did ascertain that the applicant had been informed and accepted that there were no arguments to be made on his behalf".[235]

5.3 Transcripts of the trial

The right to appeal can also be affected by a delay in producing the transcripts of the trial. Because of such delay in the *Pinkney* case, the author's leave to appeal was not heard until 34 months after he had applied for leave to appeal, a delay that "was incompatible with the right to be tried without undue delay" contrary to article 14(3)(c) and (5) of the International Covenant.[236]

5.4 Preservation of evidence

The Committee has further recognized "that in order for the right to review of one's conviction to be effective, the State party must be under an obligation to preserve sufficient evidential material to allow for" an effective review of one's conviction.[237] However, it does not see "that ***any*** failure to preserve evidential material until the completion of the appeals procedure constitutes a violation of" article 14(5), but only "where such failure prejudices the convict's right to a review, i.e. in situations where the evidence in question is indispensable to perform such a review". Moreover, in its view, "this is an issue which it is primarily for the appellate courts to consider".[238] Consequently, where the State party's "failure to preserve the original confession statement was made one of the grounds of appeal" and the court dismissed the appeal since it had no merit and "without giving further reasons", the Committee considered

[234]Communication No. 662/1995*, P. Lumley v. Jamaica* (Views adopted on 31 March 1999), in UN doc. *GAOR*, A/54/40 (vol. II), p. 145, para. 7.3.

[235]Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 129, para. 10.5.

[236]Communication No. R.7/27, *L. J. Pinkney v. Canada* (Views adopted on 29 October 1981), in UN doc. *GAOR*, A/37/40, p. 113, para. 35, read in conjunction with p. 103, para. 10.

[237]Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 130, para. 10.7; emphasis added.

[238]Ibid., loc. cit.; emphasis added.

that it was "not in a position to re-evaluate the ... findings on this point" and concluded that article 14(5) had not been violated.[239]

5.5 The right to legal aid

The Committee has consistently held that "it is imperative that legal aid be available to a convicted prisoner under sentence of death, ***and that this applies to all stages of the legal proceedings***".[240] In the case of *LaVende*, the author had been denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council, and, in the opinion of the Committee, this denial constituted a violation not only of article 14(3)(d), but also of article 14(5), since it effectively barred him from obtaining a review of his conviction and sentence.[241]

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The right to appeal as guaranteed by article 8 (2)(h) of the American Convention on Human Rights was violated in the case of *Castillo Petruzzi et al.* where the victims had only been able to file an appeal with the Supreme Court of Military Justice against the judgement of the lower military court. As noted by the Inter-American Court of Human Rights, the right to appeal the judgement as guaranteed by the Convention "is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse"; on the contrary, for "a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional authority to take up the particular case in question".[242] In this case, where the victims had been tried by a military court with an appeal possible to the Supreme Court of Military Justice, "the superior court was part of the military structure and as such did not have the independence necessary to act as or be a tribunal previously established by law with jurisdiction to try civilians"; consequently, "there were no real guarantees that the case would be reconsidered by a higher court that combined the qualities of competence, impartiality and independence that the Convention requires".[243]

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Although the right to appeal is not guaranteed as such by article 6 of the European Convention on Human Rights, the European Court has consistently held that "a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees" of that article; yet "the manner of application of Article 6 to proceedings before such courts depends on the special features of the proceedings involved" and "account must be taken of the entirety of the proceedings in the domestic legal order

[239] Ibid., para. 10.8.

[240] Communication No. 554/1993, *R. LaVende v. Trinidad and Tobago* (Views adopted on 29 October 1997), in UN doc. *GAOR*, A/53/40 (vol. II), p. 12, para. 5.8; emphasis added.

[241] Ibid., pp. 12-13, para. 5.8.

[242] *I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 208, para. 161

[243] Ibid., loc. cit.

and of the role of the appellate court therein".[244] As previously noted, the right to appeal is, however, included in article 2 of Protocol No. 7.

International human rights law guarantees the right to appeal against a conviction. The appeal proceedings must provide a full review of the facts and the law. Inter alia, the effective exercise of the right to appeal requires, as a minimum, access within a reasonable time to the written judgement. It may also require the transcript of the trial, access to evidential material, and the granting of free legal aid.

It is not sufficient that the right to appeal is exercised before a higher court; this court must be independent and impartial and administer justice in accordance with the rules of due process of law.

6. The Right to Compensation in the Event of a Miscarriage of Justice

Of the main human rights treaties examined in this chapter, only the International Covenant on Civil and Political Rights provides *expressis verbis* for compensation in case of a miscarriage of justice. Article 14(6) thereof reads:

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

As is clear from this text, a pardon must be based on the fact that a miscarriage of justice has taken place, and, consequently, where a presidential pardon was instead motivated by considerations of ***equity***, no question of compensation arises under article 14(6) of the Covenant.[245]

Under the International Covenant on Civil and Political Rights a person has the right to compensation in case of conclusive evidence that he or she has been the victim of a miscarriage of justice. The victim must not have contributed to the miscarriage of justice. Pardons based on equity do not give rise to any ground for compensation.

[244] *Eur. Court HR, Case of Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, Series A, No. 316-B*, p. 79, para. 59.

[245] Communication No. 89/1981, *P. Muhonen v. Finland* (Views adopted on 8 April 1985), in UN doc. *GAOR*, A/40/40, pp. 169-170, paras. 11.2-12.

7. The Right to a Fair Trial and Special Tribunals

In General Comment No. 13, the Human Rights Committee stated with regard to the creation of military and other special tribunals that

> "The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."[246]

Without explaining what aspect of the proceedings was not in conformity with article 14, the Human Rights Committee concluded that the Nicaraguan Peoples' Tribunals (*Tribunales Especiales de Justicia*) "did not offer the guarantees of a fair trial provided for" in that article. In the case in question the author had been sentenced to 30 years' imprisonment on account of his outspoken criticism of the Marxist orientation of the Sandinistas.[247]

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It is clear from the case-law of the African Commission on Human and Peoples' Rights that the provisions of article 7 of the African Charter should be considered to be non-derogable and that all tribunals, including military courts, must be impartial and ensure fair legal proceedings at all times.[248]

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The Inter-American Court of Human Rights concluded that the military courts permitted to try civilians for treason in Peru violated article 8(1) of the American Convention on Human Rights because they were not independent and impartial and because, since the judges were "faceless", the defendants had no possibility of knowing their identity and of assessing their competence.[249]

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[246] *United Nations Compilation of General Comments*, p. 123, para. 4.

[247] Communication No. 328/1988, *R. Z. Blanco v. Nicaragua* (Views adopted on 20 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 18, para. 10.4.

[248] See e.g. *ACHPR, Civil Liberties Organisation and Others v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001*, p. 3 of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/218-98.html.

[249] *I-A Court HR, Castillo Petruzzi et al. judgment of May 30, 1999, Series C, No. 52,* pp. 196-197, paras. 129-134.

The European Court of Human Rights held in several cases that National Security Courts trying civilians in Turkey lacked the independence and impartiality required by article 6(1) of the European Convention on Human Rights and could not, consequently, guarantee the applicants' right to a fair hearing. The reason why the National Security Courts failed to comply with the requirements of article 6(1) in this respect was that one of their three members was a military judge belonging to the army and subject to military discipline and assessment reports; further, the term of office of National Security Court judges was only a renewable period of four years.[250]

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What follows from these few examples of the international case-law on this matter is that all courts trying civilians, whether ordinary or special, including military tribunals, must be independent and impartial so as to be able to guarantee a fair hearing to the accused at all times.

All courts trying civilians, whether ordinary or special courts, must at all times be independent and impartial and respect due process guarantees.

8. The Right to a Fair Trial in Public Emergencies

The right to due process in public emergencies will be dealt with in Chapter 16. Suffice it to point out here that, although the articles on fair trial in the International Covenant and the American and European Conventions do not, as such, form part of the list of non-derogable rights in article 4(2) of the Covenant, article 27(2)of the American Convention and article 15(2) of the European Convention, this in no way means that these provisions can be derogated from at will.

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With regard to the International Covenant on Civil and Political Rights, the Human Rights Committee has stated in its General Comment No. 13 that

> "If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14."[251]

[250] *Eur. Court HR, Case of Çiraklar v. Turkey, judgment of 28 October 1998, Reports 1998-VII*, pp. 3072-3074, paras. 37-41.

[251] *United Nations Compilation of General Comments*, p. 123, para. 4.

The Committee has also made it abundantly clear that the "***right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception***".[252] It is further beyond doubt that the basic fair trial guarantees laid down in article 14 must be ensured even in severe crisis situations, although the Committee has accepted "that it would simply not be feasible to expect that all provisions of article 14 can remain fully in force in any kind of emergency".[253] However, it has not yet defined what aspect, or aspects, of the fair trial guarantees might possibly not be applicable in public emergencies threatening the life of the nation.

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Since, as already noted above, the African Commission on Human and Peoples' Rights considered that article 7 of the African Charter on Human and Peoples' Rights should be considered non-derogable, it follows that the fair trial guarantees contained therein must be ensured at all times.[254]

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The Inter-American Court has emphasized that "the guarantees to which every person brought to trial is entitled must be not only ***essential*** but also ***judicial***", a conception that implies "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".[255] In the case of *Castillo Petruzzi* "the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality" that article 8(1) "recognizes as essentials of due process of law".[256] More details about the interesting inter-American jurisprudence relating to article 27 of the American Convention will be given in Chapter 16 of this Manual.

The right to enjoy a ***fair trial*** *must also be guaranteed in public emergencies threatening the life of the nation, although possibly some aspects thereof may be subject to limited enforcement.*

The right to be tried by an ***independent and impartial tribunal*** *must be guaranteed at all times, including in public emergencies threatening the life of the nation.*

[252]Communication No. 263/1987, *M. González del Río v. Peru* (Views adopted on 28 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2; emphasis added.

[253]See UN doc. *GAOR*, A/49/40 (vol. I), p. 5, para. 24. This was prompted by a request by the Sub-Commission on Prevention of Discrimination and Protection of Minorities that a new optional protocol be elaborated to include, inter alia, article 14 in the list of non-derogable rights.

[254]See e.g. *ACHPR, Civil Liberties Organisation and Others v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001*, p. 3 of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/218-98.html.

[255]*I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 197, para. 131; emphasis added.

[256]Ibid., para. 132.

9. Concluding Remarks

This chapter has explained the principal rights that must be effectively ensured to accused persons in the determination of any criminal charges against them, rights which must be protected from the beginning of the trial proceedings until conviction or acquittal. It has also shown the indispensable role played by domestic judges in the fair administration of justice, a role which runs like a thread through Chapters 4 onwards. The essential role both of prosecutors and of defence lawyers has also been emphasized whenever relevant.

But the national judge is not only responsible for his or her own actions *stricto sensu*. He or she is also to some extent responsible for those of prosecutors and defence lawyers, to the extent that, where the judge has any indication that the prosecutor has erred in the course of the criminal inquiry by resorting to unlawful means of investigation, or that the defence lawyer has not duly consulted with his or her client or simply has not acted professionally, that judge has a duty to intervene to correct those errors or insufficiencies, since such action may be essential in order to guarantee a fair hearing and equality of arms between the prosecution and the defence.

The rights dealt with in this chapter are manifold and it is difficult, or even impossible, to single out some as being more important than others. These rights indeed form a whole, and, together with the rights dealt with in Chapters 4 to 6, constitute the foundation on which a society respectful of human rights in general, including the rule of law, is built.