



Legal Digest of International Fair Trial Rights

Legal Digest of
International Fair Trial Rights

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Foreword

The right to a fair and public trial by a competent, independent and impartial tribunal established by law, along with other due process guarantees, is an integral part of the Human Dimension commitments as affirmed by OSCE participating States.¹ The States have acknowledged the importance of trial monitoring as a tool “to ensure greater transparency in the implementation of these commitments” and have agreed “to accept as a confidence building measure the presence of observers [...] at proceedings before the courts”.²

The *Legal Digest of International Fair Trial Rights* aims at building the capacity of legal practitioners to conduct professional trial monitoring by providing them with a comprehensive description of fair trial rights coupled with practical checklists based on the experience of OSCE trial monitoring operations.

OSCE field operations and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) have already developed a significant wealth of substantive knowledge and practical experience in this area. ODIHR has taken up the role of systematizing and harmonizing this know-how in line with its mandate to “enhance the collection and preservation of past and present expertise.”³ The *Legal Digest of International Fair Trial Rights* is an important step in this direction, and this publication represents an important contribution to building the institutional memory of the OSCE.

Practitioners involved in trial monitoring, among them OSCE staff, are the primary beneficiaries of the *Legal Digest*. Moreover, ODIHR undertakes to reach out to NGOs and to disseminate the *Legal Digest* widely among civil society. ODIHR is also developing a training

1 Concluding Document of the Vienna Meeting, Vienna 1989, para 13.9; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 5.12 to 5.19.

2 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 12.

3 Common Responsibility, commitments and implementation, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2006) page 74, *in fine*, Report which was submitted to the OSCE Ministerial Council in response to the OSCE Ministerial Council, Decision No. 17/05, “Strengthening the Effectiveness of the OSCE”, within OSCE Ministerial Council Document, Thirteenth Meeting of the Ministerial Council, Ljubljana, 5–6 December 2005, para 2.

curriculum that builds on the *Legal Digest* and aims at enhancing the capacity of legal professionals and NGOs to set up and conduct their own trial monitoring programmes. Thus, by making the OSCE's trial monitoring expertise available for the use of legal practitioners and civil society, ODIHR works towards ensuring the sustainability of OSCE trial monitoring programmes.

This publication is the result of a long and participatory consultation process that started on 9 July 2010 with the establishment of an Advisory Board comprised of representatives of nine OSCE field operations and ODIHR.⁴ This body has since assisted ODIHR with the development of tools to serve the objectives of enhancing the professionalism and efficiency of trial monitoring programmes, building the institutional memory of the OSCE and ensuring the sustainability of OSCE trial monitoring programmes. The *Legal Digest* represents one of these tools. It is complemented by ODIHR's *Trial Monitoring: A Reference Manual for Practitioners*, which was first published in 2008 and includes a collection of methodologies, tools and techniques for trial monitoring.⁵ Therefore, readers are encouraged to consult both guides in their trial monitoring activities.

ODIHR would like to express its appreciation to Alex Conte, who drafted the *Legal Digest*. Likewise, the Office would wish to thank the Advisory Board for its contribution,⁶ without which the *Legal Digest* would have not been able to reach this scale and standard. Finally, ODIHR is grateful for the generous contributions of OSCE participating States whose funding made this publication possible.

4 OSCE Presence in Albania, OSCE Office in Baku, OSCE Mission to Bosnia and Herzegovina, OSCE Mission in Kosovo, OSCE Mission to Montenegro, OSCE Mission to Serbia, OSCE Mission to Skopje, OSCE Office in Yerevan, OSCE Office in Zagreb.

5 *Trial Monitoring: A Reference Manual for Practitioners*, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2008).

6 See *supra*, footnote No. 4.

Introduction

The ODIHR and the majority of OSCE field operations have been conducting trial monitoring programmes over the last ten years. These programmes aim to assist participating States in developing functioning justice systems that adjudicate cases consistently with the rule of law and due process.

In 2008, the OSCE Ministerial Council called on the participating States “to honour their obligations under international law as a key element of strengthening the rule of law in the OSCE area”,⁷ thus including States’ legal obligations resulting from other international environments into the body of the OSCE commitments. Against this background, the *Legal Digest of International Fair Trial Rights* builds on international laws and standards applicable in criminal and non-criminal proceedings as spelled out by the International Covenant on Civil and Political Rights (hereinafter ICCPR)⁸ and the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as European Convention on Human Rights, hereinafter ECHR)⁹, in addition to the OSCE Human Dimension commitments.¹⁰

Consequently, the *Legal Digest* makes vast reference to the case law as developed by the UN Human Rights Committee, as well as by the European Court of Human Rights. Not all OSCE participating States are members of the Council of Europe and thereby the European Convention on Human Rights is not applicable to them. However, the European Court of Human Rights’ jurisprudence provides authoritative decisions and guidance that go well beyond the Convention’s *espace juridique* and is, therefore, also relevant for non-member States.

Reference is also made to a limited number of additional binding and non-binding legal sources, including treaties, declarations and recommendations, with a view to complementing the

⁷ OSCE Ministerial Council, Decision No. 7/08, “Further Strengthening the Rule of Law in the OSCE area”, within OSCE Ministerial Council Document, Sixteenth Meeting of the Ministerial Council, Helsinki, 4–5 December 2008.

⁸ International Covenant on Civil and Political Rights, adopted on 16 December 1966.

⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950.

¹⁰ See OSCE Human Dimension Commitments, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 3rd edition, 2011).

commentary on the fair trial rights under the ICCPR and ECHR. This is particularly the case in areas such as the rights of victims and witnesses, which have been largely developed after the adoption of the said treaties.

The scope of the publication is limited to the description of the rights pertaining to the trial and, therefore, does not cover the right to liberty or, more generally, the pre-trial stage of proceedings, including the investigation, arrest and issues related to pre-trial detention.

Each chapter of the publication starts with a reference to the applicable OSCE Human Dimension commitments, as well as to the relevant legal provisions of the ICCPR and ECHR. To help readers distinguish between the political and legal obligations, OSCE political commitments are listed in blue boxes, whereas ICCPR and ECHR legal provisions are quoted in grey boxes. The chapter then provides an overall description of a particular fair trial right and its constituent elements. Each aspect is examined through extensive reference to the case law of the UN Human Rights Committee and the European Court of Human Rights. These sections include a comparison between the two universal and regional systems of fair trial rights protection and, within each system, an analysis of areas of the jurisprudence that have been developed throughout the years. Finally, each chapter ends with a checklist intended to provide trial monitors with practical questions stemming from the corresponding laws and standards.

While the primary target audience of this publication is trial monitors, others, in particular legal professionals, such as judges, prosecutors, lawyers and researchers, may find the *Legal Digest* equally useful as a tool to assess whether a justice system adheres to international fair trial rights.

User Guide

The following suggestions are intended to facilitate the reader's consultation of the *Legal Digest of International Fair Trial Rights*.

HYPERLINKS

The *Legal Digest* features hyperlinks to additional information and resources throughout. Those hyperlinks contained in the main body of the main text direct readers to relevant and related sections elsewhere in the publication. Click on the link to jump to the related text, or press the Alt+left arrow keys if you wish to jump back to the original place in the document.

Hyperlinks in the footnotes provide readers with direct access to resources elsewhere on the Internet. Many of these are links to the case law of the UN Human Rights Committee and the European Court of Human Rights. A list of those cases and their web addresses can be found at the end of the publication in two separate annexes.

GLOSSARY

The glossary contained in Chapter 11 lists and provides definitions for the legal terms used in this publication. Words that are featured in the glossary appear in bold throughout the text.

CHECKLISTS

The *Legal Digest* is complemented by practical checklists. The checklists are the result of years of OSCE trial monitoring experience aimed at assisting trial monitoring practitioners with tools that will help them recognize violations of fair trial rights in their daily observation of case proceedings. They are not intended to be exhaustive, as they do not present a comprehensive account of all circumstances that may give rise to a violation of fair trial rights. Therefore, they are to be taken as guidance for trial monitoring programme managers engaged in designing tools to support trial monitoring activities. Consulting these checklists alongside ODIHR's *Trial Monitoring: A Reference Manual for Practitioners*, will also be highly beneficial in this respect.¹¹

¹¹ Trial Monitoring: A Reference Manual for Practitioners, *op. cit.* note 5.

CHAPTER I

Fair Trial Standards: Scope of Application

ICCPR

Article 11

“No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

Article 13

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

Article 14

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

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

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

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

“(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

“(c) To be tried without undue delay;

“(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the 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;

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

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

“(g) Not to be compelled to testify against himself or to confess guilt.

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

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

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

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

Article 15

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

“(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

ECHR**Article 6**

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

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

“(3) Everyone charged with a criminal offence has the following minimum rights:

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

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

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

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

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

Article 7

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

“(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Article 1 of Protocol 4

“No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.”

Article 1 of Protocol 7

“(1) An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

“(a) to submit reasons against his expulsion,

“(b) to have his case reviewed, and

“(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

“(2) An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

Article 2 of Protocol 7

“(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

“(2) This right 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 the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

Article 3 of Protocol 7

“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 the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

Article 4 of Protocol 7

“(1) 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.

“(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

“(3) No derogation from this Article shall be made under Article 15 of the Convention.”

Fair trial standards in the International Covenant on Civil and Political Rights (ICCPR) and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are found principally within Article 14 of the ICCPR and Article 6 of the ECHR.¹² These are supplemented by procedural guarantees applicable to proceedings concerning the expulsion of aliens (See also 1.3) (Article 13 of the ICCPR and Article 1 of Protocol 7 to the ECHR), the principle of non-retroactivity (See also 8.1.1) (Article 15 of the ICCPR and Article 7 of the ECHR), and the prohibition against imprisonment for inability to fulfil a contractual obligation (See also 8.3.4) (Article 11 of the ICCPR and Article 1 of Protocol 4 to the ECHR).

The fair trial standards in Article 14 of the ICCPR and Article 6 of the ECHR are of a complex and interlinked nature, aimed at ensuring the proper administration of justice. The overarching right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within paragraph (1) of both articles, and is expressly applicable to criminal and non-criminal (“civil”) proceedings. Paragraphs (2)-(7) of Article 14 of the ICCPR, and paragraphs (2)-(3) of Article 6 of the ECHR, expressly apply to criminal proceedings, although there are in many cases parallel guarantees for civil proceedings, e.g., the right to legal assistance (See also 6.1.2). Having said this, there are some rights within the latter provisions that apply only to criminal proceedings, such as the right

¹² The standards within Article 14 of the ICCPR are reflected not only within Article 6 of the ECHR, but also within Protocol 7 to the ECHR, i.e., Article 2 (right to appeal, corresponding to Article 14(5) of the ICCPR), Article 3 (compensation for miscarriage of justice, corresponding to Article 14(6) of the ICCPR) and Article 4 (the principle against double jeopardy, corresponding to Article 14(7) of the ICCPR).

to be presumed innocent, and there is a clear division in the structure of Articles 14 and 15 of the ICCPR and Articles 6 and 7 of the ECHR in their treatment of civil and criminal proceedings.¹³ In *A. J. v. G. v the Netherlands*, for example, the applicant's claim that he had been denied the right to benefit from lighter penalties prescribed by law, in violation of Article 15 of the ICCPR, was dismissed by the Human Rights Committee, noting that the provision relates to criminal offences, while the applicant's claim related to proceedings concerning child custody.¹⁴

For the purpose of this Digest, it should be assumed that each chapter and sub-chapter is applicable to both criminal and non-criminal proceedings unless stated otherwise.

Three final matters should be considered concerning the scope of application of fair trial rights. The first is that there is a different approach between the Human Rights Committee and the European Court of Human Rights concerning the degree of latitude to be afforded to States when implementing fair trial standards under the ICCPR and the ECHR. While the European Court will grant States some **margin of appreciation** in determining the full meaning and practical application of rights and guarantees, the Human Rights Committee takes a more strict approach. As stated in its General Comment 32 concerning fair trial rights: "Article 14 contains guarantees that States Parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees."¹⁵

The second matter concerns the relationship between fair trial rights and other rights in the ICCPR or the ECHR and its Protocols. The *procedural* guarantees afforded by the provisions of the ICCPR and ECHR concerning fair trial standards often play an important role in the implementation of *substantive* guarantees that must sometimes be taken into account

13 As emphasized in *Silva v Sweden*, HRC Communication 748/1997, UN Doc CCPR/C/67/D/748/1997 (1999), para 4.9; *Strik v the Netherlands*, HRC Communication 1001/2001, UN Doc CCPR/C/76/D/1001/2001 (2002), para 7.3; and *Dombo Beheer B. V. v the Netherlands* [1993] ECHR 49, paras 32–33. The same division is to be found within the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948. Article 10 of the UDHR, which relates to both criminal and civil proceedings, states that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Article 11, which applies to criminal proceedings only, provides that: "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" and "(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed".

14 *A. J. v. G. v the Netherlands*, HRC Communication 1142/2002, UN Doc CCPR/C/77/D/1142/2002 (2003), para 5.7.

15 UN Human Rights Committee, CCPR General Comment 32 (2007), para 4.

during the course of criminal and civil proceedings.¹⁶ Fair trial standards are relevant to the exercise of the right to an effective remedy (Article 2(3) of the ICCPR and Article 13 of the ECHR).¹⁷ The imposition of a sentence of death upon conclusion of a trial (See also 8.3.6), during which fair trial guarantees have not been scrupulously respected, constitutes a violation of the right to life (Article 6 of the ICCPR and Article 2 of the ECHR).¹⁸ Compelling a person to confess guilt through ill-treatment or torture violates both the minimum fair trial guarantees prohibiting such compulsion (See also 5.2.6) and the non-derogable prohibition against torture and inhuman, cruel or degrading treatment (Article 7 of the ICCPR and Article 3 of the ECHR).¹⁹ Criminal defamation charges against journalists may, if kept pending for several years, amount to a violation of the right to trial without undue delay (See also 6.4), as well as having a chilling effect on the media which would adversely affect the right to freedom of expression (Article 19 of the ICCPR and Article 10 of the ECHR).²⁰ Unreasonable delays may also prevent an accused from leaving the country and may thereby violate the right of every person to leave one's own country (Article 12 of the ICCPR and Article 2(2) of Protocol 4 to the ECHR) while proceedings are pending.²¹ The dismissal of judges might not only concern the independence of the judiciary (See also 3.3.1) but may, depending on the circumstances, also be in violation of the right to have access to public service on general terms of equality (Article 25(c) of the ICCPR).²² Any distinctions regarding access to courts and tribunals (See also 2.1.2) based on the race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status will not only violate Article 14(1) of the ICCPR and Article 6(1) of the ECHR but will also amount to discrimination (Article 26 of the ICCPR and Article 14 of the ECHR).²³ It should also be recalled that there is sometimes the need for fair trial guarantees to be limited when in conflict with other rights. This may occur, for example, in the context of restricting the access of the public to a hearing in order to protect the private lives of one or more of the parties (See also 4.1.5), or restricting the requirement of a public pronouncement of judgment where the interest of juvenile persons requires (See also 9.1.2).

16 UN Human Rights Committee, CCPR General Comment 32 (2007), para 58.

17 UN Human Rights Committee, CCPR General Comment 32 (2007), para 58; *Czernin v the Czech Republic*, HRC Communication 823/1998, UN Doc CCPR/C/83/D/823/1998 (2005), para 7.5; and *Singarasa v Sri Lanka*, HRC Communication 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (2004), para 7.4.

18 UN Human Rights Committee, CCPR General Comment 32 (2007), para 59.

19 UN Human Rights Committee, CCPR General Comment 32 (2007), para 60.

20 UN Human Rights Committee, CCPR General Comment 32 (2007), para 63; and *Kankanamge v Sri Lanka*, HRC Communication 909/2000, UN Doc CCPR/C/81/D/909/2000 (2004), para 9.4.

21 UN Human Rights Committee, CCPR General Comment 32 (2007), para 63; and *González del Rio v Peru*, HRC Communication 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), paras 5.2–5.3.

22 UN Human Rights Committee, CCPR General Comment 32 (2007), para 64; *Pastukhov v Belarus*, HRC Communication 814/1998, UN Doc CCPR/C/78/D/814/1998 (2003), para 7.3; and *Mundy Busyo et al. v Democratic Republic of Congo*, HRC Communication 933/2000, UN Doc CCPR/C/78/D/933/2000 (2003), para 5.2.

23 UN Human Rights Committee, CCPR General Comment 32 (2007), para 9; UN Human Rights Committee, CCPR General Comment 18 (1989), para 7; and *Ato del Avellanal v Peru*, HRC Communication 202/1986, UN Doc CCPR/C/34/D/202/1986 (1988), para 10.2.

Also relevant to the general question of the application of fair trial rights is the extent to which they may be limited. The limitation of fair trial rights may occur by operation of three mechanisms. The first is through the interpretation and application of the particular provision(s) of the ICCPR and ECHR to a set of facts, e.g., determining what is “fair” in the circumstances may involve a restricted application of rights (in application of the overarching right to fairness in Article 14(1) of the ICCPR and Article 6(1) of the ECHR). The second is whether fair trial rights involve **qualified rights** capable of limitation in pursuit of identified objectives, so long as this is both necessary and proportional, e.g., the ability to restrict public access to a trial if this is necessary in the interests of the private lives of the parties (as expressly provided for in Article 14(1) of the ICCPR and Article 6(1) of the ECHR). The third situation where fair trial rights may be restricted is through **derogation** from the relevant provision(s) of the ICCPR or ECHR, whereby a State temporarily suspends the application of the right(s) in order to deal with a **state of public emergency**. It is important to note that, even during such a state of emergency, not all fair trial rights are capable of derogation. The extent to which each of the fair trial standards considered in this Digest is capable of limitation or derogation is considered within each corresponding division of this Digest. In all situations, any interference with fair trial rights must comply with the principle of legality, i.e., it must be **prescribed by law**.

1.1 DETERMINATION OF A “CRIMINAL CHARGE” AND OF A “CRIMINAL OFFENCE”

The vast majority of the fair trial standards in Articles 14 and 15 of the ICCPR and Articles 6 and 7 of the ECHR are expressly applicable to criminal proceedings. Some of these guarantees are applicable only to criminal proceedings. The terminology used to define criminal proceedings differs only slightly between the generally applicable fair trial guarantees in Article 14(1) of the ICCPR and Article 6(1) of the ECHR – which refer to the determination of any “criminal *charge*” – and the guarantees that are specific to criminal proceedings, as found in the balance of Article 14 of the ICCPR and Article 6 of the ECHR – which refer to the determination of any “criminal *offence*”. The expressions are treated by the Human Rights Committee and the European Court of Human Rights as interchangeable.

As a preliminary point, it should be noted that the European Court of Human Rights relies on an autonomous meaning of the ECHR provisions. As explained by the European Court in *Adolf v Austria*, the prominent place held in a democratic society by the right to a fair trial means that the Court will favour “a ‘substantive’, rather than a ‘formal’, conception of the ‘charge’ referred to by Article 6...; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a ‘charge’ within the meaning of Article 6”.²⁴ The concept of a “criminal charge”, therefore, requires an autonomous interpretation. In *Deweere v Belgium*, the European Court defined the notion of charge (also known as an **indictment**) as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”.²⁵ This definition is usually accompanied in European Court jurisprudence

²⁴ *Adolf v Austria* [1982] ECHR 2, para 30.

²⁵ *Deweere v Belgium* [1980] ECHR 1, para 46.

by the corresponding test of whether “the situation of the suspect has been substantially affected”.²⁶

Based on this autonomous approach, the European Court of Human Rights has developed a well-established case law concerning the meaning of a criminal charge, or offence. Its case law sets out three criteria, often referred to as the “Engel criteria” from the leading case of *Engel and Others v the Netherlands*, requiring consideration of:

- 1) the domestic classification of the act as criminal or otherwise (See also 1.1.1);
- 2) the nature of the offence (See also 1.1.2); and
- 3) the purpose and severity of the penalty (See also 1.1.3).²⁷

Although the Human Rights Committee has used much less precise language in its description of “criminal charges”, it too has referred to three corresponding factors, namely:

- 1) acts declared to be punishable under domestic criminal law (comparable to Engel criterion (1)),
- 2) with the potential that this may extend to acts that are criminal in nature (comparable to Engel criterion (2)),
- 3) accompanied by sanctions that, “regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity” (comparable to Engel criterion (3)).²⁸

One possible difference between the approaches of the European Court and the Human Rights Committee is that the Committee’s description *appears* to require factors (2) and (3) to be cumulative, whereas the European Court has stated that the second and third criteria are alternative and not necessarily cumulative.²⁹ As stated by the European Court of Human Rights in *Jussila v Finland*:

“It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere... The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character... This does not exclude a cumulative approach where separate analysis of each

²⁶ *Eckle v Germany* [1982] ECHR 4, para 73.

²⁷ *Engel and Others v the Netherlands* [1976] ECHR 3, paras 80–85. As reaffirmed, for example, in *Ezeh and Connors v the United Kingdom* [2002] ECHR 595, para 56.

²⁸ UN Human Rights Committee, CCPR General Comment 32 (2007), para 15; and *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), para 9.2.

²⁹ *Lutz v Germany* [1987] ECHR 20, para 55; *Kadubec v Slovakia* [1998] ECHR 81, para 51; *Ziliberberg v Moldova* [2005] ECHR 51, para 31.

riterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge...”³⁰

Whether or not proceedings are criminal is normally clear. The issue that often arises in this area is the line to be drawn between what are clearly criminal proceedings before criminal courts, versus disciplinary or administrative proceedings.

1.1.1 *Domestic classification as an offence under criminal law*

The first consideration to be had in deciding whether or not the determination of a “charge” involves criminal proceedings is the domestic classification of the charge. The State’s classification will not, however, be decisive.³¹ As explained by the European Court of Human Rights in *Engel and Others v the Netherlands*:

“[I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value...”³²

This means that the autonomy of the State to designate offences as criminal or otherwise operates in one direction only. If the State classifies an offence as criminal, this will be determinative.³³ But if the State does not classify an act as criminal, the European Court of Human Rights can conclude that the act is criminal having regard to the nature of the offence (See also 1.1.2) and the purpose and severity of the offence (See also 1.1.3). In *Engel and Others v the Netherlands*, for example, the determination of disciplinary charges (offences against military discipline) was found to amount to criminal proceedings.³⁴ In *Lauko v Slovakia*, the classification by Slovakia of a minor offence as an “administrative” offence did not prevent the European Court from concluding that the nature of the offence and the punitive character of the penalty meant that the proceeding was a criminal one for the purpose of Article 6 of the ECHR.³⁵

The rationale behind this approach is that it prevents States Parties from misusing domestic legal nomenclature for the purpose of avoiding the guarantees provided for by Article 6 of

30 *Jussila v Finland* [2006] ECHR 996, para 31. See also *Engel and Others v the Netherlands* [1976] ECHR 3, para 81; *Lutz v Germany* [1987] ECHR 20, para 55; *Ravnsborg v Sweden* [1994] ECHR 11, paras 31–35; and *Lauko v Slovakia* [1998] ECHR 82, para 56; *Ezeh and Connors v the United Kingdom* [2002] ECHR 595, para 58.

31 *Ziliberg v Moldova* [2005] ECHR 51, para 30; *Kadubec v Slovakia* [1998] ECHR 81, para 51.

32 *Engel and Others v the Netherlands* [1976] ECHR 3, para 81.

33 *Engel and Others v the Netherlands* [1976] ECHR 3, paras 80–81.

34 *Engel and Others v the Netherlands* [1976] ECHR 3, para 85. See also, for example, *Weber v Switzerland* [1990] ECHR 13, paras 33–35.

35 *Lauko v Slovakia* [1998] ECHR 82, para 58. See also: *Bendenoun v France* [1994] ECHR 7, para 47 (concerning customs and exchange-control proceedings); and *A. P., M. P. and T. P. v Switzerland* [1997] ECHR 50, para 41 (concerning proceedings under tax legislation).

the ECHR. In *Öztürk v Germany*, the Court explained: “if the Contracting States were able at their discretion, by classifying an offence as ‘regulatory’ instead of criminal, to exclude the operation of the fundamental clauses of articles 6 and 7 the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.”³⁶ Similarly, in *Weber v Switzerland*, the Court said that: “While recognising the right of States to distinguish between criminal law and disciplinary law, the European Court has reserved the power to satisfy itself that the line drawn between these does not prejudice the object and purpose of article 6”³⁷.

In the abovementioned leading case of *Öztürk v Germany*, the European Court additionally recognized the advantages of the moves towards decriminalization. By removing certain forms of conduct from the category of criminal offences, the lawmaker may be able to serve the interests of the individual as well as the needs of the proper administration of justice, in particular in so far as the domestic authorities are thereby relieved of the task of prosecuting and punishing contraventions – which are numerous but of minor importance.³⁸ However, the classification provided by the domestic law will not prevent the European Court from looking at the substantive nature of the offence.

1.1.2 Nature of the offence

The second factor relevant to determining whether or not a proceeding is criminal concerns the nature of the offence with which the person has been charged. This is an issue that normally arises when considering disciplinary proceedings versus criminal proceedings. The European Court of Human Rights has described disciplinary proceedings as “generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct”.³⁹ It has also noted that disciplinary proceedings usually offer substantial advantages in comparison to criminal proceedings, including the potential or actual sentences passed, in general less severe, the fact that disciplinary sentences do not appear on a person’s criminal record and entail more limited consequences, and that criminal proceedings are ordinarily accompanied by fuller guarantees.⁴⁰ A similar approach is followed by the European Court in the area of tax-related offences. In *Bendenoun v France*, for instance, the provision at stake applies to all citizens in their capacity as taxpayers, and not a given group with a particular status. This aspect, together with the prominent deterrent purpose of the provision in question (See also 1.1.3), prompted the Court to qualify the provision as a “criminal” one.⁴¹

³⁶ *Öztürk v Germany* [1984] ECHR, para 49.

³⁷ *Weber v Switzerland* [1990] ECHR 13, para 30.

³⁸ *Öztürk v Germany* [1984] ECHR, para 49.

³⁹ *Weber v Switzerland* [1990] ECHR 13, para 33.

⁴⁰ *Engel and Others v the Netherlands* [1976] ECHR 3, para 80.

⁴¹ *Bendenoun v France* [1994] ECHR 7, para 47.

There is, however, no specific test for determining whether or not the “nature” of a charge is criminal, which means that there must be regard to the particular charge in question. In *Weber v Switzerland*, the European Court of Human Rights treated as influential the question of whether or not the charge was of general application. The European Court considered that the “disciplinary” charge faced by Weber (breaching the secrecy of a criminal investigation) was one that potentially affected the whole population and, combined with the possibility of punitive sanctions attaching to it (See also 1.1.3), meant that this was in fact a criminal charge.⁴²

The applicant in *Demicoli v Malta*, a journalist who published a critical article concerning the behaviour of Members of Parliament, was summoned to appear before the House of Representatives for breach of parliamentary privilege, and found culpable. The European Court noted that the issue potentially affected the whole population since it applied whether or not the alleged breach of privilege was undertaken by a Member of Parliament. The Court held that the nature of the offence was decisive and outweighed the domestic classification (See also 1.1.1) and accordingly treated the matter as being akin to a “criminal” offence within the meaning of Article 6 of the ECHR.⁴³

In *Benham v the United Kingdom*, the European Court decided for the qualification of “criminal” not only on the basis of the general application of the procedure at stake to all citizens, but also due to the fact that the proceedings in question were brought by a public authority under statutory powers of enforcement.⁴⁴ In *Ravnsborg v Sweden*, the European Court of Human Rights found that the domestic classification of contempt of court charges under the Code of Judicial Procedure was open to interpretation and did not make it clear whether such charges were criminal. The European Court, therefore, had to have regard to the nature of the contempt of court charges, which were recognized as being a common feature of States Parties to the ECHR, deriving from the power of judicial authorities to ensure the proper and orderly functioning of proceedings. It was concluded that: “Measures ordered by courts under such rules are more akin to the exercise of disciplinary powers than to the imposition of a punishment for commission of a criminal offence.”⁴⁵

In *Ziliberg v Moldova*, the applicant was taken into custody and subsequently fined for having participated in an unauthorized demonstration, albeit that the matter was categorized under domestic law as administrative. The European Court held that both the nature of the offence, which was applicable to the whole of the population for a breach of the public order, as well as the punitive and deterrent nature of the penalty imposed (See also 1.1.3), meant that the proceedings were “criminal” for the purposes of Article 6.⁴⁶

42 *Weber v Switzerland* [1990] ECHR 13, para 33; similarly, *Bendenoun v France* [1994] ECHR 7, para 47.

43 *Demicoli v Malta* [1991] 14 EHRR 47, para 33.

44 *Benham v the United Kingdom* [1996] ECHR 22, para 56.

45 *Ravnsborg v Sweden* [1994] ECHR 11, para 34.

46 *Ziliberg v Moldova* [2005] ECHR 51, paras 32, 33, 34.

1.1.3 Purpose and severity of penalty

The final, alternative, criterion for deciding whether or not a charge is “criminal” concerns the degree of severity of the penalty that the person concerned risks incurring, or actually incurred. Key to this issue is the aim of the penalty, i.e., whether or not it is intended to “punish” a person for wrongdoing and/or deter reoffending.⁴⁷ Account must be had, in this regard, to the seriousness of what is at stake, and the nature, duration or manner of execution of the penalty imposed.⁴⁸

In almost all instances, a penalty which involves the deprivation of liberty will amount to a “punishment” and will mean that the charge is treated as a criminal one, even in those cases where a pecuniary penalty is ordered instead.⁴⁹ In *Demicoli v Malta*, for example, the Court took note of the fact that although the House of Representatives imposed a fine on the applicant, the maximum penalty he risked was imprisonment for a period not exceeding 60 days. What was at stake was thus sufficiently important to warrant classifying the matter as a criminal one.⁵⁰

In *Ezeh and Connors v the United Kingdom*, the applicants were convicted prisoners and challenged the “disciplinary” classification of prison rules. The European Court of Human Rights explained that the realities of each situation should be considered. In that case, the applicants were awarded additional days of non-parole. Although this did not increase their sentence as a matter of domestic law, it meant that the possibility of early release for good behaviour was delayed. Finding that this amounted to a criminal punishment, the European Court concluded that: “The reality of awards of additional days was that prisoners were detained in prison beyond the date on which they would otherwise have been released, as a consequence of separate disciplinary proceedings which were legally unconnected to the original conviction and sentence.”⁵¹

There may be circumstances, however, where the deprivation of liberty does not by itself render the proceedings criminal in nature, such as the detention of an alien pending her/his expulsion (See also 1.3).

High financial penalties aimed at deterring reoffending will often also be considered to be punitive in nature, as in *Lauko v Slovakia*.⁵² The freezing of assets of persons listed as terrorist entities was not, however, considered by the Human Rights Committee in *Sayadi*

47 *Ravnsborg v Sweden* [1994] ECHR 11, para 35; *A. P., M. P. and T. P. v Switzerland* [1997] ECHR 50, para 41; and *Lauko v Slovakia* [1998] ECHR 82, para 58; *Bendenoun v France* [1994] ECHR 7, para 47.

48 *Engel and Others v the Netherlands* [1976] ECHR 3, para 81.

49 *Engel and Others v the Netherlands* [1976] ECHR 3, para 81.

50 *Demicoli v Malta* [1991] 14 EHRR 47, para 34.

51 *Ezeh and Connors v the United Kingdom* [2002] ECHR 595, para 123.

52 *Lauko v Slovakia* [1998] ECHR 82, para 58.

and *Vinck v Belgium* to concern criminal proceedings, notwithstanding the serious consequences of such sanctions.⁵³

1.2 DETERMINATION OF “RIGHTS AND OBLIGATIONS IN A SUIT AT LAW” AND OF “CIVIL RIGHTS AND OBLIGATIONS”

Article 14(1) of the ICCPR and article 6(1) of the ECHR apply not only to criminal proceedings, but also to any determination of a person’s “rights and obligations in a suit at law” (ICCPR) or a person’s “civil rights and obligations” (ECHR). It should be noted that there are discrepancies between the various language texts of the ICCPR pertaining to the concept of a “suit at law” (as referred to in English, or “droits et obligations de caractère civil” in French, for example) – each of which, according to Article 53 of the ICCPR, is equally authentic –. The *travaux préparatoires* to the ICCPR do not resolve these apparent discrepancies⁵⁴.

Similar to the approach concerning the meaning of “criminal” proceedings (See also 1.1), the European Court of Human Rights has reaffirmed that it will apply an autonomous meaning to ECHR expressions, i.e., autonomous when compared to their domestic law classification.⁵⁵ Any other solution might lead to results incompatible with the object and purpose of the ECHR as it would open the possibility for States to circumvent fair trial guarantees simply by classifying various areas of law as public or administrative (and thus out of the reach of the jurisdiction of Article 6 of the ECHR).⁵⁶ It is, instead, the substantive content and effects of the right in question under the domestic law of the State concerned, not its legal classification, that will determine whether or not a right is to be regarded as civil within the meaning of the ECHR.⁵⁷

It is clear that fair trial guarantees apply to civil litigation falling within the realm of private law, such as those related to actions in tort, contract, commercial and family law. Therefore, when two private persons dispute over a right or obligation, this unquestionably attracts the guarantees of Article 14(1) of the ICCPR and Article 6(1) of the ECHR. However, the problems start when disputes occur between individuals and the State around rights that, according to domestic law, fall under the realm of public or administrative law. In the leading case of *Ringeisen v Austria*, the European Court of Human Rights took the view that:

“It is not necessary that both parties to the proceedings should be private persons. The wording of Article 6(1) is far wider; the French expression ‘contestations sur (des) droits et obligations de caractère civil’ covers all proceedings the result of

53 *Sayadi and Vinck v Belgium*, HRC Communication 1472/2006, UN Doc CCPR/C/94/D/1472/2006 (2008), para 10.11.

54 UN Human Rights Committee, CCPR General Comment 32 (2007), para 16.

55 *König v Germany* [1978] ECHR 3, para 88.

56 *König v Germany* [1978] ECHR 3, para 88.

57 *König v Germany* [1978] ECHR 3, para 89.

which is decisive for private rights and obligations. The English text ‘determination of ... civil rights and obligations’, confirms this interpretation.”⁵⁸

Accordingly, in ascertaining whether a case concerns the determination of a civil right, it is ultimately “the character of the right at issue” that is determinative (See also 1.2.2)⁵⁹ or, in other words, it is enough that the outcome of the proceeding should be “decisive” for private rights and obligations.⁶⁰ For a dispute to be potentially decisive in this way and thereby attract the protection of fair trial guarantees applicable to civil proceedings, a tenuous connection or remote consequence to the right at stake will not suffice. Rather, civil rights and obligations must be the object (or one of the objects) of the dispute (“contestation” in the language of the European Court).⁶¹ As to what amounts to a “contestation”, or dispute, the European Court has provided some guidance in *Bentham v the Netherlands*,⁶² namely that the expression:

- should not be construed too technically but should instead be “given a substantive rather than a formal meaning”;⁶³
- may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised;⁶⁴
- may concern both questions of fact and questions of law;⁶⁵ and
- must be genuine and of a serious nature.⁶⁶

1.2.1 *Existence of the right in the domestic law of the State*

The starting point for deciding whether proceedings are “civil” or involve a “suit at law” is to establish that there is a right or obligation in the national law of the State concerned.⁶⁷ The Human Rights Committee has repeatedly found that there is no suit at law in situations where the domestic law does not grant any entitlement to the person concerned such as, for example, where the law does not provide any right of promotion or appointment.⁶⁸ This will be the case even if the dispute relates to a claim that might otherwise have been classified as a matter involving a determination of a civil right. Similarly, the European Court of Human

58 *Ringeisen v Austria* [1971] ECHR 2, para 94; see also *König v Germany* [1978] ECHR 3, para 90.

59 *König v Germany* [1978] ECHR 3, para 90; *Bentham v the Netherlands* [1985] ECHR 11, para 34.

60 *Baraona v Portugal* [1987] ECHR 13, para 42; *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 46.

61 *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 47.

62 *Bentham v the Netherlands* [1985] ECHR 11, para 32.

63 *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 45.

64 *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 49.

65 *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 51 *in fine*.

66 *Sporrong and Lönnroth v Sweden* [1982] ECHR 5, para 81.

67 *Z and Others v the United Kingdom* [2001] ECHR 333, para 98; and *Roche v the United Kingdom* [2005] ECHR 926, para 117.

68 *Kolanowski v Poland*, HRC Communication 837/1998, UN Doc CCPR/C/78/D/837/1998 (2003), para 6.4; *Dimitrov v Bulgaria*, HRC Communication 1030/2001, UN Doc CCPR/C/85/D/1030/2001 (2005), para 8.3; *Karatsis v Cyprus*, HRC Communication 1182/2003, UN Doc CCPR/C/84/D/1182/2003 (2005), para 6.4; and *Fernández v Spain*, HRC Communication 1396/2005, UN Doc CCPR/C/85/D/1396/2005 (2005), para 6.3.

Rights in *Roche v the United Kingdom* concluded that “the Court may not create through the interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned”.⁶⁹ Also, “article 6(1) extends only to ‘*contestations*’ (disputes) over (civil) ‘rights and obligations’ [...]; it does not itself guarantee any particular content for (civil) ‘rights and obligations’ in the substantive law of the Contracting States.”⁷⁰ In *Powell and Rayner v the United Kingdom*, the European Commission on Human Rights rejected the claim under Article 6(1) as manifestly ill-founded on the ground that the applicants had no “civil right” under English law to compensation for increased air traffic noise at Heathrow airport, other than the noise caused by aircraft flying in breach of aviation regulations.⁷¹

A distinction needs to be made, however, between substantive provisions of national law versus procedural provisions that may constitute a bar to bringing a civil claim to court.⁷² Whether a person has an actionable domestic claim may, in fact, depend not only on the substantive content of the civil right (as defined under national law) but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court.⁷³ It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) if, for example, a State could remove from the jurisdiction of the courts a whole range of civil claims without restraint, or confer immunities from civil liability on large groups or categories of persons.⁷⁴ At the same time, however, it should be noted that the European Court of Human Rights has applied a **margin of appreciation** in considering how the regulation of access to court (See also 2.1.1) is achieved by each country. In *Markovic and Others v Italy*, the European Court held that Article 6 was not applicable to a complaint for damages by the relatives of persons deceased in the NATO air strike on the Radio Televizije Srbije (RTS) building in Belgrade in April 1999. In its reasoning the European Court concluded that the decision adopted on the basis of Italian law did not amount to recognition of a procedural immunity from the lawsuit but was the result of the principles governing the substantive right of action in domestic law which excludes the possibility of the courts’ review of acts of foreign policy such as acts of war.⁷⁵

1.2.2 Nature of the right

Once it has been established that the right or obligation exists in the national law, the next question to consider is whether the right is “civil” in nature. In this regard, the exclusive focus of the Human Rights Committee and the European Court of Human Rights has been on the nature of the right in question rather than on the status of one or more of the parties (whether governmental, parastatal or autonomous statutory entities), or of the domestic

69 *Roche v the United Kingdom* [2005] ECHR 926, paras 116–121; see also *Markovic and Others v Italy* [2006] ECHR 1141, para 93.

70 *James and Others v the United Kingdom* [1986] ECHR, para 81; see also *Markovic and Others v Italy* [2006] ECHR 1141, para 93; *Fayed v the United Kingdom* [1994] ECHR 27, para 65.

71 *Powell and Rayner v the United Kingdom* [1990] ECHR 2, para 35.

72 *Markovic and Others v Italy* [2006] ECHR 1141, para 94.

73 *Fayed v the United Kingdom* [1994] ECHR 27, para 65.

74 *Markovic and Others v Italy* [2006] ECHR 1141, para 97.

75 *Markovic and Others v Italy* [2006] ECHR 1141, para 113.

designation of the type of proceedings, or on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon (especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review).⁷⁶ The concepts are autonomous of domestic designations and the European Court of Human Rights has recognized that there is no common standard pointing to a European notion of what amounts to a civil right.⁷⁷ Each case must, therefore, be examined in the light of its particular features.

There is some guidance, however, on specific categories of proceedings that have been treated as amounting to suits at law or civil proceedings by their nature. In its General Comment 32 on fair trial rights, the Human Rights Committee has summarized suits at law as falling within one of the following three categories, which overlap with similar decisions by the European Court of Human Rights:⁷⁸

- (a) judicial procedures aimed at determining rights and obligations concerning private law (law governing the relationship between individuals and legal persons) in the areas of contract, property and torts.⁷⁹
- (b) Equivalent notions in the area of administrative law (law governing the relationship between individuals and legal persons vis-à-vis the State), such as termination of the employment of civil servants for other than disciplinary reasons;⁸⁰ the determination of social security benefits;⁸¹ the pension rights of soldiers;⁸² procedures relating to the

76 *Y. L. v Canada*, HRC Communication 112/1981, UN Doc CCPR/C/OP/1 at 28 (1984), para 9.2; *Kaur v Canada*, HRC Communication 1455/2006, UN Doc CCPR/C/94/D/1455/2006 (2008), para 7.5; *Ringeisen v Austria* [1971] ECHR 2, para 94; *König v Germany* [1978] ECHR 3, para 88; *Baraona v Portugal* [1987] ECHR 13, paras 42–44; *Georgiadis v Greece* [1997] ECHR 28, para 34; and *Werner v Austria* [1997] ECHR 92, paras 38–40. See also UN Human Rights Committee, CCPR General Comment 32 (2007), para 16 and contrast with *Kolanowski v Poland*, HRC Communication 837/1998, UN Doc CCPR/C/78/D/837/1998 (2003), para 6.4.

77 *Feldbrugge v the Netherlands* [1986] ECHR 4, para 10.

78 UN Human Rights Committee, CCPR General Comment 32 (2007), para 16.

79 See, for example: *Deisl v Austria*, HRC Communication 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), para 11.1 (property rights); *Pretto and Others v Italy* [1983] ECHR 15 (property rights); and *Axen v Germany* [1983] ECHR 14 (torts).

80 *Casanovas v France*, HRC Communication 441/1990, UN Doc CCPR/C/51/D/441/1990 (1994), para 5.2; *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), para 9.2; *Vargas-Machuca v Peru*, HRC Communication 906/2000, UN Doc CCPR/C/75/D/906/2000 (2002); *Frydlender v France* [2000] ECHR 353; and *Vilho Eskelinen and Others v Finland* [2007] ECHR 314.

81 *García Pons v Spain*, HRC Communication 454/1991, UN Doc CCPR/C/55/D/454/1991 (1995), para 9.3; and *Schuler-Zraggen v Switzerland* [1993] ECHR 29.

82 *Y. L. v Canada*, HRC Communication 112/1981, UN Doc CCPR/C/OP/1 at 28 (1984), para 9.3.

use of public land;⁸³ the nationalization and restitution of private property;⁸⁴ or licensing for commercial activities.⁸⁵

- (c) Other procedures that, depending on the particular rights and obligations in question, might also be assessed on a case-by-case basis as involving a determination of rights and obligations in a suit at law.⁸⁶ In this third category, child custody and other family proceedings have been treated as falling within the meaning of a “suit at law” or “civil” proceeding.⁸⁷

Cutting across all categories, the European Court of Human Rights has found that for a right to be a “civil” one, it is sufficient that the subject matter of the action is itself of a pecuniary nature. This does not mean that proceedings are “civil” merely because they have economic implications. The action must itself be “pecuniary” in nature and founded on an alleged infringement of rights which are likewise pecuniary rights.⁸⁸ In other words, the outcome of the proceedings should be directly decisive for the pecuniary rights at stake. The right to compensation following the acquittal of a person who had been held in detention was, therefore, found to involve civil proceedings under Article 6(1) of the EHCR, as was the right to compensation for continued detention following the discontinuation of proceedings.⁸⁹

The interpretation of the European Court of Human Rights of the concept of civil rights and obligations has evolved and become more and more liberal, particularly in cases involving elements of public law. Two areas where the European Court has strikingly modified its initial viewpoints concern: a) disputes over civil service employment; and b) entitlements deriving from social security.

a) Disputes over civil service employment

Until 1999, disputes concerning civil service employment had followed the general rule that Article 6(1) of the ECHR did not apply where pecuniary claims were not central but only accessory to the main claim regarding, for instance, access to or dismissal from the civil service.⁹⁰ In *Pellegrin v France*, the European Court of Human Rights adopted a functional

83 *Äärelä and Näkkäljärvi v Finland*, HRC Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001), paras 7.2–7.4.

84 *Krcmar and Others v the Czech Republic* [2000] ECHR 99.

85 *König v Germany* [1978] ECHR 3.

86 UN Human Rights Committee, CCPR General Comment 32 (2007), para 16.

87 See, for example: *Fei v Colombia*, HRC Communication 514/1992, UN Doc CCPR/C/53/D/514/1992 (1995); *Airey v Ireland* [1979] ECHR 3 (family law); *Olsson v Sweden (No 1)* [1988] ECHR 2 (child care); *Eriksson v Sweden* [1989] ECHR 10 (fostering); and *Keegan v Ireland* [1994] ECHR 18 (adoption).

88 *Editions Périscope v France* [1992] ECHR 43, para 40; and *Werner v Austria* [1997] ECHR 92, para 38; *S. a. r. l. du Parc d'Activites de Blotzheim and SCI Haselaecker v France* [2003] ECHR, para 9; *Procola v Luxembourg* [1995] ECHR 33, para 38.

89 *Georgiadis v Greece* [1997] ECHR 28, para 35; and *Werner v Austria* [1997] ECHR 92, para 39.

90 *Nicodemo v Italy* [1997] ECHR 62, para 18; *De Santa v Italy* [1997] ECHR 56, para 18; *Lapalorcia v Italy* [1997] ECHR 61, para 21.

criterion (the Pellegrin test) based on the nature of the employee's duties and responsibilities.⁹¹ The European Court first acknowledged that in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The State, therefore, has a legitimate interest in requiring a special bond of trust and loyalty of these servants. On the other hand, in respect of other posts which do not have this aspect of "public administration", the Court found that there is no such interest. The Court, therefore, ruled that the only disputes excluded from the scope of Article 6(1) are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. The most manifest examples of such activities are those undertaken by the armed forces and the police.⁹²

In *Vilho Eskelinen and Others v Finland*, the European Court concluded that the functional criterion, as applied in practice, had not brought about a greater degree of certainty nor had it simplified the analysis of the applicability of Article 6. To the contrary, the Court took the view that the Pellegrin test had led to anomalous results and proved to be unworkable as it had not been easy to ascertain the nature and status of the applicant's functions.⁹³

In order to exclude the protection of Article 6, two conditions must now be fulfilled:

1. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question.
2. Secondly, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant is in a sector or department that participates in the exercise of power conferred by public law will not in itself be decisive. This means that, for the exclusion to be justified, it will not be enough for the State to establish a "special bond of trust and loyalty" (as expressed in *Pellegrin*) between the civil servant and the State. To be justified on objective grounds, it will be for the State to show that the subject matter of the dispute relates to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies.⁹⁴

91 *Pellegrin v France* [1999] ECHR 140, para 64.

92 *Pellegrin v France* [1999] ECHR 140, paras 65–66.

93 *Vilho Eskelinen and Others v Finland* [2007] ECHR 314, paras 51–52.

94 *Vilho Eskelinen and Others v Finland* [2007] ECHR 314, para 62.

b) Entitlements deriving from social security

In *Feldbrugge v the Netherlands*, the European Court of Human Rights for the first time had to decide on the applicability of Article 6(1) of ECHR to the field of social security, namely the compulsory public insurance health scheme.⁹⁵ The European Court acknowledged that there exists great diversity in the legislation and case law of States concerning the entitlement to health insurance benefits under social security schemes. Some States treat it as a public law right, whereas some treat it as a private law right, and others operate a mixed system.⁹⁶ In this case, the Court evaluated the relevant features of the public law, such as the character of the legislation, the compulsory nature of insurance against certain risks, and the assumption by public bodies of responsibility for ensuring social protection and private law. While none of the corresponding features of private law were in that case deemed decisive on their own, taken together and cumulatively they were treated as conferring an entitlement with the character of a civil right. Referring to the *Feldbrugge v the Netherlands* case, the European Court of Human Rights has stated that “today the general rule is that Article 6 para. 1 (art. 6–1) does apply in the field of social insurance”.⁹⁷

The European Court took an even more far-reaching approach in *Salesi v Italy* than in *Feldbrugge v the Netherlands* by extending the applicability of Article 6(1) to welfare assistance which is, unlike social security insurance, not based on individual financial contributions. While acknowledging the difference between the two cases, the Court held that Mrs. Salesi was not affected in her relations with the administrative authorities as such, acting in the exercise of discretionary powers; she suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Italian Constitution. In sum, the Court did not see any convincing reasons to distinguish between Mrs. Salesi’s right to welfare benefits and the rights to social insurance benefits asserted by Mrs. Feldbrugge.⁹⁸

1.2.3 Cases excluded by the protection granted to civil proceedings

The Human Rights Committee and the European Court of Human Rights have determined that civil proceedings do *not* include:

- (a) Extradition, expulsion or deportation procedures, although certain procedural guarantees may apply to such proceedings by application of Article 13 of the ICCPR and Article 1 of Protocol 7 of the ECHR (See also 1.3).
- (b) General taxation issues and taxation assessments.⁹⁹ It should be noted, however, that a tax-related offence may well fall under the scope of a “criminal charge” thus requiring the application of fair trial guarantees in that way (See also 1.1.2).

⁹⁵ *Feldbrugge v the Netherlands* [1986] ECHR 4, para 27.

⁹⁶ *Feldbrugge v the Netherlands* [1986] ECHR 4, para 29.

⁹⁷ *Salesi v Italy* [1993] ECHR 14, para 19.

⁹⁸ *Salesi v Italy* [1993] ECHR 14, para 19.

⁹⁹ *X v France* [1992] ECHR 45. Contrast with the right to recover money paid in tax: see *National & Provincial Building Society and Others v the United Kingdom* [1997] ECHR 87.

- (c) The right to vote and to stand for public office.¹⁰⁰
- (d) Situations where minor and non-punitive disciplinary measures are imposed on persons subordinated to a high degree of administrative control, such as civil servants, members of the armed forces, or prisoners. The following disciplinary measures should not be considered as minor and non-punitive for the purpose of attracting the applicability of fair trial guarantees:
 - (i) Disciplinary measures involving dismissal from employment, which will normally be treated as engaging rights and obligations in a suit at law within the meaning of Article 14(1) of the ICCPR, or civil rights and obligations within the meaning of Article 6(1) of the ECHR.¹⁰¹
 - (ii) Disciplinary measures of a punitive nature, such as those involving a deprivation of liberty, which will be treated as measures involving a determination of a criminal charge (See also 1.1.3) under Article 14 of the ICCPR and Article 6 of the ECHR.¹⁰²

1.3 PROCEEDINGS RELATING TO THE EXPULSION OF ALIENS

Article 13 of the ICCPR

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

Article 1 of Protocol 7 of the ECHR

“(1) An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

“(a) to submit reasons against his expulsion,

“(b) to have his case reviewed, and

“(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

¹⁰⁰ *Pierre-Bloch v France* [1997] ECHR 84, paras 49, 50, 51; *Yazar and Others v Turkey* [2002] ECHR 408, para 66.

¹⁰¹ See, for example: *Casanovas v France*, HRC Communication 441/1990, UN Doc CCPR/C/51/D/441/1990 (1994), para 5.2; and *Pertterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), para 9.2. Contrast with *Neigel v France* [1997] ECHR 12.

¹⁰² See, for example, *Engel and Others v the Netherlands* [1976] ECHR 3, para 81 (disciplinary proceedings in the military).

“(2) An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.”

According to the Human Rights Committee, rights of access and equality apply whenever the domestic law entrusts a judicial body with a judicial task (See also Chapter 2).¹⁰³ The Committee has also said that the right of access to courts and tribunals must be available to all individuals, including to asylum seekers and refugees who may find themselves in the territory or subject to the jurisdiction of a State party to the ICCPR.¹⁰⁴ It is relevant, in this regard, to consider Article 13 of the ICCPR and Article 1 of Protocol 7 to the ECHR, which are concerned with the basis upon which aliens may be removed from the territory of a State.

By way of summary, the following distinctions arise concerning the application of fair trial and due process rights to non-nationals:

- In the case of expulsion proceedings concerning an alien that is *lawfully* within the territory of the country, Article 14 of the ICCPR and Article 6 of the ECHR do not apply, but the due process guarantees in Article 13 of the ICCPR and Article 1 of Protocol 7 to the ECHR do apply (See also 1.3.1).
- In the case of expulsion proceedings concerning an alien who is *unlawfully* within the territory of the country, none of the fair trial and due process guarantees in Articles 13 and 14 of the ICCPR and Article 6 of the ECHR and Article 1 of Protocol 7 apply (See also 1.3.2). However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to expulsion or deportation ought to be taken in accordance with the guarantees under Article 13 of the ICCPR and Article 1 of Protocol 7 to the ECHR do apply (See also 1.3.2).
- In the case of all other criminal and civil proceedings in which an alien is a party, all of the fair trial guarantees in Article 14 of the ICCPR and Article 6 of the ECHR apply (See also 1.3.1 and 2.1.2).

1.3.1 Due process rights applicable to expulsion proceedings

Article 13 of the ICCPR – which only regulates the procedure, and not the substantive grounds, for expulsion – incorporates notions of due process. It requires any decision concerning the expulsion of an alien who is in the territory of a State to be made pursuant to the law. Unless prevented by compelling national security concerns, it also requires that the subject of the expulsion proceedings must be provided with the opportunity: (i) to submit reasons against the expulsion; (ii) to have the case reviewed by the authority competent to determine whether or not the expulsion should proceed (or the person or persons designated by the competent authority to conduct such a review); and (iii) to be represented in such a review. Article 7 of Protocol 7 to the ECHR provides for the same guarantees, except that it allows limitations not only when this is based on national security concerns, but also if this is necessary in the interests of public order (Article 1(2)).

¹⁰³ UN Human Rights Committee, CCPR General Comment 32 (2007), para 7.

¹⁰⁴ UN Human Rights Committee, CCPR General Comment 32 (2007), para 9.

These elements of due process are not as extensive as the fair trial guarantees under Article 14 of the ICCPR and Article 6 of the ECHR, which means that Articles 14 and 6 do not apply to proceedings concerning the expulsion of aliens that are in the territory of a State.¹⁰⁵ The European Court of Human Rights has, when addressing the potential relationship between expulsion proceedings and Article 6 of the ECHR, concluded that such proceedings do not concern the determination of a “criminal charge” (See also 1.1) or of a “civil right” (See also 1.2).¹⁰⁶ However, the procedural guarantees relating to the expulsion of aliens should, according to both the Human Rights Committee and the European Court of Human Rights, be interpreted in light of the fair trial provisions in Articles 14 and 6 of each instrument, i.e., consistently with them.¹⁰⁷ The Human Rights Committee has explained that this means that:

“Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable. All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.”¹⁰⁸

Article 14 of the ICCPR and Article 6 of the ECHR apply to their full extent concerning any other form of judicial proceedings in which aliens are a party (See also 2.1.1).

1.3.2 Application of due process right to aliens lawfully within the country

It should be noted that the rights contained within Article 13 of the ICCPR and Article 1 of Protocol 7 to the ECHR are only applicable to aliens “lawfully” within the territory of a State Party. This means that illegal entrants and aliens that have stayed longer than the law or their permit allows are not afforded protection under these provisions.¹⁰⁹ However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to expulsion or deportation ought to be taken in accordance with the guarantees under Articles 13 and 1 of each instrument.¹¹⁰

105 UN Human Rights Committee, CCPR General Comment 32 (2007), para 62; *Kaur v Canada*, HRC Communication 1455/2006, UN Doc CCPR/C/94/D/1455/2006 (2008), para 7.5; *Chadzjian v the Netherlands*, HRC Communication 1494/2006, UN Doc CCPR/C/93/D/1494/2006 (2008), para 8.4; *Maaouia v France* [2000] ECHR 455, para 37; and *A. and Others v the United Kingdom* [2009] ECHR 301 concerning non-applicability of article 6 of the ECHR to SIAC proceedings, i.e., expulsion proceedings.

106 *Maaouia v France* [2000] ECHR 455, paras 38–39.

107 UN Human Rights Committee, CCPR General Comment 32 (2007), para 62; and *Maaouia v France* [2000] ECHR 455, para 36.

108 UN Human Rights Committee, CCPR General Comment 32 (2007), para 62; and *Everett v Spain*, HRC Communication 961/2000, UN Doc CCPR/C/81/D/961/2000 (2004), para 6.4.

109 UN Human Rights Committee, CCPR General Comment 15 (1986), para 9.

110 UN Human Rights Committee, CCPR General Comment 15 (1986), para 9.

CHECKLIST: SCOPE OF APPLICATION OF FAIR TRIAL STANDARDS

1. What is the classification of the monitored case provided for under national law? Civil/Criminal/Other?
2. Are there grounds to believe that, despite the national classification, fair trial rights applicable to civil or criminal proceeding should have been granted to the monitored case?
 - a. In the specific monitored case, does the nature of the offence and the purpose and severity of the penalty, or the nature of the right disputed, attract the applicability of fair trial rights despite the national classification?
3. In an expulsion case, was the individual whose case is being examined present at the hearing in the host country in accordance with domestic law? Did the authority comply with the guarantees foreseen by Article 13 of the ICCPR and Article 1 of Protocol 7 to the ECHR?

CHAPTER II

Rights of Access to Justice and Equality in the Administration of Justice

Article 14(1) of the ICCPR

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

Article 6(1) of the ECHR

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

Rights of access to justice and equality in the administration of justice lie at the heart of the rule of law. They demand that all persons have equal rights of access to the courts and that justice is administered in a way that achieves fairness for all, regardless of the identity of the parties to the proceedings or the nature of the proceedings themselves. The Human Rights Committee has referred to the right to equality before courts and tribunals, including equal access, as a “key element” of human rights protection and as a procedural means to safeguard the rule of law.¹¹¹ The European Court of Human Rights has similarly expressed the right of access to court as essential “in view of the prominent place held in a democratic society by the right to a fair trial”.¹¹²

Article 10 of the Universal Declaration of Human Rights speaks of the right of everyone to be entitled “in full equality” to a fair and public hearing. The right to equality before the court is also spelled out in Article 14(1) of the ICCPR, whereas the ECHR refers in Article 6 only to the general prohibition of discrimination and in the preamble of Protocol 12 to the fundamental principle of equality before the law. As for the right of access to court, both the ICCPR and ECHR imply this right from the overarching entitlement to a fair and public

¹¹¹ UN Human Rights Committee, CCPR General Comment 32 (2007), para 2.

¹¹² *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 59.

hearing. Amongst the others regional human rights treaties, the only one that spells out a right “to have one’s cause heard by a court” is the African Charter on Human and Peoples’ Rights.¹¹³

Rights of access and equality apply equally to criminal and non-criminal proceedings. They apply whenever the domestic law entrusts a judicial body with a judicial task including, for example, in the case of disciplinary proceedings against a civil servant.¹¹⁴

2.1 ACCESS TO COURTS AND TRIBUNALS

The Human Rights Committee has referred to the right to equality before courts and tribunals, including equal access, as key to the protection of human rights and the safeguarding of the rule of law.¹¹⁵ The European Court of Human Rights has also said that the right of access to court is an inherent element of Article 6(1) of the ECHR “in view of the prominent place held in a democratic society by the right to a fair trial”.¹¹⁶

Article 14 of the ICCPR and Article 6(1) of the ECHR encompass the right of access to the courts in the determination of criminal charges and rights and obligations in a suit at law, for the purpose of ensuring that no individual is deprived of her/his right to claim justice.¹¹⁷ In *Golder v the United Kingdom*, the European Court of Human Rights acknowledges this principle: “It would be inconceivable, [...] that article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. [...] It follows that the right of access constitutes an element which is inherent in the right stated by article 6(1).”¹¹⁸ In civil proceedings, the right of access to court includes not only the right to institute proceedings but also the right to obtain a “determination” of the dispute by a court.¹¹⁹

2.1.1 Scope of application of the right of access to courts and tribunals

The right of equal access to a court concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.¹²⁰ Under the ICCPR, rights

113 African Charter on Human and Peoples’ Rights, also known as the *Banjul Charter*, adopted on 27 June 1981 by the Organization of African Unity, article 7.

114 UN Human Rights Committee, CCPR General Comment 32 (2007), para 7; and *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), para 9.2.

115 UN Human Rights Committee, CCPR General Comment 32 (2007), para 2.

116 *Golder v the United Kingdom* [1975] ECHR 1, paras 35–36; *Ait-Mouhoub v France* [1998] ECHR 97, para 52; *Z and Others v the United Kingdom* [2001] ECHR 333, para 91; and *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 59. See also *Philis v Greece* [1991] ECHR 38, para 65.

117 UN Human Rights Committee, CCPR General Comment 32 (2007), para 9; *Golder v the United Kingdom* [1975] ECHR 1, paras 34–36.

118 *Golder v the United Kingdom* [1975] ECHR 1, paras 35–36.

119 *Kutić v Croatia* [2002] ECHR 297, para 25; *Multiplex v Croatia* [2003] ECHR 351, para 45.

120 UN Human Rights Committee, CCPR General Comment 32 (2007), para 12.

of appeal are only guaranteed by Article 14 in the context of having a right to have one's conviction and sentence reviewed by a higher tribunal (See also 10.1). The European Court of Human Rights also reiterated that Article 6 of the ECHR does not compel States Parties to set up courts of appeal or of cassation. Where such courts do exist, however, the European Court has clarified that Article 6 must be complied with in that it guarantees to litigants an effective right of access to the courts (See also chapter 10).¹²¹ For non-criminal proceedings, the right of access only applies to first instance procedures, i.e., there is no entitlement to appeal a decision in civil proceedings (See also chapter 10),¹²² unless there is an inequality in access to appeal or other subsequent procedures that would result in an inequality before the law (See also 2.2).

The execution of a judgment given by any court is an integral part of the trial for the purposes of Article 6.¹²³ Therefore, the right to the execution of judicial decisions both in criminal and in civil proceeding represents a fundamental aspect of the right of access to court. In *Burdov v Russia*, for example, the European Court of Human Rights held that a State may not cite lack of funds as an excuse for not honoring a judgment debt.¹²⁴ In other words, parties to legal proceedings should not be prevented from benefiting from the success of litigation on the ground of alleged financial difficulties experienced by the State.¹²⁵ A delay in the execution of a judgment may be justified in particular circumstances, such as situations where a significant number of legal suits claiming large sums of money are lodged and call for a change in the law.¹²⁶ However, the delay may not be such as to impair the essence of the right to the execution of judgment.¹²⁷ It would be illusory if a domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case would be determined by a final decision in the judicial proceedings.¹²⁸ The same principle applies in criminal cases, whereby the guarantees afforded by Article 6 would be illusory if the domestic legal or administrative system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted.¹²⁹

121 See, for example, *Dunayev v Russia* [2007] ECHR 404, para 34; *Kozlica v Croatia* [2006] ECHR 923, para 32.

122 *I. P. v Finland*, HRC Communication 450/1991, UN Doc CCPR/C/48/D/450/1991 (1993), para 6.2.

123 *Assanidze v Georgia* [2004] ECHR 140, para 181; *Hornsby v Greece* [1997] ECHR 15, para 40 *in fine*; *Jeličić v Bosnia and Herzegovina* [2006] ECHR 907, para 38 *in fine*.

124 *Burdov v Russia* [2002] ECHR 432, para 35.

125 *Jeličić v Bosnia and Herzegovina* [2006] ECHR 907, paras 39–42 *in fine*.

126 *Multiplex v Croatia* [2003] ECHR 351, para 52; *Pejaković and Others v Bosnia and Herzegovina* [2007] ECHR 1115, para 27; *Jeličić v Bosnia and Herzegovina* [2006] ECHR 907, para 35, 43.

127 *Jeličić v Bosnia and Herzegovina* [2006] ECHR 907, para 39; *Kutić v Croatia* [2002] ECHR 297, para 32; *Aćimović v Croatia* [2003] ECHR 481, para 36; *Multiplex v Croatia* [2003] ECHR 351, para 48; *Kudić v Bosnia and Herzegovina* [2008] ECHR 1658, para 20.

128 *Kutić v Croatia* [2002] ECHR 297, para 25; *Jasiūnienė v Lithuania* [2003] ECHR 122, para 27; *Burdov v Russia* [2002] ECHR 432, para 34; *Jeličić v Bosnia and Herzegovina* [2006] ECHR 907, para 38; *Multiplex v Croatia* [2003] ECHR 351, para 45.

129 *Assanidze v Georgia* [2004] ECHR 140, para 182.

The right of access to courts and tribunals is not limited to citizens of the country in which a court or tribunal operates. The right of access must be available to “all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction”.¹³⁰ In the case of expulsion proceedings (See also 1.3), it should be noted that a different set of procedural guarantees are applicable – under Article 13 of the ICCPR and Article 1 of Protocol 7 to the ECHR.

Access to justice issues may also be relevant for victims of crimes, including victims of hate crimes (See also 7.2).

2.1.2 Legal restrictions to the right of access to courts and tribunals

The right of access to the courts ensures that no individual is deprived of her/his right to claim justice.¹³¹ However, this right is not absolute and may be subject to legitimate restrictions such as **statutory limitation periods**, security for costs orders, regulations concerning minors, persons of unsound mind, bankrupts and vexatious litigants, parliamentary immunity and the immunity of an international organization.¹³²

The Human Rights Committee clarifies that any restrictions regarding access rights must be based on law and justified on objective and reasonable grounds.¹³³ A violation of Article 14 of the ICCPR may be found if such limitations:¹³⁴

- are not prescribed by law; or
- are not necessary to pursue **legitimate aims**, such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law, such, for example, as immunities; or
- if the access left to an individual would be limited to an extent that would undermine the very essence of the right.

The European Court of Human Rights applies the same test for the limitation of **qualified rights** and also applies a **margin of appreciation** when considering how the regulation of

130 UN Human Rights Committee, CCPR General Comment 32 (2007), para 9.

131 UN Human Rights Committee, CCPR General Comment 32 (2007), para 9; *Golder v the United Kingdom* [1975] ECHR 1, paras 34–36.

132 *Stubbings and Others v the United Kingdom* [1996] ECHR 44, para 62; *Z and Others v the United Kingdom* [2001] ECHR 333, para 93; and Nuala Mole and Catharina Harby, *The right to a fair trial* (Strasbourg: Council of Europe, 2nd Ed, 2006), p.36; *Tolstoy Miloslavsky v the United Kingdom* [1995] ECHR 25, para 61; *Al-Adsani v the United Kingdom* [2001] ECHR 761, para 56; *McElhinney v Ireland* [2001] ECHR 763, para 35; *Cordova v Italy* [2003] ECHR 47, para 60; *Beer and Regan v Germany* [1999] ECHR 6, para 53.

133 UN Human Rights Committee, CCPR General Comment 32 (2007), para 9.

134 UN Human Rights Committee, CCPR General Comment 32 (2007), para 18.

access to courts is achieved by each country.¹³⁵ In doing so, the European Court explains that the right of access to a court, by its very nature, calls for regulation by the State, which may vary in time and in place according to the needs and resources of the community and of individuals.¹³⁶ States are, therefore, in principle, free to choose the means to be used towards this end.¹³⁷ However, States' discretion is guided by the following guiding principles, requiring that the regulation of access rights:¹³⁸

- must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired;
- should pursue a **legitimate aim**; and
- should be justified by reasonable relationship of **proportionality** between the means employed and the aim sought to be achieved.

The right of access will be violated if persons are barred from bringing proceedings against any other persons on the basis of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹³⁹ This aspect of the right to access by all persons is intimately linked to the principle of equality before court and tribunals (See also 2.2). *Ato del Avellanal v Peru*, for example, concerned a claim for unpaid rent brought by Mrs. Ato del Avellanal against former tenants of a property owned by her and her husband. Article 168 of the Peruvian Civil Code was found to violate the ICCPR because it provided that, when a woman is married, only the husband was entitled to bring a claim before the court in respect of matrimonial property.¹⁴⁰ This part of the communication was dealt with as a violation of Articles 3 and 26 of the Covenant, relating to equality and non-discrimination.

A statutory bar against bringing a civil claim was considered by the European Court of Human Rights in *Philis v Greece*. The applicant was an engineer who sought to bring a claim for reimbursement for work and wanted to bring the claim directly by him against the defendant company. Due to his membership in the Technical Chamber of Greece, however, he was statutorily barred from bringing the claim himself because only the Chamber could pursue such claims. The European Court held that Philis had the right to bring civil

135 *Lithgow and Others v the United Kingdom* [1986] ECHR 8, para 194 b); *Ashingdane v the United Kingdom* [1985] ECHR 8, para 57.

136 *Lithgow and Others v the United Kingdom* [1986] ECHR 8, para 194; *Dunayev v Russia* [2007] ECHR 404, para 34; *Golder v the United Kingdom* [1975] ECHR 1, paras 38; *Ashingdane v the United Kingdom* [1985] ECHR 8, para 57; *Biondić v Croatia* [2007] ECHR 910, para 24.

137 *Kreuz v Poland* [2001] ECHR 398, para 53.

138 *Ashingdane v the United Kingdom* [1985] ECHR 8, para 57; *Lithgow and Others v the United Kingdom* [1986] ECHR 8, para 194; *Brualla Gómez de la Torre v Spain* [1997] ECHR 104, para 33; *Tinnelly & Sons Ltd and Others and McElduff and Others v the United Kingdom* [1998] ECHR 56, para 72 and *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 62; *Acimović v Croatia* [2003] ECHR 481, para 29.

139 UN Human Rights Committee, CCPR General Comment 32 (2007), para 9; UN Human Rights Committee, CCPR General Comment 18 (1989), para 7; *Kastelic v Croatia* [2003] ECHR 348, paras 27–32.

140 *Ato del Avellanal v Peru*, HRC Communication 202/1986, UN Doc CCPR/C/34/D/202/1986 (1988), para 10.2.

proceedings directly and independently of any union membership, and thus found a violation of Article 6(1) of the ECHR.¹⁴¹ Concerning a different set of facts, in *Lithgow v the United Kingdom*, the European Court held that the limitation on a direct right of access for every individual shareholder, in the context of a large-scale nationalization measure, pursued a legitimate aim, namely the desire to avoid a multiplicity of claims and proceedings brought by individual shareholders. Also, having regard to the powers and duties of the shareholders' representative (who had the right to act on behalf of shareholders collectively), and to the Government's margin of appreciation, the European Court took the view that there was a reasonable relationship of **proportionality** between the means employed and this aim.¹⁴²

Access to courts and tribunals must also be equal as between prosecution and defence. In *Weiss v Austria*, for example, an author's inability to appeal an adverse judgment of the Upper Regional Court, in circumstances where the prosecutor could, was found by the Human Rights Committee to be a violation of Article 14(1) on the basis that the parties had not been treated equally before the courts.¹⁴³ This is a matter relevant to the right of access to appeal against one's conviction and sentence (See also 10.1).

2.1.3 *Practical obstacles to access to courts and tribunals*

In *Steel and Morris v the United Kingdom*, the European Court of Human Rights recalled that the ECHR is intended to guarantee practical and effective rights, particularly in the context of the right of access to court, due to the prominent place that the right to a fair trial holds in a democratic society.¹⁴⁴ The Human Rights Committee has similarly taken the view that access to the courts must not only be guaranteed by the law, but must also not be frustrated through systemic or repeated obstacles, stating that: "A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated... *de facto* runs counter to the guarantee of article 14 of the ICCPR."¹⁴⁵

The availability of legal assistance will often impact on the ability of persons to access relevant proceedings, or to participate in them in a meaningful way.¹⁴⁶ This is an issue that impacts on the question of legal aid (See also 6.6.7). In *Airey v Ireland*, the European Court found a violation of the right to effective access to a court due to the refusal of legal aid in a separation proceeding. Despite the possibility for Mrs. Airey to represent herself in person, the European Court of Human Rights considered it improbable that a person in Mrs. Airey's position

141 *Philis v Greece* [1991] ECHR 38, para 65.

142 *Lithgow and Others v the United Kingdom* [1986] ECHR 8, para 197.

143 *Weiss v Austria*, HRC Communication 1086/2002, UN Doc CCPR/C/77/D/1086/2002 (2003), para 9.6. See also *Dudko v Australia*, HRC Communication 1347/2005, UN Doc CCPR/C/90/D/1347/2005 (2007), para 7.4.

144 *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 59. See also *Airey v Ireland* [1979] ECHR 3, para 24.

145 UN Human Rights Committee, CCPR General Comment 32 (2007), para 9; and *Oló Bahamonde v Equatorial Guinea*, HRC Communication 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993), para 9.4.

146 UN Human Rights Committee, CCPR General Comment 32 (2007), para 10; *Airey v Ireland* [1979] ECHR 3, para 26.

could effectively present her own case.¹⁴⁷ However, the Court rejected that this would imply that the State must provide free legal aid for every dispute relating to a “civil right”. Effective access might be secured in other ways, such as a simplification of procedures.¹⁴⁸

Another financial obstacle to the right of access to court is the imposition of fees as a precondition to lodge a complaint or as a consequence of appealing against a verdict. The Human Rights Committee has held that the imposition of fees on the parties to proceedings that would *de facto* prevent their access to justice might give rise to issues under Article 14(1) of ICCPR. In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights.¹⁴⁹

In *Äärelä and Näkkäläjärvi v Finland*, the Human Rights Committee concluded that the imposition by the Court of Appeal of a uniform and substantial costs award, without the discretion to consider its implications for the particular authors or its effect on the access to court of other similarly situated claimants, constituted a violation of the authors’ rights under Article 14(1), in conjunction with Article 2 of the ICCPR (concerning the right to effective remedies).¹⁵⁰ The Human Rights Committee has noted, however, that the right of access is not absolute and that it is permissible to impose reasonable fees, or deposits, where this is rationally linked to ensuring the proper administration of justice.¹⁵¹ Fees must be reasonable, however, and an excessive level of court fees has been treated by the European Court of Human Rights as amounting to a disproportionate restriction on the right to access to a court.¹⁵² In determining whether or not a person has enjoyed her/his right of access to a court – or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired – the European Court of Human Rights has said that the amount of the fees ought to be considered in light of the particular circumstances of a given case, including the applicant’s ability to pay them and the phase of the proceedings at which the fees are imposed.¹⁵³ In *Weissman and Others v Romania*, the European Court found to be disproportionate a stamp duty of EUR 323,264 for lodging a claim of lost

147 *Airey v Ireland* [1979] ECHR 3, paras 24–25.

148 *Airey v Ireland* [1979] ECHR 3, para 26.

149 UN Human Rights Committee, CCPR General Comment 32 (2007), para 11; *Lindon v Australia*, HRC Communication 646/1995, UN Doc CCPR/C/64/D/646/1995 (1998), para 6.4. See also *Sankara et al. v Burkina Faso*, HRC Communication 1159/2003, UN Doc CCPR/C/86/D/1159/2003 (2006) concerning a failure on the part of a court registrar to advise the author of the requirement to deposit a security, resulting in a dismissal of the appeal by the court (para 12.5).

150 *Äärelä and Näkkäläjärvi v Finland*, HRC Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001), para 7.2.

151 *Casanovas v France*, HRC Communication 1514/2006, UN Doc CCPR/C/94/D/1514/2006 (2008), para 11.3.

152 *Kreuz v Poland* [2001] ECHR 398, paras 59, 60.

153 *Weissman and Others v Romania* [2006] ECHR, para 37. See also: *Tolstoy Miloslavsky v the United Kingdom* [1995] ECHR 25, para 63–67; *Kreuz v Poland* [2001] ECHR 398, para 60; *Teltronic-CATV v Poland* [2006] ECHR 21, para 48.

income from property, thus leading to violation of Article 6.¹⁵⁴ In *Ciorap v Moldova*, a case of a prisoner complaining of the alleged damage to his health caused by the actions of the authorities, the Court found that, regardless of his ability to pay, the applicant should have been exempted from paying court fees due to the nature of his claim.¹⁵⁵

Practical obstacles to access by parties to the proceedings might also arise for the same sorts of reasons that the public encounters in the context of obstacles to a public hearing (See also 4.2). Parties may be prevented from accessing the judicial system, for example, because of a lack of information regarding the place and time of hearing (See also 4.2.1 and 6.5.3) or because the location of the court is such that it is difficult or impossible for parties to get to the hearing venue (See also 4.2.2). Practical obstacles to access might also arise as a result of a lack of facilities to allow physical access by disabled persons, although case law on this subject has been extremely hesitant.¹⁵⁶ Articles 5(3) and 9 of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities obligate States parties to make a “reasonable accommodation” to allow persons with disabilities to access facilities and services available to others, requiring necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden on the State.

2.2 EQUALITY BEFORE COURTS AND TRIBUNALS

Whereas equality of arms (See also 6.1) pertains to the enjoyment of procedural rights between parties to the same proceeding, equal treatment is broader in its application and engages the principles of equality before the law and non-discrimination. In its most simple sense, equality before courts and tribunals involves the idea that everyone should be treated the same.

As well as the reference in Article 14(1) of the ICCPR that “[a]ll persons shall be equal before the courts and tribunals”, Article 16 guarantees that: “Everyone shall have the right to recognition everywhere as a person before the law.” Article 26 adds that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law...”¹⁵⁷ Article 3 provides that the parties to the ICCPR “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”. Article 14 of the ECHR similarly provides that the enjoyment of rights must be secured without discrimination on any grounds. Protocol 12 to the ECHR refers, in its preamble, to the principles of equality before the law and the entitlement to the equal protection of the law as fundamental principles. Article 1 of Protocol 12 guarantees that:

154 *Weissman and Others v Romania* [2006] ECHR, paras 40, 42.

155 *Ciorap v Moldova* [2007] ECHR 502, para 95.

156 Loukis G. Loucaides, “The European Convention on Human Rights and the rights of persons with disabilities”, in *The European Convention on Human Rights: Collected Essays* (Martinus Nijhoff Publishers, 2008), p.5; *Farcas v Romania* [2010] ECHR, paras 48–49 available in French only.

157 UN Human Rights Committee, CCPR General Comment 32 (2007), para 65.

“The enjoyment of any right set forth by law shall be secured without discrimination on any ground...”¹⁵⁸

In *González v Spain*, the author claimed that there was a violation of Article 14(1) of the ICCPR, together with Article 26 (equality and non-discrimination), by virtue of the fact that she was unable to appear before the Constitutional Court without being represented by a *procurador* (legal counsel accredited to the Constitutional Court). The author claimed that this resulted in an inequality before the law, since those with a law degree did not need to be represented, whereas those without a law degree were required to be represented by a *procurador*. The Human Rights Committee accepted the position of the Constitutional Court, i.e., that the requirement for representation reflected the need for a person with legal training to assume responsibility for proceedings in connection with appeals to that court. The Committee did not accept, on the evidence before it, that this failed to be based upon objective and reasonable criteria.¹⁵⁹

2.3 ABBREVIATED OR SIMPLIFIED PROCEEDINGS

The Human Rights Committee, in its General Comment on the right to a fair trial, refers to the equality before courts and tribunals as requiring that similar cases be dealt with in similar ways. If exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, this distinction must be justified on objective and reasonable grounds.¹⁶⁰

In its Concluding Observations to the fifth period report of the United Kingdom, for example, the Human Rights Committee gave consideration to the fact that some elements of criminal procedure differed between Northern Ireland and the remainder of the United Kingdom. In particular, under the so-called “Diplock court” system in Northern Ireland, persons charged with certain offences were subject to a different regime of criminal procedure, including the absence of a jury. This modified procedure was applicable unless the Attorney-General certified the contrary, although there was no need to give reasons for such certification. The Committee emphasized that the application of different criminal procedures requires objective and reasonable grounds to be provided by the appropriate prosecution authorities. It recommended that the United Kingdom ensure that, in every case where an individual was subjected to a “Diplock court”, there were objective and reasonable grounds justifying this.¹⁶¹

158 Protocol 12 of the ECHR, adopted on 4 November 2000. See also the following articles of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948: article 1 (right to equality in dignity and rights); article 2 (enjoyment of rights without distinction); article 6 (recognition before the law); and article 7 (equality before the law).

159 *González v Spain*, HRC Communication 1005/2001, UN Doc CCPR/C/74/D/1005/2001 (2002), para 4.3.

160 UN Human Rights Committee, CCPR General Comment 32 (2007), para 14.

161 UN Human Rights Committee, Concluding Observations: the United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/CO/73/UK (2001), para 18.

In *Engel and Others v the Netherlands*, the applicants before the European Court of Human Rights were conscript soldiers in the Dutch armed forces and complained about the fact that they were subject to military disciplinary procedures instead of criminal procedures applicable to civilians. They complained that these procedures did not provide the guarantees required of Article 6 of the ECHR and that this also involved discrimination against them, as members of the armed forces. The European Court considered that there were objective and reasonable grounds justifying the application to members of the armed forces of disciplinary procedures that were separate to the criminal law procedures applicable to civilians. The Court stated:

“Whilst military disciplinary procedure is not attended by the same guarantees as criminal proceedings brought against civilians, it offers on the other hand substantial advantages to those subject to it... The distinctions between these two types of proceedings in the legislation of the Contracting States are explicable by the differences between the conditions of military and of civil life. They cannot be taken as entailing a discrimination against members of the armed forces, within the meaning of Articles 6 and 14 (art. 14+6) taken together.”¹⁶²

In *Scoppola v Italy*, the European Court of Human Rights noted that the summary procedure provided for in the Italian Code of Criminal Procedure entails undoubted advantages for the defendant, including a substantially reduced sentence and a bar for the prosecutor to appeal on almost all grounds. The European Court, nevertheless, took the view that the summary procedure also entailed a diminution of the procedural safeguards, particularly public hearings and the possibility to adduce evidence and have witnesses summoned.¹⁶³

¹⁶² *Engel and Others v the Netherlands* [1976] ECHR 3, para 92.

¹⁶³ *Scoppola v Italy* [2009] ECHR 1297, para 134.

CHECKLIST: RIGHTS OF ACCESS AND EQUALITY IN THE ADMINISTRATION OF JUSTICE

1. In the monitored case, were there any statutory restrictions imposed on the ability of a party to bring a claim to court?
 - a. What kind of restrictions (substantive or procedural) were imposed on bringing a specific case for examination before the courts?
 - b. Did these restrictions pursue a legitimate aim? (If the restrictions are based on the person's race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such restrictions will not be treated as pursuing a legitimate aim.)
 - c. Did a relationship of proportionality exist between the restriction imposed in the specific case and the aims sought to be achieved by the restriction on access to a court?
 - d. Did the bar restrict the access left to the individual in such a way or to such an extent that the very essence of the right was impaired? Please provide details.
2. In the monitored case, were there any practical obstacles to a person's access to courts or tribunals?

This might include, for example, lack of legal aid, excessive costs and fees imposed by the courts, lack of information regarding the place and time of hearing, the location of the court and whether it is accessible to the public, or a lack of reasonable facilities to allow access by disabled persons.

- a. Did the party or the legal counsel officially complain about the obstacle?
 - b. Was the complaint dealt with by the judicial authority?
 - c. Did the judicial authority (including the law enforcement agencies and the court staff) take any action to overcome the practical obstacle in the specific case? How?
3. Are the parties to the proceedings *treated* equally, i.e., not in a way that discriminates against them based on their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status?
4. Are the procedures applied to the case the same as would be applied in similar cases? If not, are there objective and reasonable grounds justifying the application of different procedures?

CHAPTER III

Right to a Hearing by a Competent, Independent and Impartial Tribunal Established by Law

Article 14(1) of the ICCPR

“(1) ...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...”

Article 6(1) of the ECHR

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

OSCE Commitments

(19) The participating States

(19.1) – will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, *inter alia*, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;

(19.2) – will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary ...

(20) For the promotion of the independence of the judiciary, the participating States will

(20.1) – recognize the important function national and international associations of judges and lawyers can perform in strengthening respect for the independence of their members

and in providing education and training on the role of the judiciary and the legal profession in society;

(20.2) – promote and facilitate dialogue, exchanges and co-operation among national associations and other groups interested in ensuring respect for the independence of

the judiciary and the protection of lawyers;

(20.3) – co-operate among themselves through, inter alia, dialogue, contacts and exchanges in order to identify where problem areas exist concerning the protection of the independence of judges and legal practitioners and to develop ways and means to address and resolve such problems;

(20.4) – co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners, as well as the preparation and enactment of legislation intended to strengthen respect for their independence and the impartial operation of the public judicial service.

Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991.

Article 14(1) of the ICCPR and article 6(1) of the ECHR guarantee for every person a fair trial before an “independent and impartial tribunal established by law”.¹⁶⁴ Article 14(1) of the ICCPR adds that such a tribunal must be “competent”. OSCE participating States have committed to respecting the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service.¹⁶⁵ OSCE participating States have also undertaken to co-operate on an ongoing basis in such areas as the education and training of judges and legal practitioners and, more in particular, have recognized the important function national and international associations of judges and lawyers can perform in strengthening respect for the independence of their members and in providing education and training on the role of the judiciary and the legal profession in society.¹⁶⁶

The notion of a “tribunal” is described by the Human Rights Committee as “a body, regardless of its denomination, that is established by law, is independent of the executive and the legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.¹⁶⁷ The European Court of Human Rights

¹⁶⁴ Article 10 of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, uses more simple language, referring only to the right to a fair and public hearing by “an independent and impartial tribunal”.

¹⁶⁵ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991, p. 112, para 19.1.

¹⁶⁶ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991, p. 113, paras 20.1–20.4.

¹⁶⁷ UN Human Rights Committee, CCPR General Comment 32 (2007), para 18.

has referred to the concept of tribunal, in the substantive sense of this expression,¹⁶⁸ as not necessarily being a court of law in the classic sense integrated within the standard judicial machinery of the country.¹⁶⁹ The main characteristics of a “tribunal” within the meaning of Article 6 are the power to give a binding decision that may not be altered by a non-judicial authority (See also 3.2.2),¹⁷⁰ combined with a mandate to determine matters within the tribunal’s competence “on the basis of rules of law, following proceedings conducted in a prescribed manner”.¹⁷¹

The right to a trial before an independent and impartial tribunal established by law engages three principal considerations: first, that the tribunal is one established by law (See also 3.1); second, that the tribunal is competent to decide on matters brought before it (See also 3.2); and, third, that the tribunal is both independent and impartial (See also 3.3). It is the independence and impartiality of courts and tribunals that the Human Rights Committee and European Court of Human Rights have focused most on. Claims brought before the Committee and the Court frequently mix issues of competence, establishment, independence and impartiality and, where this occurs, matters are often decided on the question of independence and impartiality.

Also of relevance is the question of the independence, or autonomy, of prosecutors, including the extent to which prosecutors must act in an impartial way (See also 3.4). In the exercise of a tribunal’s function to enforce the fair and professional conduct of legal proceedings, it is also relevant to briefly note the question of contempt of court (See also 3.5).

The Human Rights Committee has spoken of the requirements of competence, independence and impartiality as absolute, i.e., not capable of being subject to any exception.¹⁷² However, during a state of emergency threatening the life of the nation, it may be possible to **derogate** from certain rights and freedoms, which means that the right to a fair and public hearing may be subject to legitimate restrictions that are strictly required by the exigencies of the emergency situation if this is an emergency declared under Article 4 of the ICCPR or Article 15 of the ECHR. Notwithstanding this possibility, the Human Rights Committee explains that the denial of certain fair trial rights can never occur, even in an emergency situation, because “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency”.¹⁷³ This includes the principle that only a court of law can try and convict a person for a criminal offence, i.e., only a competent, independent and impartial tribunal established by law.¹⁷⁴

168 *Sramek v Austria* [1984] ECHR 12, para 36; *Belilos v Switzerland* [1988] ECHR 4, para 64.

169 *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 76.

170 *Findlay v the United Kingdom* [1997] ECHR 8, para 77; *Van de Hurk v the Netherlands* [1994] ECHR 14, para 45.

171 *Sramek v Austria* [1984] ECHR 12, para 36; *Belilos v Switzerland* [1988] ECHR 4, para 64.

172 UN Human Rights Committee, CCPR General Comment 32 (2007), para 19. See also *González del Río v Peru*, HRC Communication 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), para 5.2.

173 UN Human Rights Committee, CCPR General Comment 29 (2001), para 16.

174 UN Human Rights Committee, CCPR General Comment 29 (2001), para 16.

The right to a trial before an independent and impartial tribunal established by law is expressly applicable to both criminal and civil proceedings. Whereas the Human Rights Committee has commented that *any* criminal conviction by a body not constituting a tribunal would be incompatible with Article 14(1) of the ICCPR, it has qualified its approach in the case of civil proceedings by stating that “whenever rights and obligations in a suit at law are determined, this must be done at least at *one* stage of the proceedings by a tribunal within the meaning of [article 14(1)]” (emphasis added).¹⁷⁵ This distinction in approach is not explained by the Committee, but fits with the fact that civil proceedings may involve various different legal frameworks (See also 1.2), such as private law (governing the relationship between individuals and legal persons), administrative law (governing the relationship between individuals and legal persons vis-à-vis the State) and other procedures. Not all of those frameworks involve determinations by a tribunal at all stages, in particular administrative law, which involves decisions by the executive branch of government. The point being made by the Human Rights Committee is that this is not incompatible with the ICCPR, so long as such decisions are capable of review on at least one occasion by a competent, independent and impartial tribunal established by law. The European Court of Human Rights has made the same point with regard, for example, to decisions of tax authorities.¹⁷⁶

3.1 TRIBUNAL ESTABLISHED BY LAW

For the purposes of Article 14 of the ICCPR and Article 6 of the ECHR, criminal and civil proceedings must be conducted by a “tribunal established by law”. This requirement, according to the European Court of Human Rights, embodies the principle of the rule of law inherent in the system of the ECHR and its protocols. A body that has not been set up in accordance with the will of the people, i.e., as expressed through the law, would necessarily lack the legitimacy that is needed in a democratic society for such a body to hear the case of individuals.¹⁷⁷ The expression “established by law” is not defined in the ICCPR or the ECHR but includes two key requirements: first, that the judicial system is established and sufficiently regulated by law emanating from Parliament (See also 3.1.1); and, second, that each tribunal is established, in the case of all hearings, in accordance with the legal requirements for its establishment (See also 3.1.2). Consideration also needs to be had to the question of *ad hoc* or special tribunals (See also 3.1.3) and the fact that there is no right to trial by jury (See also 3.1.4).

3.1.1 Establishment of the judiciary

The starting point for the proper establishment of a tribunal is the legislative establishment of a framework for the judiciary. As explained by the European Commission of Human Rights, the object of the requirement that a tribunal be established by law is to create certainty and independence. A legal framework under which the judicial organization is sufficiently regulated by law emanating from Parliament is needed in order to ensure that the organization of the judiciary in a democratic society does not depend on the discretion of the

¹⁷⁵ UN Human Rights Committee, CCPR General Comment 32 (2007), para 18.

¹⁷⁶ *Vastberga Taxi Aktiebolag and Vulic v Sweden* [2002] ECHR 621, para 93.

¹⁷⁷ *Lavents v Latvia* [2002] ECHR 786, para 114, available in French only.

Executive.¹⁷⁸ Furthermore, the European Court of Human Rights has held that, in countries where the law is codified, the organization of the judicial system cannot be left to the sole discretion of the judicial authorities either, although this does not exclude the ability of the courts to have some latitude in interpreting the relevant national legislation.¹⁷⁹

The term “established by law” includes not only the legal basis of the existence of the court but also the composition and the competences of the judicial body. The law should also explain the grounds for the exclusion of judges from hearing certain cases. This includes provisions relating to the incompatibilities and disqualification of judges.¹⁸⁰

The principle of the legal establishment of the judiciary does not require that an Act of Parliament regulate each and every detail of the operation of the judicial system. So long as the legislature “establishes at least the organisational framework for the judicial organisation”, it is adequate and common for delegated legislation to expand on the operational details of that organization.¹⁸¹

3.1.2 Establishment of each tribunal in accordance with the law

The second key feature of the requirement that a tribunal be established by law is that each individual hearing is before a tribunal whose composition is in full compliance with the requirements of the law.¹⁸² In other words, the phrase “established by law” covers not only the legal basis for the very existence of a “tribunal” but also the composition of the bench in each case, including the circumstances for the replacement of judges (voluntary withdrawal of a judge or recusation).¹⁸³ In *Posokhov v Russia*, for example, the failure to appoint lay judges by ballot and for periods longer than permitted by the Lay Judges Act resulted in a finding that the hearing of Posokhov had not been undertaken by a tribunal established by law.¹⁸⁴ In *Moiseyev v Russia*, the European Court of Human Rights found that the State had failed to explain how 11 replacements of the judges on the bench in the course of the trial could be reconciled with the rule of immutability of the court composition.¹⁸⁵

3.1.3 Ad hoc or special tribunals

The right of equal access to courts and tribunals (See also 2.1) and equal treatment by courts and tribunals (See also 2.2) requires that similar cases are dealt with in a similar way (See also 2.3). The Human Rights Committee has explained that this means that specially constituted courts or tribunals established for the determination of certain categories of cases

178 *Zand v Austria* [1978] European Commission of Human Rights, paras 60–70; *Coëme and Others v Belgium* [2000] ECHR 250, para 98.

179 *Coëme and Others v Belgium* [2000] ECHR 250, para 98.

180 *Lavents v Latvia* [2002] ECHR 786, para 114, available in French only.

181 *Zand v Austria* [1978] European Commission of Human Rights, paras 69–70.

182 *Posokhov v Russia* [2003] ECHR 17, para 39.

183 *Posokhov v Russia* [2003] ECHR 17, para 39.

184 *Posokhov v Russia* [2003] ECHR 17, paras 39–43.

185 *Moiseyev v Russia* [2008] ECHR 1031, para 179.

must be established on objective and reasonable grounds in order to justify the distinction between such tribunals and ordinary courts.¹⁸⁶

3.1.4 *Jury trial*

As to the form of the tribunal established by law, the Human Rights Committee has determined that the ICCPR does not confer the right to trial by jury, nor does it confer a right to be tried by professional judges. The touchstone is that all judicial proceedings, with or without a jury, must conform to the guarantees of a fair trial.¹⁸⁷ Similarly, the European Court of Human Rights has acknowledged that jury trials exist in a variety of forms in different States, reflecting each State's history, tradition and legal culture. The European Court has also recognized that a State's choice of a particular criminal justice system is in principle outside the scope of the Court's supervision, limiting its task to consider whether the system adopted has led in a given case to results which are compatible with the ECHR.¹⁸⁸

3.2 COMPETENT TRIBUNAL

The right to a fair hearing by a "competent" tribunal is only expressly referred to within Article 14(1) of the ICCPR, although this has been treated as an implicit requirement of Article 6(1) of the ECHR. The expression is not defined in the ICCPR, but competence has been understood as involving three requirements: competence of individual judicial officers (See also 3.2.1); competence of a tribunal to make a binding decision (See also 3.2.2); and jurisdictional competence of a tribunal (See also 3.2.3). The objective of these requirements is to ensure that each tribunal is competent to decide on matters brought before it.

3.2.1 *Competence of individual judicial officers*

The ordinary meaning of the expression "competence" calls for a tribunal to be staffed by competent judicial officers, i.e., suitably qualified and experienced persons to act as judicial officers. There are two issues to be considered in this regard. The first concerns procedures to ensure the proper selection, recruitment, promotion and retirement of judges (See also 3.3.1). The second relates to whether the requirement of competence can be measured against errors made by judicial officers and, in turn, the extent to which a State can be held responsible for errors by individual judges or tribunals in particular cases. On the latter point, the Human Rights Committee has repeatedly said that Article 14 guarantees procedural equality and fairness but cannot be interpreted as ensuring the absence of error on the part of a competent tribunal,¹⁸⁹ explaining that it is generally for domestic courts to review facts and evidence, unless it can be shown that such evaluation was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its

¹⁸⁶ UN Human Rights Committee, CCPR General Comment 32 (2007), para 14.

¹⁸⁷ See, for example: *Kavanagh v Ireland*, HRC Communication 819/1998, UN Doc CCPR/C/71/D/819/1998 (2001), para 10.1; and *Wilson v Australia*, HRC Communication 1239/2004, UN Doc CCPR/C/80/D/1239/2004 (2004), para 4.4.

¹⁸⁸ *Taxquet v Belgium* [2010] ECHR 1806, paras 83–84.

¹⁸⁹ UN Human Rights Committee, CCPR General Comment 32 (2007), para 26; and *B. d. B. et al. v the Netherlands*, HRC Communication 273/1988, U.N. Doc. CCPR/C/35/D/273/1988 (1989), para 6.4.

obligation of independence and impartiality.¹⁹⁰ The Human Rights Committee has similarly concluded that it is not in principle for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated her/his obligation of impartiality.¹⁹¹

3.2.2 Competence to make a binding decision

The function of a court or tribunal is to determine matters within its competent jurisdiction (See also 3.2.3).¹⁹² This means that a tribunal must be able to make a binding decision that cannot be altered by a non-judicial authority to the detriment of an individual party,¹⁹³ something described by the European Court of Human Rights as inherent to the very notion of a judicial tribunal.¹⁹⁴ The power to give a binding decision can be also seen as a component of the “independence” of the tribunal (See also 3.3.1).¹⁹⁵

3.2.3 Jurisdictional competence of courts and tribunals

The final aspect of “competence” is that there may be a duty on a State to establish a court, or to extend the jurisdiction of an existing court, to deal with matters in respect of which there is no existing right of recourse to the courts. This overlaps with the right of access to courts and tribunals (See also 2.1.1). In its General Comment on fair trial standards, the Human Rights Committee has explained that:

“The failure of a State party to establish a competent tribunal to determine... rights and obligations or to allow access to... a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.”¹⁹⁶

190 See, for example: *Simms v Jamaica*, HRC Communication 541/1993, UN Doc CCPR/C/53/D/541/1993 (1995), para 6.2; *Romanov v Ukraine*, HRC Communication 842/1998, UN Doc CCPR/C/79/D/842/1998 (2003), para 6.4; *Schedko v. Belarus*, HRC Communication 886/1999, UN Doc CCPR/C/77/D/886/1999 (2003), para 9.3; *Martínez Mercader et al. v Spain*, HRC Communication 1097/2002, UN Doc CCPR/C/84/D/1097/2002 (2005), para 6.3; *Arenz et al. v Germany*, HRC Communication 1138/2002, UN Doc CCPR/C/80/D/1138/2002 (2004), para 8.6; and *Riedl-Riedenstein et al. v Germany*, HRC Communication 1188/2003, UN Doc CCPR/C/88/D/1188/2003 (2007) para 7.3.

191 *Kelly v Jamaica*, HRC Communication 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para 5.13.

192 *Sramek v Austria* [1984] ECHR 12, para 36.

193 *Van de Hurk v the Netherlands* [1994] ECHR 14, para 45; *Findlay v the United Kingdom* [1997] ECHR 8, para 77; and *Morris v the United Kingdom* [2002] ECHR 162, para 73.

194 *Morris v the United Kingdom* [2002] ECHR 162, para 73; *Findlay v the United Kingdom* [1997] ECHR 8, para 77; *Van de Hurk v the Netherlands* [1994] ECHR 14, para 45.

195 *Morris v the United Kingdom* [2002] ECHR 162, para 73; *Findlay v the United Kingdom* [1997] ECHR 8, para 77; *Van de Hurk v the Netherlands* [1994] ECHR 14, para 45.

196 UN Human Rights Committee, CCPR General Comment 32 (2007), para 18.

The establishment of the International Criminal Court (ICC), for instance, imposes on States a duty to establish specific courts or extend jurisdiction of an existing court(s). In the case of Croatia, for example, the ratification of the Rome Statute on the ICC was followed by the adoption of legislation establishing four specialized war crimes courts.

3.3 INDEPENDENT AND IMPARTIAL TRIBUNAL

The independence and impartiality of a tribunal is a central pillar of the right to a fair hearing.¹⁹⁷ In implementing the relevant standards and commitments, OSCE participating States have agreed to ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the *Basic Principles on the Independence of the Judiciary*.¹⁹⁸ Moreover, the OSCE has published the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, to assist participating States in strengthening the independence of their judiciaries, particularly in the areas of judicial administration, the selection of judges and their accountability.¹⁹⁹

The requirement of independence means, in general terms, that tribunals should be free from any form of direct or indirect influence, whether this comes from the government, from the parties in the proceedings or from third parties, such as the media (See also 3.1).²⁰⁰ Impartiality is a guarantee that is linked to the principle of equality before courts and tribunals (See also 2.2) and involves the idea that everyone should be treated the same. It requires that judicial officers exercise their function without personal bias or prejudice and in a manner that offers sufficient guarantees to exclude any legitimate doubt of their impartiality (See also 3.3.2). The requirements of independence and impartiality apply to juries as well as judges (See also 3.3.3)

Although independence and impartiality each hold different meanings and give rise to varying implications, the two requirements are very often dealt with together by the Human Rights Committee and the European Court of Human Rights.²⁰¹ This becomes particularly evident when considering the subject of specialized courts, such as military tribunals (See

197 *Delcourt v Belgium* [1970] ECHR 1, para 25; and *De Cubber v Belgium* [1984] ECHR 14, para 30.

198 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991, para 19.2, page 113. See also, UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146.

199 OSCE Office for Democratic Institutions and Human Rights, “Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia”, Kyiv, 23–25 June 2010.

200 UN Human Rights Committee, CCPR General Comment 32 (2007), para 25; *Ringeisen v Austria* [1971] ECHR 2, para 95; and *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 55. See also, UN Basic Principles on the Independence of the Judiciary, adopted in 1985 by the UN General Assembly Resolutions 40/32 and 40/146, para 4: “There shall not be any inappropriate or unwarranted interference with the judicial process”.

201 See, for example, *Grievies v the United Kingdom* [2003] ECHR 688, para 69.

also 3.3.4), tribunals of faceless judges (See also 3.3.5) and religious courts or courts based on customary law (See also 3.3.6).

3.3.1 Independence of a tribunal

In determining whether a body can be considered to be independent, regard must be had to four main features:

- (a) The manner in which judicial officers are appointed;²⁰²
- (b) The security of tenure of judicial officers, i.e., the duration of their term of office and the general principle that they should not be subject to removal;²⁰³
- (c) The existence of adequate guarantees protecting the tribunal and its members from external pressures;²⁰⁴ and
- (d) An outward appearance that the tribunal is independent.²⁰⁵

Concerning the manner in which judicial officers are appointed, the fact that members of a tribunal are appointed by the executive does not itself violate the requirements of independence. In *Campbell and Fell v the United Kingdom*, for example, the appointment of members of Parole Boards for England and Wales by the British Home Secretary was not, by itself, considered to mean that those members were not independent of the executive, even though the Office could issue the Boards with guidelines as to the performance of their functions.²⁰⁶ The European Court of Human Rights found, *inter alia*, that there was a sufficient guarantee of independence due to the fact that the members of the Boards were not subject to the British Home Secretary's instructions in their adjudicatory role.²⁰⁷

Security of tenure requires that, during their term of office, judicial officers must enjoy a level of independence such that they do not fear that decisions made contrary to any asserted or implied pressure would result in their removal from office or a detriment to their conditions of service. The European Court of Human Rights has described the irremovability of

202 UN Human Rights Committee, CCPR General Comment 32 (2007), para 19; *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 57; and *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 78; *Findlay v the United Kingdom* [1997] ECHR 8, para 73; *Bochan v Ukraine* [2007] ECHR, para 65; *Moiseyev v Russia* [2008] ECHR 1031, para 173.

203 UN Human Rights Committee, CCPR General Comment 32 (2007), para 19; and *Campbell and Fell v the United Kingdom* [1984] ECHR 8, paras 78, 80; *Findlay v the United Kingdom* [1997] ECHR 8, para 73; *Bochan v Ukraine* [2007] ECHR, para 65; *Moiseyev v Russia* [2008] ECHR 1031, para 173.

204 UN Human Rights Committee, CCPR General Comment 32 (2007), para 19; *Piersack v Belgium* [1982] ECHR 6, para 27; and *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 78; *Findlay v the United Kingdom* [1997] ECHR 8, para 73; *Bochan v Ukraine* [2007] ECHR, para 65; *Moiseyev v Russia* [2008] ECHR 1031, para 173.

205 *Delcourt v Belgium* [1970] ECHR 1, para 31; and *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 78; *Findlay v the United Kingdom* [1997] ECHR 8, para 73; *Bochan v Ukraine* [2007] ECHR, para 65; *Moiseyev v Russia* [2008] ECHR 1031, para 173.

206 *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 79.

207 *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 79.

judges during their term of office as a corollary of the independence of judges.²⁰⁸ This does not mean that judges must be appointed for life. Judicial appointments for fixed terms, with or without possibilities of reappointment, have been treated as consistent with judicial independence.²⁰⁹ The European Court of Human Rights has refrained from setting up a minimum term of appointment that would satisfy the requirement of independence. Clearly, however, the longer the term the more likely it is that the European Court would find a tribunal to have been established in compliance with Article 6(1) of ECHR. In *Campbell and Fell v the United Kingdom*, the European Court found that the appointment of members of a prison disciplinary body for terms of three years as “relatively short” but acceptable in view of the unpaid character of the assignment.²¹⁰ Considerations of security of tenure also involve the conditions governing the promotion, adequate remuneration, pension, transfer, suspension or termination of office, or other conditions of service of a judge, which must all be adequately secured by law.²¹¹ The Human Rights Committee has explained that the dismissal of a judge by the executive prior to the expiry of a judge’s term of office may only be contemplated “on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law”.²¹²

The third feature of independence – adequate guarantees against outside pressures – will normally be met by virtue of the existence of mechanisms and procedures aimed at minimizing the risk of undue influence. If, however, the treatment of individual judicial officers is subject to executive control without measures in place to protect the judicial officers from being influenced, this will amount to a violation of the requirements of independence.²¹³ The Human Rights Committee has explained, in this regard, that the functions and competencies of the judiciary and the executive must be clearly distinguishable.²¹⁴ A situation where the executive is able to control or direct the judiciary is incompatible with the notion of an independent tribunal.²¹⁵ For the distribution of cases among judges, for instance, proper rules and procedures will render external interference more difficult. The assignment (or re-assignment) of a case to a particular judge or court has been treated as falling within a State’s margin of appreciation. When assigning a case, authorities are entitled to take into account a wide range of factors, including available resources, the qualification of judges,

208 *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 80.

209 *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, paras 26, 57.

210 *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 80.

211 UN Human Rights Committee, CCPR General Comment 32 (2007), para 19.

212 UN Human Rights Committee, CCPR General Comment 32 (2007), para 20. See, for example: *Pastukhov v Belarus*, HRC Communication 814/1998, UN Doc CCPR/C/78/D/814/1998 (2003), para 7.3; *Mundy Busyo et al. v Democratic Republic of Congo*, HRC Communication 933/2000, UN Doc CCPR/C/78/D/933/2000 (2003), para 5.2; and *Bandaranayake v Sri Lanka*, HRC Communication 1376/2005, UN Doc CCPR/C/93/D/1376/2005 (2008), para 7.3.

213 UN Human Rights Committee, Concluding Observations: Slovakia, UN Doc CCPR/C/79/Add.79 (1997), para 18; and *Kadubec v Slovakia* [1998] ECHR 81, paras 56–57.

214 UN Human Rights Committee, CCPR General Comment 32 (2007), para 19.

215 *Oló Bahamonde v Equatorial Guinea*, HRC Communication 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993), para 9.4.

any conflicts of interest and accessibility of the place of hearings for the parties. Although it is not the role of the European Court of Human Rights to assess whether there were valid grounds for the domestic authorities to assign a case to a particular judge or court, the Court has taken the view that it must be satisfied that such assignments are compatible with Article 6(1) of ECHR.²¹⁶

The final requirement of an outward appearance of independence may involve hypothetical possibilities of interference. The mere possibility of influence will be sufficient to undermine the independence of the judiciary. In *Belilos v Switzerland*, for example, the fact that a member of the Police Board was a serving police officer was seen as undermining the appearance of independence, despite the fact that the officer (as a lawyer working at police headquarters) was not subject to orders, was appointed to act in his personal capacity and could not be dismissed prior to the expiry of his term of office. The European Court of Human Rights, nevertheless, took the view that: “The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society.”²¹⁷ In *Öcalan v Turkey*, the replacement of the military judge by a civilian judge in the course of the proceedings did not remedy the situation, as the European Court of Human Rights held that the court must be seen to be independent of the executive and the legislature at each of the three stages of the proceedings, namely the investigation, the trial and the verdict.²¹⁸

Should the personal prejudice of a judge, or the practice of a court in the treatment of accused persons, result in the adverse treatment of an accused in a criminal trial, this may amount to a violation of the presumption of innocence (See also 5.1).

3.3.2 *Impartiality of a tribunal*

It is of fundamental importance in a democratic society that the courts inspire confidence in the public.²¹⁹ To that end, both the ICCPR and ECHR require a tribunal falling within the scope of Articles 14 and 6 respectively to be impartial. The requirement of impartiality has two features: first, that judges do not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them – referred to as subjective impartiality; and, second, that the tribunal must also appear to the reasonable observer to be impartial – referred to as objective impartiality.²²⁰ The European Court

²¹⁶ *Bochan v Ukraine* [2007] ECHR, para 71; *Moiseyev v Russia* [2008] ECHR 1031, para 176.

²¹⁷ *Belilos v Switzerland* [1998] ECHR 4, para 67. See also *Sramek v Austria* [1984] ECHR 12, paras 41–42; and *Öcalan v Turkey* [2005] ECHR 282, paras 114, 118.

²¹⁸ *Öcalan v Turkey* [2005] ECHR 282, paras 114, 118.

²¹⁹ *Padovani v Italy* [1993] ECHR 12, para 27; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Farhi v France* [2007] ECHR 5562, para 23; *Jasinski v Poland* [2005] ECHR 883, para 53.

²²⁰ UN Human Rights Committee, CCPR General Comment 32 (2007), para 21; *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992), para 7.2; *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), paras 10.2–10.4; *Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008), para 9.5; *Piersack v Belgium*

of Human Rights has recognized the difficulty of establishing a breach of Article 6 of the ECHR on account of subjective partiality and, for this reason, has in the vast majority of cases focused on the objective aspects of impartiality.²²¹ However, there is no clear-cut division between the two notions since the conduct of a judge may not only prompt misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of her/his personal conviction (subjective test).²²²

3.3.2(a) Subjective impartiality

The first of the dual criteria of impartiality is that judicial officers must exercise their function without regard to any personal view or conviction about the parties or the nature of the proceedings. In applying the subjective test, the European Court of Human Rights has consistently reaffirmed the principle that a tribunal shall be presumed to be free of personal prejudice or partiality until there is proof to the contrary.²²³ It reflects an important element of the rule of law, namely that the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness.²²⁴ Judges must act without personal bias or prejudice, and without any preconceptions about the case before them.²²⁵ The subjective test of impartiality, therefore, aims at determining the personal conviction of a judge in a given case.²²⁶ As regards the type of proof required, the European Court of Human Rights has, for example, sought to ascertain whether a judge has displayed hostility or ill-will, or has arranged to have a case assigned to her/himself for personal reasons.²²⁷

Subjective impartiality was found to be lacking in *Lavents v Latvia*, where the trial judge made comments to the media before the trial, in which he referred to the possibility of conviction or partial acquittal of the defendant, without mentioning the possibility of total acquittal. This was taken to infer a personal bias, or pre-determination, of the case and, thus, was in violation of the requirement of impartiality.²²⁸ In general, with regard to the use of the media by the judges, the European Court has taken the view that judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges, thus affecting their objective impartiality

[1982] ECHR 6, para 30; *Incal v Turkey* [1998] ECHR 48, para 65; and *Wettstein v Switzerland* [2000] ECHR 695, para 42; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Sara Lind Eggertsdóttir v Iceland* [2007] ECHR 553, para 41.

221 *Kyprianou v Cyprus* [2005] ECHR 873, para 119.

222 *Kyprianou v Cyprus* [2005] ECHR 873, para 119.

223 *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 58 *in fine*; *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 84; *Hauschildt v Denmark* [1989] ECHR 7, para 47; *Padovani v Italy* [1993] ECHR 12, para 26; *Kyprianou v Cyprus* [2005] ECHR 873, para 119.

224 *Kyprianou v Cyprus* [2005] ECHR 873, para 119.

225 UN Human Rights Committee, CCPR General Comment 32 (2007), para 21; and *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992), para 7.2.

226 *Piersack v Belgium* [1982] ECHR 6, para 30; *Kyprianou v Cyprus* [2005] ECHR 873, para 118.

227 *Kyprianou v Cyprus* [2005] ECHR 873, para 119.

228 *Lavents v Latvia* [2002] ECHR 786, para 119, available in French only.

(See also 3.3.2(b)). This should dissuade judicial officers from making use of the press, even if in reaction to media requests.²²⁹ In *Buscemi v Italy*, public statements to the press by the President of the court implied that he had already formed an unfavorable view of the applicant's case, before the case was heard, and led the European Court to consider such statements to be incompatible with the impartiality required of judicial officers.²³⁰

Cases of this kind will also have an impact on the presumption of innocence (See also 5.1). Personal prejudice might also take the form of unbalanced or clearly biased directions to a jury given during the course of a trial judge's summing up.²³¹ In *Farhi v France*, the European Court found a violation of subjective impartiality in a case involving informal communication between the prosecutor and one of the jurors which the judge had refused to record as an incident. The European Court questioned the limited verification carried out by the judge and considered that the judge's behaviour deprived the applicant of the possibility of effective appeal to the Court of Cassation.²³²

The facts in *Lavents v Latvia*²³³ should be distinguished from those in *Perera v Sri Lanka*, which concerned civil proceedings between the applicant and his former employer. The applicant claimed that the encouragement by the Chief Justice that both parties reach an amicable settlement on the quantum of damages exceeded the bounds of a superior court's proper management of its judicial resources. The Human Rights Committee noted that counsel did not explicitly contest the Court's framing of the disposition of the case and that, in substance, the High Court's findings in the applicant's favour were almost entirely upheld at the appellate level. It was concluded, therefore, that the applicant's claim had been unsubstantiated and inadmissible under Article 2 of the Optional Protocol to the ICCPR.²³⁴

3.3.2(b) Objective impartiality

Concerning the second feature of objective impartiality, it is essential that judicial officers exercise their function in a manner that offers sufficient guarantees to exclude any legitimate doubt of their impartiality, i.e., the tribunal must appear, to the reasonable observer, to be impartial. As repeated in the jurisprudence of the European Court of Human Rights: "it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance".²³⁵ In practical terms, this calls for the exercise of two separate duties: first, a general duty on the State to protect the judiciary from conflicts of inter-

229 *Kyprianou v Cyprus* [2005] ECHR 873, para 120; *Buscemi v Italy* [1999] ECHR 70, para 67.

230 *Buscemi v Italy* [1999] ECHR 70, para 68.

231 See, for example, *Wright v Jamaica*, HRC Communication 349/1988, UN Doc CCPR/C/45/D/349/1989 (1992), para 3.3.

232 *Farhi v France* [2007] ECHR 5562, paras 28–31.

233 *Lavents v Latvia* [2002] ECHR 786, available in French only.

234 *Perera v Sri Lanka*, HRC Communication 1091/2002, UN Doc CCPR/C/78/D/1091/2002 (2003), para 6.3.

235 *Ferrantelli and Santangelo v Italy* [1996] ECHR 29, para 58; *Hauschildt v Denmark* [1989] ECHR 7, para 48; *Wettstein v Switzerland* [2000] ECHR 695, para 44; *Daktaras v Lithuania* [2000] ECHR 460, para 32; *Kyprianou v Cyprus* [2005] ECHR 873, para 118.

est, thus ensuring that the internal organization prevent the exercise of different functions within the judicial process by the same person;²³⁶ and, second, a specific duty on the part of individual judges to recuse themselves from cases where there might be an appearance of such a conflict.²³⁷ To determine whether these duties are engaged, the test to be applied is whether the reasonable observer would view the situation as one in which legitimate doubt is raised as to the impartiality of the judicial officer(s). The Human Rights Committee and the European Court of Human Rights have stated that although the standpoint of those claiming that there is reason to doubt a judge's impartiality is significant, "[w]hat is decisive is whether the fear can be objectively justified".²³⁸ This means that the fear must be a reasonable one.²³⁹ In *Castedo v Spain*, the applicant's apprehensions as to the impartiality of the judge were found to be objectively justified in circumstances where the judge was also an employee of one of the parties (a university), where the judge worked as an associate lecturer.²⁴⁰ The European Court has similarly explained that there need not be any suggestion of actual bias.²⁴¹ Even appearances may be of a certain importance or, as stated in an English maxim quoted by the European Court: "justice must not only be done, it must also be seen to be done".²⁴²

Many instances where objective impartiality is called into question concern situations where a judge plays different roles or functions in the course of the proceedings (prosecutorial and judicial, or advisory and judicial) or has taken part in different stages of same proceeding (as a first instance, and then as appeal judge).

The fact that a judge has acted in different capacities in the same case (for instance prosecutorial and judicial) may, in certain circumstances, compromise a tribunal's impartiality.²⁴³ In *Piersack v Belgium*, the fact that a judge had presided over a criminal trial after having been the head of the public prosecutor's office in charge of the prosecution of the particular

236 UN Human Rights Committee, CCPR General Comment 32 (2007), para 19; *Kyprianou v Cyprus* [2005] ECHR 873, para 121.

237 *Piersack v Belgium* [1982] ECHR 6, para 30 a) *in fine*; *Hauschildt v Denmark* [1989] ECHR 7, para 48.

238 *Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008), para 9.7; *Kyprianou v Cyprus* [2005] ECHR 873, para 118; *Wettstein v Switzerland* [2000] ECHR 695, para 44; *Ferrantelli and Santangelo v Italy* [1996] ECHR 29, para 58; *Jasinski v Poland* [2005] ECHR 883, para 53; *Sara Lind Eggertsdóttir v Iceland* [2007] ECHR 553, para 42.

239 *Holm v Sweden* [1993] ECHR 58, paras 33–34; *Jasinski v Poland* [2005] ECHR 883, para 54 *in fine*; *Ferrantelli and Santangelo v Italy* [1996] ECHR 29, para 58.

240 *Castedo v Spain*, HRC Communication 1122/2002, UN Doc CCPR/C/94/1122/2002 (2008), para 9.8. See also *Procola v Luxembourg* [1995] ECHR 33, para 37, and contrast with *Kleyn and Others v the Netherlands* [2003] ECHR 226, paras 193–195.

241 *Wettstein v Switzerland* [2000] ECHR 695, para 43.

242 *Delcourt v Belgium* [1970] ECHR 1, para 31; *De Cubber v Belgium* [1984] ECHR 14, para 26; *Mežnarić v Croatia* [2005] ECHR 497, para 32.

243 *Huber v Switzerland* [1990] ECHR 25, para 43; *Brincat v Italy* [1992] ECHR 71 paras 20–22; *Assenov and Others v Bulgaria* [1998] ECHR 98, para 146; *Kyprianou v Cyprus* [2005] ECHR 873, para 126.

case was treated as capable of casting doubt on the tribunal's impartiality. The European Court of Human Right therefore found a breach of Article 6(1) of the ECHR.²⁴⁴

In *Mežnarić v Croatia*, a Constitutional judge who had previously represented the opposing party in the case, sat on the panel deciding on the applicant's constitutional complaint. The Court found that the dual role of the individual judge in a single set of proceedings created a situation that was capable of raising legitimate doubts as to the judge's impartiality. Although there was no indication of actual personal bias on the part of the judge (subjective test), the appearance of impartiality was brought into question, particularly given applicable State rules that contemplated recusal in such a situation.²⁴⁵

The mere fact that the judge deciding on the merit of a case had previously ruled on detention on remand does not necessary rule out the judge's impartiality. The issues that a judge has to answer when taking decisions on pre-trial detention are not the same as those that are decisive for final judgment. In the first case, the judge summarily assesses whether there are *prima facie* grounds for suspicion that the accused has committed an offence, whereas to render the judgment he/she must assess whether the evidence suffices for finding the accused guilty. Suspicion and formal findings of guilt are not to be treated as being the same.²⁴⁶ Although such situations may give rise to misgivings by the accused, the European Court will refer to the circumstances of each particular case to assess whether such misgivings should be treated as objectively justified.²⁴⁷

In *Hauschildt v Denmark*, a lack of impartiality was feared because the City Court judge who presided over the trial and the High Court judges who eventually took part in deciding the case on appeal had already dealt with the case at an earlier stage of the proceedings and had given various decisions with regard to the applicant at the pre-trial stage. Because of the "very high degree of clarity" as to the question of guilt that was required in the particular case to justify detention on remand, the Court held that the impartiality of both tribunals was capable of appearing to be open to doubt and the applicant's fears in this respect could therefore be considered objectively justified.²⁴⁸

The participation of a judge at different stages of the proceedings may also be seen as indication of possible bias. In *Castillo Algar v Spain*, the fear that the trial court was not impartial stemmed from the fact that two of the judges sitting in it had previously sat in the chamber that had upheld the *auto de procesamiento* on appeal. That kind of situation, the European Court upheld, may give rise to misgivings on the part of the accused as to the impartiality of the judges and should be considered based on the circumstances of each particular case.²⁴⁹

244 *Mežnarić v Croatia* [2005] ECHR 497, para 33; *Piersack v Belgium* [1982] ECHR 6, paras 30–31.

245 *Mežnarić v Croatia* [2005] ECHR 497, paras 33, 36, 37.

246 *Hauschildt v Denmark* [1989] ECHR 7, paras 49–50; *Jasinski v Poland* [2005] ECHR 883, para 55.

247 *Castillo Algar v Spain* [1998] ECHR 99, para 46; *Jasinski v Poland* [2005] ECHR 883, para 55.

248 *Hauschildt v Denmark* [1989] ECHR 7, paras 49–52.

249 *Castillo Algar v Spain* [1998] ECHR 99, para 46.

In *Procola v Luxembourg*, the applicant complained that four of the five members sitting on the Judicial Committee ruling on his case had previously sat on the advisory panel that had given its opinion on the draft regulation that was at stake during the proceeding. In view of the opinions they had previously expressed, it was argued that the members of the Judicial Committee could not have approached the question submitted to them with a completely open mind.²⁵⁰ The European Court found that the mere fact that certain persons successively performed two types of functions (advisory and judicial) in the same case did in that case cast doubt on the institution's structural impartiality.²⁵¹

The situation in which, following the annulment of the first instance decision by a higher court and the referral to the lower court, the same judge examines the case at first instance two or more times does not raise questions of objective impartiality and should be distinguished from instances where the same judge intervenes at different stages of proceedings.

3.3.3 Independence and Impartiality of Juries

The requirements of independence and impartiality have been held to apply to juries as well as judges.²⁵²

In its General Comment on the right to a fair trial, the Human Rights Committee referred to jurisprudence of the Committee on the Elimination of All Forms of Racial Discrimination, citing as an example of unfairness the situation where expressions of racist attitudes were made by a jury that appeared to be tolerated by the tribunal.²⁵³ The same factual situation was also held to be a violation of Article 6(1) by the European Court of Human Rights in *Remli v France*, where a juror was overheard in the corridor outside the courtroom stating: "I'm racist. I don't like Arabs." The European Court focused its attention on the juror's statement and the fact that the applicant's complaint had been dismissed by the national court on a purely formal ground, i.e., that the court was "not able to take formal note of events alleged to have occurred out of its presence". The national court also failed to take any steps to collect evidence in order to verify what had been reported or to take formal note of it. The applicant had consequently been unable either to have the juror in question replaced or to challenge the juror's impartiality in any other way. The European Court, therefore, found that the applicant had been deprived of the possibility of remedying a situation, contrary to the requirements of the ECHR.²⁵⁴

In *Gregory v United Kingdom*, the European Court clarified that, while the guarantee of a fair trial may in certain circumstances require a judge to discharge a jury, this is not always the only means to achieve compliance with the right to a fair trial. Other safeguards, including a carefully worded redirection to the jury, as in *Gregory v United Kingdom*, may be

²⁵⁰ *Procola v Luxembourg* [1995] ECHR 33, para 41.

²⁵¹ *Procola v Luxembourg* [1995] ECHR 33, paras 45–46.

²⁵² *Holm v Sweden* [1993] ECHR 58, paras 33–34; and *Remli v France* [1996] ECHR 18, para 46.

²⁵³ *Narrainen v Norway*, CERD Communication 3/1991, UN Doc CERD/C/44/D/3/1991 (1994), para 9.3 – cited in UN Human Rights Committee, CCPR General Comment 32 (2007), para 25.

²⁵⁴ *Remli v France* [1996] ECHR 18, paras 46–48.

sufficient. In *Sander v the United Kingdom*, the European Court treated racist comments made by jurors to be very serious given that, in today's multicultural European societies, the eradication of racism had become a common priority goal for all Contracting States.²⁵⁵ It was alleged in *Sander v United Kingdom* that two jurors had been making openly racist remarks and jokes combined with a stated fear by another juror that the jurors concerned would convict the defendants not on the evidence but because they were Asian.²⁵⁶ The Court considered that this could not be taken lightly, since jokes of this nature, when made by jurors in the context of judicial proceedings, take on a different hue and assume a different significance from jokes made in the context of a more intimate and informal atmosphere.²⁵⁷ Moreover, the European Court considered that, generally speaking, an admonition or direction by a judge, however clear, detailed and forceful, would not be sufficient to change racist views overnight.²⁵⁸ The Court, therefore, considered that the allegations contained in the note were capable of causing the applicant and any objective observer legitimate doubts as to the impartiality of the court.²⁵⁹ It also considered that the judge should have reacted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence.²⁶⁰

These cases illustrate that the European Court of Human Rights will, when presented with allegations of impartiality, consider the factual issues at stake in order to determine:

- Whether objectively justified or legitimate doubts existed as to the impartiality of the jury;
- Whether there were sufficient guarantees to remedy and redress potential threats to the impartiality of the jury, including by way of firmly warning the jurors; and
- Whether stronger measures, including the disqualification of jurors, were required in the specific circumstances of the case.

Allegations of attempted jury tampering by an investigating officer were made in *Collins v Jamaica*. The Human Rights Committee commented that in a trial by jury the necessity to evaluate facts and evidence independently and impartially applied to the jury and that, therefore, it was important that all the jurors be placed in a position in which they could assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee also observed that, where alleged improprieties in the behaviour of jurors or attempts at jury tampering come to the knowledge of the defence, these alleged improprieties should be challenged before the court.²⁶¹

255 *Sander v the United Kingdom* [2000] ECHR, para 23.

256 *Sander v the United Kingdom* [2000] ECHR, para 29.

257 *Sander v the United Kingdom* [2000] ECHR, para 26. Z

258 *Sander v the United Kingdom* [2000] ECHR, para 30.

259 *Sander v the United Kingdom* [2000] ECHR, para 32.

260 *Sander v the United Kingdom* [2000] ECHR, paras 34, 35.

261 *Collins v Jamaica*, HRC Communication 240/1987, UN Doc CCPR/C/43/D/240/1987 (1991), para 8.4. See also *Mulai v Guyana*, HRC Communication 811/1998, UN Doc CCPR/C/81/D/811/1998 (2004), paras 6.1–6.2.

3.3.4 *Military tribunals*

Military tribunals may be used in two contexts, both of which require compliance with independence and impartiality. The first and most common use of military tribunals is for disciplinary procedures against military personnel that, depending on the nature of the charge and the purpose and severity of the applicable penalty, may amount to a criminal proceeding for the purposes of Article 14 of the ICCPR and Article 6 of the ECHR (See also 1.1).²⁶² The second situation is where military tribunals are used to try military personnel, and sometimes civilians, in respect of special categories of offences, such as war crimes.

In principle, a military tribunal is capable of constituting an independent and impartial tribunal, despite the fact that it functions within the framework of the armed forces and, therefore, the executive branch of government.²⁶³ This will only be the case so long as sufficient safeguards are in place to guarantee the independence and impartiality of the judicial officers concerned.²⁶⁴ Very often, problems will lie with the ability or otherwise of a military convening officer to dissolve a military tribunal, or to ratify or modify the sentence imposed by the court martial.²⁶⁵ The status of the judicial officers as serving members of the armed service who can themselves be subject to pressure from superiors or to disciplinary proceedings is also a matter of concern.²⁶⁶ This would create the danger that the military judge might allow him or herself to be unduly influenced by considerations that have nothing to do with the nature and merits of the case.²⁶⁷ In *Cooper v United Kingdom*, however, the European Court of Human Rights held that the Court Martial convened in that case was provided with sufficient guarantees to comply with Article 6 of the ECHR, by virtue of the fact that there was a civilian judge advocate dealing with questions of law and that, although the president was a senior serving officer in the Royal Air Force, his post was full-time and would be held for a number of years prior to his retirement, at a time when that officer had no effective hope of promotion and thus not capable of being influenced by such factors.²⁶⁸

As explained in the UN ECOSOC's Siracusa Principles, the right to a fair and public hearing may be subject to legitimate restrictions that are strictly required by the exigencies of an emergency situation, i.e., an emergency declared under Article 4 of the ICCPR or Article 15 of the ECHR as one threatening the life of the nation. Even in such situations, however, the Siracusa Principles explain that the denial of certain rights can never occur, even in an

²⁶² See, for example, *Engel and Others v the Netherlands* [1976] ECHR 3, paras 80–85.

²⁶³ *Engel and Others v the Netherlands* [1976] ECHR 3, paras 80–85; and *Morris v the United Kingdom* [2002] ECHR 162, para 59.

²⁶⁴ *Morris v the United Kingdom* [2002] ECHR 162, paras 59–77; and *Cooper v the United Kingdom* [2003] ECHR 686, paras 104–110.

²⁶⁵ *Findlay v the United Kingdom* [1997] ECHR 8, para 77. See also UN Human Rights Committee, CCPR General Comment 32 (2007), para 22.

²⁶⁶ See, for example: *Grievies v the United Kingdom* [2003] ECHR 688, paras 86–87; *Findlay v the United Kingdom* [1997] ECHR 8, para 76. See also UN Human Rights Committee, CCPR General Comment 32 (2007), para 22.

²⁶⁷ *Incal v Turkey* [1998] ECHR 48, para 72.

²⁶⁸ *Cooper v the United Kingdom* [2003] ECHR 686, para 118.

emergency situation. This includes the principle that civilians must normally be tried by the ordinary courts but that, where it is found strictly necessary to establish military tribunals or special courts to try civilians, “their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority”.²⁶⁹

The Human Rights Committee has noted the existence in many countries of military courts that try civilians. Although neither the ICCPR nor the ECHR explicitly prohibit the trial of civilians by such courts, the current trend at the international level excludes criminal jurisdiction of military courts over civilians. The Human Rights Committee has said that such trials must be in full conformity with the requirements of Article 14 of the ICCPR and that the trial of civilians by military courts should be exceptional, i.e., “limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.²⁷⁰ In practice, the Human Rights Committee no longer hesitates to criticize States whose legislation permits military courts to try civilians. In the Concluding Observations on Slovakia’s periodic report, for example, the Committee noted with concern that civilians could be tried by military courts in certain cases, including betrayal of State secrets, espionage and State security. Therefore, the Committee recommended that the Criminal Code be amended so as to prohibit the trial of civilians by military tribunals in *any* circumstances.²⁷¹ There is an increasing view by treaty bodies that military tribunals should not try civilians. This is also the position of the European Court of Human Rights, as expressed, for example, in *Ergin v Turkey*, concerning an applicant newspaper editor charged with incitement to evade military service: “The Court derives support in its approach from developments over the last decade at international level, which confirm the existence of a trend towards excluding the criminal jurisdiction of military courts over civilians.”²⁷²

The *Ergin v Turkey* case is emblematic, in that the European Court of Human Rights put forward the following principles:

- a. While it cannot be contended that the ECHR absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny;²⁷³

269 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 70(f).

270 UN Human Rights Committee, CCPR General Comment 32 (2007), para 22; *Kurbanov v Tajikistan*, HRC Communication 1096/2002, UN Doc CCPR/C/79/D/1096/2002 (2003), para 7.6; *Bee v Equatorial Guinea*, HRC Communications 1152/2003 and 1190/2003, UN Doc CCPR/C/85/D/1152&1190/2003 (2005), para 6.3; *Abbassi v Algeria*, HRC Communication 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (2007), para 8.7; and *Benhadj v Algeria*, HRC Communication 1173/2003, UN Doc CCPR/C/90/D/1173/2003 (2007), para 8.8.

271 UN Human Rights Committee, Concluding Observations: Slovakia, UN Doc CCPR/C/79/Add.79 (1997), para 20.

272 *Ergin v Turkey* [2006] ECHR 529, para 45.

273 *Ergin v Turkey* [2006] ECHR 529, para 42.

- b. The situation in which a civilian must appear before a court composed, if only in part, of members of the armed forces seriously undermines the confidence that courts ought to inspire in a democratic society;²⁷⁴
- c. When a court is composed *solely* of military judges the concern is all the more valid. Only in very exceptional circumstances could the determination of criminal charges against civilians by such courts be held to be compatible with Article 6 of ECHR;²⁷⁵ and
- d. The jurisdiction of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offences to military courts *in abstracto*.²⁷⁶

In order to safeguard the rights of an accused under Article 14(1) and (3) of the ICCPR, the Committee has commented that judges in military or special courts should have the authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.²⁷⁷

3.3.5 *Tribunals of faceless judges*

The Human Rights Committee has also considered resort to tribunals of “faceless judges” – tribunals composed of anonymous judges – which has usually occurred in South American countries within measures taken to fight terrorist activities. The initial approach of the Human Rights Committee to such cases was to treat trials before faceless judges as automatically failing to guarantee the independence and impartiality of the judges.²⁷⁸ In *De Polay v Peru* and *Vivanco v Peru*, however, Committee member Ivan Shearer took the view that the Committee’s views do not amount to condemnation of the practice of “faceless justice” in itself and in all circumstances. It was acknowledged that the practice of masking or otherwise concealing the identity of judges in special cases – practiced in some countries by reason of serious threats to their security caused by terrorism or other forms of organized crime – may become a necessity for the protection of judges and of the administration of justice. When States are faced with such an extraordinary situation, however, Committee member Shearer advocated that they should take the steps set out in Article 4 of the ICCPR to derogate from their obligations, in particular those arising from Article 14, but only to the extent strictly required by the exigencies of the situation.²⁷⁹

274 *Ergin v Turkey* [2006] ECHR 529, para 43; *Öcalan v Turkey* [2005] ECHR 282, para 116; *Incal v Turkey* [1998] ECHR 48, para 72.

275 *Ergin v Turkey* [2006] ECHR 529, para 44.

276 *Ergin v Turkey* [2006] ECHR 529, para 47.

277 UN Human Rights Committee, CCPR General Comment 13 (1984), para 15.

278 *De Polay v Peru*, HRC Communication 577/1994, UN Doc CCPR/C/61/D/577/1994 (1997); *Vivanco v Peru*, HRC Communication 678/1996, UN Doc CCPR/C/74/D/678/1996 (2002), para 7.1. See also *Gomez v Peru*, HRC Communication 981/2001, UN Doc CCPR/C/78/D/981/2001 (2003), para 7.3.

279 *De Polay v Peru*, HRC Communication 577/1994, UN Doc CCPR/C/61/D/577/1994 (1998). See also *Arredondo v Peru*, HRC Communication 688/1996, UN Doc CCPR/C/69/D/688/1996 (2000).

In *De Polay v Peru*, the Committee articulated the following view:

“As to Mr. Polay Campos’ trial and conviction on 3 April 1993 by a special tribunal of ‘faceless judges’, no information was made available by the State Party, in spite of the Committee’s request to this effect in the admissibility decision of 15 March 1996. As indicated by the Committee in its preliminary comments of 25 July 1996 on the Third Periodic Report of Peru and its Concluding Observations of 6 November 1996... such trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant. It cannot be held against the author that she furnished little information about her husband’s trial; in fact, the very nature of the system of trials by ‘faceless judges’ in a remote prison is predicated on the exclusion of the public from the proceedings. In this situation, the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by ‘faceless judges’, neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces. In the Committee’s opinion, such a system also fails to safeguard the presumption of innocence, which is guaranteed by article 14, paragraph 2. In the circumstances of the case, the Committee concludes that paragraphs 1, 2 and 3 (b) and (d) of article 14 of the Covenant were violated.”²⁸⁰

Thus, the complete circumstances in which trials by faceless judges are conducted must be taken into account. Having said so, the Human Rights Committee’s General Comment on fair trial rights points to the practical reality that, even if the identity of judges is independently verified, such courts often suffer from other irregularities and infers that it should, therefore, be vigilant when considering the independence and impartiality of such courts.²⁸¹ In *Más v Peru*, for example, the author’s trial was conducted by a court comprising faceless judges, in a situation where he did not have an opportunity to question witnesses (See also 6.7) and his lawyer had received threats (See also 6.6.4), resulting in a finding of a violation of Article 14.²⁸²

²⁸⁰ *De Polay v Peru*, HRC Communication 577/1994, UN Doc CCPR/C/61/D/577/1994 (1998), para 8.8.

²⁸¹ UN Human Rights Committee, CCPR General Comment 32 (2007), para 23.

²⁸² *Más v Peru*, HRC Communication 1058/2002, UN Doc CCPR/C/85/D/1058/2002 (2005), para 6.4. See also *Roque v Peru*, HRC Communication 1125/2002, UN Doc CCPR/C/85/D/1125/2002 (2005), para 7.3; *Alegre v Peru*, HRC Communication 1126/2002, UN Doc CCPR/C/85/D/1126/2002 (2005), para 7.5; *Barney v Colombia*, HRC Communication 1298/2004, UN Doc CCPR/C/87/D/1298/2004 (2006), para 7.2; and *Guerra de la Espriella v Colombia*, HRC Communication 1623/2007, UN Doc CCPR/C/98/D/1623/2007 (2010), para 9.2.

3.3.6 *Religious courts, or courts based on customary law*

In some countries, the legal order recognizes religious courts, or courts based on customary law, and entrusts them with judicial tasks that might involve the determination of civil rights or obligations (See also 1.2). Where this occurs, the Human Rights Committee has commented that:

“It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.”²⁸³

3.4 INDEPENDENT AND IMPARTIAL PROSECUTION IN CRIMINAL CASES

Prosecutors play a crucial role in the administration of criminal justice and sometimes form part of the same judicial corps of civil servants as judges. Although there is no specific jurisprudence of the Human Rights Committee or European Court of Human Rights on the subject, it should be recalled that prosecutors should be able to operate autonomously and in a manner that is absent of personal bias or undue influence from the executive. Prosecutorial authorities often guard their independence and impartiality with great vigour. In 1990, the United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the UN Guidelines on the Role of Prosecutors, formulated for the purpose of assisting States to secure and promote the effectiveness, impartiality and fairness of prosecutors.²⁸⁴

3.5 CONTEMPT OF COURT

Deriving from the inherent power of judicial authorities to ensure the proper and orderly functioning of proceedings is the ability of judicial officers to hold persons in contempt of court.²⁸⁵ Measures ordered by courts under contempt of court procedures have been described as akin to the exercise of disciplinary powers.²⁸⁶ They must be exercised only for their legitimate purpose, i.e., ensuring the proper and orderly functioning of proceedings, and must not be used by judicial officers in a way that would undermine the actual or appar-

²⁸³ UN Human Rights Committee, CCPR General Comment 32 (2007), para 24.

²⁸⁴ UN Guidelines on the Role of Prosecutors, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. For further information on the role of prosecutors, see *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners Guide No. 1* (Geneva: International Commission of Jurists, 2007), especially p.71–76.

²⁸⁵ *Ravnsborg v Sweden* [1994] ECHR 11, para 34.

²⁸⁶ *Ravnsborg v Sweden* [1994] ECHR 11, para 34.

ent impartiality of the judge (See also 3.3.2) or otherwise interfere with the practical enjoyment of fair trial rights.²⁸⁷

In *Kyprianou v Cyprus*, a defence lawyer was convicted for contempt of court. The lawyer had directed his criticism to the manner in which individual judges had been conducting the proceedings. The same judges took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in his case a term of imprisonment. In such a situation, the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in her/his own cause and, consequently, as to the impartiality of the bench based on the objective criteria of impartiality (See also 3.3.2 (b)).²⁸⁸ This is also one of the few cases in which the violation of impartiality of the court was found by the European Court also with regard to the subjective test (See also 3.3.2 (a)). The European Court held that the judges had not succeeded in detaching themselves sufficiently from the situation for various reasons, including that: The judges in their sentencing of the applicant acknowledged that they had been "deeply insulted... as persons" by the applicant; the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements; and the judges expressed the opinion early on in their discussion with the applicant that they considered him guilty of the criminal offence of contempt of court and, after deciding that the applicant had committed the offence, they gave the applicant, the choice either to maintain what he had said and to provide reasons why a sentence should not be imposed on him or to retract the statement. In the latter respect, the lawyer was effectively asked to mitigate "the damage he had caused by his behavior" rather than to defend himself. For all these reasons the European Court found there had been violation of Article 6(1) of ECHR.²⁸⁹

287 UN Human Rights Committee, CCPR General Comment 32 (2007), para 25.

288 *Kyprianou v Cyprus* [2005] ECHR 873, para 127.

289 *Kyprianou v Cyprus* [2005] ECHR 873, paras 130, 135.

CHECKLIST: RIGHT TO A HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

1. Is the tribunal established by law?
 - a) Is the framework for the judicial system established through law emanating from Parliament, under which the judicial organization is sufficiently regulated?
 - b) Is the particular tribunal composed of judicial officers who have been appointed in full compliance with the requirements of the law?
 - c) In the case of a specially constituted tribunal established for the determination of certain categories of cases, has the tribunal been established on objective and reasonable grounds?
2. Is the tribunal competent to decide matters brought before it?
 - a) Is/are the individual judicial officer(s) suitably qualified and experienced to deal with the case in question?
 - b) Does the tribunal have the authority to make a binding decision that cannot be altered by a non-judicial authority to the detriment of one of the parties?
3. Does the monitored case refer to a civil right or obligation in respect of which no tribunal has competent jurisdiction to make a determination?
4. Is the tribunal independent?
 - a) How are the judicial officers appointed?
 - b) What security of tenure do the judges enjoy?
 - c) What guarantees are there to protect judges from external pressures?
 - d) Does the tribunal appear, to the reasonable observer, to be independent?
 - e) Are there any concerns about the existence of influence, pressure and threats, towards whom and by whom?
 - f) Were there any indications that the court allowed itself to be influenced by popular feeling or by any outside pressure whatsoever?
5. Is the tribunal impartial?
 - a) Has the judge acted in a way that displays personal bias or prejudice, or a pre-determination of the case, including by way of giving his/her opinion on the guilt of a person during the trial, inside or outside the courtroom?
 - b) Are there circumstances, such as a potential conflict of interest, that raise a reasonable fear that the judge may not act impartially?
 - c) Is the composition of the court and the parties to the case announced?
 - d) Is the right to challenge the court's composition explained by the judge? Were the respective motions considered?
 - e) Was the judicial conduct, including both actual and perceived, biased?

- f) Were there any legal grounds according to which a judge should have been disqualified from the case?
 - g) Was a trial judge involved in rendering a previous decision in the same case?
 - h) Was there a complaint submitted with regard to the court's impartiality?
6. Are there any factors which cast doubt on the independence of the tribunal or the impartiality of the judges? (For example, the judge receiving phone calls during the proceedings, the judge communicating with the prosecutor or defense counsel prior to the hearing or between the hearings, family relationship, the judge inviting the defense counsel or prosecutor to his/her office or deliberation room prior to or during the deliberations, etc.)
 7. In the case of a criminal trial, is the prosecutor independent (autonomous) and has s/he exercised the prosecutorial function in a way that is absent of personal bias or undue influence from the executive?
 8. Where contempt of court procedures have been invoked by a judge, has this been limited to the purpose of ensuring the proper and orderly functioning of proceedings?

CHAPTER IV

Right to a Public Hearing

Article 14(1) of the ICCPR

“...everyone shall be entitled to a... public hearing ...The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...”

Article 6(1) of the ECHR

“...everyone is entitled to a... public hearing... but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

OSCE Commitments

(5.16) – in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing ...

(12) The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence-building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

The right to a public hearing is founded on the idea of the open and transparent administration of justice, which is an important safeguard for the interests of the individual and of society at large.²⁹⁰ The right to a public hearing, which involves the ability of the public as well as the parties to a case to be present during judicial proceedings, lies at the heart of the role of the trial monitor, since the absence of this right would preclude the public monitoring of judicial proceedings. This role has been acknowledged by the OSCE participating States, who have decided to accept as a confidence-building measure the presence of observers at proceedings before courts.²⁹¹ The conduct of hearings in public helps to ensure the transparency and the integrity of the judicial process and protect against potential abuse of that process. Public monitoring, in general, can influence judges and prosecutors to act impartially and professionally, can assist in motivating witnesses to speak truthfully, and allows the maintenance of public confidence in the administration of justice. As stated by the European Court of Human Rights: “the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society...”.²⁹² Against this background, OSCE participating States have agreed that proceedings may only be held *in camera* in the circumstances prescribed by law and consistent with obligations under international law and international commitments.²⁹³ In such cases, participating States have agreed that the law will indicate if the presence of persons other than the parties can be allowed in order to assist the proceedings.²⁹⁴ The role of trial monitors is all the more important when hearings are conducted *in camera*, and participating States are encouraged, therefore, to allow and regulate their presence.

As well as forming part of Article 14(1) of the ICCPR and Article 6(1) of the ECHR, the right to a public hearing is reflected in the Universal Declaration of Human Rights, albeit in much briefer terms.²⁹⁵ The Human Rights Committee has commented that, in principle, all hear-

290 UN Human Rights Committee, CCPR General Comment 32 (2007), para 28.

291 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 12.

292 *Werner v Austria* [1997] ECHR 92, para 45. See also: *Lawless v Ireland (No 1)* [1960] ECHR 1, p. 13; *Golder v the United Kingdom* [1975] ECHR 1, para 36; *Axen v Germany* [1983] ECHR 14, para 25; *Diennet v France* [1995] ECHR 28, para 33; *Hummatov v Azerbaijan* [2007] ECHR 1026, para 140; and *Schlumpf v Switzerland* [2009] ECHR 36; *Riepan v Austria* [2000] ECHR 575, para 27.

293 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 12.

294 OSCE Reference Guide to Criminal Procedure, annex to the Report to the Belgian OSCE Chairmanship on the elaboration of a Reference Guide to Criminal Procedure (2007), para 4.2.4.

295 Article 10 of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, refers simply to the entitlement of every person to a public hearing, without describing any potential grounds of restriction. Article 11 of the UDHR, which concerns itself with criminal proceedings, speaks of the right of every person to be presumed innocent until proved guilty according to law “in a public trial...”.

ings on the merits of a case (for both criminal and non-criminal proceedings) should be conducted orally and publicly.²⁹⁶ The European Court of Human Rights has similarly spoken of the right to a public hearing on at least one level of jurisdiction, which would normally occur during the **trial at first instance**.²⁹⁷ It should be noted that the right to a public hearing may not apply to pre-trial or appellate proceedings, which might take place on the basis of written evidence or submissions (See also 10.3).²⁹⁸ The Human Rights Committee has taken the view, in this regard, that the absence of oral hearings in appellate proceedings raises no issue, by itself, under Article 14(1) of the ICCPR.²⁹⁹ It has similarly concluded that the right to a public hearing does not apply to pre-trial decisions made by prosecutors and public authorities.³⁰⁰

4.1 LEGAL GROUNDS FOR EXCLUSION OF THE PRESS AND PUBLIC

Both the ICCPR and the ECHR protect the freedom of expression and the function of media as oversight mechanisms to ensure public scrutiny of the administration of justice. Therefore, the right to a public hearing encompasses the right for the press to be present at court proceedings. However, the right to a public hearing is a **qualified right**. Article 14(1) of the ICCPR and Article 6(1) of the ECHR reflect the authority of courts to exclude all or part of the public from a hearing for reasons of morals (See also 4.1.2), public order (See also 4.1.3), national security (See also 4.1.4), the interest of the private lives of the parties (See also 4.1.5) or to avoid prejudice to the interests of justice (See also 4.1.6).³⁰¹ Apart from these exceptional circumstances, a hearing must be open to the public, including members of the media, and must not, for instance, be limited to a particular category of persons.³⁰² In order to ensure that any restriction is both necessary and proportionate (See also 4.1.1), restrictions on the right to a public hearing must be strictly required in order to achieve one or more of the reasons just identified and must be assessed on a case-by-case basis. As well as considering the legal grounds for exclusion of the public from a hearing, it should be noted that the convening of hearings in public might be waived in limited circumstances (See also 4.1.7).

296 UN Human Rights Committee, CCPR General Comment 32 (2007), para 28.

297 *Fischer v Austria* [1995] ECHR 11, para 44; *Hummatov v Azerbaijan* [2007] ECHR 1026, para 141; and *Schlumpf v Switzerland* [2009] ECHR 36.

298 UN Human Rights Committee, CCPR General Comment 32 (2007), para 28.

299 *R. M. v Finland*, HRC Communication 301/1988, UN Doc CCPR/C/35/D/301/1988 (1989), para 6.4. See also *Bulut v Austria* [1996] ECHR 10, paras 40–41; and *Hummatov v Azerbaijan* [2007] ECHR 1026, para 141.

300 *Kavanagh v Ireland*, HRC Communication 819/1998, UN Doc CCPR/C/71/D/819/1998 (2001), para 10.4, where the Human Rights Committee concluded that there was no violation of the right to a public hearing in circumstances where the author was not heard by the Department of Public Prosecutions on the decision to convene a Special Criminal Court.

301 The Universal Declaration of Human Rights (adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948) simply refers in Article 10 to the right to a public hearing, without describing any potential grounds of restriction.

302 UN Human Rights Committee, CCPR General Comment 32 (2007), para 29. *Vasilskis v Uruguay*, HRC Communication 80/1980, UN Doc CCPR/C/18/D/80/1980 (1983), para 11; *Guerra de la Espriella v Colombia*, HRC Communication 1623/2007, UN Doc CCPR/C/98/D/1623/2007 (2010), para 9.3.

Even if the public is excluded from all or part of a hearing, the decision of the court – whether made orally or issued in writing,³⁰³ and including the essential findings, evidence and legal reasoning of the decision – must be made public, unless there are proper reasons to restrict publication of the judgment (See also 9.1.2).³⁰⁴

4.1.1 Necessity and proportionality of exclusion of the press and public

Any limitation on the right to a public hearing must pursue a legitimate aim (i.e., it must be **necessary**, based on one of the grounds of exclusion set out in Article 14(1) of the ICCPR and Article 6(1) of the ECHR), and must be **proportional** (i.e., it must be proportional as between the legitimate aim being pursued, such as the protection of **national security**, and the particular means by which that objective is being achieved, such as the exclusion of the public from part of an oral hearing dealing with information the disclosure of which would be prejudicial to national security). This means that the exclusion of the public from a hearing must be strictly required and assessed on a case-by-case basis, having regard – in the case of decisions by the European Court of Human Rights – to an appropriate **margin of appreciation**.³⁰⁵ In *T. v the United Kingdom*, the European Court of Human Rights examined the trial of a juvenile defendant accused of the murder of toddler, which generated an extremely high level of press and public interest. The Court challenged the argument in favour of the public attendance at the trial in the general interest of the open administration of justice.³⁰⁶ “In respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible her/his feelings of intimidation and inhibition.” In this connection, the Court praised the practice of dealing with children charged with such crimes in special youth courts, from which the general public is excluded and in relation to which there are imposed automatic reporting restrictions on the media.³⁰⁷

In *Touron v Uruguay*, for example, the applicant complained of the absence of an oral hearing of the merits of the case, as a consequence of there being no provision for a public hearing during the entire process of first instance hearings.³⁰⁸ Because the **trial at first instance** was, instead, conducted in writing, without any possibility in any circumstance

303 The UN ECOSOC’s Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR speaks of potential limitations on the requirement of courts to present “findings announced in open court”: see UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 38(a).

304 Reiterated in: UN Human Rights Committee, CCPR General Comment 32 (2007), para 29; and UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 38(b).

305 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 10; UN Human Rights Committee, CCPR General Comment 29 (2001), para 4; *Ashingdane v the United Kingdom* [1985] ECHR 8, para 57; and *Kart v Turkey* [2009] ECHR 1981, para 79.

306 *T. v the United Kingdom* [1999] ECHR 170, para 85.

307 *T. v the United Kingdom* [1999] ECHR 170, paras 28–29. See also on the same case, reference in *S. C. v the United Kingdom* [2004] ECHR 263, para 30.

308 *Touron v Uruguay*, HRC Communication 32/1978, UN Doc CCPR/C/OP/1 (1984), paras 2.2, 5.

for a public hearing, the Committee concluded that there had been a violation of Article 14(1) of the ICCPR.³⁰⁹

Where necessity and proportionality dictate that the press and public should be excluded, the UN ECOSOC's Siracusa Principles call for this conclusion to be announced in open court.³¹⁰

4.1.2 Exclusion in the interests of morals

A court has the ability to exclude the public and press if their presence during an oral hearing, and the publicity that might follow this, would endanger **public morals**.

4.1.3 Exclusion in the interests of public order

The press and public may be excluded in the interests of **public order** (also referred to as "ordre public" in the ICCPR). It has been held, for example, that exclusion of the press and public from *disciplinary* hearings in prison is justifiable, the European Court of Human Rights observing that: "To require that disciplinary proceedings concerning convicted prisoners should be held in public would impose a disproportionate burden on the authorities of the State."³¹¹ In the context of *criminal* proceedings concerning an accused who was already serving a sentence of imprisonment, however, the Court found that this did not automatically imply that the proceedings should have been relocated from a normal courtroom to the place of the accused's imprisonment (See also 4.2.2). While security concerns might justify the exclusion of the public from a trial, the Court reiterated in *Hummatov v Azerbaijan* that this will be rare, noting that security problems are a common feature of many criminal proceedings, and concluded that there were no such security concerns in that case.³¹²

4.1.4 Exclusion in the interests of national security in a democratic society

Exclusion of the public from a hearing may occur if this is in the interests of **national security** in a democratic society. In *Kennedy v the United Kingdom*, the European Court of Human Rights gave consideration to the holding of hearings in respect of which the public was excluded by the Investigatory Powers Tribunal, concerning a complaint that the applicant's communications were being secretly intercepted in "challengeable circumstances", within the meaning of the Regulation of Investigatory Powers Act 2000 (UK). In order to ensure the efficacy of the secret surveillance regime in question, and bearing in mind the importance of such measures to the fight against terrorism and serious crime in the United Kingdom, the European Court concluded that the restrictions on the applicant's rights were

309 *Touren v Uruguay*, HRC Communication 32/1978, UN Doc CCPR/C/OP/1 (1984), para 12. See also: *Weisz v Uruguay*, HRC Communication 28/1978, UN Doc CCPR/C/OP/1 (1984), para 16; *Osman v the United Kingdom* [1998] ECHR 101, paras 147–154; *Wait and Kennedy v Germany* [1999] ECHR 13, paras 59–67; and *Asan Rushiti v Turkey* [2000] ECHR 106, para 23.

310 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 38(a).

311 *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 87.

312 *Hummatov v Azerbaijan* [2007] ECHR 1026, para 150.

both **necessary and proportionate** and did not impair the very essence of rights under Article 6(1) of the ECHR.³¹³

It should be noted that, although national security concerns may ultimately give rise to a **state of public emergency**, which can in limited circumstances allow a country to temporarily **derogate** from certain rights, the UN ECOSOC's Siracusa Principles identify that – even during a state of public emergency – any person charged with a criminal offence must be provided with a public hearing, save where the court orders otherwise on grounds of security, and then only so long as adequate safeguards are in place to prevent abuse.³¹⁴ One such safeguard might be to allow Trial Monitors to observe the closed hearing.

4.1.5 Exclusion in the interest of the private lives of the parties

Where the private lives of the parties so require, the press or the public may be excluded from judicial proceedings. The European Commission on Human Rights has found, for example, that the exclusion of the public from a case involving sexual offences against minors was compatible with the grounds of exclusion under Article 6(1) of the ECHR.³¹⁵ A fully public hearing, in which the public, witnesses and parties in the proceedings can view and hear each other, might also be restricted where this is necessary to protect a witness (See also 7.1).

In *Diennet v France*, the need to protect professional confidentiality and the private lives of the defendant's patients was called to justify holding a disciplinary proceeding *in camera*. However, the European Court of Human Rights found a violation of Article 6 in that the public was excluded because of the automatic prior application of the domestic provisions without a factual assessment of the circumstances of the case. Since the proceedings were to deal only with the "method of consultation by correspondence" adopted by Dr. Diennet, there was no good reason to suppose that either the tangible results of that method in respect of a given patient or any confidences that Dr. Diennet might have picked up in the course of practicing his profession would be mentioned. The European Court also added that if it had become apparent during the hearing that there was a risk of a breach of professional confidentiality or an intrusion on private life, the tribunal could have ordered that the hearing should continue *in camera* rather than establishing an *a priori* automatic exclusion of the public for the duration of the entire proceeding.³¹⁶ In *B. and P. v the United Kingdom*, the European Court of Human rights examined the decision to exclude the press and the public from a case involving the determination of children's residence following the parents' divorce or separation. In such cases, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity

³¹³ *Kennedy v the United Kingdom* [2010] ECHR 682, paras 184–191.

³¹⁴ UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 70(g).

³¹⁵ *X v Austria*, (Application 1913/63, Judgment of 30 April 1965) 2 *Digest of Strasbourg Case Law* 438.

³¹⁶ *Diennet v France* [1995] ECHR 28, paras 34–35.

or comment; hence, the Court found that in such proceedings the exclusion of the press and public may be justified.³¹⁷

4.1.6 Exclusion to avoid prejudice to the interests of justice

Where, in the opinion of the court, publicity would prejudice the interests of justice, the press and public may be excluded from judicial proceedings. To avoid an unjustifiably wide application, this ground of exclusion is expressed carefully within both the ICCPR and ECHR. Exclusion to avoid prejudice to the interests of justice may only occur “to the extent strictly **necessary**... in special circumstances” (as articulated in both instruments). The application of this ground of exclusion is limited to situations where the court believes that publicity would prejudice “the interests of justice”. The UN Economic and Social Council has, in its Siracusa Principles, referred to this ground as being limited to circumstances where publicity would be prejudicial to the fairness of the trial.³¹⁸

4.1.7 Waiver of the right to a public hearing

According to the European Court of Human Rights, the requirement to hold a hearing in public *might* be waived based on the will of the person concerned.³¹⁹ In *Thompson v the United Kingdom*, the European Court explained that a waiver of any right guaranteed by the ECHR (in so far as it is permissible) must not run counter to any important public interest; requires minimum guarantees commensurate to the waiver’s importance; and must be established in an unequivocal manner.³²⁰ In criminal proceedings, the latter point means that any waiver of the right to a public hearing would be made by the defendant. In civil proceedings, it should be assumed that waiver of the requirement to hold a hearing in public must be consented to by all parties to the proceedings, although there is no case directly addressing this point.

In contrast to this approach, the Human Rights Committee has spoken of a duty to provide (through both legislation and judicial practice) for the possibility of the public attending a hearing “if the public so wish” and regardless of whether this has been requested by one of the parties in the proceedings.³²¹ The approach of the Committee has been that the provision of public hearings is a duty that “is not dependent on any request, by the interested party”.³²² The attitude of the Human Rights Committee is based on the general view that rights may not be waived and that the right to a public hearing is an interest of the public which may not be surrendered by a party to the proceedings.

³¹⁷ *B. and P. v the United Kingdom* [2001] ECHR 298, para 38.

³¹⁸ UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 38(a).

³¹⁹ *H. v Belgium* [1987] ECHR 30, para 54.

³²⁰ *Thompson v the United Kingdom* [2004] ECHR 267, para 43. See also, *Håkansson and Sturesson v Sweden* [1990] ECHR 1, para 66; *Pfeifer and Plankl v Austria* [1992] ECHR 2, para 37.

³²¹ *Van Meurs v the Netherlands*, HRC Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990), para 6.1.

³²² *Van Meurs v the Netherlands*, HRC Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990), para 6.1.

In a more detailed line of decisions, however, the European Court of Human Rights has acknowledged that neither the letter nor the spirit of Article 6(1) prevents a person from expressly or tacitly waiving the entitlement to have one's case heard in public.³²³ Such waiver must, however, be made in an unequivocal way and must be accompanied by minimum safeguards commensurate with the importance of the right to a fair hearing, as well as not running counter to any important public interest.³²⁴ In *Le Compte, Van Leuven and De Meyere v Belgium*, for example – where the European Court found that the applicants had clearly wanted and claimed a public hearing – refusal to grant a public hearing was held to violate Article 6(1) of the ECHR, since there was no express waiver of the right and since none of the grounds of exclusion of the public existed.³²⁵ In *Zana v Turkey*, the European Court found a violation of Article 6 for failure to unequivocally establish the applicant's wish to waive the right to public hearing. The fact that the applicant wished to address the court in Kurdish – the European Court determined – in no way could be interpreted as to signify that he implicitly waived his right to defend himself and to appear before the court.³²⁶

Tacit waiver of the right to a public hearing will not be found where the law does not provide for the possibility of a public hearing,³²⁷ or where the practice of a country is such that there is little chance of securing a public hearing.³²⁸ In the case of *Håkansson and Sturesson v Sweden*, no express waiver of the right to a public hearing was made, but the question arose as to whether there had been a tacit waiver. The case concerned the conduct of a hearing before the Göta Court of Appeal which, despite being held in an appellate court, involved the first and only consideration of the applicants' complaint by a judicial authority. The applicants had not requested a public hearing, despite the provision in the Code of Judicial Procedure to allow the Göta Court of Appeal to hold hearings in public. The European Court of Human Rights concluded that, since the applicants could have been expected to ask for a public hearing if they had considered this to be important, their failure to do so amounted to an unequivocal waiver of the right to a public hearing before the Court of Appeal.³²⁹

4.2 OBSTACLES TO A PUBLIC HEARING

Apart from the formal exclusion of the public from a hearing by an order of a judge, there may be other practical factors that have the effect of *de facto* excluding the public from a hearing. As recognized in the context of other rights and freedoms, factors that amount to a practical hindrance to the enjoyment of rights can contravene human rights in the same

323 *H. v Belgium* [1987] ECHR 30, para 54.

324 *Håkansson and Sturesson v Sweden* [1990] ECHR 1, para 66; and *Scoppola v Italy* [2009] ECHR 1297, para 135; *Thompson v the United Kingdom* [2004] ECHR 267, para 43; *Pfeifer and Plankl v Austria* [1992] ECHR 2, para 37.

325 *Le Compte, Van Leuven and De Meyere v Belgium* [1981] ECHR 3, para 59.

326 *Zana v Turkey* [1997] ECHR 94, para 70.

327 *Werner v Austria* [1997] ECHR 92, paras 45–51.

328 *H. v Belgium* [1987] ECHR 30, para 54.

329 *Håkansson and Sturesson v Sweden* [1990] ECHR 1, paras 66–68.

way as legal impediments.³³⁰ This may result, for example, from a lack of publicity of hearings (See also 4.2.1), an inaccessible venue (See also 4.2.2), insufficient courtroom space (See also 4.2.3) or the application of unreasonable conditions on entry into the courtroom (See also 4.2.4).

4.2.1 Publicity of hearings

The publicity of hearings ensures the transparency of proceedings and, thus, provides an important safeguard for the interests of the individual and of society at large. The European Court of Human Rights has stated that “a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place”.³³¹ Therefore, courts must make information available to the public regarding the time and venue of oral hearings.³³² Trial schedules should be regularly displayed either outside the courthouse, in the entry of courthouse or in the courtrooms. Information should include details concerning the date and location of hearings, as well as of the court responsible for the hearing.

4.2.2 Location of hearings

In order to render public access to a hearing both practical and effective, the place of hearing must be easily accessible to the public. The exclusion of the public from the hearing held in prison facilities is justifiable according to the ECHR only for disciplinary proceedings (See also 4.1.3). As observed by the European Court of Human Rights in *Hummatov v Azerbaijan*, “the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access”.³³³ The Court concluded, in that case, that the failure to provide a regular shuttle service to the hearing venue had a clearly discouraging effect on potential spectators wishing to attend the applicant’s trial and held that there had been a violation of Article 6(1) of the ECHR.³³⁴

4.2.3 Courtroom space

Both domestic legislation and judicial practice must provide for the possibility of the public attending a hearing, if members of the public so wish.³³⁵ In order to facilitate this, the Human Rights Committee has observed that courts must make information on the time

330 *Airey v Ireland* [1979] ECHR 3, para 25; *Artico v Italy* [1980] ECHR 4, para 33; *Hummatov v Azerbaijan* [2007] ECHR 1026, para 144; and *Andrejeva v Latvia* [2009] ECHR 297, para 98.

331 *Riepan v Austria* [2000] ECHR 575, para 29. See also *Van Meurs v the Netherlands*, HRC Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990), para 6.2.

332 *Van Meurs v the Netherlands*, HRC Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990), para 6.2; *Hummatov v Azerbaijan* [2007] ECHR 1026, para 144.

333 *Hummatov v Azerbaijan* [2007] ECHR 1026, para 144. See also *Riepan v Austria* [2000] ECHR 575, paras 29–31.

334 *Hummatov v Azerbaijan* [2007] ECHR 1026, paras 140–152.

335 *Van Meurs v the Netherlands*, HRC Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990), para 6.1.

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 (**necessary and proportional**) limits.³³⁶ This will need to take into account various factors, such as the potential public interest in the case and the duration of the oral hearing. In *Marinich v Belarus*, for example, the Human Rights Committee found a violation of Article 14(1) of the ICCPR in a situation where a small hearing room, able to accommodate only 12 people, was used for the hearing of a public figure in respect of which it was reasonable to assume that there would be significant public interest.³³⁷

The Human Rights Committee has acknowledged, however, that failure to make large courtrooms available does not constitute a violation of the right to a public hearing if no interested member of the public has actually been barred from attending an oral hearing.³³⁸

4.2.4 *Entry conditions*

If a hearing is open, access to the courtroom must be available to the general public, including the media, and must not be restricted to a particular category of persons.³³⁹ This means that a hearing will be treated as not having been held in public if the access by the general public is hindered, notwithstanding the presence of trial monitors. The imposition of strict entry conditions, combined with an overall environment of surveillance and secrecy, can amount to a violation of the right to a public hearing. In *Marinich v Belarus*, for example, representatives of political parties and NGOs were effectively barred from the courtroom – even though hearings were declared to be open to the public – in a situation where the court building was surrounded by police who prevented people from approaching the building and where security services were constantly present in the building and recorded the proceedings.³⁴⁰

Media representatives should be allowed to report on the hearing, although it is permissible for judicial authorities to restrict the use of cameras and audio-visual recordings. It is also compatible with the right to a public hearing for authorities to require reasonable identity and security checks if security concerns require this.³⁴¹

336 *Van Meurs v the Netherlands*, HRC Communication 215/1986, UN Doc CCPR/C/39/D/215/1986 (1990), para 6.2.

337 *Marinich v Belarus*, HRC Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010), para 10.5.

338 *Marinich v Belarus*, HRC Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010), para 10.5.

339 UN Human Rights Committee, CCPR General Comment 32 (2007), para 29.

340 *Marinich v Belarus*, HRC Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010), paras 2.16, 10.5.

341 *Hummatov v Azerbaijan* [2007] ECHR 1026, para 143.

CHECKLIST: RIGHT TO A PUBLIC HEARING

1. Have the public or press been excluded from any part of the oral hearing?
 - a) Was the decision to exclude the public announced by the Court in public session?
 - b) Was the Court's decision discussed as preliminary question with the parties *in camera*? Were only certain categories (such as media) excluded from the hearing?
3. If the public was excluded from the hearing, have any of the following reasons been given for exclusion of the public:
 - a) interests of morals;
 - b) interests of public order;
 - c) interests of national security;
 - d) interests of the private lives of the parties; or
 - e) prejudice to the fairness of the trial?
4. If the public was excluded from the hearing, is there anything to suggest that the exclusion of the public was:
 - a) not required by those interests;
 - b) involved a greater level of exclusion than necessary to safeguard those interests (i.e., it was disproportionate); or
 - c) involved an automatic exclusion of the public without regard to the particular situation?
5. If the public was excluded from the hearing, was this explained to be because the parties in the proceedings had waived their right to a public hearing?

If so:

 - a) did the parties clearly waive this right (either expressly or tacitly)?
 - b) were safeguards implemented to ensure that the hearing would proceed in a fair way (such as recording of proceedings)? and
 - c) is there anything to suggest that holding the hearing in private was contrary to an important public interest?
6. Were there any practical obstacles that prevented the observation of the hearing by the public?
 - a) Where did the court session take place?
 - b) Was the schedule of the case (including date, time and venue) available on the information board at the entrance of the court building? If not, was it placed in another publicly accessible and visible place (please specify)?
 - c) Was the room size adequate to accommodate all of the participants of the case?

- d) Was the courtroom equipped with the necessary furniture? Was the correct technical equipment (including translation equipment) in place? Were the room temperature and the lighting adequate?
- e) Were there any entry conditions (such as the payment of fees, display of identification cards, etc.) required for the public to attend? Was any particular category of persons singled out or targeted by these entry conditions?
- f) Was anyone denied access to the courtroom? If so, on what account?

CHAPTER V

Right to be Presumed Innocent and Privilege against Self-Incrimination

Article 14 of the ICCPR

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

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

“(g) Not to be compelled to testify against himself or to confess guilt.”

Article 6(2) of the ECHR

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

OSCE Commitments

(5) The participating States solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.19) – everyone will be presumed innocent until proved guilty according to law.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

The right to be presumed innocent is encapsulated within Article 14(2) of the ICCPR and Article 6(2) of the ECHR, which speak of the right to be “presumed innocent until proved guilty according to law” (See also 5.1).³⁴² The presumption finds protection not just within these provisions of the ICCPR and ECHR, but is also supplemented by rights that reinforce

³⁴² Article 11(1) of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, also guarantees that: “Everyone charged with a penal

it, namely that everyone is entitled not to be compelled to testify against him or herself or to be compelled to confess guilt, referred to together as the privilege against self-incrimination (See also 5.2). OSCE participating States have declared that the presumption of innocence is among those elements of justice that are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings.³⁴³

As explained in the UN ECOSOC's Siracusa Principles, the right to a fair and public hearing may be subject to legitimate restrictions that are strictly required by the exigencies of an emergency situation, i.e., an emergency declared under Article 4 of the ICCPR or Article 15 of the ECHR as one threatening the life of the nation. Even in such situations, however, the Siracusa Principles explain that the denial of certain fair trial rights can never occur, even in an emergency situation, because "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency".³⁴⁴ This includes the presumption of innocence and the right not to be compelled to testify against oneself or to confess guilt.³⁴⁵ The Human Rights Committee leaves no space for doubt in this regard:

"Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times...³⁴⁶ States Parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by... deviating from fundamental principles of fair trial, including the presumption of innocence... The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency... The presumption of innocence must be respected."³⁴⁷

By their very nature, these rights are restricted in their application to criminal proceedings. For example, the provisions of bankruptcy law in France, which had included a presumption of responsibility of company managers in the absence of proof of their diligence, were determined by the Human Rights Committee not to engage Article 14(2) of the ICCPR, since the bankruptcy proceedings did not involve any charge of a criminal offence.³⁴⁸

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

343 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 5.

344 UN Human Rights Committee, CCPR General Comment 29 (2001), para 16.

345 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 70(g).

346 UN Human Rights Committee, CCPR 29 (2001), para 6

347 UN Human Rights Committee, CCPR General Comment 32 (2007), paras 6, 11, 16.

348 *Moraël v France*, HRC Communication 207/1986, UN Doc CCPR/C/36/D/207/1986 (1989), para 9.5. See also *W. J. H. v the Netherlands*, HRC Communication 408/1990, UN Doc CCPR/C/45/D/408/1990 (1992), para 6.2; *W. B. E. v the Netherlands*, HRC Communication 432/1990, UN Doc CCPR/C/46/D/432/1990

5.1 PRESUMPTION OF INNOCENCE

Once charged with a criminal offence, and applicable to all stages of criminal proceedings up to conviction, every person so charged has the right to be presumed innocent until proved guilty according to law.³⁴⁹ The presumption of innocence governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution.³⁵⁰ Therefore, as the European Court stated in *Matijašević v Serbia* and in *Garycki v Poland*, the fact that the applicant is ultimately found guilty does not vacate her/his initial right to be presumed innocent until proved guilty according to law.³⁵¹

The presumption of innocence applies, under certain circumstances, even before the official notification of a criminal charge in the form of an indictment has been issued. According to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: “A detained person *suspected of or charged with* a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”³⁵² The European Court of Human Rights adopts an autonomous meaning of the ECHR expression “charged with a criminal offence” (See also 1.1) as referring to “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected”.³⁵³ The second parameter includes the stage of investigation in the case of a suspect who is arrested and detained in police custody pending the formalization of the charges.³⁵⁴

The presumption of innocence is treated as fundamental to the protection of human rights³⁵⁵ and demands various things in its practical application, namely that:³⁵⁶ The court of tribunal must not predetermine the case before it (See also 5.1.1); guilt beyond reasonable doubt must be proved by the prosecution, except to the extent that presumptions of law or fact might be permissible (See also 5.1.2); the way in which an accused person is treated should not be such so as to indicate that the accused is guilty (See also 5.1.3); and the media should avoid news coverage that undermines the presumption of innocence, and public authorities must similarly refrain from making public statements that would have the same effect (See

(1992), para 6.6; and *Cabal and Bertran v Australia*, HRC Communication 1020/2001, UN Doc CCPR/C/78/D/1020/2001 (2003), para 7.6.

349 *Alenet de Ribemont v France* [1995] ECHR 112, para 37.

350 *Minelli v Switzerland* [1983] ECHR 4, para 30.

351 *Matijašević v Serbia* [2006] ECHR 1161, para 49; *Garycki v Poland* [2007] ECHR 112, para 72.

352 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly on 9 December 1988, principle 36, paragraph 1.

353 *Serves v France* [1997] ECHR 82, para 42.

354 *Alenet de Ribemont v France* [1995] ECHR 112, para 37.

355 UN Human Rights Committee, CCPR General Comment 32 (2007), para 30.

356 UN Human Rights Committee, CCPR General Comment 32 (2007), para 30; *Barberá, Messegué and Jabardo v Spain* [1998] ECHR 25, para 77.

also 5.1.4). The impact on the presumption of innocence of custodial remands or preventive detention (See also 5.1.5) and acquittals or stays of proceedings (See also 5.1.6) should also be noted, as should the fact that violations of the presumption of innocence can be subsequently remedied through judicial proceedings (See also 5.1.7).

5.1.1 *Pre-determination of the outcome of a case*

At the core of the rule that every person must be presumed innocent until proven guilty is the requirement that the court or tribunal responsible for determining whether or not guilt has been proved must not prejudge the case. This requirement will be violated if a judge or jury member reflects an opinion that a person charged with a criminal offence is guilty before the legal process for determination of that fact has occurred.³⁵⁷ As the European Court of Human Rights puts it: “It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty.”³⁵⁸ The Court has emphasized, however, that a fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime versus a clear declaration, in the absence of a final conviction, that an individual has committed the crime.³⁵⁹

The European Court of Human Rights has also stated that the presumption of innocence requires, *inter alia*, that, when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged.³⁶⁰ The presumption is in this way closely linked to the requirement that courts and tribunals must be subjectively impartial (See also 3.3.2 a). The European Court has found violations of the principle in cases of improper use of the media by the judges. In *Lavents v Latvia*, for example, the trial judge made comments to the media before the trial, in which he referred to the possibility of conviction or partial acquittal of the defendant, without mentioning the possibility of total acquittal. This was taken to infer a personal bias, or pre-determination, of the case and, thus, held to be in violation of the requirement of impartiality.³⁶¹

5.1.2 *Burden and standard of proof*

During the conduct of a trial, the principle of presumption of innocence has been taken to mean that the burden of proof for any criminal charge is on the prosecution, and that an accused must have the benefit of the doubt.³⁶² It also follows that it is for the prosecution to

357 *Minelli v Switzerland* [1983] ECHR 4, para 37; *Alenet de Ribemont v France* [1995] ECHR 112, para 35.

358 *Deweere v Belgium* [1980] ECHR 1, para 56; *Minelli v Switzerland* [1983] ECHR 4, paras 27, 30, 37; *Alenet de Ribemont v France* [1995] ECHR 112, para 35–36; *Daktaras v Lithuania* [2000] ECHR 460 para 41–44; *Böhmer v Germany* [2002] ECHR 647, para 54; *Matijašević v Serbia* [2006] ECHR 1161, para 45; *Garycki v Poland* [2007] ECHR 112, para 66; *Nešťák v Slovakia* [2007] ECHR 185, para 88.

359 *Matijašević v Serbia* [2006] ECHR 792, para 48; *Nešťák v Slovakia* [2007] ECHR 185, para 89.

360 *Barberá, Messegue and Jabardo v Spain* [1998] ECHR 25, para 77.

361 *Lavents v Latvia* [2002] ECHR 786, para 119, available in French only; see also *Buscemi v Italy* [1999] ECHR 70, paras 67–68.

362 *Telfner v Austria* [2001] ECHR 228, para 15; see also *Barberá, Messegue and Jabardo v Spain* [1998] ECHR 25, para 77.

inform the accused of the case that will be made against her/him, so that s/he may prepare and present her/his defence accordingly, and it is for the prosecution to adduce evidence sufficient to convict her/him (See also 6.3).³⁶³ An accused's guilt cannot therefore be presumed until a charge has been proven beyond reasonable doubt.³⁶⁴ The Draft Body of Principles on the Right to a Fair Trial and Remedy refers to the standard of proof required to establish guilt as being "to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law".³⁶⁵

This does not mean, however, that **presumptions of law or fact** are impermissible. The European Court of Human Rights has held that such presumptions do not necessarily violate article 6(2) of the ECHR, so long as any rule which shifts the burden of proof or which applies a presumption operating against the accused must be confined within "reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".³⁶⁶ The mere possession of goods when passing through customs may, for example, act as a permissible limit on the presumption of innocence in the case of smuggling.³⁶⁷ Examples of such cases include **strict liability offences** and cases concerning the recovery of assets. As an example of the second case, in *Phillips v the United Kingdom* the European Court of Human Rights considered the British presumption that allows a court to assume that all property held by a person convicted of a drug-trafficking offence within the preceding six years from the date of the crime represented the proceeds of drug trafficking. The European Court noted that the presumption did not serve the purpose of finding of guilt but, instead, of establishing the proceeds of the crime. Overall, the Court was satisfied that the application of the presumption was confined within reasonable limits and that, in view of the attendant safeguards, the rights of the defence were fully respected.³⁶⁸

Although the Human Rights Committee will not normally look to evaluate evidence, it has been prepared to find a violation of the presumption of innocence where uncontested information before it leaves room for considerable doubt about guilt.³⁶⁹ The European Court of Human Rights has similarly taken the approach that the burden of proof must be properly

363 *Barberá, Messegué and Jabardo v Spain* [1998] ECHR 25, para 77.

364 UN Human Rights Committee, CCPR General Comment 32 (2007), para 30; and *Sobhraj v Nepal*, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para 7.3.

365 Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex II, Draft Body of Principles on the Right to a Fair Trial and Remedy para 59 a), Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994.

366 *Phillips v the United Kingdom* [2001] ECHR 437, para 40; *Salabiaku v France* [1998] ECHR 19, para 28; *Pham Hoang v France* [1992] ECHR 61, para 33.

367 *Salabiaku v France* [1988] ECHR 19, paras 28–30.

368 *Phillips v the United Kingdom* [2001] ECHR 437, para 47.

369 *Ashurov v Tajikistan*, HRC Communication 1348/2005, UN Doc CCPR/C/89/D/1348/2005 (2007), para 6.7; and *Larrañaga v the Philippines*, HRC Communication 1421/2005, UN Doc CCPR/C/87/D/1421/2005 (2006), para 7.4.

discharged, such that treating the silence of an accused as the main basis of conviction is in contravention of the presumption of innocence.³⁷⁰

5.1.3 Treatment of accused persons that may impact on perceptions of innocence

Should the personal prejudice of a judge or the practice of a court in the treatment of accused persons result in the adverse treatment of an accused in a criminal trial, this may amount to a violation of the presumption of innocence (See also 5.1). The Human Rights Committee has commented that a hearing would not be fair, for example, if a defendant was faced with “the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects”.³⁷¹ In *Gridin v Russian Federation*, the applicant claimed that the courtroom was crowded with people who were screaming that he should be sentenced to death and that prosecutors and victims were threatening the witnesses and the defence. The applicant also claimed that the judge did not do anything to counteract the hostile attitude from the public.³⁷² The Human Rights Committee found a violation of article 14(1) of ICCPR because of the failure by the trial court to control the hostile atmosphere and the pressure created by the public in the courtroom, which it accepted had made it impossible for defence counsel to properly cross-examine the witnesses and present his defence.³⁷³

In its General Comment on fair trial rights, the Committee has also stated that defendants should normally not be shackled or kept in cages during trials, or otherwise presented to the court in a manner indicating that they may be dangerous criminals.³⁷⁴ For the presumption of innocence to be fully effective, the appearance of the defendant during the trial is very important and restrictive measures should therefore only be authorized where security or other risks are at stake in the specific circumstances of the case, such as when there is a danger that the accused might abscond or cause injury or damage. In *Ramishvili and Kokhreidze v Georgia*, the European Court of Human Rights found no justification for the defendants being placed in a caged dock during the public hearings, nor for the presence of military “special forces” in the courthouse, considering the defendants’ status as public figures, their lack of earlier convictions and their orderly behaviour during the criminal proceedings. According to the European Court, this undermined the principle of the presumption of innocence and humiliated the applicants in their own eyes, if not in those of the

370 *Telfner v Austria* [2001] ECHR 228, paras 17–18. See also: *Albert and Le Compte v Belgium* [1983] ECHR 1, para 40; and *Unterpertinger v Austria* [1986] ECHR 15, paras 31–33; see also *John Murray v the United Kingdom* [1996] ECHR 3, para 54 *in fine*.

371 UN Human Rights Committee, CCPR General Comment 32 (2007), para 25.

372 *Gridin v Russian Federation*, HRC Communication 770/1997, UN Doc CCPR/C/69/D/770/1997 (2000), para 3.5.

373 *Gridin v Russian Federation*, HRC Communication 770/1997, UN Doc CCPR/C/69/D/770/1997 (2000), para 8.2.

374 UN Human Rights Committee, CCPR General Comment 32 (2007), para 30.

public.³⁷⁵ By the same token, the European Court has found a violation of the presumption of innocence in cases –such as *Jiga v Romania* and *Samoilă et Cionca v Romania* – where defendants were required to wear prison uniforms during the hearing, concluding that this practice is likely to reinforce the perception of guilt amongst the public.³⁷⁶

5.1.4 Impact on the presumption of innocence of media coverage and of statements made by public authorities

Although the Human Rights Committee has commented that the media should avoid news coverage undermining the presumption of innocence,³⁷⁷ it has also taken the view that the impact of pre-trial publicity on the ability to conduct a fair hearing is primarily a question of fact which should be considered by the trial court and any appeals court. The provision of clear instructions to a jury to consider only the evidence presented at trial will prevent any violation of the presumption of innocence on this account.³⁷⁸ The Council of Europe has adopted principles concerning the provision of information through the media in relation to criminal proceedings in which it is stated that while “the public must be able to receive information about the activities of judicial authorities and police services through the media... opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused”.³⁷⁹ This is particularly relevant in the context of a trial involving juries or lay judges, where judicial authorities and police services “should abstain from publicly providing information which bears a risk of substantial prejudice to the fairness of the proceedings”.³⁸⁰

The European Court of Human Rights has ruled on the improper use of the media by judges and courts in the context of the principle of judicial impartiality (See also 3.3.2).³⁸¹

The European Court of Human Rights and the Human Rights Committee have additionally clarified that the presumption of innocence not only applies to the judiciary and to the conduct of proceedings within court, but also demands that other public authorities refrain from prejudging the outcome of a trial.³⁸² In *Gridin v Russian Federation*, where public statements made by high-ranking law enforcement officers portraying the author as guilty were given wide media coverage, the Human Rights Committee did not hesitate to find

375 *Ramishvili and Kokhraidze v Georgia* [2009] ECHR 153, paras 100–101.

376 *Jiga v Romania* [2010] ECHR, para 102, available in French only; *Samoilă et Cionca v Romania* [2008] ECHR, para 100, available in French only.

377 UN Human Rights Committee, CCPR General Comment 32 (2007), para 30; and *Mwamba v Zambia*, HRC Communication 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010), para 6.5. Compare with *News Verlags GmbH v Austria* [2000] ECHR 5, paras 44–60.

378 *Dudko v Australia*, HRC Communication 1347/2005, UN Doc CCPR/C/90/D/1347/2005 (2007), para 6.3.

379 CoE Recommendation Rec (2003)13 on the Provision of Information through the Media, Principles 1 and 2.

380 CoE Recommendation Rec (2003)13 on the Provision of Information through the Media, Principle 10.

381 *Kyprianou v Cyprus* [2005] ECHR 873, para 120; *Buscemi v Italy* [1999] ECHR 70, para 67.

382 *Allenet de Ribemont v France* [1995] ECHR 112, para 36. See also, *Daktaras v Lithuania* [2000] ECHR 460, para 42; *Butkevicius v Lithuania* [2002] ECHR 331, para 49.

a violation of the presumption of innocence.³⁸³ In *Marinich v Belarus*, the Committee also found a violation of the presumption of innocence in circumstances where episodes of the author's interrogation were broadcasted on state-controlled Belarusian television, accompanied by false and degrading comments about the author suggesting that he was guilty.³⁸⁴

To assess whether a statement of a public official is in breach of the presumption of innocence, the European Court of Human Rights has adopted a case-by-case approach based on the particular circumstances in which the impugned statement was made.³⁸⁵ The European Court has recalled that the freedom of expression includes the freedom to receive and impart information and that the presumption of innocence cannot, therefore, act as an absolute bar on the authorities from informing the public about criminal investigations in progress. This is all the more so where a public figure is involved. However, if the presumption of innocence is to be respected, public officials ought to exercise their right to inform the public with all the discretion and circumspection necessary.³⁸⁶

In *Allet de Ribemont v France*, the applicant was one of the persons arrested for the murder of Mr. Jean de Broglie, a Member of Parliament and former Government Minister. During a televised press conference, the Minister of Interior and two senior police officers stated that all the people involved in the murder had been arrested, and that the applicant was one of the instigators of the murder. The European Court noted that the statements made by high profile public authorities in the present case clearly amounted to a declaration of the applicant's guilt. The statements encouraged the public to believe him guilty and also prejudged the assessment of the facts by the competent judicial authority. The European Court thus concluded that there had been a breach of article 6(2) of the ECHR.³⁸⁷

Butkevicius v Lithuania concerned a similar situation, in which the applicant was an important political figure at the time of the alleged offence, and the European Court acknowledged, therefore, that State officials, including the Chairman of the Seimas, had the right to inform the public.³⁸⁸ This means that the mere fact that public authorities voice a *suspicion* of guilt is not, per se, incompatible with the presumption of innocence. However, the choice of words by public officials in their statements is of utmost importance and, in the Court's opinion, the statements made amounted to declarations by a public official of the applicant's

383 *Gridin v Russian Federation*, HRC Communication 770/1997, UN Doc CCPR/C/69/D/770/1997 (2000), para 8.3. See also: *Allet de Ribemont v France* [1995] ECHR 112, paras 32–37; *Mwamba v Zambia*, HRC Communication 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010), para 6.5; and *Kulov v Kyrgyzstan*, HRC Communication 1369/2005, UN Doc CCPR/C//99/D/1369/2005 (2010), para 8.7.

384 *Marinich v Belarus*, HRC Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010), para 10.6.

385 *Adolf v Austria* [1982] ECHR 2, paras 36–41. See also, *Daktaras v Lithuania* [2000] ECHR 460 para 43.

386 *Allet de Ribemont v France* [1995] ECHR 112, para 38; *Karakaş and Yeşilirmak v Turkey* [2005] ECHR 431, para 50; *Garycki v Poland* [2007] ECHR 112, para 69–70 ; *Pesa v Croatia* [2010] ECHR 488, para 139.

387 *Allet de Ribemont v France* [1995] ECHR 112, para 41.

388 *Butkevicius v Lithuania* [2002] ECHR 331, para 50. See also, *Garycki v Poland* [2007] ECHR 112, paras 69–70.

guilt, which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority.³⁸⁹ In *Pesa v Croatia*, the European Court similarly found a violation of the applicant's right to be presumed innocent because of a statement made in the media by the State Attorney and the Head of the Police.³⁹⁰

In *Daktaras v Lithuania*, the impugned statements were made by a prosecutor to reject the defense lawyer's request to discontinue the prosecution at a pre-trial stage. The European Court found that the statements did not breach the principle of the presumption of innocence. First of all, they were not made outside the context of the criminal proceedings, such as, for instance, in a press conference. Furthermore, the prosecutor had used the same words as those by the defense lawyer in asserting in his decision that the applicant's guilt had been "proved" by the evidence in the case file. Although the European Court found the use of the term "proved" unfortunate, it concluded that, having regard to the context in which the word was used, it was clear that both the defense lawyer and the prosecutor were only referring to the question of whether the case file disclosed sufficient evidence of the applicant's guilt to justify proceeding to trial.³⁹¹

5.1.5 The presumption of innocence in relation to custodial remands, preventive detention

Denial of bail to an accused (See also 6.4.3), and the consequent remand in custody of a person who has not been convicted, does not affect the presumption of innocence.³⁹² However, because article 9(3) of the ICCPR and article 5(3) of the ECHR guarantee the right to trial within a reasonable time or to release pending trial, the denial of bail does demand that the accused person must be tried as expeditiously as possible.³⁹³ The Human Rights Committee has also made it clear that the length of pre-trial detention should never be taken as an indication of guilt.³⁹⁴

Preventive detention will also not normally affect the right of persons to be presumed innocent because such forms of detention do not involve a criminal charge against a person.³⁹⁵ However, in *Cagas v the Philippines*, the Human Rights Committee took the view that an excessive period of preventive detention, exceeding nine years in that case, did affect

389 *Butkevicius v Lithuania* [2002] ECHR 331, para 53.

390 *Pesa v Croatia* [2010] ECHR 488, para 142; see also, *Böhmer v Germany* [2002] ECHR 647, para 56.

391 *Daktaras v Lithuania* [2000] ECHR 460 paras 43–45.

392 UN Human Rights Committee, CCPR General Comment 32 (2007), para 30.

393 UN Human Rights Committee, CCPR General Comment 32 (2007), para 35; *Sextus v Trinidad and Tobago*, HRC Communication 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001), para 7.2; *Jablonski v Poland* [2000] ECHR 685, para 102; *Castravet v Moldova* [2007] ECHR 209, para 30; and *Kučera v Slovakia* [2007] ECHR 609, para 95.

394 UN Human Rights Committee, CCPR General Comment 32 (2007), para 30. See also UN Human Rights Committee Concluding Observations: Argentina, UN Doc CCPR/CO/70/ARG (2000), para 10.

395 *Wairiki Rameka et al. v New Zealand*, HRC Communication 1090/2002, UN Doc CCPR/C/79/D/1090/2002 (2003), para 7.4.

the right to be presumed innocent and, thereby, constituted a violation of article 14(2) of the ICCPR.³⁹⁶

5.1.6 *Affect of stay of proceedings or acquittal*

If criminal proceedings have been stayed, e.g., due to the expiry of an applicable **statute of limitations**, a court cannot impose prosecution costs and/or compensation to an alleged victim if the law only allows such costs or compensation to be imposed following a conviction.³⁹⁷ On the other hand, when criminal proceedings are discontinued for procedural reasons, the State has no obligation to indemnify the defendant for *any* detriment s/he may have suffered. A defendant in such a situation will be unable to seek reimbursement of expenses under subsequent civil proceedings, and the court will be able to justify this refusal on the basis of the existence of “strong suspicions” without breaching the presumption of innocence principle.³⁹⁸

Upon **acquittal**, it is no longer permissible for a court to rely on suspicions regarding an accused person’s guilt. This principle is lined to the prohibition against double jeopardy (See also 8.4). As stated by the European Court of Human Rights in *Sekanina v Austria*:

“The voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final.”³⁹⁹

5.1.7 *Remedy of violations through judicial proceedings*

It should be noted that conduct of the State that is inconsistent with the presumption of innocence can be subsequently remedied through the judicial process. In *Vargas-Machuca v Peru*, for example, the applicant had been dismissed from service in the Peruvian National Police based upon assertions that the applicant claimed had never existed. Ultimately, however, both the Trujillo Third Special Civil Court and the Trujillo First Civil Division found that the applicant had been unlawfully dismissed and reinstated him in his post. Consequently, the Human Rights Committee took the position that there was no violation of due process within the meaning of article 14(1) of the ICCPR, since the domestic court had remedied the breach. It also considered that the domestic courts had recognized the applicant’s innocence and that there was consequently no violation of the right contained article 14(2).⁴⁰⁰

396 *Cagas v the Philippines*, HRC Communication 788/1997, UN Doc CCPR/C/73/D/788/1997 (2001), para 7.2. See also UN Human Rights Committee Concluding Observations: Italy, UN Doc CCPR/C/ITA/CO/5 (2006), para 14.

397 *Minelli v Switzerland* [1983] ECHR 4, para 38.

398 *Lutz v Germany* [1987] ECHR 20, para 63.

399 *Sekanina v Austria* [1993] ECHR 37, para 30.

400 *Vargas-Machuca v Peru*, HRC Communication 906/2000, UN Doc CCPR/C/75/D/906/2000 (2002), para 7.3. Compare with *Arutyuniantz v Uzbekistan*, HRC Communication 971/2001, UN Doc CCPR/C/83/D/971/2001 (2005), para 6.4.

5.2 PRIVILEGE AGAINST SELF-INCRIMINATION

Article 14(3)(g) of the ICCPR expressly guarantees that any person charged with a criminal offence is entitled not to be compelled to testify against her/himself. This is often referred to as the privilege against self-incrimination, which is made up of the right to silence along with the entitlement not to be compelled to confess guilt.⁴⁰¹ In the context of the ECHR, it is implied from the overarching right to a fair trial in article 6(1) of the ECHR. As stated by the European Court of Human Rights in *Saunders v the United Kingdom*:

“Although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6... The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense, the right is closely linked to the presumption of innocence.”⁴⁰²

As explained by the European Court, protecting an accused person from improper compulsion by the authorities is aimed at contributing to the avoidance of miscarriages of justice.⁴⁰³ This means that an accused cannot be compelled to give testimony in court (See also 5.2.1). However, the privilege against self-incrimination is restricted to the right to silence and does not prevent the compulsory production of material evidence, such as documents, or blood or other bodily samples (See also 5.2.2). In limited circumstances, a person might be legally compelled to answer questions, so long as safeguards are in place to protect the integrity of the right to silence, such as use immunity (See also 5.2.3). For the right to silence to be effective, great care must be taken as to what inferences might or might not be drawn from the exercise of an accused person of her/his right to silence (See also 5.2.4). The right to silence must be understood as prohibiting any direct or indirect psychological (See also 5.2.5) or physical (See also 5.2.6) coercion by investigating authorities of an accused with a view to obtaining a confession or guilt.

5.2.1 Defendant's testimony in court

The most direct and practical result of the prohibition against compulsion to testify against oneself is that a defendant cannot be called as a witness in the criminal trial against her/him. The privilege against self-incrimination means that the prosecution must prove its case against an accused person without resorting to “evidence obtained through methods

⁴⁰¹ As explained, for example, in the Commission of the European Communities, *Green Paper: The Presumption of Innocence*, EC Doc COM(2006) 174 final, p. 7.

⁴⁰² *Saunders v the United Kingdom* [1996] ECHR 65, para 68. See also: *Funke v France* [1993] ECHR 7, para 44; *John Murray v the United Kingdom* [1996] ECHR 3, para 45, *Heaney and McGuinness v Ireland* [2000] ECHR 684, para 40 and *Gäfgen v Germany* [2010] ECHR 759, para 168.

⁴⁰³ *Saunders v the United Kingdom* [1996] ECHR 65, para 68; *John Murray v the United Kingdom* [1996] ECHR 3, para 45 *in fine*; *Heaney and McGuinness v Ireland* [2000] ECHR 684, para 40.

of coercion or oppression in defiance of the will of the accused”.⁴⁰⁴ If, however, a defendant voluntarily decides to give evidence as a witness in her/his own case, s/he will be subject to cross-examination by the prosecution (See also 6.7.3). The right to remain silent is not confined to the trial but also applies to the investigation stage. A suspect or accused has the right to remain silent under police questioning.⁴⁰⁵

5.2.2 Compulsion to produce, or allow collection of, material evidence

The privilege against self-incrimination is concerned with respecting the right to silence. This means that it does not extend to preventing the use in criminal proceedings of material that can be obtained from an accused person through the use of compulsory powers that do not affect the accused’s right to silence. This might include, for example, documents obtained under a search warrant, or breath, blood and urine samples, or bodily tissue compulsorily obtained for the purpose of DNA testing, so long as this is done pursuant to a requirement in the law and to the extent necessary and proportionate to combat crime.⁴⁰⁶ In *P.G. and J.H. v the United Kingdom*, the European Court of Human Rights referred to voice samples, which did not include any incriminating statements, as akin to blood, hair or other physical or objective specimens used in forensic analysis, to which privilege against self-incrimination does not apply.⁴⁰⁷ A failure to comply with such requirements may itself amount to an offence or to contempt of court (See also 3.5).

A different situation occurs when a suspect or accused is compelled to *actively* provide evidence, such as documents, by way of locating, obtaining, delivering or giving otherwise access to them, thus contributing to her/his conviction. In *Funke v France*, the European Court dealt with a custom case in which a conviction was ordered as a way of pressuring Mr. Funke to provide documents constituting evidence of offences he had allegedly committed. The Court noted that the special features of customs law cannot justify such an infringement of the right of anyone charged with a criminal offence to remain silent and not to contribute to incriminating her/himself.⁴⁰⁸

5.2.3 Legal compulsion to answer questions

In limited circumstances, authorities may have the ability to compel a person to answer questions outside the context of a criminal hearing. This may be by way of a court hearing held before a judicial officer, or by questions asked in other settings by a non-judicial officer, and commonly involves the giving and recording of evidence under oath. Wherever this occurs, the privilege against self-incrimination demands that the evidence provided cannot be used in subsequent criminal proceedings against the person compelled to give

404 *Saunders v the United Kingdom* [1996] ECHR 65, para 68; *Heaney and McGuinness v Ireland* [2000] ECHR 684, paras 54–55; and *Allan v the United Kingdom* [2002] ECHR 702, para 44.

405 *John Murray v the United Kingdom* [1996] ECHR 3, para 45.

406 *Saunders v the United Kingdom* [1996] ECHR 65, para 69.

407 *P. G. and J. H. v the United Kingdom* [2001] ECHR 550, para 80.

408 *Funke v France* [1993] ECHR 7, para 44.

evidence.⁴⁰⁹ This is referred to as “use immunity” (meaning that the evidence is *immune* from being *used* against the person who is compelled to break her/his right to silence). In this regard, the European Court of Human Rights has clarified that the right not to incriminate oneself cannot reasonably be confined to directly incriminating remarks. What is crucial is the use to which evidence obtained under compulsion is put in the course of the criminal trial.⁴¹⁰ In *Saunders v the United Kingdom*, the fact that the compulsorily obtained statements were read to the jury over a period of three days confirmed the considerable reliance from the prosecutorial side on the statements, hence prompting the European Court to conclude that they were used in a manner which sought to incriminate the defendant.⁴¹¹ In the same case, the European Court excluded that the “public interest” could be invoked to allow the use of statements compulsorily obtained in a non-judicial investigation to incriminate a defendant in a criminal trial.⁴¹²

A failure to answer questions the law requires to be answered may amount to an offence of non-cooperation with the authorities. In *López v Spain*, for example, a request was made of the applicant in that case on the basis of article 72(3) of the Road Safety Act, which provided that: “The owner of the vehicle, on being duly asked to do so, has the duty to identify the driver responsible for the offence; if he fails to fulfil this obligation promptly without justified cause, he shall be liable to a fine for having committed a serious misdemeanour.” Pursuant to this request, Mr. López sent the traffic authorities a letter, in which he stated that he was not the driver of the vehicle and did not know who had been driving it since he had lent it to several people during that period. He was fined 50,000 pesetas. The applicant claimed that his rights to the presumption of innocence and the right not to testify against himself were violated, since he had to identify the driver of the vehicle. The Human Rights Committee concluded that Mr. López had been punished for non-cooperation with the authorities and not for a traffic offence. It took the view that a penalty for failure to cooperate with the authorities fell outside the scope of application of article 14(2) and (3)(g) of the ICCPR.⁴¹³

5.2.4 Adverse inference drawn from silence

Like the privilege against self-incrimination, the right to silence lies at the heart of the notion of a fair trial, and particular caution is required, therefore, before a domestic court adversely refers to an accused’s silence.⁴¹⁴ For the right to silence to be effective, it is impermissible to base the conviction of an accused solely or mainly on the accused’s silence or on her/his refusal to answer questions or give evidence during the trial.⁴¹⁵ On the other hand, an accused’s decision to remain silent throughout criminal proceedings may have implica-

409 *Saunders v the United Kingdom* [1996] ECHR 65, paras 71–76.

410 *Saunders v the United Kingdom* [1996] ECHR 65, para 71.

411 *Saunders v the United Kingdom* [1996] ECHR 65, para 72.

412 *Saunders v the United Kingdom* [1996] ECHR 65, para 74.

413 *López v Spain*, HRC Communication 777/1997, UN Doc CCPR/C/67/D/777/1997 (1999), para 6.4.

414 *Condrón v the United Kingdom* [2000] ECHR 191, para 56; *Beckles v the United Kingdom* [2002] ECHR 661, para 58.

415 *John Murray v the United Kingdom* [1996] ECHR 3, para 47; *Condrón v the United Kingdom* [2000] ECHR 191, para 56; *Beckles v the United Kingdom* [2002] ECHR 661, para 58.

tions when the trial court seeks to evaluate the evidence against her/him. The European Court of Human Rights has accepted that the right to silence is not absolute so that, in situations that clearly call for an explanation to be given by an accused, the accused's silence can be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution and/or the credibility of an explanation later given by the accused.⁴¹⁶ The European Court set up certain criteria to assess whether the drawing of adverse inferences from an accused's silence infringes upon the notion of a fair hearing under article 6(1) of the ECHR. The Court will look at the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence, and the degree of compulsion inherent in the situation.⁴¹⁷ The European Court will also pay special attention to the trial judge's direction to the jury on the issue of adverse inferences.⁴¹⁸

In *Heaney and McGuinness v Ireland*, the European Court examined the inference drawn from silence pursuant to section 52 of the British Offences Against the State Act 1939, according to which a refusal to provide information on a suspect's movements makes that suspect liable to imprisonment for a term not exceeding six months.⁴¹⁹ The European Court inferred that "the degree of compulsion imposed on the applicants by the application of section 52 of the 1939 Act, with a view to compelling them to provide information relating to charges against them under that Act, in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent".⁴²⁰

5.2.5 Psychological coercion to answer questions or confess guilt

The Human Rights Committee has repeatedly held that the wording in article 14(3)(g) of the ICCPR (that no one shall be "compelled to testify against himself or confess guilt") must be understood as prohibiting any direct or indirect physical (See also 5.2.6) or psychological coercion by the investigating authorities of the accused with a view to obtaining a confession of guilt.⁴²¹

The European Court of Human Rights has gone further than this and taken the view that the right to silence is not confined to cases where duress has been brought to bear on an accused

⁴¹⁶ *John Murray v the United Kingdom* [1996] ECHR 3, para 47; *Condon v the United Kingdom* [2000] ECHR 191, paras 56–57; *Beckles v the United Kingdom* [2002] ECHR 661, para 57.

⁴¹⁷ *John Murray v the United Kingdom* [1996] ECHR 3, para 47 *in fine*; *Condon v the United Kingdom* [2000] ECHR 191, para 56.

⁴¹⁸ *Beckles v the United Kingdom* [2002] ECHR 661, para 59 *in fine*.

⁴¹⁹ *Heaney and McGuinness v Ireland* [2000] ECHR 684, para 24.

⁴²⁰ *Heaney and McGuinness v Ireland* [2000] ECHR 684, para 55.

⁴²¹ UN Human Rights Committee, CCPR General Comment 32 (2007), para 41. See also: *Deollall v Guyana*, HRC Communication 912/2000, UN Doc CCPR/C/82/D/912/2000 (2004), para 5.1; *Singarasa v Sri Lanka*, HRC Communication 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (2004), para 7.4; and *Khuseynova and Butaeva v Tajikistan*, HRC Communication 1263/2004 and 1264/2004, UN Doc CCPR/C/94/D/1263–1264/2004 (2008), para 8.3.

or where the will of the accused has been directly overborne in some way. The European Court said in *Allan v the United Kingdom* that the right:

“...serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.”⁴²²

In *Allan v the United Kingdom*, this meant that the use as evidence of the accused’s admissions to an informer placed in the same police cell as the accused was treated as a violation of article 6 of the ECHR because those admissions were seen as the product of persistent questioning during the course of psychological pressure, thereby impinging upon the voluntariness of the statements.

5.2.6 Compulsion through use of torture or other forms of inhuman or degrading treatment

Also relevant to the right to silence, especially the right not to be compelled to confess guilt, is the prohibition against torture or other forms of inhuman or degrading treatment (article 7 of the ICCPR and article 3 of the ECHR) and the right to be treated with humanity when detained (article 10(1) of the ICCPR). As explained by the Human Rights Committee in its general comment on fair trial rights:

“To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3 (g) prohibiting compulsion to testify against oneself or confess guilt.”⁴²³

Despite this, the Human Rights Committee has observed that methods that violate the prohibition against ill-treatment are frequently used. In *Saldias de Lopez v Uruguay*, for example, Lopez Burgos and several others were forced, under threats of death or serious injury, to sign false statements that were subsequently used in legal proceedings against them.⁴²⁴

⁴²² *Allan v the United Kingdom* [2002] ECHR 702, para 50.

⁴²³ UN Human Rights Committee, CCPR General Comment 32 (2007), para 60. See, for example: *Sultanova v Uzbekistan*, HRC Communication 915/2000, UN Doc CCPR/C/86/D/915/2000 (2006), paras 7.2–7.3; *Boimurodov v Tajikistan*, HRC Communication 1042/2001, UN Doc CCPR/C/85/D/1042/2001 (2005), para 7.2; *Shakurova v Tajikistan*, HRC Communication 1044/2002, UN Doc CCPR/C/86/D/1044/2002 (2006), para 8.2; and *Usaev v Russian Federation*, HRC Communication 1577/2007, UN Doc CCPR/C/99/D/1577/2007 (2010), para 9.3.

⁴²⁴ *Saldias de Lopez v Uruguay*, HRC Communication 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984), para 13. See also: *Izquierdo v Uruguay*, HRC Communication 73/1981, UN Doc CCPR/C/15/D/73/1981 (1982), para 9; *Kelly v Jamaica*, HRC Communication 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para 5.5; *Deollall v Guyana*, HRC Communication 912/2000, UN Doc CCPR/C/82/D/912/2000 (2004), para 5.1; *Kurbonov*

No statements or confessions, or in principle other evidence, obtained in violation of article 7 of the ICCPR or article 3 of the ECHR may be invoked as evidence in any criminal or civil proceedings, including during a state of emergency, even if the admission of such evidence was not decisive in securing the conviction.⁴²⁵ The only exception to this rule is that a statement or confession may be used as evidence that torture or other treatment prohibited by article 7 of the ICCPR or article 3 of the ECHR has occurred.⁴²⁶ In such cases, the burden is on the State to prove that statements made by the accused were given by the free will of the accused.⁴²⁷

The UN Guidelines on the Role of Prosecutors place specific obligations on prosecutors who know or believe on reasonable grounds that evidence was obtained through recourse to unlawful methods, including torture or cruel, inhuman or degrading treatment or punishment. The Guidelines provide that prosecutors “shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”⁴²⁸

v Tajikistan, HRC Communication 1208/2003, UN Doc CCPR/C/86/D/1208/2003 (2006), paras 6.2–6.4; and *Shakurova v Tajikistan*, HRC Communication 1044/2002, UN Doc CCPR/C/86/D/1044/2002 (2006), paras 8.2–8.3. Contrast with *Lyashkevich v Uzbekistan*, HRC Communication 1552/2007, UN Doc CCPR/C/98/D/1552/2007 (2010), para 9.2.

425 UN Human Rights Committee, CCPR General Comment 32 (2007), paras 6, 41; and UN Human Rights Committee, CCPR General Comment 29 (2001), paras 7, 15. See also *Jalloh v Germany* [2006] ECHR 721, para 99; *Levinta v Moldova* [2008] ECHR 1709, paras 101, 104–105; and *Gäfgen v Germany* [2010] ECHR 759, paras 166–167. See also article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which 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.”

426 UN Human Rights Committee, CCPR General Comment 32 (2007), para 41. See also article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid*).

427 UN Human Rights Committee, CCPR General Comment 32 (2007), para 41. See also: *Kelly v Jamaica*, HRC Communication 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para 7.4; *Singarasa v Sri Lanka*, HRC Communication 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (2004), para 7.4; and *Khuseynova and Butaeva v Tajikistan*, HRC Communication 1263/2004 and 1264/2004, UN Doc CCPR/C/94/D/1263–1264/2004 (2008), para 8.3.

428 UN Guidelines on the Role of Prosecutors, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para 16.

CHECKLIST: RIGHT TO BE PRESUMED INNOCENT AND RIGHT TO SILENCE

1. Has the defendant enjoyed the right to be presumed innocent until proved guilty at all stages of criminal proceedings, from the time of being charged up to final conviction?
 - a) Has the court predetermined the guilt or innocence of the defendant? If yes, in which ways?
 - b) Has guilt beyond a reasonable doubt been proved by the prosecution, except to the extent that presumptions of law or fact are permissible?
 - c) Has the defendant been treated in a way such as to indicate that s/he is guilty? Has the defendant been shackled or kept in a cage during the hearing? Has the defendant been compelled to wear a prison uniform? Have such measures been used and motivated by judicial authorities on the basis of security reasons, for instance that the defendant might abscond or cause injury or damage?
 - d) Has the media undertaken news coverage that undermines the presumption of innocence?
 - e) Have public authorities made public statements that undermine the presumption of innocence?
 - f) Have violations of the presumption of innocence been rectified through subsequent judicial proceedings?

2. Has the defendant enjoyed her/his right to silence?
 - a) Did the judge explain to the defendant her/his right not to testify against her/himself, her/his spouse or other relative?
 - b) Has the defendant been compelled to give testimony in court?
 - c) Have statements made by the defendant under legal compulsion been admitted into evidence?
 - d) Has the prosecution or court sought to draw any adverse inferences from the exercise by the defendant of her/his right to silence? If so, was the defendant warned that this would be the case and given the opportunity to answer?
 - e) Have any forms of physical or psychological coercion of the defendant been used by the investigating authorities with a view to obtaining a confession of guilt?
 - f) Has the right to silence been undermined by the authorities by use of subterfuge to elicit from the defendant confessions or other statements of an incriminatory nature?
 - g) Are there any reasons to suspect that the way plea agreement was administered has impinged upon the right of the defendant not to incriminate her/himself?

CHAPTER VI

Equality of Arms and Rights to a Fair Hearing

Article 14 of the ICCPR

“(1) 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... hearing...

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

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

“(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

“(c) To be tried without undue delay;

“(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the 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;

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

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

Article 6 of the ECHR

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair... hearing...

“(3) Everyone charged with a criminal offence has the following minimum rights:

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

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

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

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

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

OSCE Commitments

(5) The participating States solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.16) – in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair ... hearing ...

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 5.

Applicable to both criminal and non-criminal proceedings is the entitlement of every person, under Article 14(1) of the ICCPR and Article 6(1) of the ECHR, to a “fair hearing”.⁴²⁹ OSCE participating States have referred to the right to a fair hearing as being part of those elements of justice that are essential to the full expression of the inherent dignity and of the

429 Article 10 of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, also guarantees that: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

equal and inalienable rights of all human beings.⁴³⁰ To be fair, the conduct of a hearing must comply with various requirements. Some of these requirements are expressed as *minimum guarantees* in criminal proceedings (see Article 14(3) of the ICCPR and Article 6(3) of the ECHR). This means that such guarantees are not exhaustive, such that the particular needs of a case may require these guarantees to be supplemented. As recognized by the European Court in *Artico v Italy*, a criminal trial may fail to fulfil the requirements of a fair trial, even if the minimum guarantees in Article 6(3) of the ECHR are upheld.⁴³¹ It follows that the minimum guarantees in those Articles will not be interpreted and applied in isolation, but will instead be treated as aspects of the overall right to a fair trial as spelled out in Articles 14(1) and 6(1).⁴³² Although these minimum guarantees do not expressly apply to non-criminal proceedings, there are, in a number of instances, parallel rights applicable to civil proceedings, based either on the principle of equality of arms (See also 6.1) or on the overall need to ensure that proceedings are “fair” (as required by Article 14(1) of the ICCPR and Article 6(1) of the ECHR). An assessment of whether a hearing has been fair will ultimately depend on the full circumstances of the case, the gravity of the matter being determined by the court, as well as its consequences, and whether or not the irregularity caused actual prejudice to a party in the proceedings. Emphasis will be placed on providing a *practical and effective exercise of rights*. This reference represents one of the main and most commonly used benchmarks for the European Court of Human Rights to assess State compliance with the ECHR.

As explained in the UN ECOSOC’s Siracusa Principles, the right to a fair and public hearing may be subject to legitimate restrictions that are strictly required by the exigencies of an emergency situation, i.e., an emergency declared under Article 4 of the ICCPR or Article 15 of the ECHR as one threatening the life of the nation. Even in such situations, however, the Siracusa Principles (and the Human Rights Committee’s General Comment on the right to a fair trial) explain that the denial of certain fair trial rights can never occur, even in an emergency situation, because “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency”.⁴³³ This list includes the following fair trial rights applicable to any person charged with a criminal offence:⁴³⁴

- The right to be informed of the charges promptly, in detail and in a language understood by the defendant (See also 6.3.1);
- The right to have adequate time and facilities to prepare the defence, (See also 6.3) including the right to communication confidentially with legal counsel (See also 6.6.6);

430 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 5.

431 *Artico v Italy* [1980] ECHR 4, para 32.

432 *Czekalla v Portugal* [2002] ECHR 662, para 59.

433 UN Human Rights Committee, CCPR General Comment 29 (2001), para 16.

434 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 70(g).

- The right to a lawyer of one's choice (See also 6.6.3), with free legal assistance if the defendant does not have the means to pay for it (See also 6.6.7);
- The right to be present at the trial (See also 6.5.2); and
- The right to obtain the attendance and examination of defence witnesses (See also 6.7.1).

The Human Rights Committee's General Comment on the right to a fair trial adds that, even in emergency situations, the guarantees of a fair trial may never be made subject to derogation if this would circumvent the protection of non-derogable rights. For example, because the right to life is a right that is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must comply with all of the requirements of a fair trial.⁴³⁵

6.1 EQUALITY OF ARMS

Article 14 of the ICCPR

“(1) All persons shall be equal before the courts and tribunals...

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

Article 6(1) of the ECHR

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair... hearing...”

The principle of equality of arms means that the procedural conditions at trial and sentencing must be the same for all parties. It calls for a “fair balance” between the parties, requiring that each party should be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent.⁴³⁶

The principle is an inherent aspect of the right to a fair trial and intimately linked to the principle of equality before courts and tribunals (See also 2.2). The notion of equality is referred to in this broader context within Article 14(1) of the ICCPR, and also within the specific context of criminal proceedings in the chapeaux to Article 14(3) of the ICCPR, in terms of the enjoyment of fair trial rights “in full equality”.⁴³⁷ Although it is not expressly referred

435 UN Human Rights Committee, CCPR General Comment 32 (2007), para 6.

436 *Werner v Austria* [1997] ECHR 92, para 63; *Coëme and Others v Belgium* [2000] ECHR 250, para 102; *G. B. v France* [2001] ECHR 564, para 58.

437 In similar terms, article 10 of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, also guarantees that: “Everyone is entitled in full equality to a fair and public hearing... in the determination of his rights and obligations and of any criminal charge against him”.

to within Article 6 of the ECHR, the principle of equality of arms is both an autonomous concept and inherent element of the overarching right to a fair hearing under the ECHR.⁴³⁸ It has been expressly acknowledged by both the Human Rights Committee and the European Court of Human Rights that the principle of equality of arms is applicable to criminal and non-criminal proceedings alike.⁴³⁹ However, in the context of criminal trials where the character of the proceedings already involves a fundamental inequality of the parties, the principle of equality of arms is even more important.⁴⁴⁰

6.1.1 Procedural equality

The Human Rights Committee has described equality of arms as requiring the enjoyment of the same procedural rights by all the parties, unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness.⁴⁴¹ In the context of criminal proceedings, the European Commission of Human Rights (as it was then called, in 1962) referred to the equality of arms as the “procedural equality of the accused with the public prosecutor”⁴⁴²

Procedural inequalities may relate, for example, to the holding of hearings *in absentia* (See also 6.5.3); to a situation where only the prosecutor, but not the defendant, is allowed to appeal a decision (See also 10.1);⁴⁴³ or to a refusal to adjourn proceedings for one party in the proceedings where adjournments have been allowed for the other party. In *Dudko v Australia*, the applicant was not present in court at the hearing of her application for leave to appeal because she was in custody, although prosecutorial authorities were represented, since the practice in New South Wales was that people in custody did not appear in the High Court. Due to a lack of explanation by the State in support of this procedural inequality, the Human Rights Committee failed to understand why an unrepresented defendant in detention should be treated more unfavourably than an unrepresented defendant *not* in detention, and therefore found this to be in violation of Article 14(1) of the ICCPR.⁴⁴⁴ The refusal of a trial judge to order an adjournment to allow the defendant in *Robinson v Jamaica* to have legal representation, when several adjournments had already been ordered when the prosecution’s witnesses were unavailable or unready, was also found to violate Article 14(1) on the basis that this amounted to an inequality of arms between the parties.⁴⁴⁵

438 *Ofner and Hopfinger v Austria* [1963] European Commission of Human Rights, p. 78, para 46; *Neumeister v Austria* [1968] ECHR 1, para 22; *Delcourt v Belgium* [1970] ECHR 1, para 28.

439 UN Human Rights Committee, CCPR General Comment 32 (2007), para 13; *Dombo Beheer B.V. v the Netherlands* [1993] ECHR 49, para 33; *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 59.

440 Pieter Van Dijk and Fried van Hoof, *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2nd Ed, 1990), p.319.

441 UN Human Rights Committee, CCPR General Comment 32 (2007), para 13.

442 *Ofner and Hopfinger v Austria* [1963] European Commission of Human Rights, p. 78, para 46.

443 *Weiss v Austria*, HRC Communication 1086/2002, UN Doc CCPR/C/77/D/1086/2002 (2003), para 6.4.

444 *Dudko v Australia*, HRC Communication 1347/2005, UN Doc CCPR/C/90/D/1347/2005 (2007), para 7.4.

445 *Robinson v Jamaica*, HRC Communication 223/1987, UN Doc CCPR/C/35/D/223/1987 (1989), para 10.4.

6.1.2 *Equality in presenting one's case: the adversarial nature of proceedings*

It is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the arguments and evidence adduced by the other party.⁴⁴⁶ For the European Court of Human Rights this means the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed by the other party, such that: “Each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”⁴⁴⁷ In *McMichael v the United Kingdom*, a case involving the decision on child custody, the European Court of Human Rights found that the applicant’s right to a fair trial had been impaired because reports related to the child were not made available to him. This practice revealed a basic inequality and placed the parent at a substantial disadvantage, both in respect of bringing an appeal and in the subsequent presentation of any appeal.⁴⁴⁸ In *Steel and Morris v the United Kingdom*, the applicants were respondents in a civil defamation suit brought by McDonalds. They were unemployed and, despite the enormous imbalance in resources between them and the large and high profile legal team representing McDonalds, Steel and Morris were denied legal aid (See also 6.6.7) and were, therefore, obliged to represent themselves. The European Court held that the denial of legal aid contributed to an unacceptable inequality of arms between the parties. It stated:

“The Court recalls that the Convention is intended to guarantee *practical and effective rights*. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial... It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court... and that he or she is able to enjoy equality of arms with the opposing side...”⁴⁴⁹

In the context of criminal trials, the equality in presenting the case is a particularly relevant safeguard for the defendant. It determines the very nature of criminal proceedings, which should be “adversarial”. In other words, the right to an adversarial trial is a direct corollary to the principle of equality of arms. As the European Court of Human Rights puts it: “It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence.”⁴⁵⁰

446 *Äärelä and Näkkäläjärvi v Finland*, HRC Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001), para 7.4; *Asch v Austria* [1991] ECHR 28, para 27.

447 *Dombo Beheer B. V. v the Netherlands* [1993] ECHR 49, para 33. See also: *Ankerl v Switzerland* [1996] ECHR 45, para 38; *Helle v Finland* [1997] ECHR 105, para 49; *Krcmar and Others v the Czech Republic* [2000] ECHR 99, para 39; *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 62; *Van Orshoven v Belgium* [1997] ECHR 33, para 41; *Ruiz-Mateos v Spain* [1993] ECHR 27, para 63; *Dowsett v the United Kingdom* [2003] ECHR 314, para 41.

448 *McMichael v the United Kingdom* [1995] ECHR 8, paras 82–83.

449 *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 59.

450 *Rowe and Davis v the United Kingdom* [2000] ECHR 91, para 60.

Both the Human Rights Committee and the European Court of Human Rights have been reluctant to rule on the admissibility of evidence (See also 6.7.4).⁴⁵¹ This does not, however, do away with the fact that evidence must be heard, or otherwise taken, by a court or tribunal in a manner that achieves overall fairness, requiring, as explained by the European Court of Human Rights, that all evidence must, in principle, be produced in the presence of the accused at a public hearing with a view to permitting the conduct of an adversarial hearing.⁴⁵² In *Jansen-Gielen v the Netherlands*, the Human Rights Committee found that there had been an inequality of arms. The Central Appeals Tribunal in the Netherlands had refused to append a psychological report to the case file that had been submitted by the applicant's lawyer two days before the hearing. The Netherlands argued that the Court considered that admission of the report two days before the hearing would have unreasonably obstructed the other party in the conduct of the case. It refused to adjourn proceedings to allow admission of the report and consideration of it by the other party. The applicable procedural law did not, however, provide for a time limit for the submission of documents. The Committee, accordingly, found that it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit, to ensure that each party could challenge the documentary evidence the other filed or wished to file and, if need be, to adjourn proceedings.⁴⁵³

Inequality in the presentation of one's case may also affect the right to call witnesses (See also 6.7.1) or to appoint experts (See also 6.7.2) in order to present contradictory evidence. In *Nazarov v Uzbekistan*, for example, the defendant was accused to have been in the possession of hemp for the purpose of sale. Without giving reasons, the trial court refused his request for the appointment of an expert to determine the geographical origin of the hemp, which may have constituted crucial evidence for the trial. In the absence of any explanation for the reasons to refuse the defendant's request, the Human Rights Committee concluded that this denial did not respect the requirement of equality between the prosecution and defence in producing evidence, and thereby amounted to a denial of justice.⁴⁵⁴ Because the opinion of an expert who has been appointed by the competent court to address issues arising in the case is likely to carry significant weight in the court's assessment of those issues, the lack of neutrality on the part of an expert may give rise to a breach of the principle of equality of arms.⁴⁵⁵ Even the lack of the appearance of neutrality, where this can be objec-

451 According to the Human Rights Committee: "it is primarily for the domestic legislatures of States Parties to determine the admissibility of evidence and how their courts assess it" – see UN Human Rights Committee, CCPR General Comment 32 (2007), para 39. According to the European Court of Human Rights: "It is for the domestic court to assess the credibility of witnesses and the relevance of evidence to the issues in the case" – see *Mirilashvili v Russia* [2008] ECHR 1669, para 161; *Saïdi v France* [1993] ECHR 39, para 43; *Schenk v Switzerland* [1988] ECHR 17, para 46; *G. B. v France* [2001] ECHR 564, para 59.

452 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 51; *Barberá, Messegué and Jabardo v Spain* [1998] ECHR 25, paras 76, 78 *in fine*; *Mirilashvili v Russia* [2008] ECHR 1669, para 162; *G. B. v France* [2001] ECHR 564, para 59; *Dowsett v the United Kingdom* [2003] ECHR 314, para 43.

453 *Jansen-Gielen v the Netherlands*, HRC Communication 846/1999, UN Doc CCPR/C/71/D/846/1999 (2001), para A8.2.

454 *Nazarov v Uzbekistan*, HRC Communication 911/2000, UN Doc CCPR/C/81/D/911/2000 (2004), para 6.3.

455 *Bönisch v Austria* [1985] ECHR, para 32; *Sara Lind Eggertsdóttir v Iceland* [2007] ECHR 553, para 47.

tively justified, may amount to a breach of the principle of equality of arms.⁴⁵⁶ Regard must, therefore, be paid to factors such as the expert's procedural position and her/his role in the proceedings.⁴⁵⁷ The European Court of Human Rights noted, in *Brandstetter v Austria*, that the right to a fair trial does not require that a national court should appoint, at the request of the defence, further experts when the expert appointed by the court supports the prosecution case.⁴⁵⁸

6.2 INSTRUCTION CONCERNING RIGHTS DURING TRIAL

In *Steel and Morris v the United Kingdom*, the European Court of Human Rights reiterated that, especially in the context of the right to a fair trial (given the prominent place it holds in a democratic society), the ECHR is intended to guarantee the practical and effective exercise of rights. The Court explained that: "It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court."⁴⁵⁹ The Human Rights Committee has also stated, in the criminal context, that States Parties to the ICCPR have an obligation to ensure that any person accused of a crime is able to exercise the right to a defence.⁴⁶⁰

Depending upon the particular circumstances of each case, it might, therefore, be necessary for a judge or the court administration, or even a legal representative, to provide certain information to a party in judicial proceedings to ensure that the person is aware of – and thereby given an opportunity to exercise – her/his fair trial rights. It should be clear, for example, that a person understands that s/he has the right to legal representation and what options might be available for the appointment of legal counsel where the person cannot afford to pay for this (See also 6.6); that a person giving evidence understands that s/he has the right against self-incrimination (See also 5.2); and that a person pleading guilty to a criminal charge has been advised of the full range of available options, including plea bargaining if applicable, and the consequences of a guilty plea. The Human Rights Committee has stated, by way of further example, that the effective exercise of the rights under Article 14 of the ICCPR presupposes that the necessary steps have been taken to inform the accused beforehand about the proceedings against her/him (See also 6.3.1).

456 *Mirilashvili v Russia* [2008] ECHR 1669, para 178 as well as *Stoimenov v the former Yugoslav Republic of Macedonia* [2007] ECHR 257, para 40.

457 *Mirilashvili v Russia* [2008] ECHR 1669, para 178; *Sara Lind Eggertsdóttir v Iceland* [2007] ECHR 553, para 47 *in fine*.

458 In *Brandstetter v Austria* [1991] ECHR 39, para 46. See also, *G. B. v France* [2001] ECHR 564, para 68.

459 *Steel and Morris v the United Kingdom* [2005] ECHR 103, para 59.

460 See, for example, *Gueorguiev v Spain*, HRC Communication 1386/2005, UN Doc CCPR/C/90/D/1386/2005 (2007), para 6.3.

6.3 ADEQUATE PREPARATION

Article 14 of the ICCPR

“(1) 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... hearing...

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

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

“(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;”

Article 6 of the ECHR

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair... hearing...

“(3) Everyone charged with a criminal offence has the following minimum rights:

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

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

The right to have adequate time and facilities for the preparation of one’s case has been expressly recognized by the Human Rights Committee as an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms.⁴⁶¹ The rights associated with the preparation of one’s case involve a range of issues. Some rights are expressed as minimum guarantees in criminal proceedings (see Article 14(3)(a) and (b) of the ICCPR and Article 6(3)(a) and (b) of the ECHR). Often, however, there are parallel rights applicable to non-criminal proceedings, based either on the principle of equality of arms (See also 6.1) or on the overall need to ensure that proceedings are “fair” (as required by Article 14(1) of the ICCPR and Article 6(1) of the ECHR).

⁴⁶¹ UN Human Rights Committee, CCPR General Comment 32 (2007), para 32; *Smith v Jamaica*, HRC Communication 282/1988, UN Doc CCPR/C/47/D/282/1988 (1993), para 10.4.

6.3.1 *The right to be informed of criminal charges*

Article 14(3)(a) of the ICCPR and Article 6(3)(a) of the ECHR guarantee the right of every person accused of a “criminal charge” or “criminal offence” (See also 1.1) to be informed promptly, in detail, and in a language which the accused understands, of the nature (legal characterization of the offence) and cause (alleged facts) of the charge. By the very nature of this right, it is applicable in criminal proceedings only. This guarantee does not apply to investigations preceding the formal laying of charges, in respect of which there is a separate pre-trial right to notice of the reasons for arrest.⁴⁶² The scope of the right of the accused to information is broader than the right to notice of the reasons for arrest.

The right to be informed of the charge “promptly” is an integral part of the right to adequate time for the preparation of one’s defence. It requires that the information be given as soon as the person concerned is formally charged by a competent authority with a criminal offence, or the individual is publicly named as such.⁴⁶³ The specific requirements of the right to be informed of criminal charges (i.e., to be informed in detail, and in a language which the accused understands, of the nature and cause of the charge) can be met either orally or in writing.⁴⁶⁴ Where the information is provided orally, it must be later confirmed in writing.⁴⁶⁵ In some jurisdictions, this written notification is described as an “**indictment**” or “charge sheet”.

The European Court of Human Rights has described the level of detail in the information provided to the defendant as “crucial”, because it is from the moment that this information is provided that the accused is formally put on notice of the factual and legal basis of the charges against her/him.⁴⁶⁶ The information must be detailed and must not only inform the defendant of the cause of the accusation, i.e., the acts that s/he is alleged to have committed and on which the accusation is based, but must also inform the defendant of the legal characterization given to those acts, i.e., specifying the law under which those alleged acts constitute a criminal offence.⁴⁶⁷ While the extent of the “detailed” information varies depending on the particular circumstances of each case, the accused must, at any rate, be provided with sufficient information as is necessary to understand fully the extent of the charges

462 UN Human Rights Committee, CCPR General Comment 32 (2007), para 31; *Kelly v Jamaica*, HRC Communication 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para 5.8; *Williams v Jamaica*, HRC Communication 561/1993, UN Doc CCPR/C/59/D/561/1993 (1997), para 9.2; *Smirnova v Russian Federation*, HRC Communication 712/1996, UN Doc CCPR/C/81/D/712/1996 (2004), para 10.3; *Marques de Morais v Angola*, HRC Communication 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005), para 5.4; and *Medjnoune v Algeria*, HRC Communication 1297/2004, UN Doc CCPR/C/87/D/1297/2004 (2006), para 8.6.

463 UN Human Rights Committee, CCPR General Comment 32 (2007), para 31; and *Marques de Morais v Angola*, HRC Communication 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005), para 5.4.

464 UN Human Rights Committee, CCPR General Comment 32 (2007), para 31.

465 UN Human Rights Committee, CCPR General Comment 32 (2007), para 31.

466 *Kamasinski v Austria* [1989] ECHR 24, para 79; *Sadak and Others v Turkey* [2001] ECHR 479, para 48.

467 *Pélissier and Sassi v France* [1999] ECHR 17, paras 51–52; *Mattoccia v Italy* [2000] ECHR 383, para 59. See also UN Human Rights Committee, CCPR General Comment 32 (2007), para 31.

against her/him, with a view to preparing an adequate defence.⁴⁶⁸ In *Mattoccia v Italy*, where the accused was alleged to have raped a mentally disabled child, the European Court of Human Rights considered the information contained in the accusation as characterized by vagueness as to essential details concerning time and place, which impaired his opportunities to defend himself in a practical and effective manner.⁴⁶⁹

It is important that the information is provided in a language which the accused understands. In *Brozicek v Italy*, the European Court of Human Rights considered the situation of a German defendant who did not reside in Italy but who faced criminal charges there. The defendant received a letter notifying him of the charges brought against him, following which he informed the relevant authorities that, because of his lack of knowledge of Italian, he had difficulty in understanding the communication. The European Court held that, on receipt of the defendant's request for a translation of the communication either in his mother tongue or in one of the official languages of the United Nations, the Italian judicial authorities should have taken steps to comply with the request, so as to ensure compliance with Article 6(3)(a) of the ECHR.⁴⁷⁰ In the case of *Kamasinski v Austria*, the European Court clarified that the right to be informed of a criminal charge in a language understood by the accused does not imply that the relevant information should be given in writing or translated in written form for a foreign defendant (See also 6.8.3).⁴⁷¹

The Human Rights Committee has stated, in the context of trials *in absentia* (See also 6.5.3), that Article 14(3)(a) of the ICCPR requires that, notwithstanding the absence of the accused, all due steps are taken to inform the accused of the charge and to notify her/him of the proceedings.⁴⁷²

6.3.2 *The right to be convicted only of the accusation against a defendant*

Also specific to criminal proceedings is the right, implied from Article 14(3)(a) and (b) of the ICCPR and Article 6(3)(a) and (b) of the ECHR, to be convicted only of the accusation against a defendant, i.e., the accusation that formed the basis of the notification to the defendant of what s/he is alleged to have done. In *Pélissier and Sassi v France*, for example, the accused were charged with criminal bankruptcy but were instead convicted of conspiracy to commit criminal bankruptcy. Because the elements of the two offences differed, the European Court of Human Rights held this to amount to a violation of Article 6(3)(a) and (b) of the ECHR.⁴⁷³ Where a trial court has the right to recharacterize proved facts as amounting to an offence with different legal elements than those in the **indictment** (or equivalent notice), the accused must be duly and fully informed thereof and must be provided with ade-

468 *Mattoccia v Italy* [2000] ECHR 383, para 60.

469 *Mattoccia v Italy* [2000] ECHR 383, para 71.

470 *Brozicek v Italy* [1989] ECHR 23, para 41.

471 *Kamasinski v Austria* [1989] ECHR 24, paras 79, 81.

472 UN Human Rights Committee, CCPR General Comment 32 (2007), para 31; *Mbenge v Zaire*, HRC Communication 16/1977, UN Doc CCPR/C/18/D/16/1977 (1983), para 14.1.

473 *Pélissier and Sassi v France* [1999] ECHR 17, paras 62–63. See, similarly, *Chichlian and Ekindjian v France* [1989] ECHR 22, para 14.

quate time (See also 6.3.4) and facilities to react to them and organize her/his defence on the basis of any new information or allegation.⁴⁷⁴ It was insufficient, said the European Court in *Pélissier and Sassi*, that the accused only learned of the new charge of conspiracy to commit bankruptcy after reading the judgment of the court.⁴⁷⁵ In *Sadak and Others v Turkey*, the applicants were initially accused of treason against the integrity of the State and were later convicted for belonging to an armed organization set up for the purpose of destroying the integrity of the State. The European Court found that, in using the right to recharacterize facts, the national court should have afforded the applicants the possibility of exercising their defence rights in a practical and effective manner, particularly by giving them the necessary time to do so.⁴⁷⁶ Following a less favourable approach to the accused, the Human Rights Committee has taken the view that it might be possible for a person to be convicted of a more serious offence than the one s/he was accused of *if* the conviction was based on the facts described in the indictment.⁴⁷⁷

The right to be convicted only of the accusation against a defendant does not affect the proof of facts that are implicit in the **indictment** (or equivalent notice) and which might impact upon sentencing (See also 8.3.2). In *De Salvador Torres v Spain*, for example, the defendant, who was a public official and head of a public hospital, was accused and convicted of embezzlement. The public nature of his position was not specified in the accusation against him, but attention to this fact was brought during the trial and this ultimately influenced the sentence imposed on him. The European Court of Human Rights held that this did not amount to a violation of Article 6(3)(a) of the ECHR because the public nature of the defendant's position was an intrinsic element of the accusation, such that he must have been aware that this could constitute an aggravating circumstance for the purpose of determining the sentence.⁴⁷⁸

6.3.3 *The right to counsel during the preparation of one's defence*

A person suspected or accused of having committed a criminal offence has the right to avail her/himself of the services of legal counsel at all stages of the criminal proceedings (See also 6.6.3). In the context of the preparation of one's defence, the right to communicate with counsel is fundamental to determining whether or not an accused's preparation has been adequate (See also 6.6.6). The ICCPR and the ECHR take different linguistic approaches to the right to a lawyer in criminal proceedings, although the practical applications by the Human Rights Committee and the European Court of Human Rights are almost identical. Under the ICCPR, the right to a lawyer in criminal proceedings is mentioned in two contexts: first, under Article 14(3)(b), as a right to communicate with counsel of one's choosing for the preparation of one's defence; and then, under Article 14(3)(d), as a right to defend oneself in person or through legal assistance of one's choosing. The effect is that a person charged with an offence should have the right to a lawyer both for the *preparation* of her/

474 *Mattoccia v Italy* [2000] ECHR 383, para 61.

475 *Pélissier and Sassi v France* [1999] ECHR 17, para 62.

476 *Sadak and Others v Turkey* [2001] ECHR 479, para 57.

477 *Marques de Morais v Angola*, HRC Communication 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005), para 5.5.

478 *De Salvador Torres v Spain* [1996] ECHR 47, para 33.

his defence, and also for the *conduct* of that defence in trial. In contrast, the ECHR only has one reference to the right to a lawyer, in Article 6(3)(c), which is the right to defend oneself in person or through legal assistance of one's choosing. The European Court of Human Rights has read Article 6(3)(b) and (c) together to imply a right to a lawyer during the preparation stage of proceedings.⁴⁷⁹

The right to communicate with counsel of one's choosing in the preparation of one's defence is a right that is limited to criminal proceedings, although there might arise a comparable right to legal assistance in civil proceedings if to do otherwise would create an inequality in the ability of the parties to present their case (See also 6.1.2). In the criminal context, the right requires that the **accused** is granted prompt access to counsel.⁴⁸⁰ It also requires that counsel is able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications (See also 6.6.6).⁴⁸¹ Denying a person access to legal counsel has been concluded to amount to a failure to permit the adequate preparation of a defence case.⁴⁸² Denial of representation when requested during an interrogation also constitutes a violation of rights under Article 14(3)(b) of the ICCPR.⁴⁸³

The European Court of Human Rights considers that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police.⁴⁸⁴ The Court has underlined the importance of the investigation stage for the preparation of criminal proceedings. During this phase, the accused often finds her/himself in a particularly vulnerable position that can only be properly counter-balanced by the assistance of a lawyer, whose task it is, among other things, to help ensure adherence with the right of an accused not to incriminate her/himself (See also 5.2). The Court has also noted the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, in which the Committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment.⁴⁸⁵ The right of access to counsel during the interrogation may be exceptionally restricted only for "compelling reasons". However, such restrictions – whatever their justification – must not unduly prejudice the rights of an accused to defence. Therefore, the denial of access to counsel during the early stage of the investigation amounts to violation of Article 14 of the ICCPR and Article 6 of the ECHR, where the rights of the defence will, in principle, be irretrievably

479 *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 98.

480 UN Human Rights Committee, CCPR General Comment 32 (2007), para 34.

481 UN Human Rights Committee, CCPR General Comment 32 (2007), para 34

482 *Ramirez v Uruguay*, HRC Communication 4/1977, UN Doc CCPR/C/10/D/4/1977 (1980), para 18; and *Sequeira v Uruguay*, HRC Communication 6/1977, UN Doc CCPR/C/OP/1 at 52 (1984), para 16.

483 *Gridin v Russian Federation*, HRC Communication 770/1997, UN Doc CCPR/C/69/D/770/1997 (2000), para 8.5; *Penarrieta and Others v Bolivia*, HRC Communication 176/1984, UN Doc CCPR/C/31/D/176/1984 (1988), para 16; and *Lyashkevich v Uzbekistan*, HRC Communication 1552/2007, UN Doc CCPR/C/98/D/1552/2007 (2010), para 9.4.

484 *John Murray v the United Kingdom* [1996] ECHR 3, para 63; *Yoldaş v Turkey* [2010] ECHR 1620, para 49, available in French only.

485 *Salduz v Turkey* [2008] ECHR 1542, para 54.

prejudiced as, for instance, when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (See also 5.2).⁴⁸⁶ In *John Murray v the United Kingdom*, a case falling under anti-terrorism legislation in Northern Ireland, the European Court of Human Rights found that to deny access to a lawyer for the first 48 hours of police questioning amounted to a violation of Article 6 (6) in a situation where the rights of the defence may well have been irretrievably prejudiced. The Court considered that, under domestic rules, the accused was confronted with a fundamental dilemma relating to his defence. If he were to choose to remain silent, adverse inferences could have been drawn against him (See also 5.2.4). On the other hand, if he were to opt to break his silence during the course of interrogation, he would have run the risk of prejudicing his defence. Under such conditions, the European Court found that the concept of fairness of the trial requires that the accused has the benefit of a lawyer's assistance already at the initial stages of police interrogation.⁴⁸⁷

The exercise of the right to communicate with counsel is all the more important when the right's holder is detained or imprisoned.⁴⁸⁸ In this case, the right may not be suspended or restricted, save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.⁴⁸⁹ In any circumstances, the prohibition on incommunicado detention necessitates that the right shall not be denied for more than a matter of days.⁴⁹⁰

6.3.4 The right to adequate time to prepare one's case

The right to have adequate time for the preparation of one's defence, which applies to detained or imprisoned persons as well, is directly linked to the right to be "promptly" informed of criminal charges (See also 6.3.1) and to right to communicate with counsel (See also 6.3.3).⁴⁹¹ Determination of what constitutes "adequate time" to prepare one's case requires an assessment of the individual circumstances of each case, including the nature and the complexity of the case and the stage that the proceedings have reached.⁴⁹² The right

486 *Salduz v Turkey* [2008] ECHR 1542, para 55; *Yoldaş v Turkey* [2010] ECHR 1620, para 49, available in French only.

487 *John Murray v the United Kingdom* [1996] ECHR 3, para 66. See also, *Magee v the United Kingdom* [2000] ECHR 216, para 39, 44.

488 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (1) adopted by the UN General Assembly on 9 December 1988.

489 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (3) adopted by the UN General Assembly on 9 December 1988.

490 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15 adopted by the UN General Assembly on 9 December 1988.

491 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (2) adopted by the UN General Assembly on 9 December 1988.

492 *Albert and Le Compte v Belgium* [1983] ECHR 1, para 41; *Hibbert v Jamaica*, HRC Communication 293/1988, UN Doc CCPR/C/45/D/293/1988 (1992), para 7.4; and *Williams v Jamaica*, HRC Communication 561/1993, UN Doc CCPR/C/59/D/561/1993 (1997), para 9.3.

to adequate time to prepare one's defence must be balanced against the right to trial within a reasonable time (See also 6.4).

In the context of criminal proceedings, it is important that the defence has the opportunity to familiarize itself with the documentary evidence against an accused, by way of full and prompt disclosure (See also 6.3.5). In *Bee v Equatorial Guinea*, for example, the Human Rights Committee found a violation of Article 14(1) and (3) of the ICCPR in circumstances where defendants in a criminal hearing were not notified of the grounds for the charges against them until two days before the trial, depriving them of sufficient time to prepare their defence and making it impossible for them to select their defence lawyers.⁴⁹³ In *Albert and Le Compte v Belgium*, however, a period of 15 days between notice of disciplinary charges (of providing spurious medical certificates of unfitness) and an investigative hearing was found by the European Court of Human Rights to be sufficient in the circumstances, given the lack of complexity of the case.⁴⁹⁴ A period of 21 days to examine 49 pages of a case file was also considered to be adequate time,⁴⁹⁵ while a period of only 16 days before trial to review and consider the implication of 17,000 pages of case files was found to be inadequate time to prepare and, thus, in violation of Article 6(3)(b) of the ECHR.⁴⁹⁶ Providing newly-appointed counsel in a murder trial with just four hours to confer with the accused and prepare the defence case was found by the Human Rights Committee to violate Article 14(3)(b) of the ICCPR.⁴⁹⁷

The right to adequate time to prepare may entitle one of the parties to request and receive an adjournment of proceedings. The Human Rights Committee has considered that courts are under an obligation to grant reasonable requests for adjournment, particularly when an accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.⁴⁹⁸ This has been found to be particularly important in capital cases, i.e., where a sentence of death could result from conviction, since to do otherwise would not be compatible with the interests of justice.⁴⁹⁹ An obligation to grant an adjournment of proceedings might also arise where delays have been caused as a result of conduct by the State or by the party who is not seeking the adjournment.⁵⁰⁰ The Committee has noted that

493 *Bee v Equatorial Guinea*, HRC Communications 1152/2003 and 1190/2003, UN Doc CCPR/C/85/D/1152&1190/2003 (2005), para 6.3.

494 *Albert and Le Compte v Belgium* [1983] ECHR 1, para 41.

495 *Kremzow v Austria* [1993] ECHR 40, para 48.

496 *Öcalan v Turkey* [2005] ECHR 282, paras 147–148.

497 *Smith v Jamaica*, HRC Communication 282/1988, UN Doc CCPR/C/47/D/282/1988 (1993), para 10.4. See also *Reid v Jamaica*, HRC Communication 355/1989, UN Doc CCPR/C/51/D/355/1989 (1994), para 14.2.

498 UN Human Rights Committee, CCPR General Comment 32 (2007), para 32; *Kurbanov v Tajikistan*, HRC Communication 1096/2002, UN Doc CCPR/C/79/D/1096/2002 (2003), para 7.3.

499 See, for example, *Phillip v Trinidad and Tobago*, HRC Communication 594/1992, UN Doc CCPR/C/64/D/594/1992 (1998), para 7.2; and *Chan v Guyana*, HRC Communication 913/2000, UN Doc CCPR/C/85/D/913/2000 (2006), para 6.3.

500 *Domenichini v Italy* [1996] ECHR 55, para 39.

if a party and/or her/his legal counsel feel that they have had inadequate time to prepare, it is incumbent upon them to request an adjournment.⁵⁰¹

6.3.5 The right to adequate facilities and disclosure of information about the case

The right to “adequate facilities” must include access to documents and other evidence the accused requires to prepare her/his case as well as the opportunity to engage and communicate with counsel (See also 6.3.3).⁵⁰² In the context of criminal proceedings, the European Commission on Human Rights has held that, read together with the principle of the equality of arms (See also 6.1), the right to adequate facilities for the preparation of one’s defence in Article 6(3)(b) of the ECHR imposes an obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating her/himself or in obtaining a reduction in sentence.⁵⁰³ In *Foucher v France*, for example, the refusal by the prosecutor to give access to the case file, and to allow copies of documents contained in it to be made, by a defendant who was representing himself was concluded to prevent the defendant from preparing an adequate defence.⁵⁰⁴ In *van Marcke v Belgium*, however, the Human Rights Committee observed that the right to a fair hearing does not, in itself, require that the prosecution bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, such as by withholding exonerating evidence.⁵⁰⁵

The Human Rights Committee has explained that disclosure must include documents and other evidence that the prosecution plans to offer in court against the accused or that are exculpatory.⁵⁰⁶ Exculpatory material should be understood, the Human Rights Committee has explained, as including not only material establishing innocence but also other evidence that could assist the defence, such as indications that a confession was not voluntary (See also 5.2). In cases of a claim that evidence was obtained in violation of the prohibition against torture or other forms of cruel, inhuman or degrading treatment, information about the circumstances in which such evidence was obtained must be made available to

501 *Henry v Jamaica*, HRC Communication 230/1987, UN Doc CCPR/C/43/D/230/1987 (1991), para 8.2; *Wright v Jamaica*, HRC Communication 349/1989, UN Doc CCPR/C/45/D/349/1989 (1992), para 8.4; *Williams v Jamaica*, HRC Communication 561/1993, UN Doc CCPR/C/59/D/561/1993 (1997), para 9.3; *Adams v Jamaica*, HRC Communication 607/1994, UN Doc CCPR/C/58/D/607/1994 (1996), para 8.3; *Henry v Jamaica*, HRC Communication 610/1995, UN Doc CCPR/C/64/D/610/1995 (1998), para 7.5; *Reece v Jamaica*, HRC Communication 796/1998, UN Doc CCPR/C/78/D/796/1998 (2003), para 7.2; and *Marques de Morais v Angola*, HRC Communication 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005), para 5.6.

502 UN Human Rights Committee, CCPR General Comment 13 (1984), para 9.

503 *Jespers v Belgium* [1981] European Commission of Human Rights, para 58. See also *Rowe and Davis v the United Kingdom* [2000] ECHR 91, para 60.

504 *Foucher v France* [1997] ECHR 13, paras 34–36.

505 *Van Marcke v Belgium*, HRC Communication 904/2000, UN Doc CCPR/C/81/D/904/2000 (2004), para 8.3.

506 UN Human Rights Committee, CCPR General Comment 32 (2007), para 33.

allow an assessment of such a claim (See also 5.2.6).⁵⁰⁷ In *Yassen and Thomas v Guyana*, the applicant Thomas had been tried and, in the process, appeared at a preliminary hearing. At that preliminary inquiry, the police produced a written statement, alleged to be a confession made by Mr. Thomas and recorded in a pocket book. This pocket book, along with the Police station diary for the relevant days, disappeared between the time of the preliminary hearing of Thomas and the trial of Thomas and Yassen together. The station diary was kept in a storeroom under lock and key. The authors complained that these documents may have contained exculpatory evidence and that their disappearance therefore prejudiced the preparation of the defence case. The Human Rights Committee concluded that the failure to produce police documents at the trial that had been produced at the preliminary hearing and which may have contained evidence in favour of the authors constituted a violation of Article 14(3)(b), since it may have impeded the authors in the preparation of their defence.⁵⁰⁸

The right to disclosure of information, as a fundamental aspect of the principle of equality of arms (See also 6.1), also applies to civil proceedings, not just as between the parties in the proceedings but also as between the court and the parties. *Krcmar and Others v the Czech Republic*, for example, concerned proceedings before the Constitutional Court of the Czech Republic about the nationalization and possible restitution of the applicants' property. On its own initiative, the Constitutional Court gathered evidence additional to that presented by the parties. Although this evidence formed a basis for the Court's subsequent decision, the information was not communicated to the applicants. The European Court of Human Rights considered that, by itself, the gathering of evidence by a court is not incompatible with the requirements of a fair hearing. The Court concluded, however, that: "the concept of a fair hearing also implies the right to adversarial proceedings (See also 6.1.2), according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision".⁵⁰⁹

6.3.6 Grounds for non-disclosure of information about the case

The right to disclosure of information about the case is not an **absolute right**. Non-disclosure of information may be justified if this is required to pursue a **legitimate aim**, such as protecting **national security**;⁵¹⁰ preserving the fundamental rights of another individual, such as the protection of witnesses at risk of reprisals (See also 7.1);⁵¹¹ or safeguarding an important public interest, such as allowing police to keep secret their methods of investigating crimes.⁵¹² In *Mirilashvili v Russia*, the European Court of Human Rights recognized

507 UN Human Rights Committee, CCPR General Comment 32 (2007), para 33.

508 *Yassen and Thomas v Guyana*, HRC Communication 676/1996, UN Doc CCPR/C/62/D/676/1996 (1998), para 7.10.

509 *Krcmar and Others v the Czech Republic* [2000] ECHR 99, para 40. See also *Nideröst-Huber v Switzerland* [1997] ECHR 3, para 24.

510 *Mirilashvili v Russia* [2008] ECHR 1669, para 202; *Dowsett v the United Kingdom* [2003] ECHR 314, para 42.

511 *Doorson v the Netherlands* [1996] ECHR 14, para 70; *Kovač v Croatia* [2007] ECHR 597, para 27

512 *Rowe and Davis v the United Kingdom* [2000] ECHR 91, para 61; *Lüdi v Switzerland* [1992] ECHR 50, para 49; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 57.

that, having regard to the circumstances of the case, the documents sought by the applicant might have contained certain items of sensitive information relevant to national security. In such circumstances, the Court took the view that the national judge should enjoy a wide margin of appreciation in deciding on the disclosure request by the defence.⁵¹³

In any situation where non-disclosure occurs, such measures must be strictly **necessary** and must be weighed against the rights of the party involved.⁵¹⁴ **Proportionality** is achieved by striking a balance between the ameliorating effects of the non-disclosure and the negative impact this has on the ability of the person to respond to the case against her/him.⁵¹⁵ This means that if a less restrictive measure can achieve the legitimate aim – such as, for example, providing redacted summaries of evidence – then that measure should be applied.⁵¹⁶

Where non-disclosure is proposed, the trial court must be involved in assessing the **necessity** and **proportionality** of the proposed non-disclosure. A procedure whereby the prosecution itself, without notifying a judge, attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply, said the European Court of Human Rights in *Rowe and Davis v the United Kingdom*, with the requirements of Article 6(1) of the ECHR.⁵¹⁷

6.3.7 Safeguards accompanying non-disclosure of information about the case

In order to sufficiently compensate the handicaps under which the defence laboured, and hence, to ensure that overall fairness is achieved in judicial proceedings, any difficulties caused to a party in the proceedings as a result of the non-disclosure – especially in criminal cases – must be “sufficiently counterbalanced” by the judicial authorities (See also 7.1.1).⁵¹⁸ In *Jasper v the United Kingdom*, for example, the European Court of Human Rights examined a procedure whereby evidence that was too sensitive to be safely revealed to the defence was examined *ex parte* by the trial judge. The European Court found that the fact that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing exercise between the public interest in maintaining the confidentiality of the evidence and the need of the defendant to have it revealed, was sufficient to comply with Article 6(1). The European Court was, likewise, satisfied that the defence had been kept informed and been

513 *Mirilashvili v Russia* [2008] ECHR 1669, para 202.

514 *Dowsett v the United Kingdom* [2003] ECHR 314, para 42; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 58.

515 *Doorson v the Netherlands* [1996] ECHR 14, para 70; and *Rowe and Davis v the United Kingdom* [2000] ECHR 91, para 61.

516 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 58; and *Rowe and Davis v the United Kingdom* [2000] ECHR 91, para 61.

517 *Rowe and Davis v the United Kingdom* [2000] ECHR 91, para 63. See also *Dowsett v the United Kingdom* [2003] ECHR 314, para 44.

518 *Doorson v the Netherlands* [1996] ECHR 14, para 72; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 54; *Edwards v the United Kingdom* [1992] ECHR 77, para 36; and *Rowe and Davis v the United Kingdom* [2000] ECHR 91, paras 61, 64–65.

permitted to make submissions and participate in the decision-making process (as far as was possible without disclosing to them the material which the prosecution sought to keep secret on public interest grounds).⁵¹⁹

To amount to a “sufficient counterbalance”, the procedures adopted by the judicial authorities in non-disclosure cases must ultimately ensure that the defendant, or the respondent in civil proceedings, is able to answer the case against her/him. In *Edwards and Lewis v the United Kingdom*, the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence with which he was charged by one or more undercover police officers or informers. This was critical to the defence case because, had this complaint been accepted by the judge, the prosecution would, in effect, have had to be discontinued. In order to conclude whether or not the accused had, indeed, been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police.⁵²⁰ The defendants were denied access to the evidence and their lawyers were, therefore, precluded from fully arguing the case on entrapment. The defendants were also not informed of the nature of the non-disclosed material. In concluding that this amounted to a violation of Article 6(1) of the ECHR, the European Court of Human Rights found that the procedure employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings (See also 6.1.2) and equality of arms (See also 6.1).⁵²¹

The question of summaries of information redacted for security concerns was considered by the Human Rights Committee in *Ahani v Canada*, which involved a hearing concerning the reasonableness of a security certificate issued against the author. The Human Rights Committee noted that the court had taken steps to ensure that the applicant was aware of, and able to respond to, the case made against him and that he was also able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved and the safeguards introduced by way of providing the person with a redacted summary of the information, the Committee was persuaded that this process was fair to the applicant and, thus, found no violation of Article 14 of the ICCPR.⁵²²

⁵¹⁹ *Jasper v the United Kingdom* [2000] ECHR 90, paras 55–56.

⁵²⁰ *Edwards and Lewis v the United Kingdom* [2003] ECHR 381, para 30.

⁵²¹ *Edwards and Lewis v the United Kingdom* [2003] ECHR 381, para 59.

⁵²² *Ahani v Canada*, HRC Communication 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004), para 10.4. Contrast with the Committee’s later Concluding Observations: Canada, UN Doc CCPR/C/CAN/CO/5 (2006), para 13. Also on the question of the use of redacted summaries of information, but in the context of article 5(4) of the ECHR instead of article 6(1), see *A. and Others v the United Kingdom* [2009] ECHR 301, especially paras 205–206, 220.

6.4 TIMELY HEARING

Article 14 of the ICCPR

“(1) 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... hearing...

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

“(c) To be tried without undue delay;”

Article 6(1) of the ECHR

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time...”

The right to be tried “without undue delay” (as enunciated in Article 14(3)(c) of the ICCPR), or, as expressed in Article 6(1) of the ECHR, the right to a hearing “within a reasonable time”, is a right that accounts for more judgments of the European Court of Human Rights than on any other issue.⁵²³ The purpose of this guarantee, which is also known as the maxim “justice delayed is justice denied”, is to avoid keeping persons in a state of uncertainty by protecting all parties to court proceedings against excessive procedural delays,⁵²⁴ which may, in turn, jeopardize the effectiveness and credibility of the administration of justice.⁵²⁵ The conduct of the authorities plays a major role in determining whether there has been undue delay in trying a case. Both the Human Rights Committee and European Court of Human Rights reject the most common argument provided in response to allegations of undue delay, namely that there is a judicial backlog of cases. According to the European Court, the ECHR places Contracting States under a duty to organize their legal systems so as to enable domestic courts to comply with the requirements of Article 6(1), including that of trial within a reasonable time (See also 6.4.4).⁵²⁶ The European Court would only excuse a temporary backlog, provided effective measures are adopted to address it, and not a systemic failure to adjudicate cases without

⁵²³ Mole and Harby, *op. cit.*, note 132, p.24.

⁵²⁴ *Stögmüller v Austria* [1969] ECHR 25, para 5 (under the heading “As to the Law”); and UN Human Rights Committee, CCPR General Comment 32 (2007), para 35.

⁵²⁵ *H. v France* [1989] ECHR 17, para 58; *Bottazzi v Italy* [1999] ECHR 62, para 22; *Cocchiarella v Italy* [2006] ECHR 609, para 119 (available in french only) and UN Human Rights Committee, CCPR General Comment 32 (2007), para 35.

⁵²⁶ *Nogolica v Croatia* [2006] ECHR 1050, para 27; *Horvat v Croatia* [2001] ECHR 488, para 59; *G. H. v Austria* [2000] ECHR 447, para 20; *Salesi v Italy* [1993] ECHR 14, para 24.

undue delay.⁵²⁷ In *Kudła v Poland*, the European Court of Human Rights went even further and, for the first time, held there was a violation of Article 13 (the right to effective remedy) in that the applicant had no domestic remedy whereby he could enforce his right to a hearing within a reasonable time.⁵²⁸ As the Court put it: “Due to the growing frequency with which violations in this regard are being found, the Court has drawn attention on to the important danger that exists for the rule of law within national legal orders when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy.”⁵²⁹

6.4.1 Procedural delays and postponement of hearings

Procedural delays in the conduct of criminal and non-criminal proceedings may occur for a variety of reasons. Neither the Human Rights Committee nor the European Court of Human Rights has defined benchmarks applicable to all cases. What constitutes reasonable time is a matter of assessment in each particular case.⁵³⁰ The Human Rights Committee and European Court of Human Rights have had regard to the following as being relevant to the reasonableness or otherwise of any delay in the disposal of proceedings, although this list should not be treated as exhaustive:

- the complexity of the legal issues being determined;⁵³¹
- the nature of the facts to be established;⁵³²
- the number of accused persons, or parties in civil proceedings, and witnesses giving evidence;⁵³³
- the conduct of the accused or any of the parties to civil proceedings, including whether or not adjournments were requested by them or delay tactics adopted;⁵³⁴
- the length of each individual stage of the proceeding;⁵³⁵

527 *Zimmermann and Steiner v Switzerland* [1983] ECHR 9, paras 30–32; *Bottazzi v Italy* [1999] ECHR 62, para 22.

528 *Kudła v Poland* [2000] ECHR 512, para 160.

529 *Kudła v Poland* [2000] ECHR 512, para 148. See also, *Bottazzi v Italy* [1999] ECHR 62, para 22; *Di Mauro v Italy* [1999] ECHR 63, para 23; *Ferrari v Italy* [1999] ECHR 64, para 21.

530 UN Human Rights Committee, CCPR General Comment 32 (2007), para 35; *Obermeier v Austria* [1990] ECHR 15, para 72; and *Angelucci v Italy* [1991] ECHR 6, para 15 (under the heading “As to the Law”).

531 *Deisl v Austria*, HRC Communication 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras 11.2–11.6.

532 *Triggiani v Italy* [1991] ECHR 20, para 17 (under the heading “As to the Law”).

533 *Angelucci v Italy* [1991] ECHR 6, para 15 (under the heading “As to the Law”).

534 *Unión Alimentaria Sanders S. A. v Spain* [1989] ECHR 16, para 35; *Eckle v Germany* [1982] ECHR 4, para 82; *Cagas v Philippines*, HRC Communication 788/1999, UN Doc CCPR/C/73/D/788/1997 (2001), para 7.4; *Kelly v Jamaica*, HRC Communication 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para 5.11; *Johnson v Jamaica*, HRC Communication 588/1994, UN Doc CCPR/C/56/D/588/1994 (1996), para 8.9; *Yasseen and Thomas v Guyana*, HRC Communication 676/1996, UN Doc CCPR/C/62/D/676/1996 (1998), para 7.11; *Sextus v Trinidad and Tobago*, HRC Communication 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001), para 7.3; *Hendricks v Guyana*, HRC Communication 838/1998, UN Doc CCPR/C/76/D/838/1998 (2002), para 6.3; and *Siewpersaud, Sukhram, and Persaud v Trinidad and Tobago*, HRC Communication 938/2000, UN Doc CCPR/C/81/D/938/2000 (2004), para 6.2

535 *Deisl v Austria*, HRC Communication 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras 11.2–11.6.

- the need for law enforcement authorities to obtain mutual legal assistance;⁵³⁶
- any detrimental effect caused by the delay upon the individual's legal position;⁵³⁷
- the availability of remedies to accelerate the proceedings, and whether these were called upon;⁵³⁸
- the outcome of any appellate proceedings;⁵³⁹
- the link the case has with any other proceeding and whether the interests of justice call for stages in the two proceedings to be co-ordinated or to await steps or decisions to be taken in the other proceedings;⁵⁴⁰ and
- the repercussions the case may have on the future application of national law.⁵⁴¹

The right to a timely hearing must also be balanced against the right to adequate time and facilities to prepare one's case (See also 6.3.4 and 6.3.5), in which case there might be an entitlement to receive an adjournment of proceedings.

6.4.2 The right to be tried without undue delay in criminal proceedings

The right, in criminal proceedings, to be tried without undue delay relates to the time from when a person is charged or arrested (which sometimes, but not always, occur at the same time) until judgment is rendered (See also 9.3) and any applicable appeals or reviews are completed (See also 10.1.1).⁵⁴² The European Court of Human Rights considers the period to be taken into account in the assessment of the length of the proceedings as starting from an official notification given to an individual by the competent authority of an allegation that s/he has committed a criminal offence or from some other act that carries the implication of such an allegation and that, likewise, substantially affects the situation of the suspect.⁵⁴³ In cases involving serious charges, such as homicide or murder, and where the accused is denied bail by the court (See also 6.4.3), the Human Rights Committee has repeatedly said that an accused must be tried in as expeditious a manner as possible.⁵⁴⁴ A lack of adequate

536 *Manzoni v Italy* [1991] ECHR 15, para 18 (under the heading "As to the Law").

537 *Deisl v Austria*, HRC Communication 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras 11.2–11.6.

538 *Deisl v Austria*, HRC Communication 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras 11.2–11.6.

539 *Deisl v Austria*, HRC Communication 1060/2002, UN Doc CCPR/C/81/D/1060/2002 (2004), paras 11.2–11.6.

540 *Boddaert v Belgium* [1992] ECHR 62, para 39.

541 *Katte Klitsche de la Grange v Italy* [1994] ECHR 34, para 62.

542 UN Human Rights Committee, CCPR General Comment 32 (2007), para 35; *Deweere v Belgium* [1980] ECHR 1, para 42; *Taright, Touadi, Remli and Yousfi v Algeria*, HRC Communication 1085/2002, UN Doc CCPR/C/86/D/1085/2002 (2006), para 8.5; *Rouse v the Philippines*, HRC Communication 1089/2002, UN Doc CCPR/C/84/D/1089/2002 (2005), para 7.4; and *Sobhraj v Nepal*, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para 7.4.

543 *Kangasluoma v Finland* [2004] ECHR 29, para 26; see also *Corigliano v Italy* [1982] ECHR 10, para 34; *Eckle v Germany* [1982] ECHR 4, para 73.

544 See, for example, *Barroso v Panama*, HRC Communication 473/1991, UN Doc CCPR/C/54/D/473/1991 (1995), para 8.5; and *Francis v Trinidad and Tobago*, HRC Communication 899/1999, UN Doc CCPR/C/75/D/899/1999 (2002), para 5.4.

budgetary appropriations for the administration of criminal justice will not justify unreasonable delays in the adjudication of criminal cases.⁵⁴⁵

In *Teesdale v Trinidad and Tobago*, the Human Rights Committee considered a delay of 16 months in the murder trial of the accused to be unreasonable.⁵⁴⁶ The trial transcript in that case showed that all evidence for the case of the prosecution had been gathered by 1 June 1988 and no further investigations were carried out, whereas the trial did not begin until 6 October 1989. In *Boodoo v Trinidad and Tobago*, the Committee concluded that a period of 33 months between arrest and trial on a charge of larceny (theft) constituted undue delay and could not be deemed compatible with the provisions of Article 9(3).⁵⁴⁷ Likewise, the arrest, in September 1985, and continued detention of the author in *Sahadeo v Guyana* until he was first convicted of murder and sentenced to death in November 1989 (four years and two months after his arrest) was found to be in violation of Article 9(3) of the Covenant.⁵⁴⁸ Even taking into account the number of accused and witnesses involved in the trial, the European Court of Human Rights found a delay of eight years and two months as unreasonable for the purpose of Article 6(1) of the ECHR.⁵⁴⁹ In contrast, a period of 11 months between arrest and hearing of charges of importation and trafficking of heroin was not found to constitute a violation of Article 14(3)(c) of the ICCPR in *Hussain v Mauritius*.⁵⁵⁰

6.4.3 *The right to bail pending the disposal of criminal proceedings*

The right to an expeditious trial is all the more important in the context of one's deprivation of liberty. Article 9(3) of the ICCPR and Article 5(3) of the ECHR refer to the right of everyone arrested or detained to "trial within a reasonable time or to release" pending trial. If an accused is denied bail and thereby held in custody during the course of a criminal proceeding, the person must be tried as expeditiously as possible.⁵⁵¹ In *Sextus v Trinidad and Tobago*, where the applicant was arrested on the day of the alleged offence, charged with murder, and held until trial, and where the factual evidence was considered by the Human Rights Committee as straightforward and requiring little police investigation, the Committee concluded that a 22-month delay until trial amounted to a violation of Article 9(3) and Article 14(3)(c) of the ICCPR.⁵⁵² In *Barroso v Panama*, the Committee considered that a delay of

545 *Zimmerman and Steiner v Switzerland* [1983] ECHR 9, para 29; *Vernillo v France* [1991] ECHR 23; and *Fillastre and Others v Bolivia*, HRC Communication 336/1988, UN Doc CCPR/C/43/D/336/1988 (1991), para 6.5.

546 *Teesdale v Trinidad and Tobago*, HRC Communication 677/1996, UN Doc CCPR/C/74/D/677/1996 (2002), para 9.3.

547 *Boodoo v Trinidad and Tobago*, HRC Communication 721/1996, UN Doc CCPR/C/74/D/721/1996 (2002), para 6.2.

548 *Sahadeo v Guyana*, HRC Communication 728/1996, UN Doc CCPR/C/73/D/728/1996 (2001), para 9.2.

549 *Angelucci v Italy* [1991] ECHR 6, para 15 (under the heading "As to the Law").

550 *Hussain v Mauritius*, HRC Communication 980/2001, UN Doc CCPR/C/77/D/980/2001 (2002), para 6.5.

551 UN Human Rights Committee, CCPR General Comment 32 (2007), para 35; and *Jablonski v Poland* [2000] ECHR 685, para 102.

552 *Sextus v Trinidad and Tobago*, HRC Communication 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001), para 7.2;

over three and a half years between indictment and trial could not be justified solely by the complex factual situation and protracted investigations. In cases involving serious charges, such as homicide or murder, and where the accused is denied bail, the Committee stated that the accused must be tried in as expeditious a manner as possible.⁵⁵³

6.4.4 The right to a hearing within a reasonable time in civil proceedings

The right to a hearing within a reasonable time is treated by both the Human Rights Committee and the European Court of Human Rights as being applicable to both criminal and non-criminal proceedings, although it is only the ECHR that refers explicitly to this principle within the context of both criminal and civil proceedings.⁵⁵⁴ According to the Human Rights Committee, delays in civil proceedings cannot be justified by the complexity of the case or the behaviour of the parties (See also 6.4.1).⁵⁵⁵ The right to a hearing within a reasonable time in civil proceedings relates to the time from which the proceedings are instituted⁵⁵⁶ to when the determination of the court becomes final and the judgment has been executed.⁵⁵⁷ In *Jankovic v Croatia*, a case concerning, *inter alia*, disturbance of possession, the European Court of Human Rights reiterated that the execution (enforcement) of a judgment must be regarded as an integral part of the “hearing” for the purposes assessing the reasonableness of the length of the proceedings.⁵⁵⁸

The Human Rights Committee has treated the prompt disposal of civil proceedings as a requirement arising from the general provisions of Article 14 (1) of the ICCPR. Following his illegal detention in 1979, for example, the author in *Mukunto v Zambia* filed a complaint for compensation before the Supreme Court in 1982 and 1985. By 1999, when the Human Rights Committee considered his complaint under Article 14(1), his claim for compensation had still not been adjudicated upon. Neither of the author’s claims under Article 14 were refuted by Zambia, which, instead, put before the Committee reasons for the non-payment of compensation, including economic difficulties to provide adequate conditions to all detained persons. The Committee did not consider this to be a relevant response to the claim of violation of Article 14(1) and found that the author’s rights had not been respected.⁵⁵⁹ A similar approach was taken by the Committee concerning delays in the disposal of slander proceedings in *Paraga v Croatia*, a five-year delay in criminal proceedings in *Muñoz v Spain*, a seven-year delay in the disposal of administrative review proceedings in

553 *Barroso v Panama*, HRC Communication 473/1991, UN Doc CCPR/C/54/D/473/1991 (1995) para 8.5.

554 UN Human Rights Committee, CCPR General Comment 32 (2007), para 27. See, for example, *Hermoza v Peru*, HRC Communication 203/1986, CCPR/C/34/D/203/1986 (1988), para 11.3, and *Fei v Colombia*, HRC Communication 514/1992, UN Doc CCPR/C/53/D/514/1992 (1995), para 8.4.

555 UN Human Rights Committee, CCPR General Comment 32 (2007), para 27.

556 In certain circumstances, time may begin to run even before the issue of the writ commencing proceedings before the court, see *Golder v the United Kingdom* [1975] ECHR 1, para 32 *in fine*.

557 *Scopelliti v Italy* [1993] ECHR 55, para 18.

558 *Jankovic v Croatia* [2009] ECHR 401, para 68; *Hornsby v Greece* [1997] ECHR 15, para 40; *Plazonić v Croatia* [2008] ECHR 198, para 47.

559 *Mukunto v Zambia*, HRC Communication 768/1997, UN Doc CCPR/C/66/D/768/1997 (1999), para 6.4.

Hermoza v Peru, and a 12-year delay after the original events in *Gomez v Peru*.⁵⁶⁰ In contrast, the Committee has considered that a delay of a little over two years between complaint and judgment did not constitute a violation of Article 14(1) of the ICCPR in circumstances where the proceedings resulted in the author's reinstatement in his post.⁵⁶¹

It should be recalled that the length of the delay, while indicative to a certain extent, is not by itself determinative of whether a trial has been held without undue delay, since there are a number of factors relevant to this question (See also 6.4.1), including the complexity of the case. In *Sayadi and Vinck v Belgium*, an investigation of three and a half years into circumstances surrounding the imposition of sanctions on persons listed on the UN Consolidated List of terrorist entities was found to be justified by the complexity of the dossier and the fact that several investigative measures had to be carried out abroad.⁵⁶² In contrast, the European Court of Human Rights held in *Camasso v Croatia* that, even though there was a certain degree of complexity, it was not enough to justify proceedings that lasted six years and eleven months.⁵⁶³

The conduct of the applicant, the conduct of the relevant authorities and subject matter that is at stake for the applicant in the dispute are additional elements of consideration.⁵⁶⁴ Concerning the conduct of State authorities, the European Court explained that States must organize their legal systems in such a way that their courts can guarantee everyone's right to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time (See also 6.4).⁵⁶⁵ In *Nogolica v Croatia*, proceedings lasting eight years and ten months, with periods of inactivity amounting to more than three years that were solely attributable to the authorities, were found to constitute a breach of Article 6(1) of the ECHR. In *Mihajlović v Croatia*, a period of seven and a half years, during which the applicants were prevented from having their civil claim determined, was similarly found to violate Article 6(1).⁵⁶⁶

560 *Paraga v Croatia*, HRC Communication 727/1996, UN Doc CCPR/C/71/D/727/1996 (2001), para 9.7; *Muñoz v Spain*, HRC Communication 1006/2001, UN Doc CCPR/C/79/D/1006/2001 (2003), para 7.1; *Hermoza v Peru*, HRC Communication 203/1986, CCPR/C/34/D/203/1986 (1988), para 11.3; and *Gomez v Peru*, HRC Communication 981/2001, UN Doc CCPR/C/78/D/981/2001 (2003), para 7.3. See also *Fei v Colombia*, HRC Communication 514/1992, UN Doc CCPR/C/53/D/514/1992 (1995), para 8.4; *Filipovich v Lithuania*, HRC Communication 875/1999, UN Doc CCPR/C/78/D/875/1999 (2003), para 7.1; *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), para 10.7; *Pimentel et al. v the Philippines*, HRC Communication 1320/2004, UN Doc CCPR/C/89/D/1320/2004 (2007), para 9.2; and *Lederbauer v Austria*, HRC Communication 1454/2006, UN Doc CCPR/C/90/D/1454/2006 (2007), para 8.2.

561 *Casanovas v France*, HRC Communication 441/1990, UN Doc CCPR/C/51/D/441/1990 (1994), paras 7.3–7.4.

562 *Sayadi and Vinck v Belgium*, HRC Communication 1472/2006, UN Doc CCPR/C/94/D/1472/2006 (2008), para 10.10.

563 *Camasso v Croatia* [2005] ECHR 11, para 33

564 *Camasso v Croatia* [2005] ECHR 11, para 32; *Omerovic v Croatia* [2006] ECHR 587, para 33; *Debelic v Croatia* [2006] ECHR 864, para 29; *Jankovic v Croatia* [2009] ECHR 401, para 67; *Nogolica v Croatia* [2006] ECHR 1050, para 24 and *Plazonić v Croatia* [2008] ECHR 198, para 50.

565 *Nogolica v Croatia* [2006] ECHR 1050, para 27.

566 *Mihajlovic v Croatia* [2005] ECHR 468, para 44.

In the context of the establishment of parenthood, child custody proceedings, or proceedings concerning access of a divorced parent to her/his children, and in general in cases involving civil status and capacity, the Human Rights Committee and European Court of Human Rights have similarly required that such issues be adjudicated expeditiously.⁵⁶⁷ In *H. v the United Kingdom*, the European Court stated that, in cases of this kind, in view of what is at stake for the applicant:

“the authorities are under a duty to exercise exceptional diligence since there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing.”⁵⁶⁸

In *Jevremovic v Serbia*, for example, and notwithstanding the complexity of the case, a period of four years and nine months was found to be in violation of Article 6(1) of the ECHR in proceedings for the establishment of paternity and child custody.⁵⁶⁹ In contrast, in *Hokkanen v Finland*, a similar case concerning child custody, a period of 18 months comprising three judicial levels was found by the European Court to be reasonable.⁵⁷⁰ The need for civil hearings to proceed in an expeditious way has also been found in cases where the health of one of the parties was at issue (in a claim by an applicant who had contracted HIV from an infected blood transfusion),⁵⁷¹ employment disputes⁵⁷² and personal injury cases where an applicant has suffered serious personal injury.⁵⁷³

Where delays in civil proceedings are caused by a lack of resources or under-funding, the Committee has commented that, to the extent possible, supplementary budgetary resources should be allocated for the administration of justice.⁵⁷⁴ Notably, and in combination with the right to effective remedies under Article 2(3) of the Covenant, excessive delays on the part of administrative authorities in implementing judicial decisions has been treated as a violation of Article 14(1).⁵⁷⁵

567 *Tcholatch v Canada*, HRC Communication 1052/2002, UN Doc CCPR/C/89/D/1052/2002 (2007), paras 8.9–8.11; *E. B. v New Zealand*, HRC Communication 1368/2007, UN Doc CCPR/C/89/D/1368/2005 (2007), paras 9.2–9.4; and *Hokkanen v Finland* [1994] ECHR 32, para 72.

568 *H. v the United Kingdom* [1987] ECHR 14, para 85. See also *Bock v Germany* [1989] ECHR 3, para 49.

569 *Jevremovic v Serbia* [2007] ECHR 612, para 86.

570 *Hokkanen v Finland* [1994] ECHR 32, para 72.

571 *X v France* [1992] ECHR 45, especially paras 47–49.

572 *Obermeier v Austria* [1990] ECHR 15, para 72; *Frydlender v France* [2000] ECHR 353, para 45.

573 *Silva Pontes v Portugal* [1994] ECHR 12, para 39.

574 UN Human Rights Committee, CCPR General Comment 32 (2007), para 27.

575 *Czernin v the Czech Republic*, HRC Communication 823/1998, UN Doc CCPR/C/83/D/823/1998 (2005), para 7.5.

6.5 RIGHT TO BE HEARD

Article 14 of the ICCPR

“(1) 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... hearing...

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

“(d) To be tried in his presence...”

Article 6(1) of the ECHR

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair... hearing...”

Everyone charged with a criminal offence has the right to be tried in her/his presence so that they can hear and challenge the prosecution case and present a defence.⁵⁷⁶ The idea of a right to be “heard” invokes two notions. First is the principle of natural justice encapsulated in the *audi alteram partem* rule, that justice requires the other side to be heard. The second involves the question of whether the right to be heard involves a right to be heard in person or whether it is sufficient to be heard through written evidence and submissions. For the application of the right to be heard to non-criminal proceedings, see also 6.5.4.

6.5.1 *Audi alteram partem, hear the other side*

The principles of a fair hearing incorporate what some justice systems refer to as the rules of natural justice, including the concept of *audi alteram partem* (literally meaning “hear the other side”). This principle was found to be violated in *Hermoza v Peru*, where administrative authorities deprived the applicant of a hearing, those same authorities having made the decision to suspend him and, later, to discharge him from office.⁵⁷⁷ The need to hear the other side, whether in criminal or civil proceedings, is fundamental to and at the heart of the right to a fair hearing in Article 14(1) of the ICCPR and Article 6(1) of the ECHR.

6.5.2 *The right to be present in criminal hearings*

In the determination of criminal charges, the right to be tried in one’s presence is expressly guaranteed only by ICCPR under Article 14(3)(d), and as an implicit feature of the right to defend oneself (See also 6.6), as well as of the right to a public hearing (See also 4). It includes the right of the defendant to testify, although it should be recalled that a defendant cannot be

⁵⁷⁶ *Fair Trials Manual* (London: Amnesty International Publications, 1998), para 21.1.

⁵⁷⁷ *Hermoza v Peru*, HRC Communication 203/1986, CCPR/C/34/D/203/1986 (1988), individual opinion of Committee members Joseph Cooray, Vojin Dimitrijevic and Rajsomer Lallah.

compelled to do so (See also 5.2). The European Court of Human Rights has recognized that, although the right to be tried in one's presence is not expressly mentioned in Article 6(1), the object and purpose of the article, taken as a whole, demonstrates that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of Article 6(3) guarantee to "everyone charged with a criminal offence" the right "to defend himself in person" (See also 6.6.1), "to examine or have examined witnesses" (See also 6.7) and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court" (See also 6.8). The European Court of Human Rights has concluded that it is difficult to see how an accused could exercise these rights without being present.⁵⁷⁸

In *Orejuela v Colombia*, the applicant complained that the proceedings against him were conducted only in writing, excluding any hearing, oral or public. Colombia did not refute these allegations but merely indicated that the decisions were made public. The Human Rights Committee observed that, in order to guarantee the rights of the defence enshrined in Article 14(3) of the ICCPR (in particular, those contained in subparagraphs (d) and (e), the right to defend oneself (See also 6.6) and the right to call and examine witnesses (See also 6.7)), all criminal proceedings must provide the person charged with the right to an oral hearing, at which s/he may appear in person or be represented by counsel and may bring evidence and examine witnesses. Concluding that the applicant did not have such a hearing during the proceedings that culminated in his conviction and sentencing, the Committee found that there was a violation of the right to a fair trial.⁵⁷⁹

It should be noted that there is no *a priori* assumption in favour of an oral hearing in review or appeal procedures (See also 10.3),⁵⁸⁰ although the principle of equality of arms (See also 6.1) would demand that, if the prosecution is entitled to be present during such procedures, the defendant should enjoy the same benefit.⁵⁸¹ Both the European Court of Human Rights and the Human Rights Committee have stated that the right to be present in person may also be required in appeal proceedings if the appeal involves questions of both fact and law, rather than questions of law alone.⁵⁸² In *Kremzow v Austria*, appeal proceedings were meant to examine whether the applicant's sentence should have been increased from 20 years to life imprisonment and whether the sentence should have been served in a normal prison instead of a special mental institution. Because these proceedings were of crucial importance to the applicant and involved not only an assessment of his character and state of mind but also his motive, the European Court concluded that it was essential to the

578 *Colozza v Italy* [1985] ECHR 1, para 27.

579 *Orejuela v Colombia*, HRC Communication 848/1999, UN Doc CCPR/C/75/D/848/1999 (2002), para 7.3; and *Guerra de la Espriella v Colombia*, HRC Communication 1623/2007, UN Doc CCPR/C/98/D/1623/2007 (2010), para 9.3.

580 *Hermi v Italy* [2006] ECHR 875, para 61.

581 *Dudko v Australia*, HRC Communication 1347/2005, UN Doc CCPR/C/90/D/1347/2005 (2007), paras 7.3–7.4.

582 *Kremzow v Austria* [1993] ECHR 40, para 58; *Sutter v Switzerland* [1984] ECHR 2, para 30; *Hermi v Italy* [2006] ECHR 875, para 64; and *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992), para 7.3.

fairness of the proceedings that he be present during the hearing of the appeals and afforded the opportunity to participate in it together with his counsel.⁵⁸³

6.5.3 *Criminal trials in absentia*

Conducting trials in the absence of the defendant is, in principle, at odds with the general requirements of due process and more specifically with the right to participate in one's own defence (See also 6.6).⁵⁸⁴ However, the Human Rights Committee has stated that Article 14 of the ICCPR cannot be construed as invariably rendering proceedings *in absentia* inadmissible, irrespective of the reasons for the accused's absence.⁵⁸⁵ The Committee has explained that, when, exceptionally, trials are held *in absentia*, strict observance of the rights of the defence is all the more necessary.⁵⁸⁶ The Committee has commented that criminal proceedings *in absentia*, in some circumstances, might be permissible in the interest of the proper administration of justice. The Committee gives only one example of where this might be permitted, i.e., when a defendant declines to exercise her/his right to be present at the hearing, despite having been informed of the proceedings sufficiently in advance.⁵⁸⁷ Similarly, the European Court of Human Rights has taken the view that proceedings that take place in absence of the accused are not in themselves incompatible with Article 6 of the ECHR,⁵⁸⁸ provided the accused has unequivocally waived her/his right to appear and to defend her/himself,⁵⁸⁹ unless it is established that the accused was seeking to evade justice.⁵⁹⁰

In this context, Article 14(3)(a) of the ICCPR (See also 6.3.1) requires that, notwithstanding the absence of the accused, all due steps are taken to inform the accused of the charge and to notify her/him of the proceedings. Similarly, the European Court of Human Rights requires that, for a hearing *in absentia* to be fair, the State should demonstrate that it gave effective notice to the accused.⁵⁹¹ In the absence of such notification, "the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e))."⁵⁹²

Council of Europe Resolution (75) 11, sets out a number of criteria governing criminal proceedings held *in absentia*, including that:

583 *Kremzow v Austria* [1993] ECHR 40, para 67.

584 See *Colozza v Italy* [1985] ECHR 1, para 27.

585 *Mbenge v Zaire*, HRC Communication 16/1977, UN Doc CCPR/C/18/D/16/1977 (1983), para 14.1.

586 UN Human Rights Committee, CCPR General Comment 13 (1984), para 11.

587 UN Human Rights Committee, CCPR General Comment 32 (2007), para 36.

588 *Sejdovic v Italy* [2006] ECHR 181, para 82.

589 *Sejdovic v Italy* [2006] ECHR 181, para 58.

590 *Sejdovic v Italy* [2006] ECHR 181, para 105.

591 See also *Colozza v Italy* [1985] ECHR 1, para 28; *Sejdovic v Italy* [2006] ECHR 181, para 58.

592 *Mbenge v Zaire*, HRC Communication 16/1977, UN Doc CCPR/C/18/D/16/1977 (1983), para 14.1; and *Benhadj v Algeria*, HRC Communication 1173/2003, UN Doc CCPR/C/90/D/1173/2003 (2007), para 8.9.

- the accused be served with a summons to appear and to prepare her/his defence;
- the consequences of the failure to appear are clearly explained in the summons;
- an adjournment of the proceeding is granted if there are reasons to believe that the accused has been prevented from appearing;
- trials are not conducted *in absentia* if it is possible and desirable to transfer the proceeding to another State, or to apply for extradition of the accused;
- judgments passed *in absentia* are notified and the time-limit for appeal does not begin to run until the convicted person has had effective notice of the judgment, except when it is established that s/he has sought to evade justice;
- a person tried in her/his absence on whom a summons has not been served in due and proper form must be provided with a remedy enabling her/him to have the judgment annulled; and
- a person tried in her/his absence, but on whom a summons has been properly served, is entitled to a retrial, in the ordinary way, if that person can prove that absence from the trial and that failure to inform the judge of this were due to reasons beyond her/his control.⁵⁹³

The right to take part in the trial is not **absolute** and can, therefore, be waived. As the European Court of Human Rights puts it, neither the letter nor the spirit of Article 6 prevents a person from waiving, of her/his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must be established in an “unequivocal manner and attended by minimum safeguards commensurate to its importance.”⁵⁹⁴ In *Sejdovic v Italy*, the Grand Chamber found a violation of Article 6, due to the lack of an effective mechanism to secure the rights of persons convicted *in absentia* where they had not been informed effectively of the proceedings against them and had not unequivocally waived their right to appear at their trial.⁵⁹⁵ In *Lala v the Netherlands*, the European Court adopted an even more far-reaching stance by stating that the fact that the defendant, in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving her/ him of her/his right to be defended by counsel (See also 6.6.3).⁵⁹⁶ In *Maleki v Italy*, Italy did not deny that Mr. Maleki had been tried *in absentia*. However, it failed to show that the applicant was summoned in a timely manner and that he was informed of the proceedings against him, stating that it assumed that the applicant was informed by his counsel of the proceedings. The Human Rights Committee considered this to be insufficient to discharge the burden placed on the State when seeking to justify trying an accused *in absentia*. It was incumbent on the court that tried the case, said the Committee, to verify that the applicant had been informed of the pending case before proceeding to

593 CoE Committee of Ministers Resolution (75) 11 on the Criteria Governing Proceedings Held in the Absence of the Accused, para I from 1 to 9.

594 *Salduz v Turkey* [2008] ECHR 1542, para 59; *Ananyev v Russia* [2009] ECHR 1241, para 38; *Poitrimol v France* [1993] ECHR 62, para 31; *Yoldaş v Turkey* [2010] ECHR 1620, para 51, in French only.

595 *Sejdovic v Italy* [2006] ECHR 181, para 109.

596 *Lala v the Netherlands* [1994] ECHR 30, para 33. *Van Geysegem v Belgium* [1999] ECHR 5, para 34.

hold the trial.⁵⁹⁷ The Committee added that the violation of the applicant's right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy.⁵⁹⁸ Similarly, in *Colozza v Italy*, the European Court of Human Rights stated that, when domestic law permits a trial to be held, notwithstanding the absence of a person charged with a criminal offence, that person should, once s/he becomes aware of the proceedings, be able to obtain a fresh determination of the merits of the charge from the court that had heard the charge *in absentia*.⁵⁹⁹

6.5.4 The right to be present at the hearing in non-criminal proceedings

Any entitlement to an oral hearing in non-criminal proceedings relies on an inference to this effect being drawn from the overall right to a "fair" hearing in Article 14(1) of the ICCPR and Article 6(1) of the ECHR. The *travaux préparatoires* to the ICCPR recognize that in the legal system of many countries trials take place on the basis of written documentation, which is deemed not to place at risk the parties' procedural guarantees, as the content of all these documents can be made public. In the individual opinion of Human Rights Committee member Bertil Wennergren, in *Karttunen v Finland*,⁶⁰⁰ the requirement in Article 14(1) must be applied in a flexible way and cannot, *prima facie*, be understood as requiring an oral hearing. He further considered that this explained why, at a later stage of the *travaux préparatoires* on Article 14(3)(d), the right to be tried in one's own presence before the court of first instance was specifically inserted in the context of criminal proceedings.

The Human Rights Committee has commented that Article 14(1) of the ICCPR "may" require that an individual be able to participate in person in civil proceedings. In such circumstances, the State Party is under an obligation to allow that individual to be present at the hearing, even if the person is a non-resident alien. In assessing whether the requirements of Article 14(1) were met in *Said v Norway*, the Committee noted that the applicant's lawyer did not request a postponement of the hearing for the purpose of enabling the applicant to participate in person, nor did instructions to that effect appear in the signed authorization given to the lawyer by the applicant and subsequently presented by the lawyer to the judge at the hearing of a child custody case. In those circumstances, the Committee adopted the view that there was no violation by the State through any failure by the Oslo City Court to postpone the hearing, on its own initiative, until the applicant could be present in person.⁶⁰¹ Regrettably, the Committee went no further to clarify *when* civil proceedings "may" require that an individual be able to participate in person in civil proceedings.

597 *Maleki v Italy*, HRC Communication 699/1996, UN Doc CCPR/C/66/D/699/1996 (1999), para 9.4. See also *Lumley v Jamaica*, HRC Communication 662/1995, UN Doc CCPR/C/65/D/662/1995 (1999), para 7.4.

598 *Maleki v Italy*, HRC Communication 699/1996, UN Doc CCPR/C/66/D/699/1996 (1999), para 9.5.

599 *Colozza v Italy* [1985] ECHR 1, para 29; *Krombach v France* [2001] ECHR 88, para 85; *Sejdovic v Italy* [2006] ECHR 181, para 82, 105, 109. See also CoE Committee of Ministers Resolution (75) 11 on the Criteria Governing Proceedings Held in the Absence of the Accused, para I (9).

600 *Karttunen v Finland*, HRC Communication 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992).

601 *Said v Norway*, HRC Communication 767/1997, UN Doc CCPR/C/68/D/767/1997 (2000), para 11.3.

It must be recalled that the principle of equality of arms (See also 6.1) will demand that if one of the parties in the proceedings is given the benefit of being present during non-criminal proceedings, then the same benefit should be accorded to the other party(ies).⁶⁰²

6.6 RIGHT TO DEFEND ONESELF

Article 14 of the ICCPR

“(1) 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... hearing...

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

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

Article 6 of the ECHR

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair... hearing...

“(3) Everyone charged with a criminal offence has the following minimum rights:

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

OSCE Commitments

(5.17) – any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

⁶⁰² *Äärelä and Näkkäläjärvi v Finland*, HRC Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001), para 7.4.

(13.9) ...

the right to a fair ... hearing..., including the right to present legal arguments and to be represented by legal counsel of one's choice.

Concluding Document of the Vienna Meeting, Vienna 1989.

The right to defend oneself stands at the core of the notion of due process and includes the following: the right to self-representation (See also 6.6.1); the right to be represented by counsel of one's choice (See also 6.6.3, 6.6.4 and 6.6.5) and to be informed of this right (See also 6.6.2); the right to seek and give instructions from and to counsel in confidence (See also 6.6.6); and the right to receive free legal assistance (See also 6.6.7). Though the right to "defend" oneself has connotations typically associated with criminal proceedings, it is also intimately linked to the right to be heard (See also 6.5), especially to the principle of *audi alteram partem* (See also 6.5.1) ("hear the other side"), which is applicable to both criminal and non-criminal proceedings alike. In the context of criminal proceedings, OSCE participating States have committed themselves to ensuring that any prosecuted person will have the right to defend her/himself in person or through prompt legal assistance of her/his own choosing or, if s/he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.⁶⁰³

6.6.1 *The right to self-representation*

Every person is entitled to represent her/himself in judicial proceedings, which means that, in principle, a person cannot be forced to accept State-appointed counsel.⁶⁰⁴ In the context of criminal proceedings, however, this right is not **absolute**, which means that any restriction on the ability of a person to defend her/himself must have an objective and sufficiently serious purpose, and not go beyond what is necessary to uphold the interests of justice, including the interests of ensuring that a defendant is able to properly defend her/himself on serious charges. States should avoid adopting an absolute ban against the right to defend oneself in criminal proceedings without the assistance of legal counsel, so that every situation is assessed on its merits. As explained by the Human Rights Committee, "the interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused", giving the following particular examples:

- persons substantially and persistently obstructing the proper conduct of trial;
- persons facing a grave charge but being unable to act in their own interests; or

603 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 5.17.

604 *Domukovsky and Others v Georgia*, HRC Communications 623/1995, 624/1995, 626/1995, 627/1995, UN Docs CCPR/C/62/D/623/1995 (1998), CCPR/C/62/D/624/1995 (1998), CCPR/C/62/D/626/1995 (1998), and CCPR/C/62/D/627/1995 (1998), para 18.9.

- where this is necessary to protect vulnerable witnesses (See also 7.1) from further distress or intimidation if they were to be questioned by the accused.⁶⁰⁵

In *González v Spain*, for example, the applicant claimed that there was a violation of Article 14(1) of the ICCPR, together with Article 26 (equality and non-discrimination), by virtue of the fact that she was unable to appear before the Constitutional Court without being represented by a *procurador* (legal counsel accredited to the Constitutional Court). The applicant claimed that this resulted in an inequality before the law (See also 2.2), since those with a law degree did not need to be represented, whereas those without a law degree were required to be represented by a *procurador*. The Human Rights Committee accepted the position of the Constitutional Court, i.e., that the requirement for representation reflected the need for a person with legal training to assume responsibility for proceedings in connection with appeals to that court. The Committee did not accept, on the evidence before it, that this failed to be based upon objective and reasonable criteria.⁶⁰⁶

In such cases, it is important that effective legal assistance be provided, *inter alia*, by appointing a counsel of experience and competence commensurate with the nature of the offence (See also 6.6.3).⁶⁰⁷

6.6.2 The right to be informed of one's entitlement to legal assistance

If a person appears in criminal proceedings without legal assistance, Article 14(3)(d) of the ICCPR requires that s/he be informed of the right to be defended by legal counsel (See also 6.6.2).⁶⁰⁸ The same requirement can be implied to derive from Article 6(3)(c) of the ECHR, by virtue of the approach of the European Court to apply the Convention in a way that the rights in it are not “theoretical or illusory but that are practical and effective”.⁶⁰⁹ To ensure the practical and effective enjoyment of the rights under Article 14(3)(d) of the ICCPR and Article 6(3)(c) of the ECHR, a person who appears before a court to represent her/himself should be asked whether or not s/he understands the entitlement to legal assistance of one's choosing⁶¹⁰ (See also 6.6.3) and the fact that, should the person have insufficient means to pay for legal assistance, there may also be an entitlement to legal aid (See also 6.6.7).

Although the right to be informed of one's entitlement to legal assistance is expressed within the context of criminal proceedings, the approach of ensuring the practical and effective enjoyment of rights might also call for the application of this right in non-criminal

605 UN Human Rights Committee, CCPR General Comment 32 (2007), para 37. See also *Correia de Matos v Portugal*, HRC Communication 1123/2002, UN Doc CCPR/C/86/D/1123/2002 (2006), paras 7.4–7.5.

606 *González v Spain*, HRC Communication 1005/2001, UN Doc CCPR/C/74/D/1005/2001 (2002), para 4.3.

607 See also UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, para 6.

608 See also UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, para 5.

609 See, for example: *Airey v Ireland* [1979] ECHR 3, para 24; and *Artico v Italy* [1980] ECHR 4, para 33.

610 *Yoldaş v Turkey* [2010] ECHR 1620, para 52 in French only.

proceedings, particularly if it is evident that a lack of legal representation by one of the parties would result in an inequality of arms (See also 6.1).

6.6.3 *The right to be defended by a counsel of one's choice*

In addition to self-representation, every person is entitled to legal representation by counsel of one's own choosing, in both criminal and non-criminal proceedings.⁶¹¹ The OSCE participating States recognize that the right to a fair and public hearing includes the right to be represented by legal counsel of one's choice.⁶¹² The two types of representation, self-representation and representation by counsel, are not to be considered mutually exclusive.⁶¹³ Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf, therefore exercising some degree of self-representation while defended by legal counsel.⁶¹⁴

The right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be (See also 6.6.4), is considered by the European Court of Human Rights to be one of the fundamental features of a fair trial.⁶¹⁵ However, the right to defend one's case with the assistance of a counsel of one's choice is not an **absolute** right and can be subject to regulations (See also 6.6.5). The right to legal representation can also be waived. When this is the case, the European Court of Human Rights requires that the waiver be established in an "unequivocal manner and be attended by minimum safeguards commensurate to its importance".⁶¹⁶ This also implies that before an accused can be said to have implicitly, through her/his conduct, waived the right to be defended by a counsel it must be shown that s/he could have reasonably foreseen what the consequences of this conduct would be.⁶¹⁷

Counsel must be available at all stages of criminal proceedings, particularly in capital cases, where the Human Rights Committee has affirmed that it is axiomatic that legal representation must be made available.⁶¹⁸ In *Brown v Jamaica*, for example, the Committee decided

611 See, for example, *Kulov v Kyrgyzstan*, HRC Communication 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), para 8.7. See also UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, para 1.

612 Concluding Document of the Vienna Meeting, Vienna 1989, para 13.9.

613 *Trial Observation Manual for Criminal Proceedings – Practitioners Guide No. 5* (Geneva: International Commission of Jurists, 2009), chapter IV para 5 (ii), page 89.

614 UN Human Rights Committee, CCPR General Comment 32 (2007), para 37.

615 *Dembukov v Bulgaria* [2008] ECHR para 50.

616 *Salduz v Turkey* [2008] ECHR 1542, para 59; *Ananyev v Russia* [2009] ECHR 1241, para 38; *Poitrimol v France* [1993] ECHR 62, para 31; *Yoldaş v Turkey* [2010] ECHR 1620, paras 51–52, in French only.

617 *Ananyev v Russia* [2009] ECHR 1241, para 39; *Sejdovic v Italy* [2006] ECHR 181, para 87 *in fine*.

618 *Robinson v Jamaica*, HRC Communication 223/1987, UN Doc CCPR/C/35/D/223/1987 (1989), para 10.4; *Wright and Harvey v Jamaica*, HRC Communication 459/1991, UN Doc CCPR/C/55/D/459/1991 (1995); *LaVende v Trinidad and Tobago*, HRC Communication 554/1993, UN Doc CCPR/C/61/D/554/1993 (1997), para 5.8; *Simpson v Jamaica*, HRC Communication 695/1996, UN Doc CCPR/C/73/D/695/1996 (2001); *Levy v Jamaica*, HRC Communication 719/1996, UN Doc CCPR/C/64/D/719/1996 (1998), para 7.1; *Marshall*

that a magistrate should not have proceeded with the deposition of witnesses during a preliminary hearing without allowing the applicant an opportunity to ensure the presence of his lawyer.⁶¹⁹ The Committee sees this as an obligation, imputable to the State, even where it is solely the fault of assigned counsel that s/he fails to attend a hearing.⁶²⁰

6.6.4 The right to independent, competent and effective legal representation

In the context of criminal proceedings, Article 14(3)(d) of the ICCPR and Article 6(3)(c) of the ECHR speak of the right to legal “assistance”. The European Court of Human Rights has emphasized that this is much more than a right to the “nomination” of legal counsel on behalf of an accused and that the right to legal assistance must be practical and effective in order to provide an adequate defence.⁶²¹ It will depend on the circumstances of the case whether, taking the proceedings as a whole, the legal representation may be regarded as having been practical and effective.⁶²² This requires a balanced approach between the responsibilities and independence of legal counsel and the obligations of the competent authorities of the State.

The Human Rights Committee has commented that a State is not to be held responsible for the conduct of a defence lawyer unless it was, or should have been, “manifest” to the judge that the lawyer’s behaviour or level of competence was incompatible with the interests of justice.⁶²³ Manifest misbehaviour or incompetence that is incompatible with the interests of justice has been found to exist, for example, where counsel has withdrawn an appeal in

v Jamaica, HRC Communication 730/1996, UN Doc CCPR/C/64/D/730/1996 (1998); *Aliev v Ukraine*, HRC Communication 781/1997, UN Doc CCPR/C/78/D/781/1997 (2003), para 7.3; *Saidova v Tajikistan*, HRC Communication 964/2001, UN Doc CCPR/C/81/D/964/2001 (2004), para 6.8; *Aliboev v Tajikistan*, HRC Communication 985/2001, UN Doc CCPR/C/85/D/985/2001 (2005), para 6.4; *Khuseynova and Butaeva v Tajikistan*, HRC Communications 1263/2004 and 1264/2004, UN Doc CCPR/C/94/D/1263–1264/2004 (2008), para 8.4; *Pustovalov v Russian Federation*, HRC Communication 1232/2003, UN Doc CCPR/C/98/D/1232/2003 (2010), paras 6.4, 8.4; and *Sobhraj v Nepal*, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para 7.2; *Larrañaga v the Philippines*, HRC Communication 1421/2005, UN Doc CCPR/C/87/D/1421/2005 (2006), para 7.6.

619 *Brown v Jamaica*, HRC Communication 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999). See also *Hendricks v Guyana*, HRC Communication 838/1998, UN Doc CCPR/C/76/D/838/1998 (2002), para 8.4.

620 *Borisenko v Hungary*, HRC Communication 852/1999, UN Doc CCPR/C/76/D/852/1999 (2002), para 7.5.

621 *Artico v Italy* [1980] ECHR 4, para 33; *Imbrioscia v Switzerland* [1993] ECHR 56, para 38; and *Daud v Portugal* [1998] ECHR 27, para 38.

622 *Kulikowski v Poland* [2009] ECHR 779, para 57.

623 UN Human Rights Committee, CCPR General Comment 32 (2007), para 32; *Taylor v Jamaica*, HRC Communication 707/1996, UN Doc CCPR/C/60/D/707/1996 (1997), para 6.2; *Chan v Guyana*, HRC Communication 913/2000, UN Doc CCPR/C/85/D/913/2000 (2006), para 6.2; and *Hussain v Mauritius*, HRC Communication 980/2001, UN Doc CCPR/C/77/D/980/2001 (2002), para 6.3. See also *Artico v Italy* [1980] ECHR 4, para 36; *Kamasinski v Austria* [1989] ECHR 24, paras 33, 65; *Daud v Portugal* [1998] ECHR 27, para 38; and *Czekalla v Portugal* [2002] ECHR 662, paras 60, 62.

a death penalty case without consulting with the defendant⁶²⁴ and where counsel has been absent during the giving of evidence by a witness.⁶²⁵

Adopting the same approach, the European Court of Human Rights has concluded that, while the conduct of the defence is essentially a matter between the defendant and her/his counsel, domestic courts should not remain passive vis-à-vis instances of lack of effective legal representation.⁶²⁶ When the circumstances of the case require, the court should inquire into the manners in which a lawyer fulfils her/his responsibilities.⁶²⁷ If the authorities are notified of a situation where the lawyer appointed has been prevented from acting for a protracted period, through illness or other reasons, or is shirking her/his duties, the authorities must either replace legal counsel or cause her/him to fulfil the obligations required of providing competent and effective legal representation.⁶²⁸ The court should behave pro-actively, including, for example, by making an order for adjournment of the trial, even where this has not been requested by counsel.⁶²⁹ In the case of counsel provided by the competent authorities, the Human Rights Committee and the European Court of Human Rights seems willing to impose an even higher duty of care on the part of the presiding judge.⁶³⁰ In *Sannino v Italy*, the European Court emphasized that the applicant's failure to inform the authorities of the difficulties he faced in preparing his defence could not, of itself, relieve the authorities of their obligation to take steps to guarantee the effectiveness of the accused's defence. The competent national authorities are required to intervene not only if a failure by legal-aid counsel to provide effective representation is "manifest" but also if it is sufficiently brought to their attention in some other way.⁶³¹

As to the independence of counsel, the Human Rights Committee has commented that "lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter".⁶³²

624 *Kelly v Jamaica*, HRC Communication 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para 9.5.

625 *Hendricks v Guyana*, HRC Communication 838/1998, UN Doc CCPR/C/76/D/838/1998 (2002), para 6.4; and *Brown v Jamaica*, HRC Communication 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999), para 6.6.

626 *Sannino v Italy* [2006] ECHR 508, para 49; *Cuscani v the United Kingdom* [2002] ECHR 630, para 39.

627 *Daud v Portugal* [1998] ECHR 27, para 42.

628 *Artico v Italy* [1980] ECHR 4, para 33; *Goddi v Italy* [1984] ECHR 4, para 31; *Kamasinski v Austria* [1989] ECHR 24, paras 33, 65; and *Daud v Portugal* [1998] ECHR 27, para 38.

629 *Daud v Portugal* [1998] ECHR 27, para 42.

630 Contrast *H. C. v Jamaica*, HRC Communication 383/1989, UN Doc CCPR/C/45/D/383/1989 (1992), para 6.3 (private counsel) with: *Kelly v Jamaica*, HRC Communication 253/1987, UN Doc CCPR/C/41/D/253/1987 (1991), para 9.5; *Brown v Jamaica*, HRC Communication 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999), para 6.6; and *Hendricks v Guyana*, HRC Communication 838/1998, UN Doc CCPR/C/76/D/838/1998 (2002), para 6.4.

631 *Sannino v Italy* [2006] ECHR 508, para 49–51; *Kamasinski v Austria* [1989] ECHR 24, para 65; *Daud v Portugal* [1998] ECHR 27, para 38.

632 UN Human Rights Committee, CCPR General Comment 32 (2007), para 34. See also *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners*

6.6.5 *Grounds for restricting the right to choose one's legal representative*

The right to legal assistance of one's choosing is not an **absolute right** and may be limited in two situations. First, where a person relies on legal aid (See also 6.6.7), the legally aided person has, in principle, no right to choose her/his legal representative.⁶³³ The European Court of Human Rights has stated that the right to a counsel of one's own choosing is subject to certain limitations where legal aid is concerned. When appointing defence counsel, the European Court conceded that authorities may certainly have regard to an accused's wishes, but these wishes can be overridden when there are relevant and sufficient grounds for holding that this is necessary.⁶³⁴ A violation of the right to choose one's own counsel was found in *Lopez v Uruguay*, where Lopez and several others were forced, under threats to refrain from seeking any legal counsel other than Colonel Mario Rodriguez, in proceedings before a Military Tribunal.⁶³⁵

The second limitation on the right to choose one's counsel, even if a person is paying privately, occurs as a result of the fact that the State is entitled to regulate the appearance of counsel before courts and their obligation to respect certain principles of professional conduct.⁶³⁶ In *Ensslin and Others v Germany*, the European Commission of Human Rights did not find that the exclusion of certain lawyers from the defence, on the ground of their affiliation to the criminal association of the accused, amounted to a violation of Article 6.⁶³⁷

6.6.6 *Confidential and privileged communications with counsel*

Nowhere in Article 14 of the ICCPR or Article 6 of the ECHR is it stated that consultations with counsel should be private or that communications between lawyer and client, whether oral or in writing, should be **privileged**. Despite this, the special nature of the lawyer-client relationship – and the need for confidence and privacy to enable counsel to obtain full instructions in order to prepare and defend a case – have been treated as requiring that counsel be able to meet their clients in private and to communicate in conditions that fully respect the confidentiality of their communications.⁶³⁸ In *S. v Switzerland*, the European Court of Human Rights considered that the accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the ECHR. If a lawyer were unable to confer with her/his client and receive confidential instructions from the client without such surveillance, the European Court has taken the view that the legal assistance would lose much of its usefulness, whereas the ECHR is intended to guarantee rights that are prac-

Guide No. 1, op. cit., note 284, p. 63–69. See also UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, para 16, 18, 20.

633 *Lagerblom v Sweden* [2003] ECHR 28, para 54; and *Teesdale v Trinidad and Tobago*, HRC Communication 677/1996, UN Doc CCPR/C/74/D/677/1996 (2002), para 9.6.

634 *Lagerblom v Sweden* [2003] ECHR 28, para 54.

635 *Lopez v Uruguay*, HRC Communication 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984), para 13.

636 *Ensslin and Others v Germany* [1978] ECHR, para 20.

637 *Ensslin and Others v Germany* [1978] ECHR, para 21.

638 UN Human Rights Committee, CCPR General Comment 32 (2007), para 34.

tical and effective.⁶³⁹ The Human Rights Committee found a violation of Article 14(3)(b) of the ICCPR, for example, where all meetings between a defendant and his lawyer had been required to be held in the presence of investigators.⁶⁴⁰ It has also treated a lack of privacy between a lawyer and his client as a violation of Article 14(3)(d) of the ICCPR, in *Arutyuniantz v Uzbekistan*.⁶⁴¹

The right to confidential and privileged communications applies to all communications between a lawyer and client, irrespective of the stage at which the communications occur. Lack of privacy has been held to violate the right to counsel during the preparation of one's defence (See also 6.3.3), expressly provided for in Article 14(3)(b) of the ICCPR and implicit in Article 6(1), *juncto* 6(3)(c), of the ECHR, as well as the right to counsel during one's defence (See also 6.6.3), expressly provided for in Article 14(3)(b) of the ICCPR and in Article 6(3)(c) of the ECHR. In the context of detention or imprisonment, the need for confidentiality is even more justified. It is for this reason that interviews between a detained or imprisoned person and her/his legal counsel may be within sight, but not within the hearing, of a law enforcement official.⁶⁴² The European Court of Human Rights has also held that, as a rule, access to a lawyer should be provided from the moment of the first interrogation of a suspect by the police (See also 6.3.3).⁶⁴³ The European Court has, nevertheless, concluded that the right to access to a lawyer may be subject to restrictions for good cause.⁶⁴⁴ In such cases, the question will be whether the restriction was **necessary** to achieve a **legitimate aim** and **proportional** to that end, and whether the restriction, in light of the entirety of the proceedings, deprived the accused of a fair hearing.⁶⁴⁵

In *Brennan v the United Kingdom*, the Court considered a situation where the accused's first consultation with legal counsel was monitored by a police officer, pursuant to Section 45 of the Northern Ireland (Emergency Provisions) Act 1991, which allowed the monitoring of consultations for the purpose of preventing information being passed on to suspects still at large. While acknowledging that this was a legitimate aim, the European Court found that there was no allegation that counsel was, in fact, likely to collaborate in such an attempt and that it was unclear to what extent a police officer would have been able to spot a coded

639 *S. v Switzerland* [1991] ECHR 54, para 48; *Öcalan v Turkey* [2005] ECHR 282, para 133.

640 *Khomidova v Tajikistan*, HRC Communication 1117/2002, UN Doc CCPR/C/81/D/1117/2002 (2004), para 6.4. See also UN Human Rights Committee, CCPR General Comment 32 (2007), para 34; *Gridin v Russian Federation*, HRC Communication 770/1997, UN Doc CCPR/C/69/D/770/1997 (2000), para 8.5 and *Sigareva v Uzbekistan*, HRC Communication 907/2000, UN Doc CCPR/C/85/D/907/2000 (2005), para 6.3.

641 *Arutyuniantz v Uzbekistan*, HRC Communication 971/2001, UN Doc CCPR/C/83/D/971/2001 (2005), para 6.3.

642 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 (4) adopted by the UN General Assembly on 9 December 1988; UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, para 8.

643 *Salduz v Turkey* [2008] ECHR 1542, paras 52, 54.

644 *Salduz v Turkey* [2008] ECHR 1542, para 52.

645 *S. v Switzerland* [1991] ECHR 54, para 48; and *Brennan v the United Kingdom* [2001] ECHR 596, para 60.

message if one was, in fact, passed between client and lawyer. At most, the presence of the officer may have inhibited any improper communication of information, assuming that there was a risk of this occurring. The Court, therefore, found the measure to be disproportionate and concluded that there had been a violation of Article 6(3)(c) of the ECHR.⁶⁴⁶

The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and her/his lawyers has been affirmed in various other international instruments, including:⁶⁴⁷

- The *UN Basic Principles on the Role of Lawyers*, which refer to the right of all arrested, detained or imprisoned persons to be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality;⁶⁴⁸
- The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, which includes the entitlements of a detained or imprisoned person to communicate and consult with her/his legal counsel; to be allowed adequate time and facilities for consultations with her/his legal counsel; to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with her/his legal counsel, which may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order; and⁶⁴⁹
- The *European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights*, which provides that: “As regards persons under detention, the exercise of this right shall in particular imply that: (c) such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Court, or any proceedings resulting therefrom.”⁶⁵⁰

6.6.7 *Legal aid*

The provision of free legal assistance applies to both criminal and civil proceedings and is dependent on two conditions:⁶⁵¹ first, that the person concerned does not have sufficient means to pay for the legal assistance; and second, that the **interests of justice** require that legal counsel be assigned to represent the person.

646 *Brennan v the United Kingdom* [2001] ECHR 596, especially paras 59–63.

647 *Brennan v the United Kingdom* [2001] ECHR 596, para 38–40.

648 UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, para 8.

649 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 18 adopted by the UN General Assembly on 9 December 1988.

650 European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights, article 3 (2) (c).

651 *Artico v Italy* [1980] ECHR 4, para 34; *Pham Hoang v France* [1992] ECHR 61, paras 39–40; and *J. O., Z. S., and S. O. v Belgium*, HRC Communication 1417/2005, UN Doc CCPR/C/85/D/1417/2005 (2005), para 4.4.

The European Court of Human Rights has confirmed that it is not necessary for the individual concerned to prove that a refusal to grant legal aid had actually put her/him at a disadvantage, since this would deprive the right under Article 6(3)(c) of the ECHR of substance.⁶⁵² The Court has explained that where legal aid is concerned the right to a counsel of one's own choosing is subject to certain limitations. When appointing defence counsel, the European Court conceded that authorities may certainly have regard to an accused's wishes, but that these can be overridden when there are relevant and sufficient grounds for holding that this is necessary.⁶⁵³

In criminal proceedings, the European Court has taken the view 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.⁶⁵⁴ In order to determine whether the "interests of justice" require that an applicant receive free legal assistance, the Court will have regard to various criteria, including: the gravity of the offence and of the possible sanction;⁶⁵⁵ the capacity of the defendant to represent her/himself;⁶⁵⁶ and the complexity of the case.⁶⁵⁷

In criminal cases, the gravity of the offence with which the accused is charged will be the main issue relevant to whether the interests of justice require the assignment of free legal assistance.⁶⁵⁸ A different, though related criterion is the capacity of the defendant to represent her/himself. In *Hoang v France*, for example, the European Court of Human Rights concluded that the defendant did not have the legal training essential to enable him to present and develop the appropriate arguments on complex issues involved in the drug charges he faced.⁶⁵⁹ In *Pakelli v Germany*, the European Court ruled that the personal appearance of the appellant would not have compensated for the absence of his lawyer. Without the services of a legal practitioner, Mr. Pakelli could not have made a useful contribution to the examination of the legal issues arising.⁶⁶⁰ Also relevant to the "gravity" of an offence is the possible sanction that might be imposed if the defendant is convicted. Where immediate deprivation of liberty is at stake, the interests of justice, in principle, call for free legal representation.⁶⁶¹ In *Quaranta v Switzerland*, the European Court ruled that, considering that the maximum sentence was three years' imprisonment, free legal assistance should have been afforded, by reason of the mere fact that so much was at stake, notwithstanding

652 *Artico v Italy* [1980] ECHR 4, para 35.

653 *Lagerblom v Sweden* [2003] ECHR 28, para 54.

654 *Quaranta v Switzerland* [1991] ECHR 33, para 27; *Artico v Italy* [1980] ECHR 4, para 32.

655 *Quaranta v Switzerland* [1991] ECHR 33, para 33.

656 *Pakelli v Germany* [1983] ECHR 6, para 37, 38; and *Pham Hoang v France* [1992] ECHR 61, para 40.

657 *Granger v the United Kingdom* [1990] ECHR 6, para 47; *Quaranta v Switzerland* [1991] ECHR 33, para 34.

658 *Lindon v Australia*, HRC Communication 646/1995, UN Doc CCPR/C/64/D/646/1995 (1998), para 6.5.

659 *Pham Hoang v France* [1992] ECHR 61, para 40.

660 *Pakelli v Germany* [1983] ECHR 6, paras 37, 38.

661 *Benham v the United Kingdom* [1996] ECHR 22, para 59.

that nothing in the file indicated that the domestic court was likely to impose a sentence in excess of 18 months.⁶⁶²

In all cases in which the interests of justice requires to assign counsel, the accused is entitled to have a lawyer of experience and competence commensurate with the nature of the offence, in order to provide her/him effective legal assistance.⁶⁶³ While a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, the mere fact of assigning free-of-charge counsel to represent a party to the proceedings does not, in itself, ensure the effectiveness of the assistance (See also 6.6.4).⁶⁶⁴ Although the conduct of the defence is essentially a matter between the accused and her/his counsel, the competent national authorities are required to intervene if a failure by public defence counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.⁶⁶⁵

The right to free legal assistance is only expressly referred to within Article 14(3)(d) of the ICCPR and Article 6(3)(c) of the ECHR, i.e., within provisions concerning the conduct of criminal proceedings. The principle of equality of arms in presenting one's case (See also 6.1.2) may require, however, that legal aid be provided in civil proceedings as well. In *Steel and Morris v the United Kingdom*, for example, the applicants were respondents in a civil defamation suit brought by McDonalds. They were unemployed and, despite the enormous imbalance in resources between them and the large and high-profile legal team representing McDonalds, Steel and Morris were denied legal aid and were, therefore, obliged to represent themselves. The European Court of Human Rights held that the denial of legal aid contributed to an unacceptable inequality of arms between the parties, thus violating Article 6(1) of the ECHR.⁶⁶⁶ In its General Comment 32, the Human Rights Committee has added that the availability or absence of legal assistance often determines whether or not a person can access proceedings or participate in them in a meaningful way (See also 2.1), and thus encouraged States Parties to provide free legal aid in suits at law for individuals who do not have sufficient means to pay for representation.⁶⁶⁷ By analogy to criminal proceedings, the seriousness of the consequences of a civil suit, including the impact this might have on third parties, such as children in family custody proceedings, will be important.

On the question of legal aid for appeal proceedings (See also 10.3.4), the existence of some objective chance of success has been considered to be relevant to the question of whether the interests of justice call for legal aid to be provided.⁶⁶⁸ The European Court of Human

662 *Quaranta v Switzerland* [1991] ECHR 33, para 33.

663 See also UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, para 6.

664 *Lagerblom v Sweden* [2003] ECHR 28, para 56 and *Kulikowski v Poland* [2009] ECHR 779, para 57.

665 *Lagerblom v Sweden* [2003] ECHR 28, para 56 and *Kulikowski v Poland* [2009] ECHR 779, para 57.

666 *Steel and Morris v the United Kingdom* [2005] ECHR 103, paras 62, 67.

667 UN Human Rights Committee, CCPR General Comment 32 (2007), para 10.

668 *Z. P. v Canada*, HRC Communication 341/1988, UN Doc CCPR/C/41/D/341/1988(1991), para 5.4.

Rights, therefore, considers the refusal of legal aid on grounds such as the lack of sufficient prospects of success as legitimate in principle.⁶⁶⁹ In the case of appeals against, or applications for constitutional review of, death penalty cases, the Human Rights Committee has consistently concluded that the State is obliged to provide free legal assistance.⁶⁷⁰ The Human Rights Committee has also pointed out that States Parties to the ICCPR have an obligation, under Article 2(3) of the Covenant, to ensure that effective remedies are available in relation to claims of violations of rights under the ICCPR. In *Kennedy v Trinidad and Tobago*, the Constitutional Court of Trinidad and Tobago was the body charged with this task. As such, the Committee considered that the denial of legal aid to a person presenting a claim to the Constitutional Court constituted a violation of Article 14(1), in conjunction with Article 2(3).⁶⁷¹

It should be noted that the Human Rights Committee has been reluctant to examine the manner in which a State Party administers the provision of legal aid within its territory. Although it has acknowledged a responsibility on the part of States Parties to provide effective legal aid representation, it said in *Ricketts v Jamaica* that it is not for the Committee to determine how this should be ensured, unless it is apparent that there has been a miscarriage of justice.⁶⁷² An instance in which it found such an apparent miscarriage of justice was in the case of *Teesdale v Trinidad and Tobago*, where counsel was not assigned until the day of the accused's trial.⁶⁷³ A similar stance has been adopted by the European Court of Human Rights, observing on several occasions that the Contracting States to the ECHR enjoy considerable freedom in the choice of the means of ensuring that their legal systems satisfy the requirements of free legal assistance. However, it is the European Court's task to determine whether the method chosen leads to results that are consistent with the requirements of the ECHR.⁶⁷⁴

669 As an exception, see: *Sialkowska v Poland* [2007] ECHR 223, para 114–115; *Staroszczyk v Poland* [2007] ECHR 222, para 135–137.

670 *Currie v Jamaica*, HRC Communication 377/1989, UN Doc CCPR/C/50/D/377/1989 (1994), para 13.4; *Shaw v Jamaica*, HRC Communication 704/1996, UN Doc CCPR/C/62/D/704/1996 (1998), para 7.6; *Taylor v Jamaica*, HRC Communication 707/1996, UN Doc CCPR/C/60/D/707/1996 (1997), para 8.2; *Henry v Trinidad and Tobago*, HRC Communication 752/1997, UN Doc CCPR/C/64/D/752/1997 (1999), para 7.6; and *Kennedy v Trinidad and Tobago*, HRC Communication 845/1999, UN Doc CCPR/C/74/D/845/1998 (2002), para 7.10.

671 *Kennedy v Trinidad and Tobago*, HRC Communication 845/1999, UN Doc CCPR/C/74/D/845/1998 (2002), para 7.10. See also *Evans v Trinidad and Tobago*, HRC Communication 908/2000, UN Doc CCPR/C/77/D/908/2000 (2003), para 6.6.

672 *Ricketts v Jamaica*, HRC Communication 667/1995, UN Doc CCPR/C/74/D/667/1995 (2002), para 7.3. See also *Burrell v Jamaica*, HRC Communication 546/1993, UN Doc CCPR/C/53/D/546/1993 (1996); *Amore v Jamaica*, HRC Communication 634/1995, UN Doc CCPR/C/65/D/634/1995 (1999); *Darwish v Austria*, HRC Communication 679/1996, UN Doc CCPR/C/60/D/679/1996 (1997); and *Agudo v Spain*, HRC Communication 864/1999, UN Doc CCPR/C/76/D/864/1999 (2002).

673 *Teesdale v Trinidad and Tobago*, HRC Communication 677/1996, UN Doc CCPR/C/74/D/677/1996 (2002), para 9.5.

674 *Quaranta v Switzerland* [1991] ECHR 33, para 30.

6.7 CALLING AND EXAMINING WITNESSES

Article 14 of the ICCPR

“(1) 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... hearing...

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

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

Article 6 of the ECHR

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair... hearing...

“(3) Everyone charged with a criminal offence has the following minimum rights:

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

In civil and criminal proceedings, parties to the proceedings have the right to call, examine and cross-examine witnesses on equal terms. It is undisputed that in criminal proceedings this right represents a fundamental guarantee of the defendant, in that it counterbalances the powers of the prosecutor, thus ensuring the equality of arms (See also 6.1). However, other parties to the proceedings, such as witnesses and victims, who are usually “examined”, are not without guarantees, as they dispose of certain rights of assistance (See also 7.2.1) and protection (See also 7.1), including the right, in limited circumstances, to give evidence anonymously (See also 7.1.1).

6.7.1 *The right to call witnesses*

Article 14(3)(e) of the ICCPR and Article 6(3)(d) of the ECHR guarantee – in the context of criminal proceedings – a right to “obtain the attendance and examination of witnesses on his behalf”. By expressing that this must be “under the same conditions as witnesses against him”, both provisions incorporate the principle of equality of arms (See also 6.1), guaranteeing that the accused has the same legal powers of compelling the attendance of witnesses, and examining those witnesses, as are available to the prosecution.⁶⁷⁵

⁶⁷⁵ UN Human Rights Committee, CCPR General Comment 32 (2007), para 39; and *Guerra de la Espriella v Colombia*, HRC Communication 1623/2007, UN Doc CCPR/C/98/D/1623/2007 (2010), para 9.3.

The right to call witnesses also applies in civil proceedings. The case of *Dombo Beheer B.V. v the Netherlands*, for example, concerned civil proceedings centred around the question of whether or not an oral agreement had been reached between the applicant company and its bank to the effect that the bank would extend certain credit facilities. The agreement was said to have been made by two individuals, one representing the company and the other representing the bank. At trial, however, the judge only allowed the individual representing the bank to give evidence about the discussions that took place. The European Court of Human Rights held that it was difficult to see why the company should not have also been allowed to give evidence and concluded that the company was, therefore, put at a substantial disadvantage vis-à-vis the bank, thus violating the principle of equality of arms (See also 6.1) and so of Article 6(1) of the ECHR.⁶⁷⁶

It should also be noted that some legal systems exempt individuals from the obligation to testify against close relatives, the rationale being that an obligation to testify would be inhumane and, thus, unacceptable. Due to the lack of a generally recognized principle in this respect, however, the Human Rights Committee has not given weight to this principle in ruling on claims before it under Article 14(3)(e).⁶⁷⁷ In *Unterpertinger v Austria*, the applicant claimed that he had been convicted exclusively on the basis of the statements made to the police by his former wife and his stepdaughter, who had refused, as close relatives, to give evidence at the trial. The European Court of Human Rights found that there was a breach of Article 6(1) of the ECHR, in that the applicant was convicted on the basis of testimony in respect of which he had not had an opportunity to examine at any stage of the proceedings (See also 6.7.3).⁶⁷⁸

6.7.2 *The right to call expert witnesses*

The right to call witnesses extends to a right to call expert witnesses. The European Court of Human Rights has clarified that the right to call expert witnesses is not absolute, and it should be counterbalanced by the interests of the proper administration of justice. It is primarily for the national court to decide whether the requested measure is relevant and essential for deciding a case.⁶⁷⁹ However, if the domestic court decides that an expert examination is needed, the defence should have an opportunity to formulate questions to the expert, to challenge the expert and to examine her/him directly at the trial. In certain circumstances, therefore, the refusal to allow an *ex-parte* expert examination of material evidence has been regarded by the European Court as a breach of the principle of equality of arms.⁶⁸⁰ In *Khomidova v Tajikistan*, for example, the author claimed that his confession of guilt had been obtained as a result of being subjected to torture (See also 5.2.6). His lawyer, therefore, requested to call and examine a doctor as an expert witness, to evaluate the injuries sustained as a result of the alleged torture. Without giving reasons, the trial judge refused

676 *Dombo Beheer B. V. v the Netherlands* [1993] ECHR 49, para 35.

677 See the individual opinion of Committee member in *Campbell v Jamaica*, HRC Communication 307/1988, UN Doc CCPR/C/47/D/307/1988 (1993).

678 *Unterpertinger v Austria* [1986] ECHR 15 para 28.

679 *Mirilashvili v Russia* [2008] ECHR 1669, para 189–191.

680 *Stoimenov v the former Yugoslav Republic of Macedonia* [2007] ECHR 257, paras 41–42.

the request, leading the Human Rights Committee to conclude that there had thereby been a violation of Articles 14(1) and 14(3)(e) of the ICCPR, as well as the right under Article 14(3)(g) of not to be compelled to confess guilt (See also 5.2).⁶⁸¹

Compared to the *ex-parte* experts, experts appointed by a domestic court must be neutral. Because the opinion of the court-appointed expert is likely to carry significant weight in the court's assessment of the case, the lack of an expert's neutrality may give rise to a breach of the principle of equality of arms (See also 6.1.2).⁶⁸² Even the lack of the appearance of neutrality, where this can be objectively justified, may amount to a breach of the principle of equality of arms. This will be especially so, as in *Mirilashvili v Russia*, if it was the expert's report that prompted the bringing of a prosecution.⁶⁸³ However, as the European Court of Human Rights noted, in *Brandstetter v Austria*, the fact that the court-expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not, in itself, justify fears that s/he will be unable to act with proper neutrality. What is decisive is whether the doubts raised by appearances can be held objectively justified.⁶⁸⁴ The expert's procedural position and her/his role in the proceedings have to be taken into account while assessing the court-appointed expert's neutrality.⁶⁸⁵

6.7.3 *The right to cross-examine witnesses*

Article 14(3)(e) of the ICCPR and Article 6(3)(d) of the ECHR guarantee – in the context of criminal proceedings – a right to “examine, or have examined, the witnesses against him”.⁶⁸⁶ The Human Rights Committee has commented that this right of cross-examination must, to satisfy the principle of equality of arms (See also 6.1), be such that the accused has the same legal powers of cross-examination as are available to the prosecution.⁶⁸⁷ Given that the right to call witnesses also applies in civil proceedings (See also 6.7.1), so too does the right to cross-examine witnesses in civil proceedings.

The right to cross-examine witnesses, which is an essential aspect of the right to a fair trial, requires, in principle, that the applicant should have an opportunity to challenge any aspect of the witness' statement or testimony during a confrontation or an examination.⁶⁸⁸ In *Dugin v Russian Federation*, the failure to allow a witness to be summoned for cross-examination

681 *Khomidova v Tajikistan*, HRC Communication 1117/2002, UN Doc CCPR/C/81/D/1117/2002 (2004), para 6.5.

682 *Bönisch v Austria* [1985] ECHR, para 32; *Sara Lind Eggertsdóttir v Iceland* [2007] ECHR 553, para 47.

683 *Mirilashvili v Russia* [2008] ECHR 1669, para 178 as well as *Stoimenov v the former Yugoslav Republic of Macedonia* [2007] ECHR 257, para 40.

684 In *Brandstetter v Austria* [1991] ECHR 39, para 44.

685 *Mirilashvili v Russia* [2008] ECHR 1669, para 178; *Sara Lind Eggertsdóttir v Iceland* [2007] ECHR 553, para 47 *in fine*.

686 *Bricmont v Belgium* [1989] ECHR 12, para 81.

687 UN Human Rights Committee, CCPR General Comment 32 (2007), para 39.

688 *Bricmont v Belgium* [1989] ECHR 12, para 81.

was found to violate Article 14 of the ICCPR, particularly in circumstances where the court gave very considerable weight to the statement of that witness in its decision.⁶⁸⁹

All evidence adduced at trial must normally be produced in the presence of the accused, with a view to facilitating adversarial arguments (See also 6.1.2). This does not mean, however, that the statement of a witness must always be made in court.⁶⁹⁰ The use as evidence of statements obtained at the stage of a police inquiry or a judicial investigation without the appearance of the witness in person at the trial is not, in itself, inconsistent with the right of cross-examination, provided that the defendant has been given an adequate opportunity to challenge and question the witness when that witness made the statement, or at a later stage of the proceedings prior to the trial itself.⁶⁹¹

However, where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the pre-trial stage or at the trial, this would be incompatible with the guarantees provided for by Article 6 of the ECHR.⁶⁹² In *Balsytė-Lideikienė v Lithuania*, the editor of a company publishing calendars that were found to be inciting ethnic hatred was made subject to an administrative penalty, including the seizure of unsold copies of the calendar. The European Court of Human Rights recognized that the conclusions provided by the experts during the pre-trial stage played a key role in the proceedings against the applicant, who had been denied the opportunity to question the experts during the trial. The refusal to have the experts examined in open court was considered by the European Court to be a violation of Article 6.⁶⁹³ In *Saïdi v France*, the European Court took the view that, although there were undeniable difficulties in combating drug trafficking and severe consequences caused by it, such considerations did not justify restricting the rights of the defence. A witness' testimony in that case constituted the sole basis for the applicant's conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine the witness concerned.⁶⁹⁴

To allow effective enjoyment of the right to cross-examination, it should be recalled that there is a right, applicable to both criminal and civil proceedings, to disclosure of all material relevant to the case (See also 6.3.5). In *Peart v Jamaica*, for example, it became apparent during the cross-examination by the defence of the main witness for the prosecution that

689 *Dugin v Russian Federation*, HRC Communication 815/1998, UN Doc CCPR/C/81/D/815/1998 (2004), para 6.3; and *Kulov v Kyrgyzstan*, HRC Communication 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), para 8.7.

690 *Asch v Austria* [1991] ECHR 28, para 27.

691 *Mirilashvili v Russia* [2008] ECHR 1669, para 163; *Asch v Austria* [1991] ECHR 28, para 27; *Isgrò v Italy* [1991] ECHR para 34; *Kostovski v the Netherlands* [1989] ECHR 20, para 41.

692 *Unterpertinger v Austria* [1986] ECHR 15 para 28, 33; *Balsytė-Lideikienė v Lithuania* [2008] ECHR 1195, para 62.

693 *Balsytė-Lideikienė v Lithuania* [2008] ECHR 1195, paras 64–66.

694 *Saïdi v France* [1993] ECHR 39, para 44.

the witness had made a written statement to the police on the night of the alleged offence. The prosecution refused to provide the defence counsel with a copy of the statement, and the trial judge subsequently held that the defence had failed to put forward any reason why a copy of the statement should be provided. It transpired that, in the written statement, the witness had named another man as the one who had shot the victim in the proceedings. Even notwithstanding this, the Human Rights Committee took the view that the evidence of the witness, as the only eyewitness produced at trial, was of primary importance in the absence of any other corroborating evidence. It concluded, therefore, that the failure to make the police statement available seriously obstructed the defence in its cross-examination of the witness, thereby constituting a violation of Article 14(3)(e) of the ICCPR.⁶⁹⁵

6.7.4 Limitations on the right to call and examine witnesses

The right to call and examine witnesses does not provide an unlimited right to obtain the attendance of any witness at any time or in any manner.⁶⁹⁶ The right is only to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses.⁶⁹⁷ Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of Article 7 of the ICCPR (See also 5.2.6), the Human Rights Committee has explained that “it is primarily for the domestic legislatures of States Parties to determine the admissibility of evidence and how their courts assess it”.⁶⁹⁸ The European Court of Human Rights has similarly reiterated on several occasions that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. In order to avoid the European Court taking on a role as a court of further appeal on admissibility issues (the **fourth instance doctrine**), the Court has its role as limited to ascertaining whether the proceedings as a whole, including the way in which evidence was taken, were fair (See also 6.1.2).⁶⁹⁹

In *McLawrence v Jamaica*, the applicant claimed a violation of article 14(1) of the ICCPR, on the basis that a witness deemed to be crucial to the defence was unavailable at trial. Reaffirming that the right to a fair trial does not encompass an absolute right to have a certain witness testify in court, and having regard to the fact that repeated efforts had been made to

695 *Peart v Jamaica*, HRC Communications 464/1991 and 482/1991, UN Doc CCPR/C/54/D/464/1991 (1995) and CCPR/C/54/D/482/1991 (1995), para 11.5.

696 *Johnson v Spain*, HRC Communication 1102/2002, UN Doc CCPR/C/86/D/1102/2002 (2006), para 6.5; *Vidal v Belgium* [1992] ECHR 47, para 33.

697 UN Human Rights Committee, CCPR General Comment 32 (2007), para 39; and *Khuseynova and Butaeva v Tajikistan*, HRC Communications 1263/2004 and 1264/2004, UN Doc CCPR/C/94/D/1263–1264/2004 (2008), para 8.5.

698 UN Human Rights Committee, CCPR General Comment 32 (2007), para 39; and *Khuseynova and Butaeva v Tajikistan*, HRC Communications 1263/2004 and 1264/2004, UN Doc CCPR/C/94/D/1263–1264/2004 (2008), para 8.5.

699 *Vidal v Belgium* [1992] ECHR 47, para 33; *Edwards v the United Kingdom* [1992] ECHR 77, para 34; *Teixeira de Castro v Portugal* [1998] ECHR 52, para 34; *Allan v the United Kingdom* [2002] ECHR 702, para 42; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 51; *Mirilashvili v Russia* [2008] ECHR 1669, para 162.

secure the attendance of the witness in question, the Human Rights Committee did not consider that a violation of Article 14 had been established.⁷⁰⁰ The Human Rights Committee decided otherwise in *Shchetka v Ukraine*, where the failure of the domestic court to examine the defendant's request to call several important witnesses that could have confirmed his alibi was found to amount to a violation of Article 14(3)(e).⁷⁰¹

A different type of limitation occurs when victims and witness are authorized to testify anonymously, therefore depriving the defendant of the right to cross-examination. In principle, the admissibility of such evidence represents a breach of the due process of law, in that it places the defendant in a position of objective inequality. However, in exceptional circumstances, the principles of fair trial also require that the interests of the defence are balanced against those of witnesses or victims called upon to testify.⁷⁰² In these instances, judicial authorities shall adopt measures to sufficiently compensate the handicaps under which the defence laboured,⁷⁰³ and shall never rely for the purpose of the accused's conviction solely or to a decisive extent on those pieces of evidence.⁷⁰⁴ (See also 7.1.1)

6.8 INTERPRETATION AND TRANSLATION

Article 14(3) of the ICCPR

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

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

Article 6(3) of the ECHR

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

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

The right to have the free assistance of an interpreter is expressed within Article 14 of the ICCPR and Article 6 of the ECHR as applying to criminal proceedings. It is only by granting practical and effective enjoyment of the rights of the parties to a proceeding that the parties

700 *McLawrence v Jamaica*, HRC Communication 702/1996, UN Doc CCPR/C/60/D/702/1996 (1997), para 5.8.

701 *Litvin v Ukraine*, HRC Communication 1535/2006, UN Doc CCPR/C/102/D/1535/2006 (2011), para 10.4.

702 *Doorson v the Netherlands* [1996] ECHR 14, para 70.

703 *Doorson v the Netherlands* [1996] ECHR 14, para 72; *Kostovski v the Netherlands* [1989] ECHR 20, para 43; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 54.

704 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, paras 55, 63. *Doorson v the Netherlands* [1996] ECHR 14, para 76.

can be placed on an equal footing. In this respect, the right to have the free assistance of an interpreter enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings (See also 6.1).⁷⁰⁵ The Human Rights Committee has implied, however, that exceptional circumstances might also require that the free assistance of an interpreter be provided to a party in non-criminal proceedings, by application of the principle of equality of arms (See also 6.1), i.e., where an indigent party could not otherwise participate in the proceedings on equal terms, or witnesses produced by it be examined.⁷⁰⁶

6.8.1 Scope of application: level of understanding by the defendant

The wording of Article 14(3)(f) of the ICCPR and Article 6(3)(e) of the ECHR guarantees a right to the free assistance of an interpreter if a defendant in criminal proceedings “cannot understand or speak the language used in court”. The right applies to aliens as well as nationals.⁷⁰⁷ The test for application of the right is whether or not the person sufficiently understands what evidence is being presented to the court so that s/he or is able to challenge the evidence and present her/his defence. The lack of understanding must present an obstacle to the enjoyment of the rights of the defence.⁷⁰⁸ The European Court of Human Rights has stressed that the defendant’s linguistic knowledge is vital, especially having regard to the nature of the offence and the complexity of the communications addressed to the defendant.⁷⁰⁹

Such problems were experienced by an Italian national in criminal proceedings in the United Kingdom. The European Court of Human Rights, in *Cuscani v the United Kingdom*, found that it was clear that the defendant, despite having lived in the United Kingdom for a number of years, could not sufficiently understand English, and that this presented real difficulties to him in understanding the case against him.⁷¹⁰ In *L. N. P. v Argentina*, a case of rape where the victim was a 15-year-old girl belonging to an ethnic minority, the Human Rights Committee found a violation of the applicant’s right to access to the courts in conditions of equality (See also 2.1), due to the fact that proceedings were held entirely in Spanish, without interpretation, despite the fact that both the applicant and other witnesses had difficulty communicating in that language.⁷¹¹ In *Domukovsky and Others v Georgia*, the defendant appeared in a court in Georgia and did not receive a copy of the indictment against him in his native Russian, and was denied the services of an interpreter. However, the trial court had found that the applicant’s knowledge of the Georgian language was excellent and it was noted that the author had made his statements in Georgian. The Human Rights Committee, therefore, took the view that the information before it did not show that

705 UN Human Rights Committee, CCPR General Comment 32 (2007), para 40

706 UN Human Rights Committee, CCPR General Comment 32 (2007), para 13.

707 UN Human Rights Committee, CCPR General Comment 32 (2007), para 40.

708 UN Human Rights Committee, CCPR General Comment 32 (2007), para 40.

709 *Hermi v Italy* [2006] ECHR 875, para 71.

710 *Cuscani v the United Kingdom* [2002] ECHR 630, para 39.

711 *L. N. P. v Argentina*, HRC Communication 1610/2007, UN Doc CCPR/C/102/D/1610/2007 (2011), para 13.5.

Mr. Domukovsky's right under Article 14(3)(f) had been violated.⁷¹² A similar approach was followed by the European Court of Human Rights in *Lagerblom v Sweden*, in the case of a Finnish defendant being tried in Sweden. The European Court acknowledged that the applicant's knowledge of Swedish was somewhat limited, despite his lengthy stay in Sweden. However, the court observed that interpretation between Finnish and Swedish had been arranged by the domestic court and that the applicant had made oral and written submissions in Finnish that were translated and entered into the case file. In these circumstances, the Court considered that the interpretation assistance provided had been adequate.⁷¹³

The right to the free assistance of an interpreter has been understood and applied by many countries as extending to persons with hearing or speech impediments, where the normal method of communication is by sign language.⁷¹⁴ If the absence of interpretive assistance in such circumstances would mean that the person cannot enjoy her/his rights of defence, the principles of the equality of arms and of granting practical and effective enjoyment of rights should be capable of guaranteeing the provision of assistance.

6.8.2 Scope of application: outcome of proceedings not relevant

Where the right to free assistance of an interpreter applies (See also 6.8.1), reliance on it is not dependent on the outcome of the proceedings.⁷¹⁵ If a person has had to pay for her/his own interpreter in circumstances where there was an entitlement to free assistance of an interpreter, and where this was applied for and denied, a violation of the right to free assistance will be found, even if the case ended favourably for that person.⁷¹⁶ The right to free interpretive assistance is **absolute** such that, when it is ascertained that the person cannot understand or speak the language used in court, there can be no exception to or suspension of the right.⁷¹⁷

6.8.3 Interpretation of oral proceedings and translation of documentation

The right to free assistance of an interpreter applies to all stages of the oral proceedings.⁷¹⁸ In *Luedicke, Belkacem and Koç v Germany*, the Court stated that Article 6(3)(e) of the ECHR "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

⁷¹² *Domukovsky and Others v Georgia*, HRC Communications 623/1995, 624/1995, 626/1995, 627/1995, UN Docs CCPR/C/62/D/623/1995 (1998), CCPR/C/62/D/624/1995 (1998), CCPR/C/62/D/626/1995 (1998), and CCPR/C/62/D/627/1995 (1998), para 18.7. See also *Guesdon v France*, HRC Communication 219/1986, UN Doc CCPR/C/39/D/219/1986 (1990), para 10.2.

⁷¹³ *Lagerblom v Sweden* [2003] ECHR 28, para 62.

⁷¹⁴ Mole and Harby, *op. cit.*, note 132, p.68.

⁷¹⁵ UN Human Rights Committee, CCPR General Comment 13 (1984), para 13.

⁷¹⁶ *Luedicke, Belkacem and Koç v Germany* [1978] ECHR 5, para 48.

⁷¹⁷ *Luedicke, Belkacem and Koç v Germany* [1978] ECHR 5, para 40.

⁷¹⁸ UN Human Rights Committee, CCPR General Comment 32 (2007), para 40; *Harward v Norway*, HRC Communication 451/1991, UN Doc CCPR/C/51/D/451/1991 (1994), para 9.5; and *Sobhraj v Nepal*, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para 7.2.

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".⁷¹⁹ However, the provision does not go so far as to require a written translation of all items of written evidence or official documents in the procedure.⁷²⁰ In *Kamasinski v Austria* the European Court clarified that the right to interpretive assistance applies not only to oral statements made at the trial, but also to documentary material and the pre-trial proceedings where this is necessary to enable the defendant to have knowledge of the case against her/him and to defend her/himself.⁷²¹ With specific reference to the indictment, the Court said that Article 6(3)(a) (pertaining to the "right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him") does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant. However, the Court added, a defendant not conversant with the language of the trial court may, in fact, be put at a disadvantage if s/he is not also provided with a written translation of the indictment in a language s/he understands.⁷²² In *Singarasa v Sri Lanka*, the Human Rights Committee found a violation of Article 14, in circumstances where the applicant's conviction relied solely on his confession and where there was no interpreter provided during his interrogation. The Committee concluded that these circumstances denied a fair trial in accordance with Article 14 as a whole.⁷²³

The Human Rights Committee has found it to be sufficient, where a defendant is represented by counsel who speaks and understands the language in which investigatory documents are written for the relevant documents to be made available to counsel alone.⁷²⁴

6.8.4 Competence of the interpreter

Where the right to interpretive assistance applies, the person concerned must be provided with a competent interpreter and should not be permitted to rely on the untested language skills of a friend or relative.⁷²⁵ Furthermore, for the right to assistance of an interpreter to be practical and effective, the competent authorities have an obligation, where they are put on notice that interpretation may not be adequate, to impose a degree of control over the adequacy of the interpretation provided.⁷²⁶

Should any issue arise during the course of a trial that an interpreter is, or is thought to be, incompetent, the Human Rights Committee has clarified that it is incumbent upon the defence to raise the issue during the course of the trial. In *Griffin v Spain*, for example, the

⁷¹⁹ *Luedicke, Belkacem and Koç v Germany* [1978] ECHR 5, para 48.

⁷²⁰ *Kamasinski v Austria* [1989] ECHR 24, para 74.

⁷²¹ *Kamasinski v Austria* [1989] ECHR 24, para 74. Concerning interpretation during pre-trial proceedings, see also *Harward v Norway*, HRC Communication 451/1991, UN Doc CCPR/C/51/D/451/1991 (1994), para 9.5.

⁷²² *Kamasinski v Austria* [1989] ECHR 24, para 78.

⁷²³ *Singarasa v Sri Lanka*, HRC Communication 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (2004), para 7.2.

⁷²⁴ *Harward v Norway*, HRC Communication 451/1991, UN Doc CCPR/C/51/D/451/1991 (1994), para 9.5.

⁷²⁵ *Cuscani v the United Kingdom* [2002] ECHR 630, para 39.

⁷²⁶ *Kamasinski v Austria* [1989] ECHR 24, para 74.

author claimed that he had not received a fair trial because of the incompetence of the court interpreter and the judge's failure to intervene in this respect, and that he was convicted because of the poor translation of a question, as a result of which his statement during the trial differed from his original statement to the examining magistrate. The Committee took the view that, because the author did not complain about the competence of the court interpreter to the judge – although he could have done so – it could not find a violation of Article 14(3)(f) of the Covenant.⁷²⁷

6.8.5 No right to speak in one's language of choice

The Human Rights Committee has said that, provided the accused knows the official language sufficiently to defend her/himself effectively, Article 14(3)(f) of the ICCPR does not afford her/him with the ability to speak in the person's own tongue.⁷²⁸ The author in *C. L. D. v France*, for example, claimed to be a victim of violations of Articles 14 (fair trial) and 26 (non-discrimination) of the ICCPR because he was unable to give evidence in the language of his choice. The Committee took the view that Article 14(1), *juncto* paragraph 3(f), does not imply that an accused be afforded an opportunity to express her/himself in the language that s/he normally speaks or in which s/he expresses himself with a maximum of ease.⁷²⁹

It must be acknowledged, however, that increasingly a number of regional treaties foresee a much broader entitlement to use the language of the defendant's choice. For example, under the Framework Convention for the Protection of National Minorities: "The Parties undertake to guarantee the right of every person belonging to a national minority [...] to defend himself or herself in his or her language, if necessary with the free assistance of an interpreter."⁷³⁰ The European Charter for Regional or Minority Languages goes even further, as it provides a list of detailed guarantees related to the use of a minority language in criminal, civil and administrative proceedings.⁷³¹

⁷²⁷ *Griffin v Spain*, HRC Communication 493/1992, UN Doc CCPR/C/53/D/493/1992 (1995), para 9.5.

⁷²⁸ *Guesdon v France*, HRC Communication 219/1986, UN Doc CCPR/C/39/D/219/1986 (1990).

⁷²⁹ *C. L. D. v France*, HRC Communication 439/1990, UN Doc CCPR/C/43/D/439/1990 (1991), para 4.2.

⁷³⁰ Framework Convention for the Protection of National Minorities, H(1995)010, February 1995, article 10, para 3.

⁷³¹ European Charter for Regional or Minority Languages, article 9 para 1(a), 1(b) and 1(c).

CHECKLIST: EQUALITY OF ARMS AND RIGHTS TO A FAIR TRIAL***Right to adequate preparation***

1. In the case of criminal proceedings:
 - (a) Was the defendant informed of the criminal charges faced?
 - Was the information provided promptly, i.e., as soon as possible after the person was formally charged with the offence, or after the person was publicly named as such?
 - If the information was provided orally, was this later confirmed in writing?
 - Was the information sufficiently detailed, i.e., did it disclose the acts that the defendant was accused of having committed and the law under which those alleged acts constitute a criminal offence?
 - Was the information provided in a language understood by the defendant?
 - In cases where the defence counsel is known to the authorities:
 - Was s/he provided with the copies of the indictment?
 - (b) Was the defendant allowed to communicate with counsel of choosing during the preparation of the defence case?
 - Was access to counsel prompt, i.e., soon after the defendant was informed of the criminal charges faced?
 - Did the defendant have the right to choose the counsel?
 - Was the defendant able to meet with counsel in private and in conditions that fully respected the confidentiality of the communications?
 - Was legal representation allowed at all stages of the criminal proceedings, including during interrogation?
2. Did the parties have “adequate time” to prepare their case?
 - a) Was time allowed for the parties to familiarize themselves with documentary evidence held by other parties?
 - b) Did counsel request an adjournment, or was it otherwise obvious to the court that adequate time had not been allowed for the parties to familiarize themselves with documentary evidence held by other parties?
 - c) Were reasonable requests for adjournment granted by the court? If not, was the reasoning given in writing to the interested parties?
 - d) In determining the adequacy of the time to prepare, or the reasonableness of the request for adjournment, did the court have regard to the complexity of the case, the seriousness of the criminal charges faced (if in a criminal proceeding) and the volume of the documentary material to be reviewed?
3. Were the parties provided with disclosure of information about the case?

- a) In the case of criminal proceedings, did the prosecuting and investigating authorities disclose any material in their possession, or to which they could gain access, which might assist the defendant in exonerating her/himself or in obtaining a reduction in sentence?
 - b) If the court or tribunal gathered evidence additional to that presented by the parties, was this information disclosed to the parties?
4. If certain information about the case was not disclosed:
- (a) Was non-disclosure required to pursue a legitimate aim? A legitimate aim might include the protection of national security; preserving the fundamental rights of another individual, such as the protection of witnesses at risk of reprisals; or safeguarding an important public interest, such as allowing police to keep secret their methods of investigating crimes.
 - Was non-disclosure strictly necessary to achieve a legitimate aim?
 - Was non-disclosure proportionate, i.e., as between the ameliorating effects of the non-disclosure and the negative impact this had on the ability of the parties to respond to the case?
 - Was the decision not to disclose information made or approved by the trial judge, or a judicial officer with full knowledge of the issues in the case?
 - (b) Were safeguards introduced to ensure that any difficulties caused as a result of the non-disclosure were “sufficiently counterbalanced”?
 - Were the parties kept informed and permitted to make submissions and participate in the decision-making process (as far as possible without disclosing the material concerned)?
 - Were the parties ultimately able to respond to the case?

Timely hearing

5. Were procedural delays or postponements of the hearing reasonable, having regard to the circumstances of the case, including:
- a) the complexity of the legal issues being determined;
 - b) the nature of the acts to be established;
 - c) the number of the accused persons, or parties in civil proceedings, and witnesses giving evidence;
 - d) the conduct of the accused or any of the parties to civil proceedings, including whether adjournments were requested by them or delay tactics were adopted;
 - e) the right of parties to adequate time to prepare their case;
 - f) the length of each individual stage of the proceeding;
 - g) the need for law enforcement authorities to obtain mutual legal assistance;
 - h) any detrimental effect caused by the delay upon the individual’s legal position;

- i) the availability of remedies to accelerate the proceedings, and whether these were called upon;
 - j) the outcome of any appellate proceedings;
 - k) the link the case has with any other proceeding and whether the interests of justice call for stages in the two proceedings to be co-ordinated or to await steps or decisions to be taken in the other proceedings; and
 - l) the repercussions the case may have on the future application of national law.
6. In the case of criminal proceedings, if the defendant was denied bail and held in custody during the course of the trial, was the trial conducted as expeditiously as possible?

Right to be heard

7. Has the defendant (in criminal proceedings) or the respondent (in civil proceedings) been given an opportunity to respond to the case by way of a hearing?
8. In the context of criminal proceedings, did the hearing take place in the presence of the defendant?
 - a) If criminal proceedings proceeded by way of a trial *in absentia*, did the competent authorities take all due steps to inform the defendant (or the counsel, if known) of the charge and of the date, time and venue of the hearing?
 - b) Did the hearing continue, even after the defendant had prematurely left the courtroom for any reason? In the latter case, was the defence lawyer present?
9. In the context of civil proceedings, if the hearing did not take place in the presence of the parties (i.e., if it was conducted on the basis of written documentation), were the circumstances of the case such that the absence of an oral hearing prejudiced the ability of any of the parties to present their case or respond to the case against them?

Right to defend oneself

10. If chosen by one or more of the parties, were the parties allowed to represent themselves during the hearing?
 - If not, which were the grounds for such restriction?
 - Was the restriction based on an objective and sufficiently serious purpose that does not go beyond what is necessary to uphold the interests of justice, including, for instance, the interests of ensuring that the defendant is able to properly defend serious charges?
11. If one or more of the parties appeared without legal representation:
 - (a) In the context of criminal proceedings, was the defendant informed of her/his entitlement to legal assistance?

- (b) In the context of civil proceedings, was it evident that a lack of legal representation would have resulted in an inequality of arms, such that the unrepresented party should have been informed of the entitlement to legal assistance?
 - (c) Did the court justify whether and on what basis the interests of justice required or did not require the appointment of an attorney?
12. If one or more of the parties seeks to be represented by counsel:
- (a) Was the party allowed to be represented by legal counsel?
 - (b) If the party did not have sufficient means to pay for legal assistance, and if the interests of justice required that counsel be assigned, was the party provided with free legal assistance?
 - (c) Was the party allowed to choose who would represent her/him?
 - (d) Was counsel independent, competent and effective?
 - If counsel was not competent and effective, was this manifest to the trial judge?
 - Did the court address this problem in any way (for example, by adjourning the case)?
 - If the party was provided with free legal assistance, were there any complaints during the trial about the independence, competence and effectiveness of the *ex officio* defence attorney?
 - Did the court address this problem in any way (for example, by replacing the attorney)?
 - (e) Was the party able to consult with counsel in private and in conditions that fully respected the confidentiality of the communications?

Calling and examining witnesses

13. Were the parties provided with the same powers of compelling the attendance of witnesses, including expert witnesses, relevant to the case? Were the parties provided with the same opportunities to examine witnesses? Specifically:
- a) Was the defence given adequate notice of witnesses or experts that the prosecution intends to call at trial?
 - b) What steps were taken by the court to secure the attendance of witnesses and experts, and could these steps be considered sufficient?
 - c) Did the court allow witnesses requested by the defence?
 - d) If any defence witnesses were rejected, on what grounds did this happen?

14. Were the parties provided with the same opportunities to cross-examine witnesses, so as to enable each party to question and challenge witnesses that are presented by other parties in the proceeding?
- a) If written statements were introduced during the trial as substitute for oral testimony, did the parties have the opportunity to challenge them in person at the time when they were made (for instance, during pre-trial interrogation)?

15. If anonymous witness and victims were heard:
- a) On what exceptional ground was this allowed? Was a concrete assessment of the reprisal's threat made by the court or was the seriousness of the charge the main criterion followed?
- b) Did the court adopt any measures to counterbalance the limitation to the rights of the defence? Was the defence counsel allowed to cross-examine anonymous witness and victims?
- c) Was the sentence solely or to a decisive extent based on anonymous statements?

Interpretation and translation

16. In the context of criminal proceedings:
- a) Did the accused require the free assistance of an interpreter, i.e., could the accused not understand or speak the language used in court to the extent that this presented an obstacle to her/his enjoyment of the rights of the defence?
- b) Was there provision of interpretive assistance at all stages of the oral proceedings?
- c) Was documentary material translated, or at least provided to legal counsel who could understand the documentary material?
- d) Was the appointed interpreter an official court interpreter selected from the list of court interpreters?
- e) Was the interpreter translating in the mother tongue of the defendant or in a third language?
- f) Did the defendant appear to fully understand the translated questions?
17. If there was a problem with any of the above, how did the court react?
18. In the context of civil proceedings, did the principles of achieving equality between the parties and of enabling effective participation in the proceedings, mean that interpretation and/or translation should have been provided to one or more of the parties?
19. Were interpretation and translation services competent?
- a) If not, did the party concerned, or her/his counsel, bring this to the attention of the trial judge or competent authorities?

- b) Was it otherwise manifest to the judge and the competent authorities that the interpretation and translation services were not adequate? If so, how did the court react?

Equality of arms and instruction concerning rights during trial

- 20. In addition to the above factors, was there anything else about the conduct of the hearing that resulted in inequality between the parties?
 - a) Did the parties enjoy the same procedural rights?
 - b) If not, was any distinction based on law and capable of justification on objective and reasonable grounds, not entailing actual disadvantage or other unfairness?
 - c) Were the parties able to present their case (including to gather evidence) on equal terms, i.e., under conditions that did not place them at a substantial disadvantage vis-à-vis their opponent?
- 21. In addition to the above factors, was there any information the authorities should have given the parties in order to ensure that they were able to exercise the rights to a fair trial in a practical and effective way?

CHAPTER VII

Participation and Protection of Victims and Witnesses

The provisions of the ICCPR and ECHR dealing with fair trial standards (See also Chapter 1) do not explicitly refer to the interests or rights of witnesses, including victims called on to give evidence, nor of victims per se, as this might apply to their treatment during the investigative and trial processes. However, both the Human Rights Committee and the European Court of Human Rights have taken a proactive approach, and a body of case law does exist to date on victims and witness protection that goes beyond the strict reference to provisions dealing with fair trial standards. Particularly, the European Court has examined the call for victim and witness protection in relation to several Articles of the ECHR, namely: the obligation of the State to protect life (Article 2); the obligation of the State to protect the right not to be subjected to inhuman or degrading treatment when giving evidence (Article 3); and the right to respect for private and family life (Article 8). In so doing, the European Court has always balanced these rights against the right of the defendant to a fair trial (Article 6).⁷³² Therefore, in the assessment of the question whether an accused received a fair trial, victims' and witnesses' rights must be also taken into account. The European Court accepts that certain measures may be taken for the purpose of protecting victims and witnesses, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.⁷³³ The adoption of these measures will in all cases require compliance with the principles of **necessity** and **proportionality**, bearing in mind that the right to a fair administration of justice holds such a prominent place in a democratic society that it cannot be sacrificed to expediency.⁷³⁴

732 See *Jasper v the United Kingdom* [2000] ECHR 90, para 52; *Doorson v the Netherlands* [1996] ECHR 14, para 70; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 53; *Bocos-Cuesta v the Netherlands* [2005] ECHR, para 69. See also Explanatory memorandum to the Council of Europe Report on the protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, January 2011, p. 8, para 12.

733 *Bocos-Cuesta v the Netherlands* [2005] ECHR, para 69; *S. N. v Sweden* [2002] ECHR, para 47.

734 *Kostovski v the Netherlands* [1989] ECHR 20, para 44.

7.1 PROTECTION OF WITNESSES

Courts are called on to take steps to protect defendants, victims, witnesses and other parties who may be at risk or in danger as a result of participating in judicial proceedings.⁷³⁵ Protection of persons involved in the proceedings, including witnesses, is a necessary condition to deliver justice.

Witnesses play a very important role in ensuring an effective investigation of criminal proceedings – at times, providing the only available evidence. However, when witnesses fear reprisals, threat or intimidation, the risk is that they will not be co-operative in the proceedings. Witnesses need to be given support not only in the course of the trial but also before the trial commences and afterwards.⁷³⁶ In cases where the witness is also the victim of the crime, s/he may be unwilling to testify to avoid re-experiencing the trauma when giving testimony. As a consequence, the lack of appropriate witness/victim protection and support may result in denial of justice, as the court will have no alternative but to dismiss the case or acquit the defendant when the necessary evidence may not be otherwise collected.

Witness protection is not only fundamental to ensure an effective criminal investigation, it also serves the purpose of adequately protecting the witness's private and family life, liberty and security.⁷³⁷ The Council of Europe has issued a number of recommendations on witness protection and support mechanisms, such as on the use of pseudonyms and the establishment of witness protection programmes, which are intended to guarantee the fundamental rights of victims and witnesses participating in criminal proceedings.⁷³⁸

The Council of Europe, through its recommendations, urges States Parties to give serious consideration to the rights and interests of witnesses in criminal proceedings. Particularly, the Council of Europe has set forth the following two principles: that witnesses should be questioned in a manner which gives due consideration to their personal situation, rights, and dignity;⁷³⁹ and that States should enact legislation and introduce practices ensuring that

735 UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985); CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence, especially part II and para 12; CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, especially part III.

736 See CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 2, CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence, para 2.

737 *Doorson v the Netherlands* [1996] ECHR 14, para 70; see also CoE Recommendation Rec (2006)8 on Assistance to Crime Victims, paras 2.1, 2.2.

738 CoE Recommendation R(85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure, CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence, and CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice.

739 See CoE Recommendation R(85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure, para 8.

witnesses may testify freely and without intimidation.⁷⁴⁰ As a consequence, several countries have witness and victim protection programmes, though much remains to be done in terms of their implementation.⁷⁴¹

The right of victims and witnesses to be protected against intimidation is also expressed, in general terms, by Article 34 of the Protocol 11 to the ECHR procedure on the filing of complaints. States Parties to the ECHR undertake not to hinder the exercise of the right to file application of any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights set forth in the ECHR and its protocols.⁷⁴² In *Aksoy v Turkey*, the European Court of Human Rights recalled that it is of the utmost importance for the effective operation of the system of individual petition that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.⁷⁴³ In *Kurt v Turkey*, the European Court clarified that the expression “any form of pressure” encompasses not only direct coercion and flagrant acts of intimidation of applicants, potential applicants, or their families or legal representatives, but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy.⁷⁴⁴

At the international level, there is a growing trend in allowing the participation of victims (See also 7.2) and ensuring protection of witnesses and victims in criminal proceedings. Article 13 of the UN Convention against Torture places a legal obligation upon States Parties to take the necessary steps to “ensure that... witnesses are protected against all ill-treatment or intimidation as a consequence of... evidence given”.⁷⁴⁵ The same legal obligation is captured by Article 12(1) of the International Convention for the Protection of all Persons from Enforced Disappearance.⁷⁴⁶

740 CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 1; CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence, para 1.

741 See for instance, the UN Human Rights Committee Concluding Observations: Bosnia and Herzegovina, UN Doc CCPR/C/BIH/CO/1 (2006), para 13.

742 Article 34 of the CoE Protocol 11 of the European Convention for the protection of human rights and fundamental freedoms.

743 *Aksoy v Turkey* [1996] ECHR 68, para 105; See also, *Akdivar and Others* [1996] ECHR 35, para 105.

744 *Kurt v Turkey* [1998] ECHR 44, para 160.

745 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 13. See also: Report of the Committee against Torture, 39th Session (5–23 Nov. 2007) A 63/44, regarding Benin (para 323 (10)); regarding Uzbekistan (para 37(6)(d)); Costa Rica (para 40(12)) See also: UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, annex to the Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professional Training Series No. 8/Rev. 1 (2004), p. 59.

746 The International Convention for the Protection of all Persons from Enforced Disappearance, adopted 20 December 2006, art 12(1).

The Human Rights Committee has interpreted Article 9(1) of the ICCPR to encompass the right of witnesses to protection. In *Rajapakse v Sri Lanka*, the Human Rights Committee observed that, because of the failure from the State to provide the author with witness protection, he had to go into hiding, out of fear of reprisals.⁷⁴⁷ In finding that denying protective measures to non-detained persons subject to State jurisdiction constitutes violation of Article 9(1), the Human Rights Committee concluded that Sri Lanka was obliged “to take effective measures to ensure that... the author is protected from threats and/or intimidation with respect to the proceedings”.⁷⁴⁸

“Appropriate measures” for the protection of witnesses is required by States Parties to the Convention against Transnational Organized Crime.⁷⁴⁹ This is also an issue relevant to vulnerable witnesses, particularly in the case of child witnesses or victims, in which case the best interests of the child, including her/his her privacy, should be protected;⁷⁵⁰ and in the case of crime within the family.⁷⁵¹ For victims of or witnesses to of sexual violence, the European Court of Human Rights has regard to the special features of criminal proceedings concerning sexual offences, which are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant, and even more so in a case involving a minor. In this context, the European Court acknowledges that certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.⁷⁵² Normally, however, these measures do not justify the use of anonymous witnesses at trial.

7.1.1 *Anonymous witnesses*

The interests of a witness, including a victim giving information to police or called on to testify at trial, may, in limited circumstances, require that the identity of the witness remain confidential. This will most often be the case where there are concerns about the

747 *Rajapakse v Sri Lanka*, HRC Communication 1250/2004, UN Doc CCPR/C/87/D/1250/2004 (2006), para 9.7.

748 *Rajapakse v Sri Lanka*, HRC Communication 1250/2004, UN Doc CCPR/C/87/D/1250/2004 (2006), para 11. See also: *Delgado Páez v Colombia*, HRC Communication 195/1985, UN Doc CCPR/C/39/D/195/1985 (1990), para 5.5

749 UN Convention against Transnational Organized Crime, articles 24 and 25. See, in this regard, UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004), paras 341–373. See also: UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008); and CoE Recommendation Rec(2001)11 concerning Guiding Principles on the Fight against Organised Crime, para 24.

750 *Accardi and Others v Italy* [2005] ECHR. UN ECOSOC, Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), article 8(c) and parts X (privacy), XI (hardship), XII (safety) and XIV (special preventive measures).

751 CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence, especially part IV.

752 *Bocos-Cuesta v the Netherlands* [2005] ECHR, para 69; see also decision on inadmissibility, *Accardi and Others v Italy* [2005] ECHR. See also: CoE Parliamentary Assembly Resolution 1212 (2000) on Rape in Armed Conflicts; the CoE Recommendation 1325 (1997) on Traffick in Women and Forced Prostitution; and more generally, the CoE Recommendation Rec(2002)5 on the Protection of Women Against Violence; and the United Nations General Assembly Declaration on the Elimination of Violence against Women.

possible intimidation of witnesses, or retaliation against witnesses in the event of their giving evidence against an accused. As explained by the European Court in *Doorson v the Netherlands*:

“It is true that Article 6 [fair trial] does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 [privacy] of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled.”⁷⁵³

While ensuring that the parties have adequate opportunity to challenge the evidence given by a witness/collaborator of justice, a number of measures can be adopted aimed at preventing identification of the witness, including:⁷⁵⁴

- audiovisual recording of statements made by witnesses/collaborators of justice during the preliminary phase of the procedure;
- using statements given during the preliminary phase of the procedure as evidence in court when it is not possible for witnesses to appear before the court, or when appearing in court might result in great and actual danger to the witnesses/collaborators of justice or to people close to them; pre-trial statements should be regarded as valid evidence if the parties have, or have had, the chance to participate in the examination, interrogation and/or cross-examination of the witness and to discuss the contents of the statement during the procedure;
- disclosing information which enables the witness to be identified at the latest possible stage of the proceedings and/or releasing only selected details;
- excluding or restricting the media and/or the public from all or part of the trial;
- using devices preventing the physical identification of witnesses and collaborators of justice, such as using screens or curtains, disguising the face of the witness or distorting her/his voice; and
- using video-conferencing.

The European Court has taken a cautious approach to the use of anonymous witnesses, as the use of their statements at trial will normally present handicaps for the defence and the equality of arms principle will be curtailed. There are three principal issues raised by the use of anonymous witnesses.

The first point is that an accused must be able to enjoy the right to be given an adequate and proper opportunity to challenge and question a witness, either at the time that the witness

⁷⁵³ *Doorson v the Netherlands* [1996] ECHR 14, para 70.

⁷⁵⁴ CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 17. See also CoE Recommendation R(97)13 concerning Intimidation of Witnesses and the Rights of the Defence, para 9.

gave her/his statement to investigating authorities, or at some later stage in the proceedings, such as at the trial itself (See also 6.7.3).⁷⁵⁵

The second issue associated with the use of anonymous witnesses is that if the defence is not aware of the identity of the person being questioned, it may thereby be deprived of the ability to demonstrate that the witness is prejudiced, hostile or unreliable.⁷⁵⁶ This is a problematic feature that will almost always exist when use of an anonymous witness is made.

The third issue arises where a witness does not give evidence in person, and the trial court is thereby not given the opportunity to observe the demeanour of an anonymous witness.⁷⁵⁷ This prevents the finder of fact from forming its own impression of the reliability of the witness.⁷⁵⁸ This may be counterbalanced by the screening off of witnesses in an area visible only to the judge, and jury where applicable.

Against this background, while the protection of witnesses may, in principle, be called for in order to prevent their intimidation, or to protect their lives or privacy, any disadvantages caused to the defence must be sufficiently **counterbalanced** by the procedures followed by the judicial authorities.⁷⁵⁹ This means that judicial authorities shall adopt measures and procedures to sufficiently compensate the handicaps under which the defence laboured.⁷⁶⁰

In assessing whether the protection of witnesses justified such handicaps imposed on the rights of defence, the European Court will always consider whether four important counterbalanced measures were applied by the domestic court.

First, the European Court will check whether the domestic court examined if there really existed a clear and serious threat in order to ensure that the protective measures are granted only when “strictly necessary” to satisfy the legitimate aim of protection.⁷⁶¹ The mere reference to the seriousness of the offence would not suffice, and a specific assessment should be made on the prospect of reprisal.⁷⁶²

755 *Kovač v Croatia* [2007] ECHR 597, para 26; *Lucà v Italy* [2001] ECHR 124, paras 39, 40–43; *Lüdi v Switzerland* [1992] ECHR 50, para 49; *Windisch v Austria* [1990] ECHR 23, para 26; *Kostovski v the Netherlands* [1989] ECHR 20, para 44.

756 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 59; *Windisch v Austria* [1990] ECHR 23, para 28; *Kostovski v the Netherlands* [1989] ECHR 20, para 42.

757 *Hulki Gunes v Turkey* [2003] ECHR 305, para 95; *Windisch v Austria* [1990] ECHR 23, para 29.

758 *Kostovski v the Netherlands* [1989] ECHR 20, para 43.

759 *Doorson v the Netherlands* [1996] ECHR 14, para 76; *Al-Khawaja and Tahery v the United Kingdom* [2009] ECHR 110, paras 47–48

760 *Doorson v the Netherlands* [1996] ECHR 14, para 72; *Kostovski v the Netherlands* [1989] ECHR 20, para 43; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 54.

761 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 58. See also CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 20.

762 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 61.

The second counterbalancing measure the European Court will look at is whether the domestic court kept the restriction on the defence rights to a minimum while deciding on the type and level of protections ordered. It is appropriate for domestic courts, when faced with the problem of absent or anonymous witnesses, to consider whether alternative measures could be employed that would be less restrictive of the rights of the defence than admitting witness statements as evidence.⁷⁶³

Third, the European Court will assess whether the rights of the defence were adequately compensated for the handicaps suffered, i.e., whether the domestic court ensured that the defence had the opportunity to challenge the witness's credibility⁷⁶⁴ and/or that the finder of fact had the opportunity to form its own impression of the reliability of the witness.⁷⁶⁵ In *Kostovski v the Netherlands*, the statements and subsequent testimony of anonymous witnesses were given in the absence of the accused and his counsel. By way of counterbalance, the defence was able to submit written questions to one of the anonymous witnesses indirectly through the examining magistrate. However, because the nature and scope of the questions were considerably restricted by reason of the decision to make the statements of the witnesses anonymous, the European Court found this to be an insufficient counterbalance to the right to cross-examine witnesses.⁷⁶⁶

Finally, and most importantly, the European Court will check whether the conviction was based either solely or to a decisive extent on the anonymous statements.⁷⁶⁷ While the ECHR does not preclude reliance on anonymous informants at the investigative stage of proceedings,⁷⁶⁸ as explained in *Kostovski v the Netherlands*, the subsequent use of anonymous statements as evidence sufficient on which to base a conviction is a different matter.⁷⁶⁹ In *Kovač v Croatia*, a criminal case of indecent acts against a minor, the European Court found that the applicant did not benefit from a proper and adequate opportunity to

763 *Al-Khawaja and Tahery v the United Kingdom* [2009] ECHR 110, para 46; see also CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 14.

764 *Birutis and Others v Lithuania* [2002] ECHR 349, paras 34; *Lüdi v Switzerland* [1992] ECHR 50, para 49; *Windisch v Austria* [1990] ECHR 23, para 28. See also CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 19.

765 *Windisch v Austria* [1990] ECHR 23, para 29; *Ferrantelli and Santangelo v Italy* [1996] ECHR 29, para 52; *Trivedi v the United Kingdom* [1997] ECHR 202, decision on admissibility.

766 *Kostovski v the Netherlands* [1989] ECHR 20, para 42.

767 *Mirilashvili v Russia* [2008] ECHR 1669, para 164; *Gossa v Poland* [2007] ECHR 2, para 63; *Birutis and Others v Lithuania* [2002] ECHR 349, para 31; *Lucà v Italy* [2001] ECHR 124, para 40; *A. M. v Italy* [1999] ECHR 141, para 25; *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 55, 63. *Doorson v the Netherlands* [1996] ECHR 14, para 76; *Saïdi v France* [1993] ECHR 39, para 44; *Kostovski v the Netherlands* [1989] ECHR 20, para 44; *Unterpertinger v Austria* [1986] ECHR 15, paras 31–33. See also: CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 21.

768 *Kostovski v the Netherlands* [1989] ECHR 20, para 44; *Doorson v the Netherlands* [1996] ECHR 14, para 69; *Balsyte-Lideikiene v Lithuania* [2008] ECHR 1195, para 62.

769 *Unterpertinger v Austria* [1986] ECHR 15, para 31; *Kostovski v the Netherlands* [1989] ECHR 20, para 44.

challenge the witness statement, which was of decisive importance for his conviction and, consequently, he did not have a fair trial.⁷⁷⁰

It should also be noted that, in the case of witnesses that are members of the police force, the case in favour of anonymity becomes even more difficult. In *Van Mechelen and Others v the Netherlands*, the European Court affirmed that the position of police officers is to some extent different from that of a disinterested witness or a victim, since they owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution.⁷⁷¹ Although the interests of police officers and their families deserve protection and so as not to impair the usefulness of future policing operations, the European Court of Human Rights has said that the use of members of the police force as anonymous witnesses may be legitimate, but should be resorted to in exceptional circumstances only.⁷⁷²

7.1.2 Other forms of protecting witnesses from intimidation

The protection of witnesses from intimidation might be adequately addressed by means falling short of full-fledged anonymity. These means include: the screening off of a witness or, giving of evidence by video link so that the witness need not be face-to-face with the accused;⁷⁷³ exclusion of the public and/or media; reading aloud the witness's statement without the witness being present; and distortion of the witness's voice or revealing a witness's identity at the latest possible stage of the proceedings and/or releasing only selected personal details. These measures might be granted, for example, in the case of child witnesses in child sex abuse prosecutions or in the case of victims of sexual violence.⁷⁷⁴ The UN Economic and Social Council has also recognized that, where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risks before, during and after the justice process.⁷⁷⁵

770 *Kovač v Croatia* [2007] ECHR 597, para

771 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, para 56.

772 *Van Mechelen and Others v the Netherlands* [1997] ECHR 22, paras 56–57; *Lüdi v Switzerland* [1992] ECHR 50, para 49.

773 As recommended, for example, in CoE Recommendation Rec(2005)9 on the Protection of Witnesses and Collaborators of Justice, para 6.

774 UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, UN Doc A/52/635 of 12 Dec. 1997. See also: *Kovač v Croatia* [2007] ECHR 597, para 27.

775 UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), para 32. See also: UNODC, Good Practice for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, February 2008.

7.2 ACCESS TO JUSTICE AND FAIR TREATMENT OF VICTIMS

OSCE Commitments

The Ministerial Council, [...]

4. Notes with regret that female victims of violence are too often left without protection and assistance and urges participating States:

(i) To ensure that all female victims of violence will be provided with full, equal and timely access to justice and effective remedies; medical and social assistance, including emergency assistance; confidential counselling; and shelter;

(ii) To adopt and implement legislation that criminalizes gender-based violence and establishes adequate legal protection;

(iii) To provide in a timely manner physical and psychological protection for victims, including appropriate witness protection measures;

(iv) To investigate and prosecute the perpetrators, while addressing their need for appropriate treatment;

(v) To promote the full involvement of women in judicial, prosecutorial and law enforcement institutions and to ensure that all relevant public officials are fully trained and sensitized in recognizing, documenting and processing cases of violence against women and children;

(vi) To meet the special needs for protection and assistance of girl victims of violence.

Ministerial Council Document, Thirteenth Meeting of the Ministerial Council, Ljubljana 5–6 December 2005, Decision No.15/05 on Preventing and Combating violence against women.

(18.2) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.

(18.3) To the same end, there will be effective means of redress against administrative regulations for individuals effected thereby.

(18.4) The participating States will endeavour to provide for judicial review of such regulations and decisions.

Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991.

The right of victims to participate in the proceedings has been recognized by the European Court of Human Rights. Particularly, victims have the right to be involved in the investigation,⁷⁷⁶ to be informed of the decision to prosecute or not to prosecute,⁷⁷⁷ to be informed of the decision to appeal or not to appeal⁷⁷⁸ and to have access to the court documents.⁷⁷⁹ The European Court has acknowledged that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.⁷⁸⁰ However, the European Court has held that Article 6 of the ECHR does not recognize the right of a victim to have someone prosecuted,⁷⁸¹ or to join the prosecution as a civil party,⁷⁸² or to appeal.⁷⁸³

In *L.N.P. v Argentina*, a case of rape where the victim was a 15-year-old girl belonging to an ethnic minority, the Human Rights Committee found a violation of the victim's right to be informed of her entitlement to act as plaintiff, to participate as a party to the court proceedings and to be notified of the acquittal.⁷⁸⁴ OSCE participating States have been urged to meet the special protection and assistance needs of female victims of violence, and to ensure their full, equal and timely access to justice and effective remedies.⁷⁸⁵

In 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the Declaration on Victims of Crime).⁷⁸⁶ As a declaration adopted by a resolution of the General Assembly, its contents are recommendatory, not binding.⁷⁸⁷ The Declaration sets out a number of standards concerning the treatment and access to justice of victims, who are defined as:

“...persons who, individually, or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws...”

776 *Hugh Jordan v the United Kingdom* [2001] ECHR 327, para 109.

777 *Kelly and Others v the United Kingdom* [2001] ECHR 328, paras 118, 136; *Güleç v Turkey* [1998] ECHR para 82; *Gül v Turkey* [1998] ECHR para 93.

778 *Gorou v Greece* [2009] ECHR 488, paras 37–42.

779 *Öğür v Turkey* [1999] ECHR 30, para 92.

780 *Hugh Jordan v the United Kingdom* [2001] ECHR 327, para 109.

781 *Perez v France* [2004] ECHR 72, para 70; *Jankovic v Croatia* [2009] ECHR 401, para 50.

782 *Ernst and Others v Belgium* [2003] ECHR 359, paras 53, 56, available in French only.

783 *Berger v France* [2002] ECHR 792, para 38.

784 *L. N. P. v Argentina*, HRM Communication 1610/2007, UN Doc CCPR/C/102/D/1610/2007 (2011), para 13.5.

785 OSCE Ministerial Council, Decision No. 15/05, “Preventing and Combating Violence Against Women”, within OSCE Ministerial Council Document, Thirteenth Meeting of the Ministerial Council, Ljubljana, 5–6 December 2005, paras 4(i)-(vi).

786 UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985). See also CoE Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, Official Journal L 082, 22/03/2001.

787 Charter of the United Nations, article 10.

By way of over-arching principles, the Declaration on Victims of Crime calls for:⁷⁸⁸

- The compassionate treatment of victims, including respect for their dignity (Article 4). This is particularly relevant in the case of child victims and witnesses of crime.⁷⁸⁹
- Access by victims to mechanisms of justice that are expeditious, fair, inexpensive and accessible (Articles 4 and 5).
- Prompt redress for harm suffered (Article 4), both in terms of restitution (See also 7.2.2) and compensation (See also 7.2.3).
- Information to be given to victims about their role and the scope, timing and progress of the criminal case, especially where serious crimes are involved and where victims have requested such information (Articles 5 and 6(a)). This is, again, particularly relevant in the case of child victims and witnesses of crime.⁷⁹⁰
- Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings, without prejudice to the accused and consistent with the relevant national criminal justice system (Article 6(b)). This might include the preparation and presentation of documents such as victim impact assessments during the sentencing stage of criminal proceedings and/or consideration of the victim's views and position during any plea bargaining process (See also 8.2). This is also particularly relevant for child victims and witnesses of crime.⁷⁹¹
- Providing proper assistance (See also 7.2.1) to victims throughout the process (Article 6(c)).
- Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation (Article 6(d)) (See also 7.1).
- Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims (Article 6(d)).

OSCE participating States have pledged to ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of her/his rights. In order to guarantee respect for fundamental rights and ensure legal integrity, participating States have also specifically agreed that the right to an effective means of redress shall apply to administrative decisions and regulations for individuals affected thereby, and that all participating States will endeavour to provide judicial review of such decisions and regulations.⁷⁹²

788 UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985).

789 UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), part V.

790 UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), article 19.

791 UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), article 21.

792 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow 1991, p. 112, paras 18.2–18.4.

7.2.1 *Assistance to victims*

The Declaration on Victims of Crime calls for the provision of proper assistance to victims throughout the trial process (Article 6(c)).⁷⁹³ Elaborating on this, the Declaration recommends that:

- Victims receive the necessary material, medical, psychological and social assistance (Article 14);
- Victims are informed of the availability of health and social services and other relevant assistance, and are readily afforded access to such services and assistance (Article 15);
- Attention is given to those who have special needs because of the nature of the harm inflicted, or because of factors such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability (Articles 3 and 17); and
- Police, justice, health, social service and other personnel receive training to sensitize them to the needs of victims, and guidelines to ensure the provision of proper and prompt aid (article 16).

7.2.2 *Restitution claims of victims*

The Declaration on Victims of Crime calls for the provision of prompt redress for harm suffered by victims of crime (Article 4).⁷⁹⁴ Elaborating on the question of restitution, the Declaration recommends that:

- Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants (Article 8). According to the Declaration, “such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights”; and
- Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases (See also 8.3.3), in addition to other criminal sanctions (Article 9).

7.2.3 *Compensation claims of victims*

The Declaration on Victims of Crime calls for the provision of prompt redress for harm suffered by victims of crime (Article 4).⁷⁹⁵ Elaborating on the question of compensation, the Declaration recommends that, when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

⁷⁹³ UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985). See also: UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), part IX.

⁷⁹⁴ UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985). See also UN ECOSOC, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, UN Doc E/Res/2005/20 (2005), part XIII.

⁷⁹⁵ UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985).

- Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes (Article 12(a)); and
- The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

The European Court for Human Rights has recognized violation of Articles 2 and 3 of ECHR and the right to compensation to the relatives of victims of forced disappearances or killing, where the authorities failed to properly investigate the case.⁷⁹⁶ In *Varnava and Others v Turkey*, the European Court found that “the phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. Thus the Court’s case-law recognized from very early on that the situation of the relatives may disclose inhuman and degrading treatment contrary to Article 3.”⁷⁹⁷

In *Jeans v Croatia*, the European Court found a violation of Article 13 of the ECHR, i.e., the right of the father of the victim of a crime to an effective remedy. The European Court found that dismissing the applicant’s complaint on the length of the criminal proceeding deprived him of the effective remedy, as the length of the criminal proceeding delayed the determination of his civil claims for damages.⁷⁹⁸

CHECKLIST: PARTICIPATION OF VICTIMS AND WITNESSES

1. Are witnesses in the given monitored case at risk or in danger as a result of their participation in judicial proceeding? If so:
 - a) Has the court taken adequate steps to protect the witness, their family members or a person close to her/him from such risks, bearing in mind any particular vulnerabilities of the witness?
 - b) In case witness protection measures are available, has the court informed the witnesses about the availability of such measures?
 - c) Did such steps interfere in the given case with the rights of the defence?
 - d) In considering the application of witness protection measures, did the court attempt to select the least severe measure necessary?
 - e) Did the court provide a justification of the specific risk or danger the witness faces?
 - f) If protected measures have been given to a vulnerable witness, did the court provide adequate reasoning?
2. What type of witness protection measures was ordered? For instance:
 - a) Did the court pose questions directly to the witness on behalf of the parties? Was it done with the consent of parties/defense counsel?

⁷⁹⁶ *Skendžić and Krznarić v Croatia* [2011] ECHR 92, para 94; *Jularić v Croatia* [2011] ECHR 80, para 51.

⁷⁹⁷ *Varnava and Others v Turkey* [2009] ECHR 1313, para 200.

⁷⁹⁸ *Jeans v Croatia* [2011] ECHR 30, para 46.

- b) Did the court allow a witness to testify behind a screen or with voice/image distortion?
 - c) Did the court allow the cross-examination of a witness from a separate room?
 - d) Was the accused or her/his defence attorney removed from the courtroom before hearing the witness?
 - e) In case the witness/victim is a child, was the social worker or psychologist involved?
3. If steps to protect a witness include concealing the identity of the witness:
- a) Is the identity of the witness being concealed at the investigative stage of proceedings, or during the trial itself?
 - b) Was any anonymous testimony accepted as evidence by the court?
 - c) In case anonymous testimony was accepted, on what grounds?
 - d) What weight did the court attribute to the testimony in the judgment?
 - e) Is the anonymous witness a “key” witness, i.e., the conviction is based solely or to a decisive degree on the statement of the witness?
 - f) Did the court decide during the trial to read in and use evidence given in an earlier phase, i.e., the investigative phase? If yes, did the defendant or, at least, her/his counsel have the opportunity to challenge them in person at the time when they were made?
4. What steps have been taken by the judicial authorities to counterbalance any disadvantages caused to the defence, particularly as this may concern: (a) the adequate and proper opportunity for the defence to challenge and question the witness; (b) the ability of the defence to demonstrate that the witness is prejudiced, hostile or unreliable; and/or (c) observation by the judge or jury of the demeanour of the witness?
5. Have victims in the proceeding, whether individual or collective, enjoyed access to justice and fair treatment? In particular:
- a) Has the victim been treated in a compassionate manner and has any inconvenience been minimized?
 - b) Has proper assistance been given to the victim throughout the trial process, for example, access to psychological, social, financial and legal assistance? Has s/he been informed about their rights?
 - c) Has the victim been allowed to present her/his views and concerns?
 - d) In the event that the trial of the defendant does not pursue the full case, due to the prosecutor’s decision not to prosecute, has the victim had any say on that? Was the victim communicated the prosecutor’s decision to drop the case and provided with access to the court files? Was the prosecutor’s decision reasoned?
 - e) Was the privacy of the victim protected?
 - f) Has the victim been provided with prompt redress for harm suffered, both in terms of restitution and compensation?

- g) In cases involving victims/witnesses who are minors, did the court take appropriate measures to protect the minor(s) from harassment, confusion or any other risk? If so, what kind of measures?
- h) Is the courtroom layout and facilities suitable for the protection of vulnerable victims (is it equipped with, for instance, separate entries and waiting rooms)?

CHAPTER VIII

Conviction or Acquittal in a Criminal Trial

ICCPR

Article 11

“No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

Article 14

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

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

Article 15

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

“(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

ECHR**Article 7**

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

“(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Article 1 of Protocol 4

“No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.”

Article 3 of Protocol 7

“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 the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

Article 4 of Protocol 7

“(1) 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.

“(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

“(3) No derogation from this Article shall be made under Article 15 of the Convention.”

The conviction or acquittal of a person charged with a criminal offence must be the result of a public hearing (See also chapter 4), held before a competent, independent and impartial tribunal established by law (See also chapter 3), through which the accused has enjoyed the

right to be presumed innocent and the right to silence (See also chapter 5), as well as fair trial rights and equality of arms with the prosecution (See also chapter 6).

For a conviction to be valid, the offence with which the person is charged must constitute a criminal offence under national or international law at the time when the act was committed (See also 8.1). Where a conviction is entered following a plea-bargaining process (See also 8.2), that process must respect certain principles. A convicted person must also be sentenced in accordance with certain principles and minimum guarantees (See also 8.3). Where an accused person has been finally convicted or acquitted of an offence, s/he cannot be tried or punished again for that same offence (See also 8.4). If subsequent to a person's final conviction that conviction is reversed or made the subject of a pardon on the basis of a miscarriage of justice, compensation must normally be provided to the wrongly convicted person (See also 8.5).

It should also be remembered that, implied from Article 14(3)(a) and (b) of the ICCPR and Article 6(3)(a) and (b) of the ECHR, a defendant may only be convicted of the accusation against her/him, i.e., the accusation that formed the basis of the notification to the defendant of what s/he is alleged to have done (See also 6.3.2).

By the very nature of the rights considered in this chapter, they are applicable to criminal proceedings only.

8.1 NO PUNISHMENT WITHOUT LAW

OSCE Commitments

(5.18) – no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990.

The principle *nullum crimen, nulla poena sine previa lege poenali* (“no punishment without the law”) is reflected within Article 15 of the ICCPR and Article 7 of the ECHR. The prohibition against retrospective penal laws protects individuals from State abuse and ensures the fairness of the judicial authority and the foreseeability of the law. It also underpins the general principle of legality, requiring that any interference with rights be **prescribed by law**, and protects against the danger of the States' abuse of power. OSCE participating States committed themselves to this principle by declaring that no one will be

charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law that defines the elements of the offence with clarity and precision.⁷⁹⁹

In general terms, the principle implies that, for a conviction to be valid, the offence with which an accused person is charged and convicted must constitute a criminal offence under national or international law (See also 8.1.2) at the time when the act was committed. This means that provisions of the law that establish criminal offences cannot be applied retroactively (See also 8.1.1), although the prohibition against retroactivity does not apply to criminal procedures or evidentiary rules (See also 8.1.3).

8.1.1 *Non-retroactive offences*

The core feature of Article 15 of the ICCPR and Article 7 of the ECHR is the prohibition against the retroactive application of the law, i.e., the fundamental requirement that a person cannot be found guilty for violating a law that did not exist at the time that s/he perpetrated the act in question. This is clear from the plain language of Article 15(1) and (2) of the ICCPR and Article 7(1) and (2) of the ECHR.⁸⁰⁰

In *Pietraroia v Uruguay*, for example, the applicant was charged under an offence of the Military Penal Code that had not existed at the time of the conduct in question. Finding that the conduct was not illegal at the time when it had occurred, the Human Rights Committee concluded that there had been a corresponding violation of Article 15(1) of the ICCPR.⁸⁰¹

With so-called “continuing offences”, where the conduct began before and continued after it became an offence, the prosecution of such conduct will be in breach of the non-retroactivity principle unless it can be shown that the conviction is solely based on the acts committed after criminalization of the conduct.⁸⁰² Where the scope of an existing crime is extended or clarified through judicial interpretation, no breach of non-retroactivity is usually found. It is true that the European Court of Human Rights has stressed that Article 7 must not be extensively construed to an accused’s detriment, for instance by analogy. However, the requirement that an offence must be clearly defined in the law is satisfied where the indi-

799 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, para 5.18.

800 See also article 11(2) of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, which provide that “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”.

801 *Pietraroia v Uruguay*, HRC Communication 44/1979, UN Doc CCPR/C/12/D/44/1979 (1981), para 17. See also *Weisz v Uruguay*, HRC Communication 28/1978, UN Doc CCPR/C/OP/1 at 57 (1984), para 16. See, similarly, in the European context, *Kokkinakis v Greece* [1993] ECHR 20, para 52; *G. v France* [1995] ECHR 30, paras 10, 21–22; *C. R. v the United Kingdom* [1995] ECHR 51, para 33; *Ecer and Zeyrek v Turkey* [2001] ECHR 107, para 30; *Veeber (No 2) v Estonia* [2003] ECHR 37, para 31; *Puhk v Estonia* [2004] ECHR 69, para 25; *Jorgic v Germany* [2007] ECHR 583, para 100; and *Custers, Deveaux and Turk v Denmark* [2007] ECHR 369, para 76.

802 *Ecer and Zeyrek v Turkey* [2001] ECHR 107, para 35. See also *Veeber (No 2) v Estonia* [2003] ECHR 37, para 35; *Puhk v Estonia* [2004] ECHR 69, para 30.

vidual can know not only from the wording of the relevant provision but also, if need be, through the “assistance of the courts’ interpretation”, what acts and omissions will make him criminally liable.⁸⁰³ In *C. R. v the United Kingdom*, for example, the European Court of Human Rights upheld a ruling of the Court of Appeal and the House of Lords that the previously allowed exception to the offence of rape, namely that of a husband committed against his wife, was no longer consistent with the essence of the offence. The European Court considered that judicial recognition of the absence of the immunity had become a reasonably foreseeable development and, thus, did not constitute a violation of Article 7.⁸⁰⁴

8.1.2 Offence under national and international law

The principle of non-retroactivity concerns the application of both national and international law. This means that a conviction will be safe so long as the offence in question was at the time of its commission an offence under either the national law of the State in which the accused is tried *or* under applicable international law (Article 15(1) of the ICCPR and Article 7(1) of the ECHR).⁸⁰⁵ Article 15(2) of the ICCPR and Article 7(2) of the ECHR clarify that an offence under international law can include an offence according to the general principles of law “recognized by the community of nations” (as expressed in the ICCPR) or “recognised by civilised nations” (as expressed in the ECHR), i.e., an offence under **customary international law**.⁸⁰⁶ The case of the former Yugoslavia illustrates this principle. The Criminal Code of the Socialist Federal Republic of Yugoslavia, which was in force at the time of conflict in Bosnia and Herzegovina, did not have provisions penalizing crimes against humanity, nor did it explicitly foresee command responsibility as an applicable mode of liability. However, because crimes against humanity (and command responsibility as a mode of liability) constitute criminal offences under customary international law, the qualifying factual allegations referring to the period of the conflict as crimes against humanity are treated as not violating the principle of retroactivity.

It is relevant to note that, when speaking of national “law”, the European Court of Human Rights has held that mere State practice cannot be seen as law.⁸⁰⁷ Equally, legislative or administrative acts that are *ultra vires* in national law do not constitute law.⁸⁰⁸ The Euro-

803 *Cantoni v France* [1996] ECHR 52, para 29; *Kokkinakis v Greece* [1993] ECHR 20, para 52.

804 *C. R. v the United Kingdom* [1995] ECHR 51, para 34. See also *Kokkinakis v Greece* [1993] ECHR 20, para 52; *S. W. v the United Kingdom* [1995] ECHR 52, para 35–36; *Larissis v Greece* [1998] ECHR 13, para 34; *Başkaya and Okçuoğlu v Turkey* [1999] ECHR 42, para 36; *Jorgic v Germany* [2007] ECHR 583, paras 101–102; *Custers, Deveaux and Turk v Denmark* [2007] ECHR 369, para 77.

805 See also article 11(2) of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, which provide that “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed”.

806 See, for example, *Kokkinakis v Greece* [1993] ECHR 20, para 51 (2); *Korbely v Hungary* [2008] ECHR 848, para 90; and *Kononov v Latvia* [2010] ECHR 667, paras 203, 208, 211, 221.

807 *Streletz, Kessler and Krenz v Germany* [2001] ECHR 230, para 73–74, 87–88. See also *K.-H. W. v Germany* [2001] ECHR 229, para 90.

808 *Streletz, Kessler and Krenz v Germany* [2001] ECHR 230, para 56–65.

pean Court of Human Rights has recalled that the law must clearly define an offence and its associated penalties.⁸⁰⁹ This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, from the interpretation made by courts, what acts or omissions would make her/him liable under the law.⁸¹⁰ In other words, the criminal law must be accessible and foreseeable, reflecting that any interference with private conduct must be **prescribed by law**.⁸¹¹

It should also be noted that the law under which someone is convicted must derive its authority from the State's constitution. This becomes a problematic issue where an offence is committed during the course of a struggle for power, from which a new State emerges. In *Kuolelis, Bartoševičius and Burokevičius v Lithuania*, for example, the European Court of Human Rights considered charges brought by the new Government of Lithuania, which had declared its independence in March 1990, was internationally recognized in September 1991, and had charged the applicants with crimes committed during an attempted coup in January 1991. The applicants were convicted under laws created by the new government in November 1990. The European Court of Human Rights upheld the applicability of these laws, concluding that, by then, the political will of the new Lithuanian Government had been clearly established.⁸¹²

8.1.3 Changes in procedural or evidentiary rules

The principle of non-retroactivity applies to the issue of criminalization of the conduct only, i.e., the issue is limited to the question of whether the accused person's acts, at the material time of commission, constituted a defined criminal offence under domestic or international law and does not include reference to accompanying procedural or evidentiary rules.⁸¹³ In *Nicholas v Australia*, for example, the Human Rights Committee considered whether the lifting of a stay on the prosecution and conviction of the applicant (resulting from the admission of formerly inadmissible evidence) amounted to a retroactive criminalization of conduct. The Committee observed that Article 15(1) of the ICCPR is plain in its terms by prohibiting a finding of guilt on account of any act or omission that did not constitute a criminal offence at the time when it was committed. In the present case, the applicant was convicted of offences under Section 233B of Australia's Customs Act, which had remained materially unchanged throughout the relevant period, i.e., from the time of offending through to the trial and conviction. The change in law affecting the admissibility of previously inadmissible evidence did not, therefore, violate Article 15(1) of the ICCPR.⁸¹⁴ The European Court of

809 *Ould Dah v France* [2009] ECHR 532 (decision on inadmissibility);

810 *Başkaya and Okçuoğlu v Turkey* [1999] ECHR 42, para 36; *Cantoni v France* [1996] ECHR 52, para 29; *Kokkinakis v Greece* [1993] ECHR 20, para 52.

811 *Ould Dah v France* [2009] ECHR 532; *Cantoni v France* [1996] ECHR 52, para 29; *Başkaya and Okçuoğlu v Turkey* [1999] ECHR 42, para 36; *G. v France* [1995] ECHR 30, para 25.

812 *Kuolelis, Bartoševičius and Burokevičius v Lithuania* [2008] ECHR 152, para 120.

813 *Baumgarten v Germany*, HRC Communication 960/2000, UN Doc CCPR/C/78/D/960/2000 (2003), para 9.3.

814 *Nicholas v Australia*, HRC Communication 1080/2002, UN Doc CCPR/C/80/D/1080/2002 (2004), paras 7.3–7.7.

Human Rights similarly found in *Coëme and Others v Belgium* that an amendment to the limitation period did not constitute a violation of Article 7.⁸¹⁵

8.2 PLEA BARGAINING

Plea bargaining is a process between the prosecution and defence in which a defendant pleads guilty to an offence in exchange for some concession by the prosecutor, such as the reduction of charges or an agreement on aspects of sentencing.⁸¹⁶ It is based on the common law notion of prosecutorial discretion, i.e., that the prosecution has a level of discretion in determining which charge(s) to proceed with against an accused person. Where accepted by the judiciary, this is often on the basis that a plea agreement avoids the use of scarce judicial and prosecutorial resources and thereby enhances the overall effectiveness of the administration of justice.⁸¹⁷ When co-operation clauses are added to the plea agreement, the additional benefit consists in ensuring the testimony of the defendant for the prosecution of other cases.⁸¹⁸ There are, however, varying degrees of acceptance and formalization of the plea bargaining process from country to country. Some jurisdictions allow the prosecution and defence to discuss the practicalities of proceeding to trial, whereby the prosecution may be prepared to reduce charges in order to avoid the risk of acquittal at trial and/or to avoid lengthy proceedings, but without the ability to suggest to the courts what sentence should be imposed. Other jurisdictions have very formalized arrangements whereby plea agreements, including agreements on sentencing, are entered into between the prosecution and defence and, depending on rules concerning the procedural phase during which such agreements can be made, will then require the agreement to be submitted and approved by the court. Because plea agreements avoid the conduct of a defended trial, they are sometimes referred to as abbreviated proceedings (See also 2.3).

There are discussions about whether plea bargaining represents the right choice, in particular for cases concerning serious crimes such as genocide, crimes against humanity or war crimes against civilians. If used, plea agreements should be subject to certain requirements, such as the admission of facts in open sessions and co-operation.⁸¹⁹ Particularly for countries following traumatic events, the decision to allow plea bargaining for serious crimes should take into account the tension between establishing historical records and providing

815 *Coëme and Others v Belgium* [2000] ECHR 250, para 149.

816 *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards* (OSCE, 2nd edition, 2006), p.7.

817 *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards* (OSCE, 2nd edition, 2006), p.1.

818 However, in the case of Bosnia and Herzegovina, the draw back lies in the lack of mechanisms to ensure the fulfilment by the defendant of the cooperation clauses: see *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards* (OSCE, 2nd edition, 2006), p. 53.

819 *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards* (OSCE, 2nd edition, 2006), p. 54.

public forums for victims and survivors, on the one hand, together with the need for an efficient use of scarce resources in the administration of justice, on the other.

Notwithstanding the fact that plea bargaining may avoid the use of scarce resources, particularly where there is a very strong prosecution case, such agreements must always comply with human rights standards and should to the greatest extent possible recognize the fundamental inequality of the parties in criminal proceedings.⁸²⁰ Trial monitoring in Bosnia and Herzegovina has documented several emerging practices, for example, that raise concerns about respect for the right to a fair trial in the context of plea agreements, including: failures to fully inform the defendant of the right to defence counsel (See also 6.6.2), counsel appointed under legal aid scheme (See also 6.6.7); conclusion of plea agreements prior to the confirmation of the indictment and therefore prior to the full disclosure of the prosecution case (See also 6.3.5); the encouragement by judges of defendants to engage in plea negotiations, and the implications this may have for the presumption of innocence (See also 5.1); and failures to protect or take into account the rights or views of victims (See also 7.2).⁸²¹

8.3 SENTENCING UPON CONVICTION

Various standards apply to the sentencing of a person convicted of a criminal offence. The retrospective application of more severe penalties is prohibited, alongside a guarantee that a convicted person gain the benefit of lighter sentences introduced since the time of offending (See also 8.3.1). There is a general consensus in approach towards achieving consistent sentencing, to the extent possible, taking into account mitigating and aggravating features of the offending (See also 8.3.2), and the need for offenders to provide restitution to victims of crime (See also 8.3.3 and 7.2.2). Imprisonment cannot be imposed merely on the ground of inability to fulfil a contractual obligation (See also 8.3.4). No sentence shall involve cruel, inhuman or degrading punishment (See also 8.3.5). And, where the death penalty is applicable, various restrictions apply to the imposition of capital punishment (See also 8.3.6).

8.3.1 *Non-retroactive penalties*

As well as encompassing the principle of no punishment without the law (See also 8.1), Article 15(1) of the ICCPR and Article 7(1) of the ECHR also prohibit the retrospective application of more severe penalties than those applicable at the time when the offence was committed,⁸²² together with guaranteeing the benefit of lighter sentences.⁸²³ In most cases,

820 See Van Dijk and Van Hoof, *op. cit.*, note 439, p.319, where the importance of the equality of arms is explained to be especially important “[f]or criminal cases, where the character of the proceedings already involves a fundamental inequality of the parties...”.

821 *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards* (OSCE, 2nd edition, 2006).

822 See for example *Ecer and Zeyrek v Turkey* [2001] ECHR 107, paras 31–32.

823 Contrast with article 11(2) of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, which only prohibits the retrospective application of more severe penalties by stating that: “...Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

this means that the convicted person can only be sentenced under the law that existed at the time that the offence took place. If, however, the law changed since the time of offending, to the effect that the applicable sentence has been *reduced*, then the convicted person must be given the benefit of a lighter sentence under the new law.

In practical terms, where there has been a change in the law increasing the maximum penalty for an offence, the Human Rights Committee and the European Court of Human Rights will look at the *actual* sentence imposed on the convicted person. So long as this is within the margins of the sentencing provision applicable at the time of offending, no violation of the prohibition against non-retroactive penalties will have occurred.⁸²⁴ In *Gombert v France*, for example, a complaint of violation of Article 15(1) of the ICCPR was made, pertaining to changes in the law concerning maximum sentences. France argued that the applicant had not, however, received a sentence more severe than that which was applicable, at the time of the offending, to the acts constituting the offence for which the applicant was sentenced, and that he did not have a right to a lighter sentence under the transitional provisions of the new Criminal Code. The Human Rights Committee, therefore, considered that the applicant had not substantiated his complaint for the purposes of admissibility.⁸²⁵ In *Filipovich v Lithuania*, the Committee similarly found no violation, because the applicant's sentence was within the margin provided by the earlier law, and the State Party had referred to the existence of certain aggravating circumstances.⁸²⁶ In *Karmo v Bulgaria*, the *post facto* amendment of penalties under the Criminal Code for the offence in respect of which the applicant was found guilty operated in the applicant's favour, i.e., he received a more lenient penalty (life imprisonment) rather than the penalty envisaged at the time the offence was committed (the death penalty).⁸²⁷

As noted in the introduction to this chapter, the rights under Article 15 of the ICCPR and Article 7 of the ECHR apply only to criminal proceedings.⁸²⁸ In *A. J. v. G. v the Netherlands*, for example, the applicant's claim that he had been denied the right to benefit from lighter penalties prescribed by law, in violation of Article 15 of the ICCPR, was dismissed by

824 See, for example, the account of *X v UK* 6679/74 (1975) and *Gillies v UK* 14009/88 (1989) in David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (New York: Oxford University Press, 2009), p. 338.

825 *Gombert v France*, HRC Communication 987/2001, UN Doc CCPR/C/77/D/987/2001 (2003), para 6.4.

826 *Filipovich v Lithuania*, HRC Communication 875/1999, UN Doc CCPR/C/78/D/875/1999 (2003), para 7.2. See also *Gomez v Peru*, HRC Communication 981/2001, UN Doc CCPR/C/78/D/981/2001 (2003), para 7.4; and *Gavrilin v Belarus*, HRC Communication 1342/2005, UN Doc CCPR/C/89/D/1342/2005 (2007), para 8.3.

827 *Karmo v Bulgaria* [2006] ECHR, para C. See also: *Kokkinakis v Greece* [1993] ECHR 20, para 52; *G. v France* [1995] ECHR 30, para 24; *Ould Dah v France* [2009] ECHR 532.

828 As emphasized in *Silva and family v Sweden*, HRC Communication 748/1997, UN Doc CCPR/C/67/D/748/1997 (1999), para 4.9; *Strik v the Netherlands*, HRC Communication 1001/2001, UN Doc CCPR/C/76/D/1001/2001 (2002), para 7.3; *Dombo Beheer B.V. v the Netherlands* [1993] ECHR 49, paras 32–33; and *Kafkaris v Cyprus* [2008] ECHR 143, para 138.

the Human Rights Committee, which noted that Article 15 applies to criminal proceedings, whereas his claim related to proceedings concerning child custody.⁸²⁹

Article 7 of the ECHR does not apply to the *manner* of a penalty's execution, e.g., any retrospective alteration in the law regarding the parole or conditional release of a prisoner.⁸³⁰ In contrast, however, Article 7 has been found to apply where an existing penalty is applied to the detriment of the convicted person in a way which is not reasonably foreseeable.⁸³¹

8.3.2 Consistency and sentencing based on mitigating and aggravating circumstances

Although there is not as yet a set of international sentencing principles, the Council of Europe has called for consistency in sentencing and there is a general consensus in the approach of national courts towards achieving consistency to the extent possible, taking into account mitigating and aggravating features of the offense.⁸³² Under common law jurisdictions, courts are obliged to take into account factual and personal circumstances when sentencing a person convicted of a criminal offence. Courts there scrutinize factors, such as self-defence, provocation by the victim, proportionality of the response by the accused and the accused's state of mind. Likewise, in civil law jurisdictions, various aggravating or extenuating circumstances, such as self-defence, necessity, distress and mental capacity of the accused, and personal circumstances need to be considered in reaching a sentence in each case.⁸³³

8.3.3 Providing restitution to victims of crime

In 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the Declaration on Victims of Crime).⁸³⁴ As a declaration adopted by a resolution of the General Assembly, its contents are recommendatory, not binding.⁸³⁵ The Declaration sets out a number of standards

829 *A. J. v. G. v the Netherlands*, HRC Communication 1142/2002, UN Doc CCPR/C/77/D/1142/2002 (2003), para 5.7.

830 *Kafkaris v Cyprus* [2008] ECHR 143, para 142. See also *Saccoccia v Austria* [2008] ECHR 1734, para 35–36.

831 *Achour v France* [2006] ECHR 268, paras 53–58.

832 CoE Recommendation R(92)17 concerning Consistency in Sentencing. See also: Andrew Ashworth, "Towards European sentencing standards", *European Journal on Criminal Policy and Research*, Vol. 2, No. 1, 1994.; and Silvia D'Ascoli, *Sentencing in International Criminal Law: The Approach of the Two ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Oxford: Hart Publishing, 2011).

833 Reflecting these positions, see *Ibao v Philippines*, HRC Communication 1077/2002, UN Doc CCPR/C/77/D/1077/2002 (2003), individual opinion of Committee Member Nisuke Ando. Concerning the issues of whether criminal code provisions that include the mandatory imposition of the death penalty constitute an arbitrary deprivation of life in violation of article 6(1) of the ICCPR, see Alex Conte and Richard Burchill, *Defining Civil and Political Rights. The jurisprudence of the United Nations Human Rights Committee* (Aldershot: Ashgate Publishing, 2nd Ed, 2008), p. 147–149.

834 UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc GA Res 40/34 (1985).

835 Charter of the United Nations, article 10.

concerning the treatment and access to justice of victims, including on the subject of restitution claims by victims (See also 7.2.2).

The Declaration on Victims of Crime calls for the provision of prompt redress for harm suffered by victims of crime (para 4). Elaborating on the question of restitution, the Declaration recommends that:

- Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions (para 9); and
- Recognizing the potential collective nature of victims, including as a community, the Declaration recommends that “in cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community” (para 10).

8.3.4 No imprisonment for inability to fulfil a contractual obligation

A further important limitation on the State’s choice related to sentencing is to be found in Article 11 of the ICCPR and Article 1 to Protocol 4 of the ECHR, which guarantee that no one is to be imprisoned merely on the ground of inability to fulfil a contractual obligation.⁸³⁶

This has been rarely invoked as a ground of complaint before the Human Rights Committee, and was unsuccessfully raised in *A. R. S. v Canada*, where the applicant argued that legislation pertaining to parole agreements was contrary to Article 11. The Committee considered that this claim was groundless, since the choice offered to a prisoner to accept release under a system of mandatory supervision or to continue to serve his sentence did not result in a contractual obligation if the person concerned chose release and signed the mandatory supervision certificate.⁸³⁷ The Committee similarly found, in *Ràfols v Spain*, that a custodial sentence imposed on the applicant for failure to pay maintenance was inadmissible *ratione materiae*, since the obligation arose not under a contract but, instead, pursuant to Article 227 of the Spanish Criminal Code.⁸³⁸

Article 1 to Protocol 4 of the ECHR has also rarely been invoked, although there are three important points to be noted about its application. First, reference to debt within the context of this provision is restricted, such that Article 1 prohibits imprisonment for debt only in respect of debts arising under contractual obligations.⁸³⁹ Secondly, failure to fulfil a contractual obligation has been treated as applying not just to financial debts. The prohibition

836 Note the slight difference in language between article 11 of the ICCPR, which prohibits “imprisonment” on this ground, compared to article 1 to Protocol 4 of the ECHR, which prohibits the deprivation of liberty on this ground.

837 *A. R. S. v Canada*, HRC Communication 91/1981, UN Doc CCPR/C/OP/1 at 29 (1984), para 7.

838 *Ràfols v Spain*, HRC Communication 1333/2004, UN Doc CCPR/C/84/D/1333/2004 (2005), para 6.4.

839 *Göktan v France* [2002] ECHR 546, para 51.

against imprisonment for failure to perform a contract, therefore, also applies in respect of failures to perform contractual obligations by reason of non-delivery, non-performance or non-forbearance.⁸⁴⁰ Finally, the prohibition has been found *not* to apply where there is another factor present besides “inability” to perform a contractual obligation, e.g., if a debtor acts with malicious or fraudulent intent, if a person deliberately refuses to fulfil an obligation, irrespective of the reasons for this, or if inability to meet a commitment is due to negligence.⁸⁴¹ Against this background, Article 1 of Protocol 4 cannot be construed as prohibiting the deprivation of liberty as a penalty for a proved criminal offence or as a necessary preventive measure before trial for such an offence. However, to comply with Article 1 of Protocol 4, the law punishing with imprisonment a criminal offence for breach of contract must always provide for one or more elements of criminality other than a simple inability to perform a contractual obligation.⁸⁴²

8.3.5 Prohibition against cruel, inhuman or degrading punishment

Cruel, inhuman or degrading punishment is prohibited under Article 7 of the ICCPR, Article 3 of the ECHR and Articles 1, 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Human Rights Committee has commented that the prohibition in Article 7 of the ICCPR relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee’s view, the prohibition also extends to corporal punishment, “including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”.⁸⁴³ Similarly, the European Court of Human Rights in *Tyrer v the United Kingdom* found a violation of Article 3 of the ECHR, even though the applicant did not suffer any severe or long-lasting physical effects.⁸⁴⁴ Overlapping with the prohibition against cruel, inhuman or degrading treatment is the requirement in Article 10(1) of the ICCPR that all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. In *Rodić and Others v Bosnia and Herzegovina*, the European Court found a violation of Article 3 because the applicants’ physical well-being had not been adequately secured. The European Court considered that the mental anxiety caused by the threat of physical violence had exceeded the unavoidable level inherent in detention.⁸⁴⁵

It should be noted that the prohibition against cruel, inhuman or degrading treatment does not per se preclude the imposition of a sentence of hard labour, so long as the actual conditions of such labour are not exploitative or otherwise egregious.⁸⁴⁶ The possibility of

840 CoE Explanatory Report to Protocol 4, para 3.

841 CoE Explanatory Report to Protocol 4, para 5. See also *X v FRG* 5025/71 (1971) in Harris, O’Boyle & Warbrick, *op. cit.*, note 823, p. 736.

842 CoE Explanatory Report to Protocol 4, paras 6 (1) and (2).

843 UN Human Rights Committee, CCPR General Comment 20 (1992), para 5.

844 *Tyrer v the United Kingdom* [1978] ECHR 2, para 33.

845 *Rodić and 3 Others v Bosnia and Herzegovina* [2008] ECHR 429, para 73.

846 *Faure v Australia*, HRC Communication 1036/2001, UN Doc CCPR/C/85/D/1036/2001 (2005), para 7.5

imprisonment with hard labour is specifically preserved within Article 8(3)(b) of the ICCPR and Article 4(3)(a) of the ECHR.⁸⁴⁷

8.3.6 *Capital punishment*

Capital punishment is the imposition of the death penalty as a sentence following a criminal conviction. Imposition of the death penalty is not possible for States Parties to the ECHR (Article 1 of Protocol 6 to the ECHR). Technically, the ECHR retains the possibility of allowing imposition of the death penalty in respect of acts committed in times of war or imminent threat of war (Article 2 of Protocol 6 to the ECHR), although – for States Parties to Protocol 13 to the ECHR – this is superseded by the prohibition against the death penalty in all circumstances (Article 1 of Protocol 13 to the ECHR).

In the case of States Parties to the ICCPR, abolition of the death penalty is provided for under the Second Optional Protocol to the ICCPR. No one within the jurisdiction of States Parties to the Second Optional Protocol may be sentenced to death, and States party to it are required to take all necessary measures to implement this obligation (Article 1 of the Second Optional Protocol to the ICCPR). Although other parties to the ICCPR are not obliged to abolish the death penalty (reflected within the language of Article 6 of the ICCPR on the right to life),⁸⁴⁸ the Human Rights Committee has taken the view that the wording of Article 6(2)-(6) of the ICCPR strongly suggests that abolition is desirable.⁸⁴⁹

For States in respect of which there is no express obligation to abolish the death penalty, certain obligations apply concerning the use of capital punishment. Central to these obligations are three requirements that flow from Article 6(2) of the ICCPR. First, it follows from the language of Article 6(2) that the death penalty can only be imposed in accordance with the law in force at the time of the commission of the crime – which is a reflection of the prohibition against retroactive penalties (See also 8.3.1) – and can only be carried out pursuant to a final judgment rendered by a competent court. Second, States are obliged to limit its use and, in particular, to abolish it for other than the most serious crimes (Article 6(2)

847 See, for example, *De Wilde, Ooms and Versyp v Belgium* [1971] 1 EHRR 373 paras 89–90; and *Van Droogenbroeck v Belgium* [1982] ECHR 3, para 59.

848 See Article 6(2)-(6) of the ICCPR, which provide: “2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”

849 UN Human Rights Committee, CCPR General Comment 6 (1982), para 6.

of the ICCPR). The expression “most serious crimes” must, according to the Human Rights Committee, be read restrictively to mean that the death penalty should be an exceptional measure.⁸⁵⁰ Third, imposition of the death penalty must not be contrary to the provisions of the ICCPR or the Convention on the Prevention and Punishment of the Crime of Genocide.⁸⁵¹ The notion of consistency with the provisions of the ICCPR was expanded upon in *Binge v Zaire*, the Committee stating that Article 6(2) requires that both the substantive and procedural law in the proceedings leading to the imposition of the death penalty must be in compliance with the domestic law of the State and with the provisions of the Covenant. Consequently, in that case, a failure by the State to afford the applicant appropriate rights in the determination of the charges against him (contrary to the requirements of Article 14(3) of the ICCPR) led to a finding that the death sentence pronounced against the applicant was contrary to the provisions of the Covenant, and therefore in violation of Article 6(2).⁸⁵²

There is, therefore, a vital link between the ability to have recourse to capital punishment and compliance with the procedural guarantees under Article 14 of the ICCPR and Article 6 of the ECHR. The failure of States to observe the requirements of Article 14 of the ICCPR has repeatedly resulted in a finding of a violation of Article 6 of the ICCPR.⁸⁵³ The Human Rights Committee has commented:

“In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 of the Covenant have not been respected, constitutes a violation of the right to life (Article 6 of the Covenant).”⁸⁵⁴

850 UN Human Rights Committee, CCPR General Comment 6 (1982), para 7.

851 Concerning the crime of Genocide, see Article 6(3) of the ICCPR, which provides that: “When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide”.

852 *Mbenge v Zaire*, HRC Communication 16/1977, UN Doc CCPR/C/18/D/16/1977 (1983), para 17. See also *Henry v Jamaica*, HRC Communication 230/1987, UN Doc CCPR/C/43/D/230/1987 (1991), para 8.5; *Morrison v Jamaica*, HRC Communication 461/1991, UN Doc CCPR/C/56/D/461/1991 (1996), para 10.6; and *Daley v Jamaica*, HRC Communication 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998), para 7.7.

853 See, for example: *Chan v Guyana*, HRC Communication 913/2000, UN Doc CCPR/C/85/D/913/2000 (2006), para 5.4 (concerning violation of Article 14(3)(b) and (d) of the ICCPR); *Sultanova v Uzbekistan*, HRC Communication 915/2000, UN Doc CCPR/C/86/D/915/2000 (2006), para 7.6 (concerning violation of Article 14(1), (2) and 3(b), (d), (e) and (g) of the ICCPR); *Shakurova v Tajikistan*, HRC Communication 1044/2002, UN Doc CCPR/C/86/D/1044/2002 (2006), para 8.5 (concerning violation of Article 14(1) and (3) (b), (d) and (g) of the ICCPR); and *Rayos v the Philippines*, HRC RC Communication 1167/2003, UN Doc CCPR/C/81/D/1167/2003 (2004), para 7.3 (concerning violation of Article 14(3)(b) of the ICCPR).

854 UN Human Rights Committee, CCPR General Comment 32 (2007), para 59.

These rights are applicable in addition to the particular right under Article 6(4) to seek pardon or commutation of the sentence.⁸⁵⁵ The Committee has determined that violation of Article 6 *juncto* Article 14 may be remedied by a subsequent commutation of sentence.⁸⁵⁶ Capital punishment cannot be imposed in respect of crimes committed by persons under the age of 18, and cannot be carried out on pregnant women (Article 6(5)). Moreover, when the death penalty is applied by a State Party in respect of the most serious crimes, it must not only be strictly limited in accordance with Article 6, but it must also be carried out in such a way as to cause the least possible physical and mental suffering, in accordance with Article 7 of the ICCPR (See also 8.3.4).⁸⁵⁷

8.4 PROHIBITION AGAINST DOUBLE JEOPARDY

Article 14(7) of the ICCPR and Article 4 of Protocol 7 to the ECHR provide that no one can be liable to be tried or punished again for an offence in respect of which s/he has been finally convicted or acquitted in accordance with the law and penal procedure of each country (See also 8.4.1). This embodies the principle of *ne bis in idem*, also known as the prohibition against double jeopardy. It is first and foremost a principle of judicial protection for the citizen against the power of the State; it ensures that the legal uncertainty regarding the outcome of a criminal proceeding is limited in time, so that the defendant does not suffer from the unlimited burden of successive prosecutions; it also serves to preserve *res judicata*, the finality and integrity of criminal proceedings upon which the legitimacy of a State rests. The principle encompasses two features: first, that no one should have to face more than one prosecution for the same offence (*nemo debet bis vexari pro una et eadem causa*); and, second, that no one should be punished twice for the same offence (*nemo debet bis puniri pro uno delicto*).

It should be noted, however, that this guarantee: cannot be relied on in cases involving the domestic jurisdiction of two or more States (See also 8.4.2); does not prohibit the retrial of persons convicted in absentia if a retrial is requested by the defendant or if a retrial is undertaken to remedy failures to give proper notice during the first trial (See also 8.4.3); does not prohibit the resumption of a criminal trial where this is justified by exceptional circumstances (See also 8.4.4); and will not apply where a higher court quashes a conviction or orders a retrial (See also 8.4.5). It should also be observed that the guarantee under Article 14(7) of

855 See, for example, *Mansaraj et al. v Sierra Leone*, HRC Communications 839/1998; 840/1998 and 841/1998, UN Doc CCPR/C/72/D/839–841/1998 (2001), para 5.6; and *Domukovsky and Others v Georgia*, HRC Communications 623/1995, 624/1995, 626/1995, 627/1995, UN Docs CCPR/C/62/D/623/1995 (1998), CCPR/C/62/D/624/1995 (1998), CCPR/C/62/D/626/1995 (1998), and CCPR/C/62/D/627/1995 (1998), para 8.10.

856 *Aliev v Ukraine*, HRC Communication 781/1997, UN Doc CCPR/C/78/D/781/1997 (2003), para 7.4; *Zhurin v Russian Federation*, HRC Communication 851/1999, UN Doc CCPR/C/82/D/851/1999 (2004), para 6.6; *Boimurodov v Tajikistan*, HRC Communication 1042/2001, UN Doc CCPR/C/85/D/1042/2001 (2005), para 6.3; *Gougnina v Uzbekistan*, HRC Communication 1141/2002, UN Doc CCPR/C/92/D/1141/2002 (2008), para 5.6; and *Kharkhal v Belarus*, HRC Communication 1161/2003, UN Doc CCPR/C/91/D/1161/2003 (2007), para 6.3.

857 UN Human Rights Committee, CCPR General Comment 20 (1992), para 6.

the ICCPR and Article 4 of Protocol 7 to the ECHR applies to criminal offences only, and not to disciplinary measures that do not amount to criminal proceedings (See also 1.1).⁸⁵⁸

As explained in the UN ECOSOC's Siracusa Principles, the right to a fair and public hearing may be subject to legitimate restrictions that are strictly required by the exigencies of an emergency situation, i.e., an emergency declared under Article 4 of the ICCPR or Article 15 of the ECHR as one threatening the life of the nation. Even in such situations, however, the Siracusa Principles explain that the denial of certain fair trial rights can never occur, even in an emergency situation. This includes the prohibition against double jeopardy.⁸⁵⁹ In the context of the ECHR, this point is expressly recognized within Article 4(3) of Protocol 7 to the ECHR, which provides that "No derogation from this Article shall be made under Article 15 of the Convention."

8.4.1 Double jeopardy and res iudicata

In simple terms, the prohibition against double jeopardy means that once a person has been finally convicted or acquitted of a certain offence, the person cannot be brought before the same court or before another tribunal in respect of the same offence. For example, a person acquitted of an offence in a civilian court cannot be subsequently tried for the same offence by a military or special tribunal. The UN Working Group on Arbitrary Detention and the Human Rights Committee have commented that the repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military "may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience".⁸⁶⁰

As explained by the European Court of Human Rights, the aim of the principle of *ne bis in idem* is to prohibit the repetition of criminal proceedings that have been concluded by "a final decision".⁸⁶¹ To be "finally" convicted or acquitted of an offence means that all levels of appeal have been exhausted, including by reason of the expiry of applicable time restrictions for proceedings (such as through a **statute of limitations**) or for the filing of notices of appeal. In considering the expression "final decision" in the case of *Irving v Australia*, the Human Rights Committee was divided. The majority implied from the words that a final decision is only made where there are no further available grounds of appeal from that

858 UN Human Rights Committee, CCPR General Comment 32 (2007), para 57. See also, for example, *Strik v the Netherlands*, HRC Communication 1001/2001, UN Doc CCPR/C/76/D/1001/2001 (2002), para 7.3.

859 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 70(i).

860 UN Human Rights Committee, CCPR General Comment 32 (2007), para 55; United Nations Working Group on Arbitrary Detention, Opinion 36/1999, UN Doc E/CN.4/2001/14/Add.1 (2000), para 9; and United Nations Working Group on Arbitrary Detention, Opinion 24/2003 (Israel), UN Doc E/CN.4/2005/6/Add.1 (2004), para 30.

861 *Gradinger v Austria* [1995] ECHR 36, paras 53–55. See also *Franz Fischer v Austria* [2001] ECHR 352, especially para 24; *Sergey Zolotukhin v Russia* [2009] ECHR 252, paras 83–84; and *Maresti v Croatia* [2009] ECHR 981, para 62.

decision.⁸⁶² In the opinion of two dissenting members of the Committee, however, the word “final” in Article 14(6) of the ICCPR does not mean that only a conviction that cannot be reversed is final.⁸⁶³ The dissenting opinions pointed out that, if that were the case, the reference to a final decision being “reversed” – within the wording of Article 14(6) – would have no meaning. It was conceded, however, that due to differences between legal systems, there cannot be a single criterion of what a final conviction is and that the Committee should, therefore, make a case-by-case assessment of whether a conviction had become final.

The Explanatory Note on Protocol 7 of the ECHR provides some clarification:

“a decision is final “if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them”. It follows therefore that a judgment by default is not considered as final as long as the domestic law allows the proceedings to be taken up again. Likewise, this article does not apply in cases where the charge is dismissed or the accused person is acquitted either by the court of first instance or, on appeal, by a higher tribunal. If, however, in one of the States in which such a possibility is provided for, the person has been granted leave to appeal after the normal time of appealing has expired, and his conviction is then reversed on appeal, then subject to the other conditions of the article, in particular the conditions described in paragraph 24 below, the article may apply.”⁸⁶⁴

It should be noted that the prohibition against double jeopardy does not prevent an individual from being made subject, for the same act, to the action of a different character, e.g., disciplinary action in the case of an official, as well as to criminal proceedings.⁸⁶⁵

8.4.2 Trial in different jurisdictions

Traditionally, the *ne bis in idem* principle is recognized by the State for application only within its own domestic legal order. Due to the particular wording of Article 14(7) and Article 4 of Protocol 7 to the ECHR, which refer to conviction or acquittal in accordance with the law and “penal procedure of each country” (ICCPR) or “criminal proceedings under the jurisdiction of the same State” (ECHR), the prohibition against double jeopardy cannot be relied on in cases involving the national jurisdictions of two or more States. As observed by the Human Rights Committee in *A. P. v Italy*, the provision only prohibits double jeopardy

862 *Irving v Australia*, HRC Communication 880/1999, UN Doc CCPR/C/74/D/880/1999 (2002), para 8.4. See also *Anderson v Australia*, HRC Communication 1367/2005, UN Doc CCPR/C/88/D/1367/2005 (2006), paras 7.4–7.5.

863 Committee members Louis Henkin and Martin Scheinin.

864 CoE Explanatory Report to Protocol 7, para 22.

865 CoE Explanatory Report to Protocol 7, para 32.

with regard to an offence adjudicated within a given, respondent, State.⁸⁶⁶ The European Court of Human Rights has, likewise, taken the position that Article 4 of Protocol 7 does not apply to a person who has been or will be tried or punished by courts in different States.⁸⁶⁷

8.4.3 Retrial of persons tried in absentia

Where a defendant declines to exercise her/his right to be present at trial, and provided that all due steps are taken to inform the defendant of the charge and of the proceedings, it is possible for a criminal proceeding to commence in the absence of an accused (See also 6.5.3).⁸⁶⁸ If appropriate steps are not taken to notify an accused of the charge and of the proceedings, trial in absentia will amount to a violation of the right to be tried in one's presence.⁸⁶⁹ A violation of this kind can be remedied through allowing a retrial in the presence of the accused.⁸⁷⁰ Such a retrial is not prevented by the prohibition against double jeopardy, nor does the prohibition prevent the possibility of a retrial where the defendant requests this.⁸⁷¹

8.4.4 Retrial in other exceptional circumstances

The Human Rights Committee has clarified, in its recent General Comment, that Article 14(7) does not prohibit the resumption of a criminal trial where this is justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.⁸⁷² This is a matter expressly dealt with by Article 4 of Protocol 7 to the ECHR, which provides that the prohibition against double jeopardy "shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case".

Although there is no European Court of Human Rights jurisprudence on the application of Article 4(2), the Explanatory Note to the provision provides some guidance by explaining that: "The term 'new or newly discovered facts' includes new means of proof relating to previously existing facts. Furthermore, this Article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person".⁸⁷³

866 *A. P. v Italy*, HRC Communication 204/1986, UN Doc CCPR/C/31/D/204/1986 (1987), para 7.3. See also *A. R. J. v Australia*, HRC Communication 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997), para 6.4.

867 *Amrollahi v Denmark* [2001] ECHR, para 29–30.

868 UN Human Rights Committee, CCPR General Comment 32 (2007), para 36. See also CoE Committee of Ministers Resolution (75) 11 on the Criteria Governing Proceedings Held in the Absence of the Accused, para I (9).

869 *Maleki v Italy*, HRC Communication 699/1996, UN Doc CCPR/C/66/D/699/1996 (1999), para 9.4.

870 *Maleki v Italy*, HRC Communication 699/1996, UN Doc CCPR/C/66/D/699/1996 (1999), para 9.4; *Colozza v Italy* [1985] ECHR 1, para 29; *Krombach v France* [2001] ECHR 88, para 85; *Sejdovic v Italy* [2006] ECHR 181, paras 82, 105, 109.

871 UN Human Rights Committee, CCPR General Comment 32 (2007), para 54.

872 UN Human Rights Committee, CCPR General Comment 32 (2007), para 56.

873 CoE Explanatory Report to Protocol 7, para 31.

8.4.5 Remedy of violation by higher court

The prohibition against double jeopardy does not apply if a higher court quashes a conviction or orders a retrial.⁸⁷⁴ In *Terán v Ecuador*, for example, the Human Rights Committee was presented with an argument that Ecuador had violated Article 14(7) of the ICCPR in circumstances where Mr. Terán had been indicted for events in respect of which he had already been tried and convicted. In a domestic challenge to the indictment, the Supreme Court quashed the indictment. This led the Committee to conclude that there had not been a violation of the principle of *ne bis in idem*, but that the principle had in fact been vindicated by the decision of the Supreme Court.⁸⁷⁵

8.5 COMPENSATION FOR MISCARRIAGE OF JUSTICE

Article 14(6) of the ICCPR and Article 3 of Protocol 7 to the ECHR require that compensation according to law (See also 8.5.1) be granted to any person where:⁸⁷⁶

- (a) there has been a final decision (*res iudicata*) convicting a person of a criminal offence (See also 8.4.1);
- (b) the person so convicted has suffered punishment as a consequence of the conviction (See also 8.5.2);
- (c) the conviction is subsequently reversed, or the person is pardoned, “on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice” (as expressed identically in the ICCPR and ECHR) (See also 8.5.3); and
- (c) the non-disclosure of the unknown fact was neither partly nor wholly attributable to the convicted person.

8.5.1 Compensation according to law

To allow compensation “according to [the] law”, as expressed in Article 14(6) of the ICCPR (“according to law”) and Article 3 of Protocol 7 to the ECHR (“according to the law”), States are required to enact legislation on the subject of compensation for miscarriages of justice. The Human Rights Committee has commented that such legislation must ensure that compensation can, in fact, be paid when the circumstances calling for this apply, and that the payment can be and is made within a reasonable time.⁸⁷⁷

The Explanatory Note on Protocol 7 of the ECHR outlines the meaning of the phrase further:

“This does not mean that no compensation is payable if the law or practice makes no provision for such compensation. It means that the law or practice of the State should provide for the payment of compensation in all cases to which the article applies. The

874 UN Human Rights Committee, CCPR General Comment 32 (2007), para 56.

875 *Terán v Ecuador*, HRC Communication 277/1988, UN Doc CCPR/C/44/D/277/1988 (1992) at 76, para 5.4.

876 *Uebergang v Australia*, HRC Communication 963/2001, UN Doc CCPR/C/71/D/963/2001 (2001), para 4.2; and *W. J. H. v the Netherlands*, HRC Communication 408/1990, UN Doc CCPR/C/45/D/408/1990 (1992), para 6.3. Note that there is no jurisprudence of the European Court of Human Rights on this point.

877 UN Human Rights Committee, CCPR General Comment 32 (2007), para 52.

intention is that States would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent. The article is not intended to give a right of compensation where all the preconditions are not satisfied, for example, where an appellate court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge.”⁸⁷⁸

8.5.2 Suffering of punishment as a consequence of conviction

For compensation to be payable, the person wrongly convicted must have suffered some harm, i.e., s/he must have suffered some form or part of a punishment as a consequence of the conviction.⁸⁷⁹

8.5.3 Grounds of reversal or pardon

There are slight differences in punctuation between the text of Article 14(6) of the ICCPR and Article 3 of Protocol 7 to the ECHR. These differences are significant and can help explain a divergence of views within some of the jurisprudence of the Human Rights Committee concerning the grounds upon which a reversal or pardon must have been made for compensation to become payable.

Under Article 14(6) of the ICCPR, compensation following a final criminal conviction becomes payable “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”. On the face of it, the text of Article 14(6) is unclear as to whether the words “new or newly discovered fact...” give rise only to a pardon or refer also to the case of a reversal. In *Irving v Australia*, the majority of the Human Rights Committee adopted the view that the paragraph requires a new or newly established fact to justify *both* a reversal *and/or* a pardon. Two dissenting members, relying on the Committee’s earlier decision in *Muhonen v Finland*, took the position that, properly interpreted, this requirement applies only to pardons and not to reversals.⁸⁸⁰

Under the Article 3 of Protocol 7 to the ECHR, compensation following a final criminal conviction becomes payable “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” (punctuation emphasized). This makes it clear that, at least for the ECHR, compensation is applicable only if the pardon *or* reversal was the result of new facts conclusively showing a miscarriage of justice. This interpretation is

⁸⁷⁸ CoE Explanatory Report to Protocol 7, para 25.

⁸⁷⁹ *Uebergang v Australia*, HRC Communication 963/2001, UN Doc CCPR/C/71/D/963/2001 (2001), para 4.2; and *W. J. H. v the Netherlands*, HRC Communication 408/1990, UN Doc CCPR/C/45/D/408/1990 (1992), para 6.3.

⁸⁸⁰ *Muhonen v Finland*, HRC Communication 89/1981, UN Doc CCPR/C/24/D/89/1981 (1985), para 11.2. See *Irving v Australia*, HRC Communication 880/1999, UN Doc CCPR/C/74/D/880/1999 (2002), Individual Opinion by Committee members Louis Henkin and Martin Scheinin, para 8.4 and Appendix.

supported by the qualification in both the ICCPR and ECHR that compensation is not payable if it is proved that the non-disclosure of the unknown fact was partly or wholly attributable to the convicted person.

Explanatory Note on Protocol 7 of the ECHR defines miscarriage of justice as meaning “some serious failure in the judicial process involving grave prejudice to the convicted person”. The note explains that there is, therefore:

“...no requirement under the article to pay compensation if the conviction has been reversed or a pardon has been granted on some other ground. Nor does the article seek to lay down any rules as to the nature of the procedure to be applied to establish a miscarriage of justice. This is a matter for the domestic law or practice of the State concerned. The words “or he has been pardoned” have been included because under some systems of law pardon, rather than legal proceedings leading to the reversal of a conviction, may in certain cases be the appropriate remedy after there has been a final decision.”⁸⁸¹

The Note continues to conclude that “there is no right to compensation under this provision if it can be shown that the non-disclosure of the unknown fact in time was wholly or partly attributable to the person convicted”.⁸⁸²

In its General Comment 32 on fair trial rights, the Human Rights Committee has agreed that no compensation is due if the conviction is set aside by a pardon that is humanitarian or discretionary in nature or motivated by considerations of equity – in other words, in circumstances not implying that there has been a miscarriage of justice.⁸⁸³

881 CoE Explanatory Report to Protocol 7, paras 23–24.

882 CoE Explanatory Report to Protocol 7, paras 23–24.

883 UN Human Rights Committee, CCPR General Comment 32 (2007), para 53; *Muhonen v Finland*, HRC Communication 89/1981, UN Doc Supp 40 (A/40/40) (1985) at 164, para 11.2.

CHECKLIST: CONVICTION OR ACQUITTAL IN A CRIMINAL TRIAL

1. Was the accused convicted of an offence that constituted a criminal offence under national or international law at the time that the act(s) took place?
 - a) In the case of continuing offences, was the conviction based solely on the acts committed after the criminalization of the conduct?
 - b) Is the law under which the offence is created part of valid national or international law?
2. Has an agreement been entered into between the prosecutor or court and the accused whereby the accused has admitted having committed a crime in exchange for some concession(s), such as the reduction of charges or an agreement on aspects of sentencing?
 - a) Does this agreement, and the circumstances leading up to it, comply with fair trial rights and respect, to the greatest extent possible, the fundamental equality of the parties in criminal proceedings? (For instance, was the defendant fully informed of the right to defence counsel and to counsel appointed under legal aid scheme? Was the conclusion of plea agreements done prior to the confirmation of the indictment and therefore prior to the full disclosure of the prosecution case? Did the judge encourage the defendant to engage in plea negotiations, thus possibly violating the presumption of innocence? Were the views of the victims taken into account with regard to the plea agreement's decision?)
3. Has the convicted person been sentenced in accordance with minimum guarantees?
 - a) Have more severe penalties been applied than were applicable at the time that the offence was committed?
 - b) If lighter sentences have come into effect between the time of the commission of the offence and the time of sentencing, has the convicted person been given the benefit of the lighter sentence?
 - c) To the extent possible, taking into account the particular facts in question, including the mitigating and aggravating features of the offending, is the sentence imposed consistent with previous patterns of sentencing for similar acts?
 - d) Has sentencing included restitution to the victim(s) of the offence(s)?
 - e) In the case of an offence concerning the inability of the convicted person to fulfil a contractual obligation, has sentencing including imprisonment?
 - f) Does the sentence involve cruel, inhuman or degrading punishment?
 - g) Does the sentence involve capital punishment (the death penalty)?
4. Where finally acquitted or convicted of an offence, is the person facing new charges based on the same acts in respect of which s/he was acquitted or convicted?
 - a) Is the new trial convened within the same country?

- b) Is the new trial convened in response to a request by a defendant who had been tried in absentia, or is the new trial undertaken to remedy failures to give proper notice during a trial in absentia?
 - c) Is the trial a resumption of trial in exceptional circumstances, such as the discovery of evidence that was not available or known at the time of the acquittal?
 - d) Has the new charge(s) been quashed by a higher court, or is the new trial the result of an order by a higher court for retrial?
5. If subsequent to a person's final conviction that conviction is reversed or made the subject of a pardon on the basis of a miscarriage of justice, has compensation been provided to the wrongly convicted person?
- a) Was there a final criminal conviction?
 - b) Did the convicted person suffer punishment as a consequence of the conviction?
 - c) Has the conviction been subsequently reversed, or the person pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice?
 - d) Was the non-disclosure of the unknown fact neither partly nor wholly attributable to the convicted person?

CHAPTER IX

Right to a Public, Reasoned and Timely Judgment

Article 14(1) of the ICCPR

“...any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

Article 6(1) of the ECHR

“...Judgment shall be pronounced publicly...”

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the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

Concluding Document of the Vienna Meeting, Vienna 1989.

The right to a public, reasoned and timely judgment forms part of the overall right to a public hearing (See also chapter 4). The right is founded on the idea of the open and transparent administration of justice, which protects individuals from arbitrariness. Public access to judicial decisions helps to avoid the administration of justice in secret, protects against abuse of the judicial process, and helps to maintain public confidence in the administration of justice.⁸⁸⁴ The right to judgment is applicable to criminal and civil proceedings, and is referred to within both Article 14(1) of the ICCPR and Article 6(1) of the ECHR.⁸⁸⁵ It

884 *Pretto and Others v Italy* [1983] ECHR 15, para 21.

885 The right to judgment is not expressly referred to within the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948.

requires that judgment be publicly pronounced and accessible (See also 9.1); reasoned (See also 9.2); and pronounced within a reasonable time (See also 9.3). In the context of the right to effective remedies, the OSCE participating States have committed to uphold “the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies”.⁸⁸⁶

9.1 PRONOUNCEMENT OF JUDGMENT

The open administration of justice is partly guaranteed through the requirement that any judgment must be made public, failing which a violation of Article 14(1) of the ICCPR or Article 6(1) of the ECHR will be found.⁸⁸⁷ The public pronouncement of judgment is required even in cases where the public is excluded from the trial.⁸⁸⁸ The requirement is not absolute, however, and certain latitudes have been applied concerning the means of delivering a public judgment (See also 9.1.1), as well as legitimate reasons for restricting public access to certain judgments (See also 9.1.2).

9.1.1 Means of pronouncing judgment

The ICCPR and ECHR refer to making any judgment public, or pronouncing judgment publicly. The European Court of Human Rights has recognized that there are a variety of traditions as to how judgments are delivered and made accessible to the public. Judgments might be pronounced in open court, and then made publicly available through court registries, or through other avenues, such as websites. The European Court does not follow a literal interpretation of Article 6(1) as requiring “the reading out aloud of the judgment delivered at the final stage of the proceedings”.⁸⁸⁹ The Court has, instead, taken the view that there is no specific form of publication that must be complied with, so long as the underlying principle of public access is guaranteed, thereby avoiding the administration of justice in secret without public scrutiny.⁸⁹⁰

In *Pretto and Others v Italy*, for example, the deposit of an appeal decision with the court registry, accompanied by written notification of the operative provisions of the decision to the parties, was deemed sufficient.⁸⁹¹ The European Court of Human Rights found a violation of Article 6(1) in *Werner v Austria* however. In that case, members of the public who

Article 10 of the UDHR simply refers to the entitlement of every person to a public hearing.

886 Concluding Document of the Vienna Meeting, Vienna 1989, para 13.9.

887 See, for example: *Touren v Uruguay*, HRC Communication 32/1978, UN Doc CCPR/C/OP/1 at 61 (1984), para 12; *Weisz v Uruguay*, HRC Communication 28/1978, UN Doc CCPR/C/OP/1 at 57 (1984), para 16; and *Asan Rushiti v Turkey* [2000] ECHR 106, para 23.

888 UN Human Rights Committee, CCPR General Comment 32 (2007), para 29.

889 *Sutter v Switzerland* [1984] ECHR 2, para 34.

890 *Axen v Germany* [1983] ECHR 14, para 32; and *Campbell and Fell v the United Kingdom* [1984] ECHR 8, para 91.

891 *Pretto and Others v Italy* [1983] ECHR 15, paras 21–28.

were not parties to proceedings were entitled to apply for leave to inspect the court files, including the court judgment, but would only be granted access to those files, at the discretion of the courts, if they could show a “legitimate interest” in the case. Because this had the affect of not making court judgments available to every person who requested them, the European Court held that the publicity of the judgment was not sufficiently ensured.⁸⁹² In *Sutter v Switzerland*, the European Court held that public delivery of a decision of the Military Court of Cassation was unnecessary, because public access to that decision was ensured by other means, namely the possibility of seeking a copy of the judgment from the court registry and due to its subsequent publication in an official collection of case law.⁸⁹³

In the somewhat unusual case of *Mahmoud v Slovak Republic*, the Human Rights Committee considered a situation where a court building was cleared due to a bomb scare, resulting in a claim by the applicant that his rights were violated because the delivery of the court’s judgment was not public. The applicant conceded that, at the time the judgment was delivered, the hearing of his appeal had already been completed and that the judgment was subsequently served on him personally. The Committee dismissed his communication, since the applicant failed to show that his right under Article 14 ICCPR had been violated.⁸⁹⁴

9.1.2 Publicly-accessible judgment not required in all cases

The requirement that any judgment must be made public is not absolute. It is expressly limited within the language of Article 14(1) of the ICCPR such that the public pronouncement of judgment need not occur if “the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children”. This qualification has been read into Article 6(1) of the ECHR. In *B. and P. v the United Kingdom*, for example, hearings concerning child residency orders were conducted “in chambers” (in the office of the judge and, thus, without the presence of the public), the results of which were not publicly pronounced. The European Court of Human Rights recalled its long-standing jurisprudence that the level of publicity given to a judgment must be assessed in light of any special features of the proceedings and the aim being pursued by any restrictions on public access to the judgment. Having regard to the nature of the proceedings being dealt with in that case, and of the aim of protecting the privacy of children and the parties, the European Court held that there had been no violation of Article 6(1) of the ECHR.⁸⁹⁵

9.2 REASONED JUDGMENT

Judgments of courts and tribunals should adequately state the reasons on which they are based.⁸⁹⁶ Article 14(1) of the ICCPR and Article 6(1) of the ECHR do not require a detailed

892 *Werner v Austria* [1997] ECHR 92, paras 52–60.

893 *Sutter v Switzerland* [1984] ECHR 2, para 34.

894 *Mahmoud v Slovak Republic*, HRC Communication 935/2000, UN Doc CCPR/C/72/D/935/2000 (2001), para 6.3.

895 *B. and P. v the United Kingdom* [2001] ECHR 298, paras 45–49.

896 *Suominen v Finland* [2003] ECHR 330, para 34.

answer to be provided to every argument put to the court during the course of the trial.⁸⁹⁷ The Human Rights Committee has referred to the need for any judgment to publicly pronounce “the essential findings, evidence and legal reasoning” of the court’s decision.⁸⁹⁸ Similarly, the European Court of Human Rights maintains that the notion of fair trial calls for domestic courts to address all the essential issues of the case when pronouncing their decisions.⁸⁹⁹ In determining whether the right to a reasoned judgment has been fulfilled, the European Court has stated that: “The extent to which the 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.”⁹⁰⁰ The European Court has also stressed that it is necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the fact that the obligation to provide reasons should address at least those submissions that were crucial to the outcome of the case.⁹⁰¹

The right to a reasoned judgment is important to the legal principle of *stare decisis*, by which judges, especially in common law systems, are obliged to respect the precedents established by prior decisions. This, in turn, contributes to certainty about the interpretation and application of the law, which carries with it the possibility of creating a deterrent effect both against the repetition of conduct amounting to a civil wrong or a criminal offence, or the repetition of State practices in violation of human rights or other important norms, such as constitutional obligations. The right to a reasoned judgment also contributes to the development of the jurisprudence in civil law systems, in that it allows judges to challenge leading case law. It also allows parties to judicial proceedings to determine whether or not there are grounds to appeal a court’s decision, and for preparation of the appeal itself (See also chapter 10). As concluded by the European Court of Human Rights, there can be no useful or effective enjoyment of rights of appeal without a judgment that indicates with sufficient clarity the grounds on which the decision was taken.⁹⁰² Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision.⁹⁰³ It is only by giving a reasoned decision

897 *Van de Hurk v the Netherlands* [1994] ECHR 14, para 61; and *Hiro Balani v Spain* [1994] ECHR 45, para 27; *Suominen v Finland* [2003] ECHR 330, para 34; *Grădinar v Moldova* [2008] ECHR 279, para 107.

898 UN Human Rights Committee, CCPR General Comment 32 (2007), para 29. See, similarly: *Karakasis v Greece* [2000] ECHR 483, para 27; *Tatishvili v Russia* [2007] ECHR 168, para 58; and *Grădinar v Moldova* [2008] ECHR 279, paras 107–108, 116.

899 *Boldea v Romania* [2007] ECHR, para 30, available in French only.

900 *Hiro Balani v Spain* [1994] ECHR 45, para 27; *Ruiz Torija v Spain* [1994] ECHR 47, para 29; *Helle v Finland* [1997] ECHR 105, para 55; *Suominen v Finland* [2003] ECHR 330, para 34; *Grădinar v Moldova* [2008] ECHR 279, para 107.

901 *Hiro Balani v Spain* [1994] ECHR 45, para 28; *Ruiz Torija v Spain* [1994] ECHR 47, paras 29–30; *Helle v Finland* [1997] ECHR 105, para 55; *Suominen v Finland* [2003] ECHR 330, para 34; *Boldea v Romania* [2007] ECHR, para 30, available in French only.

902 *Hadjianastassiou v Greece* [1992] ECHR 78, para 33; *Baucher v France* [2007] ECHR, para 42 available in French only. See also: UN Human Rights Committee, CCPR General Comment 32 (2007), para 49; and *Hamilton v Jamaica*, HRC Communication 333/1988, UN Doc CCPR/C/50/D/333/1988 (1994), para 4.2.

903 *Taxquet v Belgium* [2010] ECHR 1806, para 91. See also *Suominen v Finland* [2003] ECHR 330, para 37.

that there can be public scrutiny of the administration of justice.⁹⁰⁴ The pronouncement of a reasoned judgment, furthermore, facilitates the analysis of, and academic or professional commentary on, the interpretation and application of the law, as well as potentially forming the basis of legal reform.

9.2.1 *The right to a reasoned judgment by a court or tribunal*

In *Baucher v France*, the European Court censured the practices of reading the verdict during the last hearing and of providing the reasons of the judgment only after the deadline for lodging an appeal expires. A violation of Article 6(1) was found because the parties should be allowed to make a fully informed decision on whether or not to appeal, and on which grounds.⁹⁰⁵ In *García Ruiz v Spain*, the European Court found no violation of the right to a reasoned judgment in circumstances where a higher court endorses a lower court's decision without stating any additional reasons. Even though it would be desirable for the appellate court in such circumstances to add a more substantial statement of reasons, the European Court found it sufficient that the factual and legal reasons dismissing the claim were set out at length in the first-instance decision.⁹⁰⁶ In *Helle v Finland*, the European Court emphasized that the notion of a fair procedure requires that an appellate court that has given sparse reasons for a decision, whether by incorporating the reasons of the lower court or otherwise, must at least address the essential issues that were submitted to its jurisdiction and must not merely endorse the earlier findings without further consideration.⁹⁰⁷

9.2.2 *The right to a reasoned judgment in jury trials*

Except for Spain and Switzerland, the general approach to jury trials is that the jury, when delivering its verdict, is not called on to give reasons.⁹⁰⁸ The European Court of Human Rights has recognized the freedom of States to determine the mechanisms by which their judicial systems achieve compliance with the ECHR. A State's use of a particular criminal justice system is, therefore, in principle, outside the scope of the European Court's supervision, provided that the system chosen does not contravene the rights within the ECHR.⁹⁰⁹ The absence of a reasoned verdict by a lay jury does not, therefore, in itself, constitute a breach of the right to a fair trial, and Article 6 does not preclude a defendant from being tried by a lay jury, even where reasons are not given for the verdict. Nevertheless, as stated by the European Court in *Taxquet v Belgium*, for the requirements of a fair trial to be satisfied, the accused and the public must be able to understand the verdict that has been given.⁹¹⁰ Procedural safeguards to this effect include directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, together with precise

904 *Suominen v Finland* [2003] ECHR 330, para 37.

905 *Baucher v France* [2007] ECHR, paras 47–51, available in French only.

906 *García Ruiz v Spain* [1999] ECHR 2, para 29. See also *Hirvisaari v Finland* [2001] ECHR 559, para 30.

907 *Helle v Finland* [1997] ECHR 105, para 60.

908 *Taxquet v Belgium* [2010] ECHR 1806, para 56.

909 *Achour v France* [2006] ECHR 268, para 51.

910 *Taxquet v Belgium* [2010] ECHR 1806, para 90.

and unequivocal questions put to the jury by the judge, in order to provide the jury with a framework on which the verdict is based.⁹¹¹

9.3 TIMELY JUDGMENT AND DECISIONS

The right to a timely judgment forms part of the overall right to a hearing without undue delay (as referred to within Article 14 of the ICCPR), or (as referred to within Article 6(1) of the ECHR) the right to a hearing within a reasonable time (See also 6.4).

The right to a timely hearing in criminal proceedings relates to the time from when a person is charged or arrested until judgment is rendered and any applicable appeals or reviews are completed (See also 6.4.2).⁹¹² The right to a timely hearing in civil proceedings relates to the time from when the proceedings are instituted until when the determination of the court becomes final and the judgment has been executed (See also 6.4.4).⁹¹³

The pronouncement of a court's decision must, therefore, be timely, in order to give effect to the overall right to a timely hearing in criminal and civil proceedings. In *Gonzalez v Republic of Guyana*, for example, the Human Rights Committee found a delay of eight months between the conclusion of a hearing and the delivery of judgment to contribute to an undue delay in the overall length of the proceedings.⁹¹⁴ In *Caleffi v Italy*, the European Court recalled that everyone has the right to a final decision within a reasonable time in the determination of her/his civil rights and obligations. It is, therefore, for the Contracting States to organize their legal systems in such a way that their courts can meet this requirement.⁹¹⁵ In *Frydlender v France*, the European Court took the view that neither the complexity of the case nor the applicant's conduct explained why it took the *Conseil d'Etat* nearly six years to issue the judgment. The European Court also reiterated that employment disputes, by their nature, call for an expeditious decision, in view of what is at stake for the person concerned, who through dismissal loses her/his means of subsistence.⁹¹⁶ In a similar case, *Obermeier v Austria*, the European Court found a violation of Article 6 in circumstances where no judgment had been given nine years after the applicant had instituted proceedings concerning the lawfulness of his suspension.⁹¹⁷ In *Rash v Russia*, the European Court of Human

911 *Taxquet v Belgium* [2010] ECHR 1806, para 92.

912 UN Human Rights Committee, CCPR General Comment 13 (1984), para 10. *Deweere v Belgium* [1980] ECHR 1, para 42; *Taright, Touadi, Remli and Yousfi v Algeria*, HRC Communication 1085/2002, UN Doc CCPR/C/86/D/1085/2002 (2006), para 8.5; *Rouse v the Philippines*, HRC Communication 1089/2002, UN Doc CCPR/C/84/D/1089/2002 (2005), para 7.4; and *Sobhraj v Nepal*, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para 7.4.

913 *Scopelliti v Italy* [1993] ECHR 55, para 18.

914 *Gonzalez v Republic of Guyana*, HRC Communication 1246/2004, UN Doc CCPR/C/98/D/1246/2004 (2010), para 14.2.

915 *Caleffi v Italy* [1991] ECHR 31, para 17; see also *Caillot v France* [1999] ECHR 32, para 27, available in French only.

916 *Frydlender v France* [2000] ECHR 353, paras 44–45.

917 *Obermeier v Austria* [1990] ECHR 15, para 72.

Rights found a violation of the right to a timely judgment in a defamation case because it took the court 11 months to make the text of the judgment available to the applicant.⁹¹⁸

CHECKLIST: RIGHT TO A PUBLIC, REASONED AND TIMELY JUDGMENT

1. Has the court's decision been publicly pronounced?
 - a) Did the court give an oral judgment in open court?
 - b) Is the judgment accessible to all members of the public?
 - a) If access to the judgment is restricted, is this based on reasoned and legitimate grounds, such as the aim of protecting the private lives of children or in matrimonial disputes?
2. Does the court's judgment pronounce in clear and precise terms the essential findings, evidence and legal reasoning of the decision?
3. Has the court's judgment been delivered in a timely manner, such that:
 - a) In the context of criminal proceedings, the time from when the person was charged or arrested until judgment was rendered and any applicable appeals or reviews were completed is reasonable?
 - b) In the context of civil proceedings, the time from when the proceedings were instituted until when the determination of the court became final and the judgment was executed is reasonable?

918 *Rash v Russia* [2005] ECHR 17, para 25.

CHAPTER X

Right to Appeal

ICCPR

Article 14

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

ECHR

Article 2 of Protocol 7

“(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

“(2) This right 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 the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

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the right of the individual to appeal to executive, legislative, judicial or administrative organs.

Concluding Document of the Vienna Meeting, Vienna 1989.

Article 14(5) of the ICCPR and Article 2 of Protocol 7 to the ECHR guarantee that everyone convicted (See also chapter 8) of a criminal offence (See also 1.1) has the right to have the conviction and/or sentence reviewed by a higher tribunal. Access to review by a higher tribunal is applicable to the conviction of a person in respect of a criminal offence (See also 10.1). The review must be a genuine evaluation of the law and facts pertaining to the conviction and/or sentence (See also 10.2). Where review is undertaken, fair trial rights must be guaranteed during the appeal (See also 10.3).

In the context of the right to effective remedies, the OSCE participating States have committed themselves to ensure the right of the individual to appeal to executive, legislative, judicial or administrative organs.⁹¹⁹

As explained in the UN ECOSOC's Siracusa Principles, the right to a fair and public hearing may be subject to legitimate restrictions that are strictly required by the exigencies of an emergency situation, i.e., an emergency declared under Article 4 of the ICCPR or Article 15 of the ECHR as one threatening the life of the nation. Even in such situations, however, the Siracusa Principles explain that the denial of certain fair trial rights can never occur, even in an emergency situation, because "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency". This includes the right to appeal to a higher court.⁹²⁰

The language of these provisions of the ICCPR and ECHR refer only to criminal convictions, which means that the right to review by a higher tribunal does not apply to the determination of "rights and obligations in a suit at law" as described in the ICCPR, or of "civil rights and obligations" as articulated in the ECHR (See also 1.2).⁹²¹ Nor does the right to review apply to any other procedure that is not part of the criminal appeal process, such as constitutional motions that run parallel to criminal appeal proceedings.⁹²² Having said that, the Human Rights Committee has taken the view that, if a State Party provides for review/appeal rights in respect of non-criminal proceedings, the guarantees of a fair trial implicit in Article 14 of the ICCPR must also be respected in that appeal/review process (See also 10.3).⁹²³

10.1 RIGHT TO APPEAL BEFORE A HIGHER TRIBUNAL ACCORDING TO LAW

The right to appeal against a conviction and/or a sentence must be provided for by law (See also 10.1.1), even if subject to an application for leave to appeal (See also 10.1.2). The ICCPR and ECHR, and their corresponding quasi-judicial and judicial organs, take different approaches to whether the right to appeal applies to all convictions (See also 10.1.3). Any implied relinquishment of the right to appeal is not likely to be easily found, although there may be exceptional circumstances where this validly occurs (See also 10.1.4).

10.1.1 Review according to law

Access to review by a higher tribunal must be "according to law" (as expressed in Article 14(5) of the ICCPR). The Human Rights Committee has explained that this expression does not mean that the very existence of the right to appeal is left to the discretion of States

919 Concluding Document of the Vienna Meeting, Vienna 1989, para 13.9.

920 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 70(g).

921 *I. P. v Finland*, HRC Communication 450/1991, UN Doc CCPR/C/48/D/450/1991 (1993), para 6.2.

922 *Douglas, Gentles, Kerr v Jamaica*, HRC Communication 352/1989, UN Doc CCPR/C/49/D/352/1989 (1993), para 11.2.

923 *Puertas v Spain*, HRC Communication 1183/2003, UN Doc CCPR/C/86/D/1183/2003 (2006), para 6.4; and *Linares v Spain*, HRC Communication 1213/2003, UN Doc CCPR/C/89/D/1213/2003 (2007), para 6.5.

Parties, since the right is guaranteed by the ICCPR.⁹²⁴ Rather, the expression refers to the modalities by which the review is to be carried out.⁹²⁵ This aspect is better expressed within Article 2(1) of Protocol 7 to the ECHR, which explains that “[t]he exercise of this right, including the grounds on which it may be exercised, shall be governed by law”.

The Human Rights Committee has explained that Article 14(5) of the ICCPR does not require State parties to provide for several instances of appeal.⁹²⁶ However, where the domestic law of a State does so, there must be effective access to each instance of appeal (See also 10.3).⁹²⁷

When compared to the wording in Article 14(5) of the ICCPR, Article 2(1) of Protocol 7 to the ECHR adds that only a conviction by a “tribunal” will fall within the scope of the right to review, in order to clearly signify that the provision does not concern offences tried by bodies that are not considered to be tribunals within the meaning of Article 6 of the ECHR (See also Chapter 3).⁹²⁸ This has practical implications in jurisdictions where the decision-making body at first instance is not a tribunal within the meaning of the ECHR. The decision of such a body will generally be appealable to a judicial tribunal, and this means that the right to appeal in Article 2 of Protocol 7 to the ECHR will have been satisfied.⁹²⁹

10.1.2 Leave to Appeal

In certain jurisdictions, a person wishing to appeal a criminal verdict must apply for leave to appeal. Generally, the appellant will in these cases be provided with an opportunity to submit the reasons for the appeal along with any supporting evidence in writing to the appeal court, which will, after communication with the opposing party, decide on the request. Only if granted leave to appeal will an applicant be entitled to a full examination of the appeal.

In *Peterson Sarpsborg AS and Others v Norway*, the European Commission of Human Rights examined a system whereby the appellant had to request an application for leave to appeal in order to obtain a new trial in the High Court on questions of evidence, or an appeal to the Supreme Court on questions of law. The Commission found that this system

924 See, for example, *Mennen v the Netherlands*, HRC Communication 1797/2008, UN Doc CCPR/C/99/D/1797/2008 (2010), para 8.2.

925 UN Human Rights Committee, CCPR General Comment 32 (2007), para 45. See also *Salgar de Montejo v Colombia*, HRC Communication 64/1979, UN Doc CCPR/C/15/D/64/1979 (1982), para 10.4; *Gomariz Valera v Spain*, HRC Communications 1095/2002, UN Doc CCPR/C/84/D/1095/2002 (2005), para 7.1; *Capellades v Spain*, HRC Communication 1211/2003, UN Doc CCPR/C/87/D/1211/2003 (2006), para 7; *Sánchez and Clares v Spain*, HRC Communication 1332/2004, UN Doc CCPR/C/88/D/1332/2004 (2006), para 7.2; and *Serena v Spain*, HRC Communications 1351/2005 and 1352/2005, UN Doc CCPR/C/92/D/1351–1352/2005 (2008), para 9.3.

926 UN Human Rights Committee, CCPR General Comment 32 (2007), para 45. See also *Rouse v the Philippines*, HRC Communication 1089/2002, UN Doc CCPR/C/84/D/1089/2002 (2005), para 7.6.

927 UN Human Rights Committee, CCPR General Comment 32 (2007), para 45. See also *Henry v Jamaica*, HRC Communication 230/1987, UN Doc CCPR/C/43/D/230/1987 (1991), para 8.4.

928 CoE Explanatory Report to Protocol 7, para 17.

929 *Hubner v Austria* [1999] ECHR.

of leave to appeal pursued a legitimate aim, namely the fair administration of justice.⁹³⁰ In *E. M. v Norway*, the applicant complained about the leave to appeal procedure, in particular pointing to the fact that no witnesses were heard before the appeal court took its decision and that no reasons were given for the decision on the application for leave to appeal. The European Commission noted that the principle of equality of arms had been respected, since none of the parties had been heard orally. The Commission also noted that the applicant had been given the opportunity, with the help of legal aid counsel, to submit his views in writing and to reply to the prosecutor's submissions. The Commission, therefore, concluded that the applicant had not suffered a disadvantage and, thus, found that in the circumstances of these types of decisions, it may be sufficient for the court to simply accept or reject the application.⁹³¹ No violation of the ECHR was found. It can be noted that procedures similar to leave to appeal procedures have also been found acceptable under the ECHR.⁹³²

10.1.3 Triggering the right of access to review by a higher tribunal

The right to appeal under the ICCPR and the ECHR is limited to convictions of a "crime" (Article 14(5) of the ICCPR) and "a criminal offence" (Article 2 of Protocol 7 to the ECHR), respectively. In the context of the ECHR, any offence that is deemed to be of a criminal character in such a way that it attracts the full guarantees of Article 6 of the ECHR (See also 1.1) subsequently triggers the application of Article 2 of Protocol 7 to the ECHR as regards the right to appeal.⁹³³

According to the Human Rights Committee, the different language versions of Article 14(5) of the ICCPR (crime, *infraccion*, *delitio*) mean that the guarantee to the review of a conviction is not limited to the most serious offences.⁹³⁴ In the case of the ECHR, however, the text of Article 2(2) of Protocol 7 to the ECHR provides that the right to review can be subject to exceptions in regard to offences of a minor character.

In determining whether an offence is of a minor character, the European Court of Human Rights and Commission put an emphasis on the nature of the offence and severity of the punishment, rather than the domestic classification of the offence. In *Putz v Austria*, the European Commission of Human Rights found an offence against the order in court (subject to a maximum fine of 10,000 shillings or alternatively, if in default of payment, up to eight days' imprisonment) to be of a "minor character", not sufficiently important to warrant classifying it as "criminal". The Commission concluded, therefore, that the exception to the right to appeal in Article 2(2) of Protocol 7 to the ECHR was consequently applicable.⁹³⁵ In

930 *Peterson Sarpborg AS and Others v Norway* [1996] European Commission of Human Rights, para 2 (under the heading "THE LAW").

931 *E. M. v Norway* [1995] European Commission of Human Rights, para 1 (under the heading "THE LAW"). See also *Hauser-Sporn v Austria* [2006] ECHR 1048, para 52.

932 *Hauser-Sporn v Austria* [2006] ECHR 1048, para 52.

933 *Galstyan v Armenia* [2007] ECHR 936, para 120.

934 UN Human Rights Committee, CCPR General Comment 32 (2007), para 45. See also *Conde v Spain*, HRC Communication 1325/2004, UN Doc CCPR/C/88/D/1325/2004 (2006), para 7.2.

935 *Putz v Austria* [1993] European Commission of Human Rights, para 37.

Galstyan v Armenia, the European Court of Human Rights was called on to determine the character of the offence of taking part in a protest that violated public order, classified in the domestic law as “minor hooliganism” and punishable by up to 15 days of imprisonment. The European Court noted that only three days of imprisonment had been imposed, but considered that the maximum penalty of 15 days imprisonment was “sufficiently severe not to be regarded as being of a ‘minor character’” within the meaning of Article 2(2) of Protocol 7.⁹³⁶ In *Zaicevs v Latvia*, the applicant had been sentenced to three days of “administrative detention” for contempt of court under the Regulatory Offence Code. Because the maximum sentence for this offence was 15 days’ imprisonment, the European Court concluded that the offence could not be regarded as one of a minor character. The Court added that the domestic classification of the offence only had a relative value.⁹³⁷

A further difference in the approach of the ICCPR and the ECHR concerns criminal convictions by appeal courts. The Human Rights Committee has taken the view that the right to review of one’s conviction is triggered not only by a conviction of a first instance court, but also by a conviction of an appeal court or a court of final instance following acquittal by a lower court.⁹³⁸ In contrast, Article 2(2) of Protocol 7 to the ECHR expressly allows for exceptions from the right to appeal as regards convictions following an appeal against an acquittal.

Where the highest court of a country acts as the first and only instance of a criminal hearing, the Human Rights Committee has concluded that “the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State Party concerned”.⁹³⁹ Instead, the Committee has treated such a system as being incompatible with the ICCPR, in the absence of a reservation to that effect.⁹⁴⁰ Article 2(2) of Protocol 7 to the ECHR, on the other hand, provides that convictions imposed by the highest national tribunal when operating as the tribunal of first instance *can* be exempted from the right to appeal.

10.1.4 Implied relinquishment of the right to appeal

Any implied relinquishment of the right to appeal is not likely to be found. The Human Rights Committee has, nevertheless, made such a finding in circumstances where a former judge with considerable experience insisted on being tried by the Supreme Court in Spain and, upon conviction, found himself without any higher level of judicial body capable of hearing an appeal. Because the applicant himself repeatedly insisted that he be tried directly by the Supreme Court, the Committee considered that the applicant had thereby renounced

936 *Galstyan v Armenia* [2007] ECHR 936, para 124.

937 *Zaicevs v Latvia* [2007] ECHR, para 55.

938 *Gomariz Valera v Spain*, HRC Communication 1095/2002, UN Doc CCPR/C/83/D/1099/2002 (2005), para 7.1; and *Moreno v Spain*, HRC Communication 1381/2005, UN Doc CCPR/C/90/D/1381/2005 (2007), para 7.2.

939 UN Human Rights Committee, CCPR General Comment 32 (2007), para 47. See also *Terrón v Spain*, HRC Communication 1073/2002, UN Doc CCPR/C/82/D/1073/2002 (2004), para 7.4

940 UN Human Rights Committee, CCPR General Comment 32 (2007), para 47.

his right of appeal and that, in the circumstances, the allegation by the applicant constituted an abuse of the right to submit communications.⁹⁴¹

10.2 GENUINE REVIEW

The ICCPR and the ECHR take different approaches to the scope of review required of a higher tribunal. Under the ICCPR, such review must be capable of considering both the conviction and sentence (See also 10.2.1), as well as matters of both fact and law (See also 10.2.2). Under the ECHR, the Contracting States have a wide **margin of appreciation** to limit the scope of the review of the higher tribunal. However, as explained by the European Court of Human Rights, any limitation on the exercise of this right must pursue a legitimate aim and not infringe the very essence of that right.⁹⁴² In order to meet the requirements of Article 2 of Protocol 7 to the ECHR, a review by an appellate court must be a “full and thorough evaluation of the relevant factors”.⁹⁴³

10.2.1 Review of conviction and sentence

According to the ICCPR, a review of, or appeal against, both conviction and sentence must be available.⁹⁴⁴ The Human Rights Committee has, therefore, concluded that a system of supervisory review that only applies to sentences whose execution has commenced does not satisfy the requirements of Article 14(5) of the ICCPR.⁹⁴⁵

In the Explanatory Report on Protocol 7 to the ECHR, it is clarified that Article 2 of Protocol 7 does not require that every case be reviewed both regarding sentence and conviction. The Report clarifies that if, for example, the convicted person has pleaded guilty, the right of appeal can be restricted to a review of the sentence alone.⁹⁴⁶

10.2.2 Review of facts and law

Article 14(5) of the ICCPR requires an appeal to be capable of reviewing facts as well as law.⁹⁴⁷ In circumstances where the law provides for judicial review without a hearing and on matters of law only, this kind of review falls short of the requirements of Article 14(5) of

941 *Estevill v Spain*, HRC Communication 1004/2001, UN Doc CCPR/C/77/D/1004/2001 (2003), para 6.2.

942 *Krombach v France* [2001] ECHR 88, para 96.

943 *Lalmahomed v the Netherlands* [2011] ECHR 338, para 37.

944 *Gelazauskas v Lithuania*, HRC Communication 836/1998, UN Doc CCPR/C/77/D/836/1998 (2003), para 7.2; and *Bandajevsky v Belarus*, HRC Communication 1100/2002, UN Doc CCPR/C/86/D/1100/2002 (2006), para 10.13.

945 UN Human Rights Committee, CCPR General Comment 32 (2007), para 50. See also *Bandajevsky v Belarus*, HRC Communication 1100/2002, UN Doc CCPR/C/86/D/1100/2002 (2006), para 10.13.

946 CoE Explanatory Report to Protocol 7, para 17.

947 *Vásquez v Spain*, HRC Communication 701/1996, UN Doc CCPR/C/69/D/701/1996 (2000); *Gelazauskas v Lithuania*, HRC Communication 836/1998, UN Doc CCPR/C/77/D/836/1998 (2003), para 7.2; *Ratiani v Georgia*, HRC Communication 975/2001, UN Doc CCPR/C/84/D/975/2001 (2005), paras 11.2–11.3; *Semey v Spain*, HRC Communication 986/2001, UN Doc CCPR/C/78/D/986/2001 (2003), para 9.1; *Fernández v Spain*, HRC Communication 1007/2001, UN Doc CCPR/C/78/D/1007/2001 (2003), paras 7–8; *Cabriada*

the ICCPR.⁹⁴⁸ In *Perera v Australia*, the Human Rights Committee clarified that this does not mean that a court of appeal proceed to a full retrial, but simply that a court be capable of conducting an evaluation of the evidence presented at the trial, as well as the procedural conduct of the trial.⁹⁴⁹ As explained by the Committee in its General Comment on fair trial rights, “where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case”, then the requirements of the right to review are satisfied.⁹⁵⁰

In contrast to the higher standards under the ICCPR, Article 2 of Protocol 7 to the ECHR leaves it open to the Contracting States to determine the specific scope of the review in domestic law. The review by a higher court can, for those States that are party only to the ECHR and not to the ICCPR, be limited solely to questions of law.⁹⁵¹ However, the European Court of Human Rights will find a violation of the right to access to court (See also chapter 2.1) in those cases where domestic law *does* allow for a full review in appeal of the merit of the case, and the review is not effectuated. In *Biondić v Croatia*, for instance, the European Court found a violation of the right to access to a court where the court of appeals failed to review the merits of the case solely on the basis of the inadmissibility criteria *ratione valoris*, and in spite of well-established legal jurisprudence indicating otherwise.⁹⁵²

10.3 FAIR TRIAL RIGHTS ON APPEAL

Since appeal against conviction or sentence is part of the determination of a criminal charge against a person, the overall requirement of fairness (captured in Article 14(1) of the ICCPR and Article 6(1) of the ECHR, and elaborated upon in the corresponding fair trial provisions

v Spain, HRC Communication 1101/2002, UN Doc CCPR/C/82/D/1101/2002 (2004), para 7.3; *Fernández v the Czech Republic*, HRC Communication 1104/2002, UN Doc CCPR/C/83/D/1104/2002 (2005), para 7.

948 *Domukovsky and Others v Georgia*, HRC Communications 623/1995, 624/1995, 626/1995, 627/1995, UN Docs CCPR/C/62/D/623/1995 (1998), CCPR/C/62/D/624/1995 (1998), CCPR/C/62/D/626/1995 (1998), and CCPR/C/62/D/627/1995 (1998), para 8.11; *Lumley v Jamaica*, HRC Communication 662/1995, UN Doc CCPR/C/65/D/662/1995 (1999), para 7.3; *Rogerson v Australia*, HRC Communication 802/1998, UN Doc CCPR/C/74/D/802/1998 (2002), para 7.5; *Saidova v Tajikistan*, HRC Communication 964/2001, UN Doc CCPR/C/81/D/964/2001 (2004), para 6.5; *Khalilov v Tajikistan*, HRC Communication 973/2001, UN Doc CCPR/C/83/D/973/2001 (2005), para 7.5; *Aliboev v Tajikistan*, HRC Communication 985/2001, UN Doc CCPR/C/85/D/985/2001 (2005), para 6.5; and *Bandajevsky v Belarus*, HRC Communication 1100/2002, UN Doc CCPR/C/86/D/1100/2002 (2006), para 10.13.

949 *Perera v Australia*, HRC Communication 536/1993, UN Doc CCPR/C/53/D/536/1993 (1995), para 6.4; *Juma v Australia*, HRC Communication 984/2001, UN Doc CCPR/C/78/D/984/2001 (2003), para 7.5; and *Rolando v the Philippines*, HRC Communication 1110/2002, UN Doc CCPR/C/82/D/1110/2002 (2004), para 4.5.

950 UN Human Rights Committee, CCPR General Comment 32 (2007), para 48. See also *Pérez Escobar v Spain*, HRC Communication 1156/2003, UN Doc CCPR/C/86/D/1156/2003 (2006), para 3; and *Bertelli Gálvez v Spain*, HRC Communication 1389/2005, UN Doc CCPR/C/84/D/1389/2005 (2005), para 4.5.

951 CoE Explanatory Report to Protocol 7, para 18. See also e.g., *Hauser-Sporn v Austria* [2006] ECHR 1048, para 52; *Krombach v France* [2001] ECHR 88, para 96.

952 *Biondić v Croatia* [2007] ECHR 910, paras 27–28 *in fine*.

of those instruments) also applies to the appeal hearing. The underlying principle is that the appellant must be able to enjoy an effective appeal, grounded in the fundamental idea that the rights in the ICCPR and ECHR must be meaningful and not merely illusory.⁹⁵³ This means, for example, that the right to a public hearing should be granted when the scope of the appeal covers both the facts and the law (but see the different position adopted by the Human Rights Committee) (See also 10.3.1), that an appellant must be provided with adequate facilities for the preparation of the appeal (See also 10.3.2); the appeal must be undertaken in a timely manner (See also 10.3.3); and the appellant must enjoy the right of self-representation, or representation by counsel at the appeal hearing (See also 10.3.4). Fair trial guarantees for appeal hearings in death penalty cases are particularly important (See also 10.3.5).

The European Court of Human Rights has on several occasions stressed that the manner of application of fair trial rights to proceedings before courts of appeal depends on the particular features of the proceedings involved, including the role of the appellate court in the domestic legal order.⁹⁵⁴ As stated in *Lalmahomed v the Netherlands*, Article 2 of Protocol 7 to the ECHR cannot be interpreted as limiting the scope of fair trial guarantees in appellate proceedings, even in respect of those States for whom Protocol 7 is not in force.⁹⁵⁵ Therefore, whereas Article 6 of the ECHR does not compel the Contracting States to set up courts of appeal or of cassation,⁹⁵⁶ a Contracting State that provides for the possibility of an appeal, regardless of whether or not it has ratified Protocol 7, is required to ensure that appellants enjoy the fundamental guarantees contained in Article 6.⁹⁵⁷

10.3.1 *The right to a public hearing*

The European Court of Human Rights has on a number of occasions held that, provided that there has been a public hearing at first instance, the absence of public hearings before appeal courts may be justified by the special features of the proceedings at issue.⁹⁵⁸ The absence of a public hearing on appeal has not been considered to be a violation of fair trial standards in appeals concerning questions of law or in leave-to-appeal proceedings (See also 10.1.2).⁹⁵⁹ On the other hand, the European Court has held that where an appellate court is called on to examine the facts of a case as well as the law, and to thereby make a full re-assessment of the issue of guilt or innocence, the requirement to hold a hearing in public extends to the

953 See, for example, in the context of the right to be informed of one's entitlement to legal assistance at trial, *Airey v Ireland* [1979] ECHR 3, para 24; and *Artico v Italy* [1980] ECHR 4, para 33.

954 *Ekbatani v Sweden* [1988] ECHR 6, para 27; *Kudła v Poland* [2000] ECHR 512, para 122.

955 *Lalmahomed v the Netherlands* [2011] ECHR 338, para 38.

956 *Delcourt v Belgium* [1970] ECHR 1, para 25; *De Cubber v Belgium* [1984] ECHR 14, para 32.

957 *Lalmahomed v the Netherlands* [2011] ECHR 338, para 36; *Dunayev v Russia* [2007] ECHR 404, para 34; *Khalfaoui v France* [1999] ECHR 158, para 37; *Kudła v Poland* [2000] ECHR 512, para 122; *Delcourt v Belgium* [1970] ECHR 1, para 25.

958 *Ekbatani v Sweden* [1988] ECHR 6, para 31; *K. D. B. v the Netherlands* [1998] ECHR 20 para 39; *Hummatov v Azerbaijan* [2007] ECHR 1026, para 141; Press release *Schlumpf v Switzerland* [2009] ECHR 36.

959 *K. D. B. v the Netherlands* [1998] ECHR 20 para 39; *Hummatov v Azerbaijan* [2007] ECHR 1026, para 141.

appellate hearings.⁹⁶⁰ In *Ekbatani v Sweden*, for example, the domestic Appellate Court was required to examine the case both as regards facts and law, and to make a full assessment of the applicant's guilt. The European Court concluded that these questions could not be determined without a direct assessment of the evidence entailing a full public rehearing of the applicant and the complainant.⁹⁶¹ In contrast, the Human Rights Committee has taken the view that Article 14(5) of the ICCPR does not require a full oral hearing, so long as the appeal court is able to consider the factual dimensions of the case.⁹⁶²

10.3.2 Adequate access to facilities for the preparation of one's appeal

In the same way that a defendant has the right to adequately prepare her/his defence in a criminal trial (See also 6.3), there is also a right to adequately prepare for review by a higher tribunal.⁹⁶³ This has several implications, the most immediate of which is that any effective access to review means that the convicted person must be given access within a reasonable time to a sufficiently reasoned and timely written judgment (See also chapter 9) of the trial court and, if the domestic law provides for more than one instance of appeal, access within a reasonable time to the reasoned and written judgment of at least the court of first appeal.⁹⁶⁴

The right to effectively prepare for review also implies that the convicted person must be provided with access to other documents, such as trial transcripts,⁹⁶⁵ where this is necessary for her/him to effectively exercise the right of appeal.⁹⁶⁶ This includes an obligation on the part of the State to preserve evidential material that would be indispensable to the appeal.⁹⁶⁷

960 *Tierce and Others v San Marino* [2000] ECHR 385 para 95; *Hummatov v Azerbaijan* [2007] ECHR 1026, para 141.

961 *Ekbatani v Sweden* [1988] ECHR 6, paras 32–33.

962 UN Human Rights Committee, CCPR General Comment 32 (2007), para 48; *Perera v Australia*, HRC Communication 536/1993, UN Doc CCPR/C/53/D/536/1993 (1995), para 6.4; *Juma v Australia*, HRC Communication 984/2001, UN Doc CCPR/C/78/D/984/2001 (2003), para 7.5; *Rolando v the Philippines*, HRC Communication 1110/2002, UN Doc CCPR/C/82/D/1110/2002 (2004), para 4.5.

963 See, for example, *Mennen v the Netherlands*, HRC Communication 1797/2008, UN Doc CCPR/C/99/D/1797/2008 (2010), para 8.2.

964 UN Human Rights Committee, CCPR General Comment 32 (2007), para 49. See also *Henry v Jamaica*, HRC Communication 230/1987, UN Doc CCPR/C/43/D/230/1987 (1991), para 8.4. See also *Simmonds v Jamaica*, HRC Communication 338/1988, UN Doc CCPR/C/46/D/338/1988 (1992), para 8.4; *Morrison v Jamaica*, HRC Communication 663/1995, UN Doc CCPR/C/64/D/663/1995 (1998), para 8.5; *Bailey v Jamaica*, HRC Communication 709/1996, UN Doc CCPR/C/66/D/709/1996 (1999), para 7.2; *Van Hulst v the Netherlands*, HRC Communication 903/1999, UN Doc CCPR/C/82/D/903/1999 (2004), para 6.4; and *Mennen v the Netherlands*, HRC Communication 1797/2008, UN Doc CCPR/C/99/D/1797/2008 (2010), para 8.2.

965 See, for example, *Pinkney v Canada*, HRC Communication 27/1978, UN Doc CCPR/C/OP/1 at 95 (1984), para 35.

966 UN Human Rights Committee, CCPR General Comment 32 (2007), para 49. On the limitations of this right, i.e., only as necessary to enjoy an effective appeal, see *Perterer v Austria*, HRC Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), para 10.6.

967 UN Human Rights Committee, CCPR General Comment 32 (2007), para 49. See also, for example, *Robinson v Jamaica*, HRC Communication 731/1996, UN Doc CCPR/C/68/D/731/1996 (2000), para 10.7; and *Lumley v Jamaica*, HRC Communication 662/1995, UN Doc CCPR/C/65/D/662/1995 (1999), para 7.5.

10.3.3 *Appeal without undue delay*

The effectiveness of appeal rights is also dependent on the timeliness of the appeal hearing. Just as a criminal trial at first instance must be undertaken “without undue delay” (as enunciated in Article 14(3)(c) of the ICCPR) – or “within a reasonable time”, as expressed in Article 6(1) of the ECHR – the appeal must also be undertaken in a timely manner. A failure to do so is treated by the Human Rights Committee as a combined violation of Article 14(3)(c) and 14(5) of the ICCPR.⁹⁶⁸ By way of example, a delay of almost five years between an applicant’s conviction in February 1989 and the judgement of the Court of Appeal, dismissing his appeal, in January 1994, was found to be incompatible with the requirements of Article 14(3)(c) *juncto* Article 14(5) of the ICCPR.⁹⁶⁹

The prompt disposal of an appeal is integral to the overall right in criminal proceedings to be tried without undue delay, which relates to the time from when a person is charged or arrested (which sometimes occur at the same time, but not always) until judgment is rendered and any applicable appeals or reviews are completed (See also 6.4.2).⁹⁷⁰

10.3.4 *Representation at the appeal hearing*

In the same way that an accused person is entitled to represent her/himself in person or through counsel of choosing (See also 6.6), subject to some limitations (See also 6.6.1 and 6.6.5), so too must an appellant enjoy this right during the appeal process.⁹⁷¹

Representation must be competent and effective (See also 6.6.4), although the Human Rights Committee has taken a cautious approach in this regard. In *Teesdale v Trinidad*

968 UN Human Rights Committee, CCPR General Comment 32 (2007), para 49. See also, for example, *Pratt and Morgan v Jamaica*, HRC Communications 210/1986 and 225/1987, UN Doc CCPR/C/35/D/210/1986 (1989) and CCPR/C/35/D/225/1987 (1989), paras 13.3–13.5; *Henry v Jamaica*, HRC Communication 230/1987, UN Doc CCPR/C/43/D/230/1987 (1991); *Little v Jamaica*, HRC Communication 283/1988, UN Doc CCPR/C/43/D/283/1988 (1991); *Francis v Jamaica*, HRC Communication 320/1988, UN Doc CCPR/C/47/D/320/1988 (1993); *Champagnie and Others v Jamaica*, HRC Communication 445/1991, UN Doc CCPR/C/51/D/445/1991 (1994); *Bennett v Jamaica*, HRC Communication 590/1994, UN Doc CCPR/C/65/D/590/1994 (1999), para 10.5; *Thomas v Jamaica*, HRC Communication 614/1995, UN Doc CCPR/C/65/D/614/1995 (1999), para 9.5; *Brown and Parish v Jamaica*, HRC Communication 665/1995, UN Doc CCPR/C/66/D/665/1995 (1999), para 9.5; *Daley v Jamaica*, HRC Communication 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998), para 7.4; *Sextus v Trinidad and Tobago*, HRC Communication 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001), para 7.3; *Kennedy v Trinidad and Tobago*, HRC Communication 845/1999, UN Doc CCPR/C/74/D/845/1998 (2002), para 7.5; and *Mwamba v Zambia*, HRC Communication 1520/2006, UN Doc CCPR/C/98/D/1520/2006 (2010), para 6.6.

969 *Wanza v Trinidad and Tobago*, HRC Communication 683/1996, UN Doc CCPR/C/74/D/683/1996 (2002), para 9.4. See also the Committee’s Views in *Lubuto v Zambia*, HRC Communication 390/1990, UN Doc CCPR/C/55/D/390/1990 (1995); and *Sextus v Trinidad and Tobago*, HRC Communication 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001).

970 *Deweere v Belgium* [1980] ECHR 1, para 42; *Taright, Touadi, Remli and Yousfi v Algeria*, HRC Communication 1085/2002, UN Doc CCPR/C/86/D/1085/2002 (2006), para 8.5; *Rouse v the Philippines*, HRC Communication 1089/2002, UN Doc CCPR/C/84/D/1089/2002 (2005), para 7.4; and *Sobhraj v Nepal*, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010), para 7.4.

971 *Kulov v Kyrgyzstan*, HRC Communication 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), para 8.8.

and Tobago, the applicant claimed that he was deprived of an effective appeal because he was represented by an attorney who had never consulted with him, and to whom the applicant could give no instructions. The Committee considered that, because appeals are argued on the basis of the record, it is for counsel to use her/his professional judgment in advancing the grounds for appeal, and in deciding whether to seek instructions from an appellant. A State Party, it said, cannot be held responsible for the fact that legal aid counsel did not consult with the applicant.⁹⁷² The Committee has qualified this view, however. It has said that, particularly in a capital case (See also 10.3.5), when counsel for the accused concedes that there is no merit in the appeal, the municipal court hearing the appeal should ascertain whether counsel has consulted with the accused and informed her/him accordingly.⁹⁷³ The Committee has also taken the position that the requirements of fair trial and of representation require that the applicant be informed that her/his counsel does not intend to put arguments to the Court and that s/he have an opportunity to seek alternative representation if s/he chooses.⁹⁷⁴ It has also decided that the withdrawal of an appeal without consultation would amount to a violation of Article 14(3)(d) of the Covenant.⁹⁷⁵

As for the European Court of Human Rights, the refusal of legal aid on grounds such as the lack of sufficient prospects of success in appeal is considered as legitimate in principle (See also 6.6.7). However, in *Staroszczyk v Poland* the Court held that the refusal of a legal aid lawyer to appeal should meet certain quality requirements.⁹⁷⁶ The Court challenged the fact that domestic regulations did not require a legal opinion to be prepared by the legal-aid lawyer on the prospects of the appeal, which made it impossible to objectively assess whether the refusal was arbitrary.⁹⁷⁷ Moreover, in *Sialkowska v Poland*, the refusal was given only three days before the time limit for appeal, which gave no realistic opportunity for bringing an appeal before the cassation court.⁹⁷⁸ In *Kulikowski v Poland*, the Court added that, when notified of a legal-aid lawyer's refusal to prepare a cassation appeal, it is consistent with fairness requirements that an appeal court indicate to an appellant what further procedural options are available to her/him.⁹⁷⁹ Moreover, in order not to deprive the defendant

972 *Teesdale v Trinidad and Tobago*, HRC Communication 677/1996, UN Doc CCPR/C/74/D/677/1996 (2002), para 9.7.

973 *Morrison v Jamaica*, HRC Communication 461/1991, UN Doc CCPR/C/52/D/461/1991 (1994), para 10.5.

974 *Sooklal v Trinidad and Tobago*, HRC Communication 928/2000, UN Doc CCPR/C/73/D/928/2000 (2001), para 4.10.

975 See, for example, *Collins v Jamaica*, HRC Communication 356/1989, UN Doc CCPR/C/47/D/356/1989 (1993); *Steadman v Jamaica*, HRC Communication 528/1993, UN Doc CCPR/C/59/D/528/1993 (1997); *Smith and Stewart v Jamaica*, HRC Communication 668/1995, UN Doc CCPR/C/65/D/668/1995 (1999); *Morrison and Graham v Jamaica*, HRC Communication 461/1991, UN Doc CCPR/C/52/D/461/1991 (1994); *Morrison v Jamaica*, HRC Communication 663/1995, UN Doc CCPR/C/64/D/663/1995 (1998); *McLeod v Jamaica*, HRC Communication 734/1997, UN Doc CCPR/C/62/D/734/1997 (1998); and *Jones v Jamaica*, HRC Communication 585/1994, UN Doc CCPR/C/62/D/585/1994 (1998).

976 *Staroszczyk v Poland* [2007] ECHR 222, para 135; see also *Sialkowska v Poland* [2007] ECHR 223, para 114;

977 *Staroszczyk v Poland* [2007] ECHR 222, paras 136, 137.

978 *Sialkowska v Poland* [2007] ECHR 223, paras 114, 115.

979 *Kulikowski v Poland* [2009] ECHR 779, para 70.

of a practical possibility of appealing, the time-limit for lodging the appeal should start to run only on the date on which the defendant was informed of the lawyer's refusal, not when the lawyer was served with the judgment.⁹⁸⁰

10.3.5 Right to appeal in death penalty cases

The need for an effective exercise of appeal rights is of particular importance in death penalty cases (See also 8.3.6). Due to the complexity and severity of such cases, the Human Rights Committee has concluded that a refusal to grant legal aid in an appeal concerning the death penalty would constitute a violation of both Article 14(3)(d) of the ICCPR (the right to legal aid – See also 6.6.7) and of Article 14(5) of the ICCPR (the right to effective appeal). In such cases, the Committee takes the view that the denial of legal aid “effectively precludes an effective review of the conviction and sentence by the higher instance court.”⁹⁸¹

Illustrating the higher standard applicable to death penalty cases, the Human Rights Committee has also observed that:

“The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.”⁹⁸²

980 *Kulikowski v Poland* [2009] ECHR 779, para 65.

981 UN Human Rights Committee, CCPR General Comment 32 (2007), para 51. See also *LaVende v Trinidad and Tobago*, HRC Communication 554/1993, UN Doc CCPR/C/61/D/554/1993 (1997), para 5.8.

982 UN Human Rights Committee, CCPR General Comment 32 (2007), para 51. See also: *Smith and Stewart v Jamaica*, HRC Communication 668/1995, UN Doc CCPR/C/65/D/668/1995 (1999), para 7.3; *Gallimore v Jamaica*, HRC Communication 680/1996, UN Doc CCPR/C/66/D/680/1996 (1999), para 7.4; *Daley v Jamaica*, HRC Communication 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998), para 7.5; and *Sooklal v Trinidad and Tobago*, HRC Communication 928/2000, UN Doc CCPR/C/73/D/928/2000 (2001), para 4.10.

CHECKLIST: RIGHT TO APPEAL

1. Does the conviction concern a “crime” or “a criminal offence” within the meaning of Article 14 of the ICCPR and Article 2 of protocol 7 to the ECHR respectively?
 - a) Can the offence be regarded as “a minor offence” within the meaning of the ECHR?
2. Does the law allow appeal against conviction and/or sentence?
 - a) Does the law set out the modalities for appeal, or does it go further to leave the right of appeal at the discretion of the State?
 - b) Is the appellant required to apply for leave to appeal?
3. Has the appellate court or tribunal undertaken a genuine review of the conviction and/or sentence?
 - a) Has the convicted person been able to appeal against both the conviction and/or sentence?
 - b) Has the appellate court reviewed relevant facts as well as law, in cases where this is required by law?
4. Have fair trial rights in the appeal process been respected so as to enable the appellant to enjoy an effective appeal?
 - a) Has the appellant been provided with adequate facilities for the preparation of the appeal, including a reasoned and written judgment of the trial court, trial transcripts or evidential material where this is necessary for an effective appeal?
 - b) Has there been a public hearing before the first instance and/or second instance Court?
 - c) Has the appeal been undertaken without undue delay, in the context of the overall length of the criminal proceedings (from the time the person is charged until final judgment is rendered)?
 - d) Has the convicted person and/or her/his legal counsel been allowed to make effective representations during the appeal?
 - e) Does the appeal concern a death penalty case?

CHAPTER XI

Annexes

GLOSSARY OF KEY WORDS

In this Digest, reference has been made to the following key words used in international human rights law, including in the context of fair trial standards:

Absolute rights: Absolute rights are rights expressed within human rights instruments in such a way that they do not allow for any limitation. Article 7 of the ICCPR and Article 3 of the ECHR provide a good example of this, both stating that: “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” The prohibition is expressed in plain language, which makes it clear that no exception to it is permitted. The prohibitions against slavery and servitude are similarly expressed in clear, absolute terms (Article 8 of the ICCPR and Article 4 of the ECHR).

Acquittal: An acquittal occurs when an accused criminal defendant is found not guilty of the offence with which s/he is charged.

Applicant: For the purpose of this Digest, the term “applicant” is used to signify a person bringing a claim before the European Court of Human Rights (known as an applicant) or person bringing a claim before the Human Rights Committee (known as an author).

Claim: For the purpose of this Digest, the term “claim” is used to signify an application brought before the European Court of Human Rights (known as an application) or an application before the Human Rights Committee (known as a communication).

Customary international law: Customary international law is one of the principal sources of public international law and is applicable to all States, unless objected to by them prior to the crystallization of the law. It is established through State practice (being practice that is uniform and consistent, generally applied and established over time) that is undertaken by States in the belief that such practice is obligatory (*opinio juris*).

Derogation: Derogation is permitted by Article 4 of the ICCPR and Article 15 of the ECHR, involving temporarily suspending the application of certain rights during a state of emergency. Certain rights are non-derogable, even during a state of emergency, as listed in Article

4(2) of the ICCPR and Article 15(2) of the ECHR, and as provided for under customary international law (See also “customary international law” above). A derogation must be formally declared by a derogating State and may only be legitimately invoked where: (i) the derogating measures are adopted during a time of public emergency that threatens the life of the nation (See also “state of public emergency”); (ii) the measures are limited to those strictly required by the exigencies of the situation; the measures are not inconsistent with the derogating State’s other obligations under international law; and (iv) the measures do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Fourth Instance Doctrine: This principle, elaborated by the European Court of Human Rights jurisprudence, implies that it is not for the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court’s task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair.⁹⁸³

Indictment: A written accusation charging that an individual named in the indictment has committed an act, or omitted to do something, that is punishable by law.

Legitimate aim: Qualified rights (See also “qualified rights”) within human rights instruments are those that are asserted as general principles, but then qualified by stating that they may be subject to limitation if necessary to achieve certain legitimate objectives, so long as the limitation is also prescribed by law, necessary (See also “necessity”), proportional (See also “proportionality”) and non-discriminatory. The full complement of objectives, the pursuit of which may legitimate interference with a qualified right, in the article of the ICCPR and ECHR, includes the protection of national security (See also “national security in a democratic society”), public order (See also “public order”), public safety, public health, public morals (See also “public morals”) or the rights and freedoms of others. Linked to the objective of protecting national security, the ECHR also refers to the protection of territorial integrity. Unique to the ECHR, certain provisions within that treaty also permit their limitation for the purpose of maintaining the authority and impartiality of the judiciary or the interests of the economic well-being of the State.

Margin of appreciation: The doctrine of the margin of appreciation is not applied by the Human Rights Committee, but has been developed extensively by the European Court of Human Rights. It involves the idea that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or amongst different moral convictions. The doctrine is capable of applying in two contexts: first, in determining the means of application of rights within the jurisdiction of one State as opposed to another (i.e., in the interpretation of rights or notions such as public morals – See also “public morals”); and, second, in the degree of leniency, if any, to be accorded to a State in the determination of the existence of a state of emergency (See also “state of public emergency”) for the purpose of derogating from certain rights under Article 15 of the ECHR (See also “derogation”).

983 *Edwards v the United Kingdom* [1992] ECHR 77, para 34

National security in a democratic society: One of the objectives that may legitimize the limitation of a qualified right (See also “qualified rights”) is the protection of national security in a democratic society. The Human Rights Committee has spoken of limitations for the protection of national security as those that must be necessary to avert a real, and not only hypothetical, danger to the national security or democratic order of the State.⁹⁸⁴ The Siracusa Principles, similarly, speak of national security as being capable of being invoked to justify the limitation of rights only where taken to protect the existence of the nation, or its territorial integrity or political independence, against force or threat of force.⁹⁸⁵ The Principles add that national security cannot be invoked to prevent merely local or relatively isolated threats to law and order.⁹⁸⁶ The approach of the Human Rights Committee is to be contrasted with that of the European Court of Human Rights, which applies a margin of appreciation and does so in a relatively liberal way in the context of national security. This approach is particularly evident in the context of derogating measures (See also “derogation”) that are based upon national security grounds. In the application of national security as an objective justifying the limitation of qualified rights, the European Court has found various measures permissible including: interference with the freedom of expression in the context of statements made concerning the security situation in south-east Turkey;⁹⁸⁷ secret surveillance undertaken to counter espionage and terrorism;⁹⁸⁸ and a ban on political activities and party affiliations by police officers and members of the armed forces and security services aimed at depoliticizing those services during a period when Hungary was being transformed from a totalitarian regime to a pluralistic democracy.⁹⁸⁹

Necessity: Necessity and proportionality (See also “proportionality”) are elements common to derogation (See also “derogation”) and limitation (See also “qualified right”) powers. Necessity and proportionality are interlinked, although some distinct features attach to each term. Establishing the *need* for any limitation upon rights, or derogation (See also “derogation”), normally involves a reasonably mechanical exercise, whereby a State will point to permitted objectives (See also “legitimate aim”) and draw rational links between the limiting measure and those objectives.

Prescribed by law: Common to all mechanisms authorizing the limitation of rights, any measure seeking to limit a right or freedom must comply with the principle of legality, i.e., it must be prescribed by law. The principle of legality, codified in Article 15 of the ICCPR and Article 7 of the ECHR, has been subject to careful examination by the European Court

984 *Lee v Republic of Korea*, HRC Communication 1119/2002, UN Doc CCPR/C/84/D/1119/2002 (2005), para 7.2. See also *Belyatsky et al. v Belarus*, HRC Communication 1296/2004, UN Doc CCPR/C/90/D/1296/2004 (2007), para 7.3.

985 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 29.

986 UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 30.

987 *Zana v Turkey* [1997] ECHR 94.

988 *Klass and Others v Germany* [1978] ECHR 4.

989 *Rekvényi v Hungary* [1999] ECHR 31.

of Human Rights, with commentary on the expression within the Siracusa Principles also. The European Court has established a threefold test to determine whether a limitation is prescribed by law, requiring that the interference: (i) has some basis in national law; (ii) is adequately accessible so that the citizen has an adequate indication of how the law limits her/his rights; and (iii) is formulated with sufficient precision so that the citizen can regulate her/his conduct.⁹⁹⁰

Presumption of law or fact: Presumptions of fact can be made by a judge or jury (or other fact-finding authority) where there is sufficient evidence, such as circumstantial evidence, to raise such a presumption, and where legislation or case law allows for such a presumption to be made. Presumptions of law involve legislative directions that, where certain prescribed facts exist, then it is to be presumed that a certain element(s) of the offence or civil liability provision is satisfied. Presumptions must always be capable of being rebutted.

Preventive detention: Preventive detention involves the detention of a person on the grounds that her/his detention is necessary to prevent the commission of a serious offence and/or to prevent interference with or destruction of evidence. Preventive detention regimes are highly controversial. If used, they must be strictly necessary (See also “necessity”) and proportional (See also “proportionality”).

Privileged communications between lawyer and client: Communications are privileged where they must be kept in confidence by the recipient of the communication (in this case, the lawyer) for the benefit of the communicator (the client), and where disclosure of such communications cannot be required by the authorities. Due to the special nature of the lawyer-client relationship – and the need for confidence and privacy to enable counsel to obtain full instructions in order to prepare, and pursue or defend, a case – communications between lawyer and client are treated as privileged (See also 6.6.5).

Proportionality: Necessity (See also “necessity”) and proportionality are elements common to derogation (See also “derogation”) and limitation (See also “qualified right”) powers. Necessity and proportionality are interlinked, although some distinct features attach to each term. Proportionality calls into question not only the validity of the limiting measure as a prescription by law (e.g., whether or not the criminalization of certain conduct is proportional to the need to dissuade the conduct in question), but also the way in which it is applied to each particular case (e.g., whether a sentence imposed upon conviction is proportional to the severity of the conduct). Proportionality assessments must be based on a full consideration of all relevant issues, although there are two common factors which are brought to bear in the evaluation of whether limiting measures are proportional, i.e., the negative impact of the limiting measure upon the enjoyment of the right, and the ameliorating effects of the limiting measure.

990 *Sunday Times v the United Kingdom* [1979] ECHR 1, paras 47–49, reaffirmed in *Silver v the United Kingdom* [1983] ECHR 5, paras 86–88. See also UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 17.

Public morals: One of the objectives that may legitimize the limitation of a qualified right (See also “qualified rights”) is the protection of public morals. Different approaches to this subject are taken by the Human Rights Committee, the European Court of Human Rights and the Siracusa Principles. These differences revolve around the question of whether or not a margin of appreciation (See also “margin of appreciation”) should be granted to the State in determining the meaning and implications of public morality. Although the Siracusa Principles on the ICCPR reflect an early approach of the Human Rights Committee to permit a margin of appreciation to be afforded to States when considering public morals,⁹⁹¹ they are now out of step with the Committee’s rejection of the margin of appreciation and its more robust approach to the question of public morals.⁹⁹² In contrast, the European Court takes the view that, because there is no uniform European concept of “morality”, States are entitled to enjoy a wide margin of appreciation in assessing, for example, whether censorship measures are required to protect moral standards.⁹⁹³

Public order: One of the objectives that may legitimize the limitation of a qualified right (See also “qualified rights”) is the protection of public order (*ordre public*), as referred to in the ICCPR. The ECHR refers to the same notion as the prevention of disorder or crime.

Qualified right: Qualified rights within human rights instruments are those that are asserted as general principles, but then qualified by stating that they may be subject to limitation if necessary to achieve certain legitimate objectives (See also “legitimate aims” above). The legitimacy of limitations upon qualified rights involves a detailed assessment, requiring that any limitation is: (i) prescribed by law; (ii) in pursuit of one or more of the listed objectives in the provision in question; (iii) necessary (See also “necessity”) and proportional (See also “proportionality”) to that end; and (iv) non-discriminatory.

Soft law: Soft law refers to quasi-legal instruments that do not have legally binding force, in their own right, but may either be persuasive or constitute evidence of the existence of legal norms. Contrasted with “hard law” (such as international treaties), resolutions of the General Assembly, for example, are recommendatory only and not binding in their own right, although the content of certain such resolutions may be evidence of customary international law (See also “customary international law”), such as the Universal Declaration on Human Rights.

State of public emergency: The ability under Article 4 of the ICCPR to derogate (See also “derogation”) from certain rights is triggered only “in a time of public emergency which threatens the life of the nation”. Interpreting the comparable derogation provision in Article 15 of the ECHR, which refers to times of “war or other public emergency threatening the life

991 *Hertzberg v Finland*, HRC Communication 61/1979, UN Doc CCPR/C/15/D/61/1979 (1982), para 10.3; and UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 27.

992 See, for example, *Toonen v Australia*, HRC Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), para 8.6.

993 *Handyside v the United Kingdom* [1976] ECHR 5, especially paras 47–49.

of the nation”, the European Court of Human Rights has identified four criteria to determine whether such a situation exists:⁹⁹⁴ (i) the situation in question should be a crisis or emergency that is actual or imminent;⁹⁹⁵ (ii) it must be exceptional, such that normal measures are plainly inadequate;⁹⁹⁶ (iii) it must threaten the continuance of the organized life of the community;⁹⁹⁷ and (iv) it must affect the entire population of the State taking the derogating measures,⁹⁹⁸ or a geographically-restricted area within the State where the derogation affects only that area.⁹⁹⁹

Statutory limitation periods: Statutes of limitations are laws that set out the maximum period of time that can elapse between an event(s) and legal proceedings that are based on that event(s). Limitation periods vary from jurisdiction to jurisdiction, and as between different types of criminal and non-criminal laws, taking into account factors such as the severity of the offence (or importance of the non-criminal issue) and challenges in the detection and/or investigation of such matters (especially relevant for complex issues, including where evidence might be required to be obtained from another jurisdiction). Different mechanisms are used to calculate the start and expiry of limitation periods. Limitation periods may begin at the time the act took place, or at the time a continuing act was completed, or at the time a formal indictment (See also “indictment”) was issued. The expiry of a limitation may be affected by an *extension* of the period (where additional time is allowed in certain circumstances, e.g., as a result of an application by investigators for reasons of needing to obtain evidence from abroad), a *suspension* of the limitation period (where the time stops running, e.g., if a defendant has absconded overseas) or an *interruption* of the limitation period (whereby the time period restarts upon the occurrence of certain events, such as the issuing of an indictment).

Strict liability offences: An offence in respect of which the prosecution is only required to prove that the accused committed a physical act(s) (*actus reus*) without needing to establish that s/he intended to act in that way or to produce that result (*mens rea*).

Trial at first instance: A trial at first instance is, literally, the first time that a full trial is undertaken in any legal proceedings. A court of first instance is, correspondingly, the court in which the first trial was held.

994 *Lawless v Ireland (No 3)* [1961] ECHR 2, para 28.

995 Compare with: UN Human Rights Committee, CCPR General Comment 29 (2001), para 3; and the UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), paras 40, 54.

996 Compare with UN Human Rights Committee, CCPR General Comment 29 (2001), paras 2, 4.

997 Compare with UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 39(b).

998 Compare with: UN Human Rights Committee, CCPR General Comment 29 (2001), para 4; and the UN ECOSOC, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 39(a).

999 See *Ireland v the United Kingdom* [1978] ECHR 1; and *Sakik and Others v Turkey* [1997] ECHR 95, para 39.

Ultra vires: The Latin phrase *ultra vires* literally means “beyond the powers” and signifies the situation where an act has taken place beyond the permitted authority of the actor. Legislation may be *ultra vires* if it fails to comply with authorizing constitutional provisions or, in the case of subordinate legislation, such as regulations, where that subordinate legislation is made beyond the authorization provided under the primary legislation and any other relevant legal provisions restricting the authority of the subordinate legislator.

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A

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The Office for Democratic Institutions and Human Rights (ODIHR) and the majority of OSCE field operations have been conducting trial monitoring programmes over the last ten years. These programmes aim to assist participating States in developing functioning justice systems that adjudicate cases consistently with the OSCE commitments and other international standards on rule of law and due process.

Hence, both OSCE field operations and ODIHR have developed a significant wealth of substantive knowledge and practical experience in this area. *The Legal Digest of International Fair Trial Rights* represents an important contribution to building the institutional memory of the OSCE in the field of trial monitoring and the safeguard of fair trial rights.

The Legal Digest of International Fair Trial Rights aims at building the capacity of legal practitioners to conduct professional trial monitoring by providing them with a comprehensive description of fair trial rights, coupled with practical checklists resulting from the experience of OSCE and ODIHR trial monitoring programmes.

OSCE trial monitoring staff are the primary beneficiaries of the Legal Digest. However, ODIHR also aims at reaching out to NGOs in order to promote the idea of trial monitoring as a tool to exercise the right to a public trial as well as to enhance public trust in the administration of justice.

