

Fair Trial

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Textbook on

International Human Rights

Third edition

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WEBSITES

- www.ilo.org—The International Labour Organization
www.ilo.org/public/english/standards/ipec/index.htm—The International Programme for the Elimination of Child Labour
www.interpol.int/Public/THB/default.asp—INTERPOL Children and Human Trafficking
www.ohchr.org/english/issues/slavery/index.htm—United Nations Office of the High Commissioner for Human Rights—page on Slavery and Trafficking
www.unicef.org—UNICEF
www.ohchr.org/english/issues/children/rapporteur/index.htm—Special Rapporteur of the Commission on Human Rights on the sale of children, child prostitution and child pornography
www.antislavery.org—NGO focusing on eliminating slavery and analogous practices
www.ohchr.org/english/issues/trafficking/index.htm—Special Rapporteur on trafficking in persons, especially in women and children

16

Equality before the law—the right to a fair trial

'Everyone has the right to recognition everywhere as a person before the law ... All are equal before the law ... 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 ... Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. None 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 same 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' (compiled from Arts. 6, 7, 10, 11, UDHR; see also Arts. 14–16, ICCPR; Arts. 6 and 7, ECHR and Arts. 2–4, Protocol 7; Arts. 3, 8–10, ACHR; Arts. 3 and 7, ACHPR; Arts. 6 and 7, CIS; Arts. 12, 13, 15–19, AI)

One of the cornerstones of the rule of law itself is the notion of a fair trial. The common philosophical origin and thus the interdependence of the rule of law and human rights is highly apparent in the right to a fair trial. Fair trials form an essential part of all legal systems which purport to be founded on the rule of law. Such fairness demands a fair judicial process administered by an impartial judiciary.

The right to equality before the law is distinct from the provisions on equality of persons and the freedom from discrimination although there is a degree of overlap. Equality before the law requires all individuals to have equal access to the courts and to be viewed in law in a non-discriminatory manner, especially with respect to the judicial determination of their rights and freedoms under international human rights law. International human rights demand that all persons can access and use the law in the determination of their rights and duties. A number of factors are incorporated: *inter alia*, the presumption of innocence, the right to a fair trial, the right to a public trial, a speedy determination of the law, the right to an adequate defence, the right to appeal, and compensation in the event of a mistrial.

The Universal Declaration of Human Rights was adopted from a newly established position of equality of all persons and non-discrimination. It is natural that these concepts should underpin the codified laws on equality before the law and fair trials. The Human Rights Committee in its thirteenth General Comment (1984) elaborated the related provisions of the International Covenant. Without a doubt, the provisions on the right to a fair trial have received most judicial consideration at the regional level, particularly within Europe where the equivalent provision (Art. 6) has proven the most common ground of jurisdiction in cases brought before the European Court thereby giving rise to comprehensive jurisprudence.

For reasons of space, it is impossible to provide more than an overview of the associated rights and jurisprudence in the current text. As has been stated, the right

to a fair trial is one of the most inventively elaborated and dynamically interpreted rights today, it is 'judgemade law' in the true sense of the word, constantly developing (Lehtimaja, L. and Pellonpää, M., at p.225). Reference should be had to the more specialized texts on the various international and regional instruments for more detailed analysis. This chapter will overview the right to be recognized as a person before the law/equality and the prohibition on retroactive penal legislation before considering the position of courts under the law, the presumption of innocence and those rights which accrue primarily to accused persons.

16.1 Recognition, equality, and access issues

'Everyone has the right to recognition everywhere as a person before the law' (Art. 6, UDHR; see also Arts. 16 and 26, ICCPR; Art. 3, ACHR; Art. 5, ACHPR; Art. 9, AL)

The first and certainly most crucial aspect of those rights associated with a fair trial is the right to be recognized as a person before the law. Clearly non-recognition presents severe challenges to the individual wishing to enforce rights before, or even appear before, a court or tribunal. One also has the right to be treated equally by the courts and, as has emerged through jurisprudence, every person has the right of access to courts.

16.1.1 Recognition as a person before the law

The right to recognition as a person before the law is embedded in the concept of the right to an existence. It enables the individual to enter into certain legal obligations including contracts and facilitates the exercise and enforcement of rights before the courts. Every person thus has the right to bear legal rights and obligations. It is not open to a State to subject a citizen to a 'civil death', that is to deprive an individual of legal personality. Any total or partial denial of legal personality will infringe these provisions.

The American Convention on Human Rights has the right to recognition as a person before the law tabled as the first civil and political right (Art. 3). It is, moreover, a non-derogable right in terms of the International Covenant on Civil and Political Rights in reflection of its importance. After the right to life, it is arguably the pre-eminent right for individuals as non-recognition as a person before the law precludes the exercise of all other rights. In bygone years, slaves were denied recognition as legal persons, being regarded as the legal property of their owners. More recently, under South Africa's apartheid regime, racial criteria determined legal rights.

Recognition as a person before the law facilitates enforcement of rights and freedoms derived from international human rights instruments. As human rights accrue to all persons, the recognition of personification is an essential prerequisite to the enjoyment of those rights. Fair trial procedures should be used in all court proceedings to ensure the rule of law is respected.

16.1.2 Lack of capacity to enter legal obligations

Recognition as a person before the law does not ipso facto require that the individual has full legal capacity. Minors and those lacking mental capacity, for example, though having no legal capacity to enter contracts or conduct business, are still recognized as persons before the law. The law relating to children's rights that focus on the best interests of the child and many national laws relating to individuals with mental health problems corroborate this. Should the rights of such people be compromised, it is normal for their interests to be represented by another person or party. For example, if a person lacks the capacity to enter obligations, a legal guardian may be appointed to act on his or her behalf, always ensuring that the best interests of the individual concerned are pre-eminent. Such legal guardians may be appointed by the court or by those responsible for the individual concerned. However, note that in some parts of the world, lack of legal capacity does equal denial of legal recognition.

It should be noted that Article 12 of the Convention on the Rights of the Child envisages an evolving capacity of a minor, commensurate with individual development. Moreover, where criminal charges are concerned, international human rights law requires that very young children do not have full criminal responsibility. Article 40(3)(a) imposes an obligation on State Parties to promote the establishment of laws and procedures with the aim of establishing a minimum age below which a presumption of non-infringement of penal law applies. Very young children are thus deemed not to have the legal capacity to commit crimes.

16.1.3 Problems with defining 'persons'

In essence, the right to be a person before the law means that once national law recognizes you as a person (usually after birth—but see the discussion on the parameters of the right to life in Chapter 13), then you assume the rights and duties of all people. From thenceforth forward, you are entitled to exercise all ascribed rights. Given the disparities between different States on the start of the right to life and the time of legal death, recognition is not necessarily transnational. Adding in conflict of laws/private international law, there is the theoretical possibility of some borderline cases in which individuals are deemed to be alive and thus a 'person' in one State, but not in another. Such cases are rare but have potential implications for national laws and, occasionally, international human rights.

16.1.4 Equality of persons before the law

A further extension of this right may be found when the notion of equality is added. The concept of equality before the courts can be traced to Article 7 of the 1789 French Declaration. Everyone has the right to equality before the courts and tribunals of law. Consequently, restricting capacity to sue in respect of matrimonial property to the male partner infringed the International Covenant on Civil and Political Rights (*Ato del Avellan v Peru*) as did differing burdens of proof for male and female social security claimants in the Netherlands (*Broeks v Netherlands*). Equal protection of the law is also often demanded by international human rights,

thus when Mauritian laws enabled foreign husbands of Mauritian women to be deported but not foreign wives of Mauritian men, Mauritian law was held to run contrary to the notion of equal protection of the law. Families were not accorded equal protection, thus Articles 26, 2(1), and 3 of the International Covenant on Civil and Political Rights were found by the Human Rights Committee to have been violated (*Aumeruddy-Cziffra v Mauritius*).

A General Comment issued by the Human Rights Committee provides further information on the prohibition of discrimination before the law (No. 18 (1989)): although noting that the Covenant does not define 'discrimination', the Committee believes that the term should imply 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status, and which has the effect of nullifying or impairing recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms' (para. 7). The need for affirmative action is accepted (para. 10) while the inherent non-equality principles are noted—e.g. the prohibition on the death penalty being carried out on those below eighteen years (para. 8). The Committee considers that Article 26 of the Covenant provides an autonomous right, prohibiting discrimination in law or in fact (para. 12).

16.1.5 A right of access to a court?

With the Council of Europe, elements of this have been extended to the articulation of a general right of access to a court. The landmark case is that of *Golder v United Kingdom*. The applicant had been convicted of robbery with violence and imprisoned in Parkhurst Prison. He was subsequently implicated in a disturbance within the prison and accused of assaulting a prison officer though was eventually exonerated due to mistaken identity. Thereafter, Golder decided to bring a civil action (libel) against the prison officer to ensure his prison file did not reflect his alleged wrongdoing. However, the Home Office refused Golder access to a solicitor for this purpose. On the basis of this refusal, Golder took his complaint to the European Commission on Human Rights. Both the Commission and, subsequently, the Court of Human Rights concluded that Golder's rights under the European Convention had been violated. The Court stated that Article 6 'embodies a "right to a court", of which the right to access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only' (para. 36). Subsequent cases in Europe have expanded this line of thinking—*Airey v Ireland* demonstrated that access must be effective access, hindrance was just as likely to violate the Convention as would a legal impediment to access. In that case, the applicant had been indirectly denied access to a court through the refusal of legal aid to seek a judicial separation. Mrs. Airey could go to the court and represent herself and thus technically could access a court. However, the European Court held that due to the complexity of such actions, the applicant could not reasonably be expected to bring the action herself. Accordingly, the denial of legal aid resulted in a violation of Article 6(1). More recently, the European Court decided that the need for multiple Ministerial certificates on security issues occasioned a violation of Article 6(1) when the applicant was trying to claim discrimination in Northern Ireland (*Timinelly and McElduff v United Kingdom*).

It is clear from this line of cases that the right to recognition as a person before the law entails not only recognition of legal personality, but also equality of treatment and a right of effective access to courts for the judicial determination of disputes. This can impose a significant burden on a State, especially when financial support, such as legal aid, is required to facilitate the realization of the right. However, the importance of equal access to the courts to the concept of the rule of law, which underpins these human rights, is paramount. It is reasonable to expect similar lines of reasoning to be adopted by other regional and international bodies faced with questions of access to courts.

16.2 Prohibition on retroactive penal legislation

'No one shall be held guilty for 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' (Art. 11(2), UDHR; see also Art. 15, ICCPR; Art. 7, ECHR; Art. 9, ACHR; Art. 7(2), ACHPR; Art. 7, CIS; Art. 6, AL).

Basic concepts of fairness and justice require that one cannot be punished for something which was not a crime at the time it was committed—*nullum crimen sine lege* and *nulla poena sine lege*. The Rome Statute of the International Criminal Court codifies these principles in Articles 22–23. Although 'ignorance of the law is no excuse', it is essential that individuals can ascertain the content of the laws which govern their behaviour should they so wish. The prohibition on retroactive penal legislation is linked to the right to a fair trial, as it is irrevocably an example of an unfair trial. Legal certainty demands that criminal offences are defined and prescribed in law. The prohibition on retroactivity of laws finds early expression in the Constitution of the United States 1787 and in the earlier Declarations of Rights adopted by various North American colonies.

16.2.1 National and international crimes

As the Universal Declaration makes clear, individuals can be held responsible for violations of international law, even if national law does not render the offence a crime. Thus an individual committing piracy, implicated in genocide, or even setting up a paedophile ring may be in violation of international law—the Geneva Convention on the High Seas 1958, the Genocide Convention, and the Convention on the Rights of the Child further elaborate these 'crimes'. The latter is not an international crime *per se* but it may be argued that the Convention on the Rights of the Child (and Protocol) provides a legal basis for criminalization of such activity. Crimes against humanity have long been condemned under international (sometimes customary) law. Additional criminal jurisdiction is provided with the establishment of the International Criminal Court. Naturally the International Criminal Court is also bound by these provisions thus there is a guarantee to individuals that they will not be held accountable at the international level for actions which were not deemed criminal at the time of commission or omission.

The inclusion of 'international law' provides the State with a wider scope for punishing crimes than mere reliance on national criminal law. Consequently many States have enacted legislation facilitating the prosecution of individuals found within their jurisdiction who have committed war crimes, crimes against humanity, specified acts of terrorism, piracy, and hijacking as defined and provided for under the salient international treaties. As the act was a 'crime' under international law at the time it was committed, there is no issue of retroactivity of criminal legislation. Article 5 of the Statute of the International Criminal Court limits the jurisdiction of the Court to the 'most serious crimes of concern to the international community as a whole': genocide, crimes against humanity, war crimes, and crimes of aggression. Further elaboration is provided within the Statute.

16.2.2 Defining crimes

In many States, there is a criminal code which tabulates criminal offences. In other States, a variety of individual laws provide the basis for action. The precise scope of the crime should be clear. Occasionally, laws provide that mere criminal intention is suffice to give rise to liability. In most legal systems, there is an inherent flexibility which allows judicial teleological interpretation to effect punishment of criminal activity which is not proscribed in national law. This is likely to be used in very restrictive situations—most likely in common law traditions, and for the punishment of offences with clear evidence of criminal intent.

16.2.3 Examples of violations

Many States have been found lacking in respect of this right. In several cases against Uruguay, the Human Rights Committee found violations. In *Weinberger v Uruguay*, the author was convicted for membership of a political party which was subsequently banned, while in *Pietraroia v Uruguay*, the charge was one of subversive association with a trade union, the activities of which were lawful at the salient time (albeit subsequently outlawed). In *Ireland v United Kingdom*, the United Kingdom had enacted a provision for retroactive penal legislation. However, as the Government gave an undertaking that no one had been or would be convicted under the legislation, this aspect of the complaint lodged against the United Kingdom was dropped. Most courts have recourse to these fundamental principles—for example the European Court of Justice in *Regina v Kent Kirk*.

Given the recent profile of the two International Tribunals for Rwanda and the former Yugoslavia, respectively, it should be noted that the United Nations authorities apply customary international and humanitarian law as well as codified laws such as that found in the Geneva and Hague Conventions on the conduct of war and genocide. The progressive criminalization of international humanitarian law is, apparently, acceptable (*International Prosecutor v Duško Tadić*). The enforcement of international humanitarian law through the international justice system will further strengthen the law in this area. In this respect, the work of the International Criminal Court is awaited and the spate of national cases in the US and UK military tribunals and the new Iraqi court system is noted.

16.3 What are 'courts and tribunals'?

Before a more detailed examination of the right to a fair trial can begin, it is necessary to establish what bodies constitute courts and tribunals and thus are obligated to conduct proceedings fairly. Essentially, all courts and tribunals, whatever their form, are covered by the terms of the provisions. Accordingly, many entities not entitled 'court' may be covered. The key requirement is that the body functions as a court—adjudicating on disputes and ascertaining a solution with reference to the law.

As with other aspects of human rights law, there is no solitary static definition which applies, no exhaustive list of entities which are covered. States may periodically create new bodies which have court-like functions and so these too may fall within the ambit of regional and international regulation. The Human Rights Committee has closely examined a plethora of ad hoc bodies which appear to dispense justice in States, including temporary bodies. Military and revolutionary courts and tribunals are generally covered but their existence occasions more detailed consideration by the Committee due to the potential for bias, etc. Special attention is also paid to the conduct of Shari'a courts and any 'special courts' noted in the initial or periodic reports of States.

Administrative bodies may be covered—in *Albert and Le Compte v Belgium*, the European Court of Human Rights considered a professional medical association which conducted disciplinary hearings to fall within the ambit of Article 6(1) of the European Convention, while in *Zumbotel v Austria*, the order made by a Government office regarding expropriation complied as there was a viable appeal process to the Austrian Administrative Court.

It is clear from the foregoing that human rights monitoring bodies will adopt a broad view of what is meant by a court or tribunal. If the body concerned appears to be settling disputes and adjudicating in accordance with law, the interests of justice demand that it functions in accordance with the provisions tabulating the right to a fair trial.

16.3.1 The treaty-monitoring bodies?

Note that the various international human rights monitoring bodies are not regarded as courts. The role of these bodies is to supervise the implementation of the various human rights documents by member States. Even when reviewing individual communications, there is no judicial framework—the Committee merely delivers views on the extent to which the facts before it evidence compliance with the obligations assumed by the States under the instrument in question. In contrast, the International Criminal Court will be regarded as a court and will thus be bound by the principles relating to fair trials (as mentioned, these provisions are laid out in detail in the Statute of the Court).

16.4 An independent and impartial court

The interests of justice are best served by an independent judiciary adjudicating on the merits of a given case based on application of the salient law. To this end, there should be a separation of powers between the executive and judiciary in the State. Article 41(2) of the Statute of the International Criminal Court provides that '[a] judge shall not participate in any case in which his or impartiality might reasonably be doubted on any ground'. Among the issues considered here will be the rules and procedures governing appointment and dismissal of judges, the terms and conditions of service of judges, the qualifications and training required and undertaken by judges, and also the procedural, specific and legal guarantees which seek to secure the impartiality of the judiciary. General Comment No. 13 issued by the Human Rights Committee states that impartiality and independence should be established with reference not only to the above criteria but also to the actual independence of the judiciary from the executive branch and legislature.

16.4.1 Jurisprudence

A considerable volume of jurisprudence on the subject has emanated from the European Court of Human Rights. The European Court indicates the factors to be addressed when considering if a body is independent: 'the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence' (*Campbell and Fell v United Kingdom*, para. 78). Judges who are closely connected in a personal capacity to the complaint being heard may not be regarded as impartial (see, for example, *Demicolo v Malta*). The same principles govern jury trials—any jury deciding a case should be independent and impartial—links between members of the jury and the defendants or prosecutors may also be found to contravene the provisions on fair trial (e.g. *Holm v Sweden*). It appears from the jurisprudence that the entire process should be overseen by an impartial and independent body. Hence in the case of *V v United Kingdom*, the European Court on Human Rights queried the practice of the United Kingdom Home Secretary determining the minimum length of imprisonment for a convicted murderer sentenced to be detained 'during Her Majesty's pleasure' (para. 114). The Home Secretary was clearly not independent of the executive. The United Kingdom responded swiftly with the Home Secretary referring the case to the Lord Chief Justice for determination of length of sentence. Given V was one of the juveniles convicted for murdering the toddler James Bulger, this decision attracted a lot of publicity in the United Kingdom.

The role of State prosecutors and the use of Advocates General has also been scrutinized (e.g. UN Guidelines on the Role of Prosecutors). Care must be taken to ensure that such people are also subject to the stringent requirements of the judiciary as regards appointment and independence. In many States, such appointees serve as preliminary investigators. This can give rise to substantial queries over the independence and impartiality of the judiciary. To ensure impartiality is maintained, Article 41(2)(a) of the Statute of the International Criminal Court provides

that a judge shall be disqualified from cases before the Court if he or she has previously been involved with that case at any level and in any capacity. Such a strict separation of function is lacking in some national systems. For example, in Belgium, judges can act as investigating judges before the trial—this may give rise to public doubt over impartiality (*DeCubber v Belgium*). A judge sitting on a case who had previously been head of the public prosecutor's department at the time the case was being investigated has been held to breach an objective test of impartiality (*Piersack v Belgium*). Thereafter, a judge taking over the role of prosecution during a trial gave rise to a legitimate doubt over impartiality in the case of *Thorgerston v Iceland*. Judges should not preside over more than one stage of the process. Consequently, a judge who has sat on the initial trial should not sit on an appellate trial for the same case (*Oberschlick v Austria*).

It is a matter of degree and each decision of the international and regional bodies turns on the particular facts of the case. As a general rule of thumb, an appearance of bias may be sufficient to give rise to a complaint. Certainly in Europe, an objective test is applied and many violations have been found based on what appears to be injustice rather than any proven impartiality on the part of the judge in question. A high standard of independence is clearly required.

The operation of military courts and tribunals has been noted as a potential problem area by both international and regional organizations. General Comment 13 of the Human Rights Committee states that military courts or tribunals which try civilians can present 'serious problems as far as the equitable, impartial and independent administration of justice is concerned' (para. 4). Accordingly, the Committee seeks detailed comments from States in their reports on the safeguards in place to protect civilians being tried in such courts.

16.5 Presumption of innocence

'Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence' (Art. 11(1), UDHR; see also Art. 14(2), ICCPR; Art. 6(2), ECHR; Art. 8(2), ACHR; Art. 7(1)(b), ACHPR; Art. 6(2), CIS; Art. 7, AL, Art. 66, Statute of the International Criminal Court)

The presumption of innocence is an essential principle of a fair trial and a cornerstone of democratic society, a universally accepted rule of natural justice. It can be found in early human rights' documentation such as the 1789 Declaration on the Rights of Man. An accused is entitled to be regarded as innocent until guilt is established pursuant to the criminal legal process. This right does not mean that an individual cannot be incarcerated pending trial—detention following arrest is lawful under all human rights conventions, albeit subject to controls (Chapter 15). The presumption of innocence is essentially a procedural guarantee—the adjudicators must commence proceedings with an open mind and no preconceived notions of guilt. The burden of proof is on the State bringing the criminal action, it must prove the guilt of the accused. The finding of guilt must be based on the evidence, whether direct or indirect, which is led before the Court. However, statutory offences (strict or automatic liability) do not, *prima facie*, violate international human rights. Authority for this may be obtained from the European case of

Salabiaku v France, in which the French courts had convicted the applicant for drug smuggling. He had been caught at an airport with a quantity of cannabis in his luggage. The presumption in French law that such possession was smuggling was held not to be a violation of the European Convention's presumption of innocence.

However, international law does recognize that the burden of proof may shift to the accused in certain situations. For example, an accused relying on a special defence may be required to justify its invocation—in the case of *Lingens v Austria*, the onus was on the applicant to prove veritas as a defence in a libel action. In general the mechanics for securing a rebuttal of the presumption of innocence is a matter for national law.

As a general principle, in criminal trials, proof must be beyond reasonable doubt. Attempts to incorporate this standard into the International Covenant on Civil and Political Rights failed although in General Comment No.13, para. 7, the Human Rights Committee states that '[n]o guilt can be presumed until the charge has been proved beyond reasonable doubt'. Now, however, Article 66(3) of the Statute of the International Criminal Court applies this standard to trials conducted before the court. At the regional level, the European Court of Human Rights has endorsed the notion that any doubt should benefit the accused but has not elaborated further (*Barberà, Messegue and Jabardo v Spain*).

The presumption of innocence also extends to State protection against excessive or prejudicial media coverage. For example, in a high profile criminal trial with a jury, the State must take reasonable steps to ensure that the jury will not be prejudiced in their deliberations by the publicity received. For this reason, many States impose embargoes on matters under investigation and trial. In the case of *Griffin v Russian Federation*, there had been a wide media profile of the case, including reports of public statements made by high ranking law enforcement officials portraying the author of the communication as guilty. The author was eventually convicted of murder, attempted rape and various assaults. His death sentence was commuted to life imprisonment. Referring to General Comment No. 13 on Art. 14, the Human Rights Committee considered that the presumption of innocence had been violated as the public authorities had not exercised the required restraint in refraining from prejudicing the outcome of the trial.

Attempts have been made to extend this right to a more general freedom from self-incrimination. In articulating the minimum guarantees for accused persons in criminal trials, Article 14(3)(g) of the International Covenant on Civil and Political Rights provides that an individual should not be compelled to confess guilt or testify against himself. Article 55(1)(a) of the Statute of the International Criminal Court makes similar provision for the conduct of investigations thereunder. The main communications considered under this section by the Human Rights Committee have involved allegations of confessions extracted under duress. For example, in *Estrella v Uruguay*, the accused was a professional pianist who alleged that he had been threatened with dismemberment of his hands should he fail to admit subversive activities. This was held to be a violation of the Covenant though it should be noted that the opinion of the Committee was given in default—Uruguay refused to submit observations on the complaint.

The communication from *López v Spain* raised issues of self-incrimination. However, the complaint was found inadmissible as the penalty imposed on the author was for a failure to cooperate with the authorities (in the instant case by

identifying who had been driving his vehicle when it was clocked speeding by a police radar) not for failure to incriminate himself by confessing to be the driver. This is an interesting decision when compared to similar decisions under the European Convention. In a series of cases (including *Funke v France*), the European Court of Human Rights has reiterated its view that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the notion of a fair procedure (*Murray v United Kingdom*, para. 45). However, certain inferences may be drawn from the evidence led and the silence in the face thereof. Thus, in *Murray v United Kingdom*, there was no violation of the European Convention as the applicant had, through silence, failed to explain his presence at a property in Northern Ireland where a suspected IRA informer was also found. The suspected informer had been unlawfully detained, allegedly by Murray and others, interrogated and, it was claimed, plans were afoot to have him killed. In such a situation, inferences could be drawn about the presence of the accused in the property.

The Statute of the International Criminal Court details rights of silence and freedom from self-incrimination for the accused person in Article 55(1)(a) and (2)(b), Article 67(g).

16.6 Minimum guarantees for criminal trials

International instruments on the rights of peoples to fair trials draw heavily on notions of *égalité des armes*, the need for both parties in a dispute to be on an equal footing. The *Magna Carta* is often regarded as one of the first instruments which documented 'due process'. This concept underpins the notion of all fair criminal trials, providing a set of procedural and legal guarantees for the accused person. The rights most commonly accorded to accused persons may now be found in Article 67 of the Statute of the International Criminal Court. It would appear that the principle of equality before the law requires not only equality between accused persons (freedom from discrimination) but also equality between the accused and the State in relative terms. Hence, many States have extensive procedural and evidential requirements which seek to ensure that the parties have the opportunity to prepare and defend allegations and witness testimony. Inevitably, when the State is prosecuting an individual, an element of David and Goliath will be perceived. It is the role of human rights to ensure that the rights of the individual are not compromised and justice is thus fully served. International human rights also impose on national courts an obligation to investigate any claims of infringing behaviour during the trial. In accordance with the old adage, it is not enough that justice is done, it must also be seen to be done.

16.6.1 The language of the trial and charges

Defendants must be informed of the charge(s) against them in a language which they understand and must be given appropriate time to prepare a defence thereto.

The language requirement is of fundamental importance as an accused cannot be expected to respond to allegations without knowing the substance of them.

Notification of charges should be prompt, preferably as soon as a competent authority first makes the charge. It may be necessary for a State to provide interpretation and translation facilities when charging those who do not speak the language of the State concerned. The onus is on the State to prove that all due steps were taken to ensure that the accused understood the charges levied. In the case of the International Covenant, the charge should be stated either orally or in writing, indicating both the law and the alleged facts on which it is based (General Comment No. 13, para. 8). The accused person has no right to select the language in which the charges are made. Thus, for example, a bilingual French/Spanish speaker arrested in Cameroon may not insist on being charged in Spanish if French is used. Similarly, individuals may not seek to use a regional language if they understand competently the official language of the court in question. This was illustrated in the case of *Barzhig v France*—the author of this communication to the United Nations Human Rights Committee claimed that France infringed the Covenant by refusing to provide an interpreter during his trial. The author was a French citizen, resident in Brittany, who wished to conduct the trial in Breton. However, the State conducted the trial in French as the accused and witnesses were Francophone. Following a pronouncement that individuals may not expect to choose any language for a trial, the Human Rights Committee decided that there was no violation of the Covenant. Although perhaps not particularly supportive of minority languages, this decision and others like it are certainly in accordance with the notion of a fair trial. As this communication illustrates, the right is to be informed of charges made and to partake in a trial held in a language which is understood. There is no right to select the language of trial. In a case before the European Court of Human Rights, *Brozicek v Italy*, the accused was charged with tearing down political flags and injuring a police officer in Italy. The applicant was a Czechoslovakian-born German resident. In response to a communication from the Italian authorities, he wrote to the Italian authorities, claiming he would receive communications about his trial either in German or in any official language of the United Nations (French, English, Russian, Chinese, Spanish) but not in Italian which he did not understand. The Italian authorities continued to send materials to the accused in Italian thereby violating the European Convention.

As this case suggests, there is an onus on the accused person to notify the court in question of any linguistic issues. Although the onus is on the State to ensure that charges levied against a person are understood fully, the State is permitted to assume comprehension of the language of the court unless there are indications to the contrary. An accused must thus indicate if the use of an interpreter is necessary and, indeed, whether any translation facilities which are provided are appropriate (see *Griffin v Spain*—no objections had been raised during the trial to the Canadian author being tried in Spanish with the assistance of an interpreter who spoke little English thus translated into French, a language in which the author had only a basic understanding. The Human Rights Committee held there had been no violation even although the eventual conviction was allegedly based on a response to a mistranslated question).

The images of the trial at Camp Zeist in the Netherlands of the two people suspected of involvement in the bombing of Pan Am flight 103 were characterized by the presence of interpreters, both for the accused persons and for the judges. Although this was a domestic (Scots law) trial, its conformity to international

standards is beyond question in this regard. The conduct of the International Criminal Tribunals is similar with comprehensive translation facilities provided, while the Statute of the International Criminal Court prescribes a right for the accused to have competent translation and interpretation facilities before (Art. 55(1)(c)) and during (Art. 67(f)) the trial.

It should also be noted that the interests of fairness demand that any essential translation and interpretation costs be borne by the State. Clearly, forcing the accused to pay in order to be tried runs contrary to the notion of equality before the law. The Human Rights Committee, for example in its General Comment No. 13, concludes that free interpretation must be provided where necessary and the costs must be met by the State, irrespective of the outcome of the case. Translation costs cannot be a punitive measure.

16.6.2 Adequate time and facilities to prepare and conduct a defence

Clearly, international human rights law will not condone so-called 'kangaroo courts'. Accused persons have the right to prepare an appropriate defence to the charges which have been levied. Consequently, those charged must be allowed access to potential legal counsel and free communication with any such counsel; witnesses must be permitted to be called and examined in court, with appropriate cross-examination of any witnesses called by the prosecution. The Human Rights Committee has even had cause to point out that any court-appointed counsel should be legally trained (*Vasilakis v Uruguay*). In that case, the Military Court had appointed a non-lawyer as defence counsel for the applicant when charged (and convicted) of being a member of the Tupamaros National Liberation Movement. On appeal, her sentence had been increased to thirty years' rigorous imprisonment and from five to ten years' precautionary detention.

As a variety of cases prove, holding an accused person incommunicado with no access to counsel is a clear violation of human rights. The State is obligated to facilitate some kind of channel of communication between a detained suspect and any appointed legal counsel. For this reason, prisoners have visiting rights and communication rights with counsel. The specifics of each case is dependant on the circumstances of each case, communication may be written, oral, or in person. The period of political upheaval in Latin America provided many infringing cases with accused persons being denied access to counsel, time, or facilities to compile a proper defence. In many of these instances, there was no trial, or even indictment—the suspects were detained nevertheless.

In *Setelich on behalf of Antonaccio v Uruguay*, one of the earlier cases on this point, various violations of the right to a fair trial were found by the Human Rights Committee. The fact that the author of the communication had not been able to communicate with his appointed counsel was considered to prevent the preparation of a proper defence while the failure of a military tribunal to permit Antonaccio to call witnesses in his defence was also held to be an infringement of Article 14 of the International Covenant on Civil and Political Rights. Any appointed counsel must consult with the accused and be actively involved in the preparation of the defence. This is particularly true in schemes operated in many States where public defence lawyers are assigned to cases. The assigned counsel must regularly

meet with the accused and prepare the case with due diligence (see also *Oxandabarat on behalf of Scarrone v Uruguay*).

In spite of the emphasis on equality of the parties before the courts and full preparation of the defence, it should be noted that an accused person does not per se have the right of access to all documents accrued during the criminal investigation process. Corroboration for this can be obtained from the Human Rights Committee in *O.F. v Norway*, para. 5.5 (ultimately inadmissible). In contrast, in *Ärelä & Niikkälä v Finland*, the Human Rights Committee held that it was 'a fundamental duty of the courts to ensure equality before the parties, including the ability to contest all the argument and evidence adduced by the other party' (para. 7.4). In that particular case, the applicants in a dispute concerning logging were not permitted to comment on a brief containing the legal arguments submitted by the Forestry Authority, despite the document being considered by the Finnish court (which decided in favour of the Forestry Authority).

16.6.3 Trial in absentia

Being present at the hearing of one's case is often of crucial importance to the accused. In general, one has the right to attend one's own trial although if disruptive, one may be required to monitor the trial through other means (Art. 63(2) Statute of the International Criminal Court). Trial in absentia can be in violation of international human rights. In *Mbenge v Republic of Congo (Zaire)*, the author of the communication to the Human Rights Committee was twice tried and sentenced to death in Zaire while he was resident in Belgium. He discovered this fact through press reports. The Human Rights Committee concluded that the State had not taken all appropriate steps to contact the author and inform him of the charges thus he was not afforded the time to prepare his defence. Indeed, the summons to the second trial was issued by the authorities a mere three days before proceedings commenced in the court. The International Covenant was thus infringed. However, it would appear that should an accused wilfully fail to attend a trial, trial in absentia is not such an issue.

Although one has the right to attend, there is no right per se to full oral proceedings. In certain circumstances, it would appear that written submissions might suffice for due process. Discrepancies between international and regional systems have produced some anomalies. At one point, Finland's regional system of written submissions was deemed compatible with the International Covenant (*R.M. v Finland*), but, due to European Human Rights' jurisprudence, Finland had to enter a reservation in respect of Article 6 of the European Convention to prevent cases being brought to Strasbourg on the same issue.

16.6.4 Legal aid

In order to prevent persecution and victimization, accused individuals are entitled to legal assistance in the preparation of their defence. Such legal assistance should be provided by the court, if the accused cannot pay it (for example, Article 67(d) Statute of the International Criminal Court). The denial of legal aid can be viewed as a denial of justice (see *Airey v Ireland*). A feature of many States is the provision of State-funded defence litigators or, indeed, a system of legal aid by which those

prevented by cost from funding legal representation can be assisted in this by the State. Obviously, any such lawyers appointed by the State have a duty to act in the best interests of the client even when the State is picking up the bill for the expenses. A non-independent system of legal assistance could be subject to challenge.

16.6.5 Trial within a reasonable time

Many instruments require that a trial be held within a reasonable time. This, depending on the instrument, may also apply to civil procedures. A slow and laborious judicial procedure may be viewed almost as a denial of justice if no reasons are forwarded in mitigation. The concept of what constitutes a reasonable time after the charges are levied is, of course, a matter of circumstance and degree. Naturally, the alacrity with which the trial is held assumes greater importance where the accused is detained pending trial. Thus, in *Sextus v Trinidad & Tobago*, detention from the date of the murder until trial twenty-two months later in a straightforward case was held to violate Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights. At paragraph 7.2, the Human Rights Committee stated that 'substantial reasons' must be shown to justify such a delay. General problems following an attempted coup did not count. This opinion followed *Barroso v Panama* which had a three and a half year period of detention between indictment and trial. Consequential to the presumption of innocence, detained persons should be brought swiftly to trial in order that their guilt or innocence can be ascertained. Thereafter, if innocent, the deprivation of liberty will end as extratemporal detention may result in a challenge under the provisions on deprivation of liberty. In general, the calendar starts running on the date the person is charged. The nature of the proceedings and the conduct of the parties are taken into consideration when ascertaining if the trial is held promptly. Inevitably, application of the notion of 'reasonable' time is subjective.

It is unfortunate that the Human Rights Committee has not produced more concrete guidelines on this area. In State reports, various issues are raised including political, evidentiary and even geographical reasons for delaying trials. For example, in rural areas, it may take longer to constitute a court for a trial—this issue has been raised in earlier Australian State reports but is equally applicable to many other countries with a widely dispersed population.

Swiftness of process is also required at the appeal stage of a hearing. Thus the Human Rights Committee considered that a delay of some thirty-four months from conviction to appellate procedure occasioned by delay in transcription of the trial contravened the International Covenant on Civil and Political Rights (*Pinkney v Canada*). In the case of *Sextus v Trinidad & Tobago*, a delay of four years and three months between conviction and appellate judgment was considered unreasonable. It should also be remembered that it has been held that the very lengthy appeal process which precedes the execution of a convict in, for example, the United States, can, while not violating the right of a fair trial (it is very much in the interests of the accused to exhaust every conceivable appeal avenue) violate the right of a person to humane treatment and respect for personal dignity (discussed in Chapter 14 on freedom from torture and other inhuman and degrading treatments or punishment).

16.6.6 Public hearing

Integral to the notion of a fair trial is the quality assurance mechanism of public scrutiny. As is previously noted, justice should be seen to be done thus the entire judicial process should be public. Naturally, demands of national security may necessitate closed courts and the interests of minors may demand the exclusion of the public and imposition of reporting restrictions. In such instances, there will be no violation of international human rights. However, in the case of national security, it may be necessary for there to exist some mechanism for reviewing the decision to shroud the case in privacy. A form of judicial review, for example, may enable the national security implications to be verified.

Closed trials which give rise to particular concern are those of a military or revolutionary nature when 'political' crimes are discussed. Although such trials were comparatively common in, for example, parts of Latin America, Africa, and Central Asia, the number would appear to be decreasing with the increase in publicly accountable democratic States.

16.6.7 Double jeopardy

The notion of *ne bis in idem* (double jeopardy) is expanded on in the 1791 Bill of Rights (Fifth Amendment) of the United States, while in England and Wales the law was amended recently to allow certain serious offences to be retried if new and compelling evidence emerges. The International Covenant on Civil and Political Rights (Art.14(7)) and the American Convention (Art.8(4)), both enshrine protection against double jeopardy. The International Covenant provides that no one should be tried or punished for a crime for which he has already been convicted or acquitted. The Inter-American provision provides protection following acquittal only.

National jurisprudence exists in many jurisdictions on this. It is an issue of particular concern when conflict of laws/private international law issues are raised. Thus for example, consider the hypothetical case of a Kenyan man who kills a Thai woman and an Australian man in Paraguay. He is convicted of murder in Paraguay and serves a prison sentence. On release, he returns to Kenya and is arrested on arrival. He cannot be retried and punished for the same murders. The same rule would apply should the murderer subsequently visit Thailand or Australia though both countries could exercise jurisdiction over the man. He has already served his sentence. In some situations, it may be possible for two courts to adjudicate in a matter but, in such circumstances, the second court must take account of the penalty imposed by the first court. An example can be seen in European competition law—in *Wilhelm v Bundeskartellamt*, the company was on trial in Germany and being investigated by the European Commission (European Union). On a preliminary ruling (Art. 234 Treaty of Rome, as amended) the European Court of Justice opined that the company could be tried twice as long as the second court took into account any penalty already imposed. This was permissible because two different angles of the case were being simultaneously investigated—the internal effects by Germany and the transnational effects by the European Commission. Note also the potentially concurrent jurisdiction in international criminal law, although precedence is normally given to the relevant international system (e.g. the Yugoslav Tribunal).

16.6.8 Appeal hearing

Following conviction, an accused person must have the right to have the sentence and conviction reviewed by a higher tribunal or court, according to law. There is no general right of appeal *ad infinitum*. However, at least one court should review the decision of the lower court. The higher court should re-examine the facts and application of the law in order to challenge or verify the decision of the lower court. In some jurisdictions, a branch of the court of first instance undertakes the appellate function. This is most likely when a particularly heinous crime is involved and jurisdiction is reserved for a higher court. Appeals may be to a smaller committee or chamber of the same court. As long as the judges are different and they have the constitutional power to reverse the decision, this will be in conformity with international law.

16.7 Conclusions

The right to equality before the law clearly goes to the heart of human dignity. It is one of the major embodiments of the freedom from discrimination advocated by the United Nations in the Charter itself. As has been stated, human rights can be said to represent the modern codification of the traditional concept of the rule of law which underpins societies across the world and is entrenched into numerous constitutions. The right to a fair trial, the equality of arms of parties to a legal dispute (especially when the State is a party/criminal law is involved), is fundamental to the operation of the rule of law. The standards set by international law are comprehensive; States are accorded little flexibility. Should further elaboration on the application of the law to criminal trials be required, one only has to look at the Statute of the International Criminal Court.

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