



Article scientifique

Article

2000

Published version

Open Access

This is the published version of the publication, made available in accordance with the publisher's policy.

---

The jurisprudence of the European Court of Human Rights on detention  
and fair trial in criminal matters from 1992 to the end of 1998

---

Kolb, Robert

**How to cite**

KOLB, Robert. The jurisprudence of the European Court of Human Rights on detention and fair trial in criminal matters from 1992 to the end of 1998. In: Human rights law journal, 2000, vol. 21, n° 9-12, p. 348-373.

This publication URL: <https://archive-ouverte.unige.ch/unige:44882>

while fusing secretariats from the former Commission and Court. While several of these problems are transitional in nature, the rising case load is likely to be a long term, if not permanent, problem. It is a problem faced by the U.S. courts of appeals as well.

Case law consistency is a problem the European Court will have to face. At present the Court makes use of an internal bilingual case law report on pending cases, which is distributed to all Judges and Registry lawyers. It later becomes the public "case law information note" after all confidential information has been deleted. Section Registrars meet regularly to compare notes on pending cases being processed and alert their Section Presidents when a problem is identified. As the case law continues to rise and the system evolves, more sophisticated processes will be necessary.

The capacity to function effectively with continually rising case loads requires periodic evaluation of the adequacy of staff and budget<sup>57</sup> resources and the establishment of procedures that will allow efficient disposition of meritless claims and full consideration of

those cases presenting *prima facie* violations of the Convention. At a press conference on September 28, 2000 the President of the Court spoke of the need for states parties to provide the Court with adequate financial and other resources to cope with a projected annual increase in workload for 2000 of 22% on top of a 40% increase in 1999. The Court is currently completing 600 cases a month, double the figure for 1999, but without adequate resources, the Court will be unable to continue increasing its productivity, however good its procedures. With such resources and frequent assessment and improvement of its procedures, the Court can ensure justice with all deliberate speed.

<sup>57</sup> The budget of the Strasbourg Court is roughly half that of the International Criminal Tribunal for the Former Yugoslavia. Speech by Luzius Wildhaber, Human Rights Centre of the University of Potsdam, Berlin, August 1999. See Michael O'Boyle, Nottingham Human Rights Law Review - Special Issue on the ECHR, Vol. 4, No. 3, pp. 3-8 (1999).

## THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON DETENTION AND FAIR TRIAL IN CRIMINAL MATTERS FROM 1992 TO THE END OF 1998

by Robert KOLB, Geneva

|  |     |
|--|-----|
| I) Introduction .....  | 348 |
| II) Right to personal liberty (habeas corpus) and legality of detention (Article 5 of the European Convention on Human Rights) ..... | 349 |
| A) General aspects .....   | 349 |
| B) Prompt information on the reasons of arrest, Article 5(2) .....   | 351 |
| C) Prompt presentation to judicial authority, Article 5(3) .....   | 351 |
| D) Remedy to challenge the legality of the detention, Article 5(4) .....   | 353 |
| E) Right to compensation for illegal detention, Article 5(5) .....   | 355 |
| III) Fair trial guarantees (Article 6) .....   | 355 |
| A) General aspects .....   | 355 |
| B) Equality of arms .....  | 357 |
| C) Right to personal participation in the trial or on appeal .....   | 358 |
| D) Right to adversarial proceedings and right to challenge evidence .....  | 359 |
| E) Right to an independent and impartial tribunal established by law .....   | 360 |
| F) Right to a decision in reasonable time .....  | 363 |
| G) Presumption of innocence .....  | 365 |
| H) Right to be informed of the charge .....  | 366 |
| I) Adequate time and facilities for the preparation of the defense .....   | 367 |
| J) Right to personal defense or to appointment of a (legal aid) counsel .....  | 368 |
| K) Right to call and cross-examine witnesses .....   | 370 |
| L) Right to free assistance of an interpreter .....  | 371 |
| M) Right to a reasoned judgment .....  | 371 |
| IV) Prohibition of retroactive criminal laws (Article 7) .....   | 371 |
| V) Ne bis in idem .....  | 372 |
| VI) Conclusion .....   | 373 |

### I) Introduction

In the following pages an attempt will be made to give an overview over the rich jurisprudence of the European Court of Human Rights in matters of detention and of fair trial in criminal procedure, roughly in the last decade. Time-limits have to be set in order not to exceed in length what can be reasonably done in an article and also to avoid repeating what has already been said and repeated elsewhere.

All jurisprudence on principles and fundamental rights has a constitutive role in developing and giving more precision to the law. Out of the weighing of the principles in concrete cases emerge criteria of priority which may quickly harden into contextual legal rules. These criteria establish objective priorities of one right over the other under specific constellations of circumstances. The guiding criteria for establishing or denying a breach of the Convention shall therefore be pinpointed.

Critical comments will also be provided where necessary. Furthermore, the human rights jurisprudence shall be considered here from the standpoint of a rigorously legal perspective and using legal tools. Such an approach is becoming increasingly rare, this being a matter of concern to the present author. Human rights law should not become the exclusive playground or even hotbed of some activists. Finally, the jurisprudence of the United Nations Committee on Human Rights and of the Inter-American Commission and Court will be referred to in comparison to that of the European Court.

\* Robert Kolb, Chargé d'enseignement à l'Institut universitaire de hautes études internationales, Geneva.

## II) Right to personal liberty (habeas corpus) and legality of detention (Article 5 of the European Convention on Human Rights)

### A) General aspects

1. According to the Convention and the Court's jurisprudence a deprivation of liberty must rest on: (1) a sufficient legal basis; (2) the respect of procedural guarantees; (3) a legitimate motive as set out in letters (a) to (f) of Article 5, paragraph 1, of the Convention.

2. As to the *sufficient legal basis* the Court had in the past held that a law in the material sense (delegation of legislative powers to the executive) as well as non-written law (common law) may be sufficient.<sup>1</sup> The law must then be clear and understandable so that the individual is able to conform his conduct to it.<sup>2</sup> The law must finally be accessible.<sup>3</sup> There has been no development in the case-law on this point in the period under review. Its requirements seem well-settled in the public law of the western European States. The jurisprudence of other human rights bodies is more prolific in this field. Article 9 (1) of the International Covenant on Civil and Political Rights (1966) prohibits "arbitrary" arrest or detention. Arbitrariness ordinarily involves acts which are unjustified with regard to the facts. The Human Rights Committee established under the Covenant had the opportunity to specify the sense of this term in the *A.W. Mukong v. Cameroon* case (1994). It there said that arbitrariness was not to be equated with the term "against the law" also contained in Article 9 but that it had to be interpreted in a broader way to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>4</sup> The Inter-American system for the protection of human rights had to face even more serious cases. The practice of enforced disappearances was held, *inter alia*, incompatible with the guarantee of personal liberty; such arrests are not based on legal provisions as required by Article 7, paragraphs 1 and 2, of the American Convention.<sup>5</sup> The same is true for threats of arbitrary and unjustified arrest or detention proffered by members of the army against individuals.<sup>6</sup> The Court also expressed on the prohibition of arbitrary arrest as set out by Article 7(3) of the Convention. In the *Gangaram Panday v. Suriname* case (1994) the Court said "that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality".<sup>7</sup> Contrary to the situation at the European Court, in these other systems the question of the sufficient legal basis (*principle of legality*) tends to be mixed up with questions of proper procedure and arbitrariness. This shows a certain lack of development and of refinement of the legal norms and case-law at hand. It also tends to lower the standards required under the *topos* of the sufficient legal basis.

3. As to the *respect of procedural guarantees* in case of deprivation of liberty, in the classical *Winterwerp* case (1979) the European Court had indicated that the procedure followed must be in conformity with the applicable municipal law and the Convention, including general principles contained in the latter, and not be arbitrary.<sup>8</sup> There can be errors of form, as the absence of regular presentation of the bill of arrest;<sup>9</sup> the non-respect of time-limits;<sup>10</sup> the absence of regular hearing.<sup>11</sup> Here the European Convention by a sort of *renvoi matériel*<sup>12</sup> elevates internal procedure to the status of international law within its own four corners. In the period under review

the question of the respect of procedural guarantees has been raised three times. In the *Raninen v. Finland* case (1997), the Court recalled that an unlawful arrest under internal law (*in casu* acknowledged by the municipal judicial organs) leads also to a breach of Article 5(1) of the Convention.<sup>13</sup> The *renvoi matériel* is here particularly visible. It limits the subsidiarity approach (no *quatrième instance*) otherwise held by the European Court. In the *K.F. v. Germany* case (1997) the applicant had been detained for more than the 12 hours prescribed by the German law on criminal procedure. This excess of time automatically led to the breach of the European Convention.<sup>14</sup>

The most important case in the present context is that of *Tsirilis and Kouloumpas v. Greece* (1997). The applicants complained that their detention had been illegal as it had

<sup>1</sup> *Sunday Times* case, ser. A, no. 30, p. 31, para. 47.

<sup>2</sup> *Ibid.*, p. 31, para. 49: "[A] norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail". See also the *Arrowsmith* case (Commission), DR, vol. 19, pp. 5 ff.

<sup>3</sup> *Sunday Times* case, ser. A, no. 30, p. 31, para. 49: "[T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case".

<sup>4</sup> Communication no. 458/1991, A/49/40, p. 181. See also *H. van Alphen v. The Netherlands* (1990), Communication no. 305/1988, A/45/40, p. 115, re arbitrary detention.

<sup>5</sup> *Velásquez Rodríguez v. Honduras* (Merits) (1988), ILR, vol. 95, p. 292, para. 155: "The kidnapping of a person is an arbitrary deprivation of liberty..." = 9 HRLJ 212 (1988). See also the *Caballero Delgado and Santana v. Colombia* case (1995), Inter-American Yearbook on Human Rights (IAYHR), 1995, p. 914, para. 63 = 19 HRLJ 43 (1998). For the Commission, see the Report 37/93, case no. 10,563 (Peru), IAYHR, 1993, pp. 470-2; Report 25/94, case no. 10,508 (Guatemala), IAYHR, 1994, p. 372, para. 8 and p. 374, para. 1.

<sup>6</sup> Report 1/95, case 11,006 (Peru) (1995), Inter-American Commission on Human Rights, IAYHR, 1995, p. 290-2. See also: *B. Mojica v. The Dominican Republic* (1994), U.N. Committee on Human Rights, Communication no. 449/1991, A/49/40, p. 144; *W. Delgado Páez v. Colombia* (1990), Communication no. 195/1985, A/45/40, pp. 47-8: "States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them". See also *N.O. Bahamonde v. Equatorial Guinea* (1993), Communication no. 468/1991, A/45/40, p. 187.

<sup>7</sup> Ser. C, no. 16, para. 47 = 15 HRLJ 168 (1994). The Commission seems to assume that unlawful arrest may *a fortiori* also be qualified as arbitrary under Article 7(3): Report 1/95, case no. 11,006 (Peru), IAYHR, 1995, pp. 288-290.

<sup>8</sup> Ser. A, no. 33, pp. 19-20, para. 45.

<sup>9</sup> *X. v. Netherlands* case, Commission, no. E 2621/65, Yearbook of the European Convention on Human Rights (Yb), vol. 9, p. 480.

<sup>10</sup> *Koendjibiharie* case, ser. A, no. 185-B, pp. 39-41. *Keus* case, ser. A, no. 185-C, pp. 61-68.

<sup>11</sup> *Van der Leer* case, ser. A, no. 170-A, p. 12, para. 23.

<sup>12</sup> As to the notions of "renvoi formel" and "renvoi matériel", see e.g. the short characterization in F. Capotorti, "Cours général de droit international public", RCADI, vol. 248, 1994-IV, pp. 221-2.

<sup>13</sup> *Rep.*, 1997-VIII, no. 60, p. 2819, para. 46.

<sup>14</sup> *Rep.*, 1997-VII, no. 58, p. 2676, para. 73. The law in question was formulated in absolute terms: see *ibid.*, p. 2675, para. 72.

been in disregard of an established practice of the administrative courts to recognize the status of ministers of Jehovah's witnesses. The Court found that the military authorities had blatantly ignored the case-law of the supreme administrative tribunal on the status of such ministers. Moreover, the assessment had been discriminatory when compared with the exemptions granted to ministers of the Greek Orthodox Church. As the appellate Greek courts had recognized, there had thus been no basis for detention in domestic law, the detention being for that reason arbitrary.<sup>15</sup> As this case shows, the procedural guarantees may stem not only from formal legal texts, but also from administrative practice or from the jurisprudence of the courts. Discrimination also tends to strengthen the argument of irregular procedure.

One may wonder if constant administrative practice may also operate in the other sense to weaken some guarantees formally contained in the law. If this partial abrogation of the law is consistent with internal constitutional law, may it, by way of the *renvoi matériel*, be also held consistent with the Convention? Much will certainly depend on the type of guarantee abrogated. Any important limitation of freedom must rest on a formal legal basis. But a certain leeway has to be left to the States as the criminal procedure rests a prerogative of municipal law. Moreover, one has to acknowledge that all interpretations of legal texts are broader or narrower with respect to the text on the face of it, and that changes in interpretation, especially from a broader to a narrower one, must be allowed.

4. Finally, there must be a *legitimate motive of arrest* as set out in letters (a) to (f) of Article 5(1) of the Convention: (a) conviction by a competent court;<sup>16</sup> (b) non-compliance with the lawful order of a court; (c) for presentation to the competent legal authority; (d) cases of detention of a minor for education; (e) cases of detention of the sick, unsound or drug addicts;<sup>17</sup> (f) cases of detention in order to prevent the entering of the territory or for extradition.<sup>18</sup>

In the period under review the Court had several opportunities to expand upon these reasons for detention. In the *Quinn v. France* case (1995) it affirmed that the list under letters (a) to (f) is exhaustive.<sup>19</sup> If a basis of detention comes to an end, the accused has to be released. In the present case, the accused had been retained 11 hours after a decision of release and the Court found thus a violation of Article 5. But this does not mean that further detention pending examination of possible security measures or other action cannot be squared with the Convention. This is shown by the *Eriksen v. Norway* case (1997). The accused was detained after a previous conviction because his state of mind rendered probable further assaults. A provisional security measure was taken pending examination of the appropriateness of prolonging the use of security measures. The provisional measure was in conformity with municipal law. According to the Court, such a bridging detention could be justified under letters (a) or (c) of Article 5(1).<sup>20</sup> In the *Quinn* case, the basis for detention according to municipal law had definitely lapsed. In the *Eriksen* case a further basis of detention very probably existed and was under examination. An exceptional provisional detention pending the time of examination in accordance with internal law was then admissible as a corollary of the prospective new basis of detention and on account of the dangerousness of the accused.

Concerning letter (c), the Court commented in two cases on the words "reasonable suspicion" of having committed criminal offences as contained in the text of

that provision. In the *Erdagöz v. Turkey* case (1997) it said that the suspicion must rest on "facts or information which would satisfy an objective observer that the person concerned may have committed an offence".<sup>21</sup> It had already considered the question in the context of terrorist acts in the *Murray v. United Kingdom* case (1994).<sup>22</sup> The Court normally does not review substantially the evidence for or against the accused having committed the offence. This is a prerogative of the trial judge or jury. But the reasonable suspicion criterion allows the Court to intervene at least when there is manifestly no foundation for the alleged offences. In the *Lukanov v. Bulgaria* case (1997) the Court found that there had been no lawful detention because the provisions of the Criminal Code relied on to justify such detention failed to persuade the Court of their applicability to the conduct of the accused. The submissions of the Government did not establish a

<sup>15</sup> *Rep.*, 1997-III, no. 38, p. 924, paras. 59-62. At the UN Human Rights Committee the question was posed during the period under review in the *C. Laureano v. Peru* case, Communication no. 540/1993, A/51/40, p. 114. Ms. Laureano was violently removed from her home by armed State agents who did not act on the basis of an arrest warrant or on orders of a judicial officer. At the Inter-American system the Court in the *Gangaram Panday v. Surinam* case (1994) described the general reach of Art. 7(2) of the American Convention as follows: "[N]o person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect)" (ser. C., no. 16, para. 47 = 15 HRLJ 168 (1994)). The Commission, in the Report 1/95, case no. 11,006 (Peru) (1995), said that "the legality or arbitrariness of an arrest must be analyzed on the basis of whether or not there was observance of the constitution and/or domestic laws enacted pursuant thereto that prescribe the reasons why an individual can be deprived of his or her freedom and establish the procedures that must be carried out...". In the case at hand the Commission found that the procedural clauses of the Constitution had been utterly disregarded: there was no court order for arrest, the soldiers carrying out the arrest had no authority to carry out such actions, etc. (IAYHR, 1995, pp. 288-90).

<sup>16</sup> The regularity of the conviction has not to be tested (Case B 7629/76, Commission, DR, vol. 13, pp. 57, 61). The conviction has not to be final and in force (*Wemhoff* case, ser. A, no. 7, p. 23, para. 9). Not only punitive imprisonment, but also other measures as security detention, placement in a center, etc., are covered (Case E 4210/69, Commission, CD, vol. 35, pp. 144, 149; Case E 2306/64, *ibid.*, vol. 21, pp. 23, 32), but not detention on remand (*Guzzardi* case, ser. A, no. 39, p. 37, para. 100).

<sup>17</sup> A danger for society or for the person detained has to be established (*Guzzardi* case, ser. A, no. 39, p. 37, para. 98 = 1 HRLJ 257 (1980)). The degree of the disease, etc., must be able objectively to justify such a measure (necessity) (*Winterwerp* case, ser. A, no. 33, p. 18, para. 39).

<sup>18</sup> It must be lawful under municipal law and not arbitrary: *Bozano* case, ser. A, no. 111, p. 23, para. 54. As to this interesting case, where notwithstanding the illegality one understands quite well the course of conduct of the French authorities, see G. Cohen-Jonathan, "La France et la Cour européenne des droits de l'homme. L'arrêt *Bozano c. France*", *Revue trimestrielle de droit européen*, vol. 23, 1987, pp. 255 ff.; F. Sudre, "La première affaire française devant la Cour européenne des droits de l'homme: l'arrêt *Bozano* du 18 décembre 1986", *RGDIP*, vol. 91, 1987, pp. 533 ff.

<sup>19</sup> Ser. A, no. 311, pp. 17-8, para. 42. See also *Eriksen v. Norway* (1997), *Rep.*, 1997-III, no. 37, pp. 861-2, para. 76.

<sup>20</sup> *Rep.*, 1997-III, no. 37, p. 865, para. 87.

<sup>21</sup> *Rep.*, 1997-VI, no. 54, p. 2314, para. 51.

<sup>22</sup> Ser. A, no. 300-A, pp. 24-31 = 15 HRLJ 331 (1994).

sufficient link between the conduct and the provisions, thus there being no reasonable suspicion that the accused had committed an offence.<sup>23</sup> The Court, being no appellate body, exercises only very limited jurisdiction under that count; *i.e.* it limits itself to evident insufficiency of the reasons adduced.

The Court also commented on the danger of flight as provided in letter (c)<sup>24</sup> or on the question of mental illness as provided in letter (e).<sup>25</sup> It had, moreover, opportunity to consider the conditions of letter (f) in three cases.<sup>26</sup> In *Quinn v. France* (1995) the Court recalled that if the proceedings are not being prosecuted with due diligence, the detention will cease to be justified. *In casu* a delay of 1 year and 4 months, plus, later, an additional 6 months, was excessive.<sup>27</sup>

The most interesting case under the present heading is undoubtedly that of *Drozd and Janousek v. France and Spain* (1992). In that case criminal convictions pronounced in Andorra were allowed to be enforced in French territory. There was no formal legal basis for such a detention and particularly no treaty ruling on the matter. The Court held that there existed an old bilateral custom to the effect of allowing such service of the imprisonment pronounced by the Andorran courts: "The Franco-Andorran custom (...) dating back several centuries, has sufficient stability and legal force as to serve as a basis for the detention in issue".<sup>28</sup> The bilateral custom did not create the legal title for detention; it is doubtful if it could have done so under the stringent principles of legality in criminal law. But it opened the way to consider the conviction by an Andorran Court as a sufficient title for imprisonment in France without there existing any other formal legal basis. This case provides, moreover, opportunity for public international lawyers to add to the over-solicited *Right of Passage over Indian Territory* (Mérits) case (1960)<sup>29</sup> another example of a customary rule prevailing between two States only.

#### B) Prompt information on the reasons of arrest, Article 5(2)

1. Information has to be given at the moment of arrest or immediately thereafter, that is, at the first interrogation.<sup>30</sup> There is no requirement of form. Information may thus be given orally.<sup>31</sup> The essential facts justifying the arrest have to be stated.<sup>32</sup> This covers also the essential legal grounds for the arrest.<sup>33</sup> Only essential information, not all charges that may be later brought must be indicated.<sup>34</sup> The information must be given in a language the accused understands.<sup>35</sup> One may perhaps add, as the United Nations Human Rights Committee has held in the *P. Grant v. Jamaica* case (1996), that the reasons of arrest and the charges must be notified even if the police officer has the opinion that the arrested is aware of them.<sup>36</sup>

2. In the period under review the European Court had to consider the question in the *Murray v. UK* case (1994). The applicant had complained that she had not been sufficiently informed of the reasons of her arrest. The Court starts by recalling that the bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5(2).<sup>37</sup> But looked on as a whole, the applicant must have been aware that she was questioned about her possible involvement in fund-raising for the IRA. Several questions to that effect were put to her.<sup>38</sup> The question of sufficient information must thus be solved on contextual and substantive criteria, not on formal ones. The way in which the accused learns of the charges is immaterial, provided the authorities assure

themselves that such knowledge exists in effect. The following rule can be abstracted out of the *Murray* case: information implied in the questions put to the accused may hold good if these questions give him a sufficient picture of the charges laying on him.

The Court had no occasion to rule on the promptness of such information. One may thus recall that the United Nations Committee on Human Rights has held that 10 days<sup>39</sup> since the arrest, and *a fortiori* 3-4<sup>40</sup> or 5<sup>41</sup> weeks, were excessive under Article 9(2) of the Covenant on Civil and Political Rights.

#### C) Prompt presentation to judicial authority, Article 5(3)

1. The reasonableness of the time depends on the circumstances of the case and especially on the difficulty of the investigations, the behavior of the accused and the handling of the case by national authorities.<sup>42</sup> Traditionally, the Commission held a 4-day limit, the Court a 3-day limit to be appropriate.<sup>43</sup> The accused must be brought to a judge or other officer authorized to exercise judicial power, *i.e.* who is independent from the executive and from the parties.<sup>44</sup> The function of this officer must be that of "reviewing the circumstances militating for and against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons".<sup>45</sup> If no trial can be held in a reasonable time, the accused has a right to be released on bail. Such

<sup>23</sup> *Rep.*, 1997-II, no. 34, p. 544, paras. 43-4.

<sup>24</sup> *Kemmache v. France* (No. 3) (1994), ser. A, no. 296-C, pp. 85-89.

<sup>25</sup> *Johnson v. United Kingdom*, *Rep.*, 1997-VII, no. 55, pp. 2406 ff.

<sup>26</sup> *Kolompar v. Belgium*, 1992, ser. A, no. 235-C, pp. 54-5, paras. 34-6 = 14 HRLJ 89 (1993); *Quinn v. France* (1995), ser. A, no. 311, pp. 18-20; *K.F. v. Germany*, *Rep.*, 1997-VII, no. 58, pp. 2672-6.

<sup>27</sup> *Quinn v. France* (1995), ser. A, no. 311, pp. 19-20, paras. 48-9.

<sup>28</sup> Ser. A, no. 240, p. 33, para. 107 = 13 HRLJ 445 (1992).

<sup>29</sup> ICJ., *Rep.*, 1960, pp. 39-40.

<sup>30</sup> *Fox and others* case (1990), ser. A, no. 182, p. 19, para. 40; *Mc Veigh* case, Commission, case 8022/77, DR, vol. 25, p. 45, para. 205.

<sup>31</sup> *Fox and others* case (1990), ser. A, no. 182, p. 19, para. 40.

<sup>32</sup> *X. v. United Kingdom* case (1981), ser. A, no. 46, p. 28, para. 66 = 2 HRLJ 380 (1981).

<sup>33</sup> *Fox and others* case (1990), ser. A, no. 182, p. 19, para. 40.

<sup>34</sup> *X. v. United Kingdom* case, Commission, Yb., vol. 14, p. 278.

<sup>35</sup> *Delcourt* case, Commission, Yb., vol. 10, p. 270.

<sup>36</sup> Communication no. 597/1994, A/51/40, p. 212.

<sup>37</sup> Ser. A, no. 300-A, p. 32, para. 76 = 15 HRLJ 331 (1994).

<sup>38</sup> *Ibid.*, p. 32, para. 77.

<sup>39</sup> *N. Fillastre v. Bolivia* (1991), Communication no. 336/1988, A/47/40, p. 298.

<sup>40</sup> *E. Morrison v. Jamaica* (1998), Communication no. 635/1995, A/53/40, p. 124.

<sup>41</sup> *G. Campbell v. Jamaica* (1992), Communication no. 248/1987, A/47/40, p. 238.

<sup>42</sup> *Wemhoff* case (1965), ser. A, no. 7, p. 26, para. 17; *Matznetter* case (1969), ser. A, no. 10, pp. 34-5, para. 12; *Stögmüller* case (1969), ser. A, no. 9, p. 44, para. 16.

<sup>43</sup> Cf. J.A. Frowein / W. Peukert, *Europäische Menschenrechtskonvention, Kommentar*, 2. ed., Kehl/Strasbourg, 1996, p. 123. See e.g. the *Brogan* case (1988), ser. A, no. 145-B, pp. 32-3, paras. 58 ff. = 9 HRLJ 293 (1988) (4 days and six hours) or the *De Jong and others* case (1984), ser. A, no. 77, p. 25, para. 52 = 7 HRLJ 321 (1985) (7 days), both held by the Court to violate the Convention.

<sup>44</sup> *Schiesser* case (1979), ser. A, no. 34, pp. 13-4, para. 31.

<sup>45</sup> *Ibid.*, p. 14, para. 31.

bail can be refused for reasons such as danger of flight,<sup>46</sup> interference with the course of justice,<sup>47</sup> prevention of further crime,<sup>48</sup> or preservation of public order.<sup>49</sup>

2. In the period under review the Court, as usual, had to deal mostly with the question of unjustifiable delay in the presentation to judicial authority. The only exception was the *Brincat v. Italy* case (1992) where the question was asked if a public prosecutor who may decide on detention can be considered the judicial authority prescribed by Article 5(3). The Court denied this and found a violation of the Convention: "[O]nly the objective appearances at the time of the decision on detention are material: if it then appears that the officer authorised by law to exercise judicial power may later intervene, in the subsequent proceedings, as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified".<sup>50</sup> The core criterion is thus that there must be an objective appearance of independence and impartiality as appreciated by the neutral and reasonable observer. Such appearance cannot exist if the official concerned has already or may later take part in the proceedings on substantive aspects. This is a settled jurisprudence which deserves support. For it is an old truth that justice must not only be done, but it must also be seen to be done. Without the last there is less credibility of the first and this prejudice goes to the heart of the whole judicial system.

3.a) As to the "promptness" of presentation to judicial authority, there is rich jurisprudence. In the *Brannigan and McBride v. United Kingdom* case (1993) periods of detention of 6 days, 14 hours, and 4 days, 6 hours, under the Prevention of Terrorism Act were on their face incompatible with the Court's prior jurisprudence. The Government admitted this state of affairs and the Court reaffirmed its jurisprudence under the *Brogan* case. But it admitted that the Government had validly exercised its power of derogation under Article 15 of the Convention, thus there being no breach of Article 5(3).<sup>51</sup>

There is obviously a danger that the guarantees under Article 5(3) may become illusory if Article 15 is too easily read as a specific exception available not only as to the whole Convention, but particularly to do away with the requirements under Article 5(3). But the more stringent the requirements under Article 5(3) are held to be by the Court (they are currently quite, perhaps to stringent and undifferentiated, if one considers the very wide array of different crimes and of their gravity), the more it is necessary to give the States some exceptional powers when facing crimes like terrorism. These powers obviously make sense only in States of democratic tradition and of deeply felt rule of law. Hence the problems when the conventional system is opened to States where that deeply rooted sense of the rule of law is lacking. To be sure, no formal or formalistic requirements set up by conventional provisions can overcome that lack of general spirit of which the Convention is ultimately an incomplete expression and to which it is essentially pledged.

In the *Sakik and others v. Turkey* case (1997), the detention without presentation to a judicial officer had lasted respectively 12 and 14 days. The Court, recalling again the *Brogan* case, held that there had been a breach of the Convention.<sup>52</sup>

b) Several periods of detention on remand as a whole were held by the Court to be excessive. One of the leading cases in the period under review is that of *Yağcı and Sargin v. Turkey* (1995). The accused complained that their detention pending trial has been excessively long. The Court began by recalling that the national authorities

have to display "special diligence" in the conduct of such proceedings, bearing in mind that the persistence of a reasonable suspicion is a condition for the validity of continued detention, but that after a certain time it is no longer sufficient on its own.<sup>53</sup>

*In casu* the release after 2 1/2 years of detention was refused on stereotype reasons such as danger of absconding, without taking into account, for example, that the applicants had returned to Turkey of their own accord. In the absence of sufficient explanation for continued detention, Article 5(3) had been breached.<sup>54</sup> A breach of that provision has also been found in another case. In *Muller v. France* (1997) it was again the whole period of detention which was at issue. The Court found that 4 years were excessive on the basis of 2 factors: (1) the applicant had admitted the offences, thus simplifying the case; (2) there had been many successive changes of judges showing a lack of proper organization for which the State was liable.<sup>55</sup>

<sup>46</sup> *Stögmüller* case (1969), ser. A, no. 9, p. 44.

<sup>47</sup> *Wemhoff* case (1968), ser. A, no. 7, p. 25.

<sup>48</sup> *Matznetter* case (1969), ser. A, no. 10, p. 33.

<sup>49</sup> *Letellier* case (1991), ser. A, no. 207, p. 21, para. 51 = 12 HRLJ 302 (1991); *Kemmache* case (1991), ser. A, no. 218, p. 25, para. 52 = 13 HRLJ 42 (1992) (reaction of society to a particularly grave crime).

<sup>50</sup> Ser. A, no. 249-A, p. 12, para. 21. The UN Committee on Human Rights in the *V. Kulomin v. Hungary* case (1996), Communication no. 521/1992, A/51/40, p. 81, stated that the authority must be independent, objective and impartial in relation to the issues dealt with, qualities which a public prosecutor could not be held to possess.

<sup>51</sup> Ser. A, no. 258-B, p. 48, para. 37 and pp. 56-7, paras. 66, 74 = 14 HRLJ 184 (1993).

<sup>52</sup> *Rep.*, 1997-VII, no. 58, p. 2624, paras. 45-6. The UN Committee on Human Rights had to deal with such delays in several cases. The Committee ruled that these delays should not exceed a "few days" (see e.g. *S. Daley v. Jamaica* (1998), Communication no. 750/1997, A/53/40, p. 239). Thus delays of more than 7 days (*P. Grant v. Jamaica* (1996), no. 597/1994, A/51/40, p. 212), more than 8 days (*L. Stephens v. Jamaica* (1995), no. 373/1989, A/51/40, p. 9), 9 days before being charged, 3 months before being brought to judicial authority (*S. Shaw v. Jamaica* (1998), no. 704/1996, A/53/40, p. 170), 3 weeks (*B. Whyte v. Jamaica* (1998), no. 704/1997, *ibid.*, p. 201), 5 weeks (*G. Campbell v. Jamaica* (1992), no. 248/1987, A/47/40, p. 238; and *P. Kelly v. Jamaica* (1991), no. 253/1987, A/47/40, p. 246), 6 weeks (*S. Daley v. Jamaica* (1998), no. 750/1997, A/53/40, p. 239), 2 months (*A. Berry v. Jamaica* (1995), no. 330/1988, A/49/40, pp. 26-7), etc., before being brought before judicial authority are excessive.

<sup>53</sup> Ser. A, no. 319-A, pp. 18-9, para. 50 = 16 HRLJ 286 (1995). The Inter-American Commission in its Report 12/96, case 11,245 (Argentina) (1996), IAYHR, 1996, vol. 1, pp. 258 ff. stated that a violation of Article 7(5) of the American Convention rested on two aspects linked to this idea of "special diligence" mentioned by the European Court: "To this effect, the Commission has developed a two-part analysis to determine whether an accused's pre-trial incarceration violates Article 7(5) of the Convention. First, the national judicial authorities must justify an accused's preventive detention using relevant and sufficient criteria. Second, where the Commission concludes that the findings of the national judicial authorities are adequately relevant and sufficient to justify continued detention, it must then examine whether these authorities used 'special diligence' in the conduct of proceedings so that the length of detention would not be unreasonable" (*loc. cit.*, pp. 264-6, para. 83).

<sup>54</sup> Ser. A, no. 319-A, p. 19, paras. 51-5 = 16 HRLJ 286 (1995). See also *Mansur v. Turkey* (1995), ser. A, no. 319-B, pp. 49-51.

<sup>55</sup> *Rep.*, 1997-II, no. 32, pp. 390-1, paras. 78-9. See also *Tomasi v. France* (1992), ser. A, no. 241-A, p. 39, paras. 102-3 = 13 HRLJ 453 (1992).

On the other hand, if there were good reasons for prolonged detention, Article 5(3) has not been held breached. Thus, in *Quinn v. France* (1995) a detention on remand for one year was legitimate as there had not been any negligence of the authorities which had acted with diligence.<sup>56</sup> One could add, even if this is only relative justification, that the period concerned corresponded to current practice in situations like that faced by the applicant in his case. In the *Tang v. Spain* case (1995), the applicant had been detained on remand for 3 years and 2 months. This detention was justified by a real danger of absconding as the applicant had no link with Spain. The delay was also justified in the light of the joinder of the case to a larger drug-offences file opening the way to a better administration of justice.<sup>57</sup>

c) The situation may be summarized as follows. There must first be a good reason or title for detention. Such is, for example, the danger of absconding. The reason has to be checked substantially and seriously by the national authorities. Stereotype allegations are not sufficient. Second, because of the presumption of innocence, there is a duty of special diligence by the State organs in speeding up the procedure. Every delay caused by negligence, lack of proper organization, workload, procedural errors and so on, if not unforeseeable and/or based on *force majeure*, and if attributable to the State, will lead to a breach of the Convention.<sup>58</sup> On the other hand, every reason which adequately or cogently justifies a delay in the interest of a proper administration of justice (joinder of files, adjudging of remedies used by the accused, search for further important witnesses, etc.), if not induced by fault (duty of special diligence), will qualify under the Convention. Third, there is a rule of proportionality. The lengthier the delay incurred, the more cogent the reasons must be and the more negligence may be presumed. An exception to that must be made if the accused himself excessively multiplies the judicial or administrative complaints according to remedies available. Moreover, for dilatory conduct the general principle *nemo commodum capere potest de propria turpitudine* applies to the extent the State organs do not take the opportunity to add further delays not justified by the necessities of the situation. Outside such contingencies, there may be an absolute limit of time where detention on remand would no longer be justified; this amount of time is linked to the prospective maximum penalties incurred for the offences charged if the accused is found guilty. The Court had no opportunity to expand on this point in the period under review.

4. The European Court had no opportunity to elaborate on the relative weight of the several reasons for detention on remand. One may thus perhaps mention at this place *Report no. 12/96 in case 11,245 (Argentina)* of the Inter-American Commission. In this Report the Commission explained that the State party had based itself too much on the seriousness of the crime and on the previous criminal record, limiting excessively the presumption of innocence.<sup>59</sup> This state of affairs had been aggravated by the fact that the authorities had failed to show special diligence in expediting the proceedings.<sup>60</sup> This last consideration is a separate ground and does not suffer criticism. As to the first point, the Commission seems to imply that the seriousness of the crime and past record of the accused are less cogent reasons for detention on remand than others, more akin to the necessities of the proceedings in course. The European Court has also shown a tendency in this direction under the heading of public order.<sup>61</sup> If this means that these factors have to be carefully weighed against the importance of the freedom

for the accused (e.g. on account of his health) the *dictum* is unimpeachable. If on the other hand, as it is more probable, this corresponds to a progressive downgrading in the abstract of those factors in their quality as justifying reasons for preventive detention, the *dicta* are not to be accepted. The seriousness of the crime, probable social reactions and *ordre public* or the previous record of the accused are very material factors in appreciating the appropriateness of a release. Some of them are inextricably linked with prospective aspects, as the danger of new offences or the danger of flight. In the sphere of very serious crimes, social interests deserve stronger protection. The focus has to be displaced from the question of the ability to justify detention on remand to another aspect: if such detention is ordered on account of collective interests, the State has to expedite proceedings according to the formula of special diligence. The "if" should be turned into a "how" and a "when".

#### D) Remedy to challenge the legality of the detention, Article 5(4)

1. The remedy has to be heard by a judicial body. To be of judicial character, a body must be independent both of the executive and of the parties to the case.<sup>62</sup> The accused must be able to challenge all the formal and substantive reasons and conditions of imprisonment.<sup>63</sup> The court must have the power to decide on the release of the person.<sup>64</sup> It must function in accordance with procedural guarantees<sup>65</sup> such as: (1) oral hearing;<sup>66</sup> (2) legal assistance and aid;<sup>67</sup>

<sup>56</sup> Ser. A, no. 311, p. 20, para. 56.

<sup>57</sup> Ser. A, no. 321, pp. 20-2, paras. 67, 74, 76. In the Inter-American system, see Resolution 17/89 of the Commission in case no. 10,037 (Argentina) (1989), IAYHR, 1989, pp. 94 ff. In this case the pre-trial detention had lasted 3 1/2 years. Even if this period was long, no violation of the Convention had occurred since the accused himself had delayed the proceedings for extradition and then of trial, and also because of the complexity of the case (*ibid.*, pp. 98-100).

<sup>58</sup> Under the jurisprudence of the UN Committee on Human Rights (in the period under review), two cases raised this point. In *A. Perkins v. Jamaica* (1998), the accused had been kept in detention on remand for 1 year and 9 months; this was held to be a violation of Article 9(3) of the Covenant (Communication no. 733/1997, A/53/40, p. 210). In *N. Fillastre v. Bolivia* (1991), more than 4 years before trial were held to be incompatible with the same provision (Communication no. 336/1988, A/47/40, p. 298). The reasoning of the Committee is characterized, here as elsewhere, by an excessive paucity which makes it difficult to abstract objective criteria out of the case-law.

<sup>59</sup> IAYHR, 1996, vol. 1, pp. 266-270.

<sup>60</sup> *Ibid.*, p. 272, paras. 99, 103.

<sup>61</sup> See Frowein / Peukert (*supra*, note 43), pp. 128 ff. See also: the *Letellier* case, (*supra*, note 49), para. 51; *Kemmache* case, (*supra*, note 49), paras. 51-2; *Tomasi* case, (*supra*, note 55), para. 91.

<sup>62</sup> *De Wilde and others* case (1972), ser. A, no. 12, p. 41, para. 77.

<sup>63</sup> Frowein / Peukert (*supra*, note 43), p. 141.

<sup>64</sup> *X. v. United Kingdom* case (1981), ser. A, no. 46, pp. 25-6, paras. 58-9; *Van Droogenbroeck* case (1982), ser. A, no. 50, pp. 26-7, para. 49 = 3 HRLJ 236 (1982).

<sup>65</sup> *De Wilde and others* case (1972), ser. A, no. 12, pp. 41-2, para. 76-8.

<sup>66</sup> *Sanchez-Reisse* case (1986), ser. A, no. 107, p. 19, para. 51, exceptions possible.

<sup>67</sup> *Woukam Moudefo* case, Commission, ser. A, no. 141-B, pp. 41-3, paras. 85 ff.; *Bouamar* case (1988), ser. A, no. 129, p. 24, para. 60 (juvenile).

(3) adversarial proceedings;<sup>68</sup> (4) time and facilities to prepare application.<sup>69</sup> The court must act speedily. Consideration must here be given to the diligence of the national authorities and any delays brought by the conduct of the detained person as well as other factors causing delay not in the power of the State organs.<sup>70</sup>

2. In the period under review the question of the *existence* of a remedy to challenge the legality of a detention was raised in four cases. In the chronologically previous two cases, the European Court had the possibility to recall that Article 5(4) only applies, in principle, to detention prior to conviction by a competent court. There is an exception to the extent that the conviction encompasses a discretionary sentence. In such a situation the executive retains a wide power to determine the conditions and length of detention justifying thus the existence of a remedy to challenge and to control the exercise of this power. Accordingly, in *Iribarne Pérez v. France* (1995), after having found that the Andorran courts were competent to effect the review claimed, the Court went on to say that there was no discretionary sentence involved and that therefore Article 5(4) had not been breached.<sup>71</sup> In the *Hussain v. United Kingdom* case (1996) the Court had to decide on the nature of detention "at Her Majesty's Pleasure". Did the mandatory or discretionary element prevail? The Court looked to the purpose of the institution because it would direct the modalities of exercise of such detention. The purpose of that detention for young persons is to leave flexibility. The executive has to take into account the developments in the offender's personality as he grows older, the idea being to prevent dangerousness for society. Thus the discretionary element prevails. Article 5(4) applies.<sup>72</sup> On the merits of the case, the Court found that the procedure at the Parole Board did not live up to the standards under Article 5(4). The Board has no jurisdiction to release the prisoner and lacks an adversarial procedure. Where the assessment of the applicant's character, mental state or evolution is of importance, a fair proceeding must include an oral hearing and adversarial handling of evidence.<sup>73</sup> There are here two elements to be kept in mind. First, the type of required judicial authority and its functioning must meet the criteria of Article 5(3). To this extent there is a *renvoi interne* from Article 5(4) to Article 5(3). Second, fair trial presupposes that each time that a decision depends on the assessment of personality or personal matters, an oral hearing must be granted to the individual concerned.

The two chronologically more recent cases deal with the effectiveness of the remedy in question. In *R.M.D. v. Switzerland* (1997) this question was raised in a classical way. The applicant had been prevented to use the remedies formally available due to his quick transfer from one canton to another. This transfer was not abusive as his offences had related to all of these several cantons. But a side-effect was that the court of every canton lost subject-matter jurisdiction as soon as he was transferred out of that canton. The Court said that it must take account not only of the existence of formal remedies, but to their effective operation in context. In the present case the remedies had proved ineffective, each cantonal court declining jurisdiction at the moment the accused left the canton. Article 5(4) had thus been violated.<sup>74</sup> This case leads to the following rule: it is the effectiveness of the remedy which is decisive, not its formal existence. In the *Sakik and others v. Turkey* case (1997) the applicants had complained that they had not been able to take proceedings to have the lawfulness of their detention decided by a judge. The Court starts by a general

description of the remedy required under the Convention: "[A] remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of Article 5(4)".<sup>75</sup> The ineffectiveness of the remedies were not clear on the face of things as in the Swiss case. The Court relied on the following criterion to find a breach of Article 5(4): the remedy invoked by the Government had apparently never been successfully used. This indicated its uncertainty in practice.<sup>76</sup> Thus, effectiveness can and will be appreciated either on manifest, legal, impossibility, or on the basis of more quantitative criteria, by looking to the actual judicial or administrative practice. In the last case, the burden of proof will rest on the State.

Effectiveness can be lacking also because of personal contingencies of the accused. Thus, in *Megyeri v. Germany* (1992) the Court stressed that a mentally insane person must receive legal aid to be able to enjoy effectively his right under Article 5(4).<sup>77</sup>

3. In the *Navarra v. France* case (1993) the accused challenged the *speed* at which his remedy was handled. The Court recalled that in cases where the proceedings are conducted on two levels of jurisdiction an overall assessment is necessary. This overall length may well have been long in the present case, but it was cured by the fact that the accused had the possibility to submit further applications for release at any time (which he did not).<sup>78</sup> *Quaere* to what extent other remedies have to be exercised if there is delay in the main remedy as the right to handling in reasonable time attaches to each of them *uti singuli*, independently of the others.

4. Another time problem was posed by the *M.I. Torres v. Finland* case (1990) decided by the United Nations Committee on Human Rights. The accused could appeal the detention orders of the Ministry of the Interior (under the Aliens Act) only if, after 7 days, the detention was confirmed by the Minister. With regard to the "without delay" requirement in Article 9(4) of the Covenant on Civil and Political Rights, the Committee found that the impossibility to challenge the order for 7 days violated the quoted provision.<sup>79</sup> During these 7 days a remedy to the Minister himself was available. The Committee nevertheless found that this remedy did not satisfy the

<sup>68</sup> *Toth* case (1991), ser. A, no. 224, p. 23, para. 84 = 13 HRLJ 112 (1992); *Lamy* case (1989), ser. A, no. 151, p. 17, para. 29.

<sup>69</sup> *K. v. Austria* case, Commission, ser. A, no. 255-B, p. 41, para. 64; *Farmakopoulos* case, Commission, ser. A, no. 235-A, p. 15, para. 53.

<sup>70</sup> *Sanchez-Reisse* case (*supra*, note 66), para. 56; *Navarra* case (1993), ser. A, no. 273-B, pp. 28-9, para. 29 (delay by filing the appeal); *Kolompar* case (*supra*, note 26), paras. 42-3 (dilatatory conduct of the accused). As to examples of delays in specific cases, see D.J. Harris / M. O'Boyle / C. Warbrick, *Law of the European Convention on Human Rights*, London / Dublin / Edinburgh, 1995, p. 157.

<sup>71</sup> Ser. A, no. 325-C, p. 63, paras. 30-1.

<sup>72</sup> *Rep.*, 1996-I, no. 4, p. 269, paras. 53-4.

<sup>73</sup> *Ibid.*, p. 270-1, paras. 58-60. See also *Singh v. United Kingdom* (1996), *ibid.*, pp. 296-301.

<sup>74</sup> *Rep.*, 1997-VI, no. 51, p. 2014-5, paras. 47, 52; and *ibid.*, p. 2016, para. 55.

<sup>75</sup> *Rep.*, 1997-VII, no. 58, p. 2625, para. 53.

<sup>76</sup> *Ibid.*, p. 2625, paras. 53-4.

<sup>77</sup> Ser. A, no. 237-A, p. 12, para. 23 = 13 HRLJ 206 (1992). As to these criteria of effectiveness, see also the remarks under Article 5(5), below.

<sup>78</sup> Ser. A, no. 273-B, p. 28-9, paras. 28-9.

<sup>79</sup> Communication no. 291/1988, A/45/40, p. 100.

Covenant as its Article 9(4) "envisages that the legality of the detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control".<sup>80</sup>

5. It may finally be recalled that the Inter-American Court has held that the essential remedies for challenging the legality of detention (such as, in the Inter-American law, *habeas corpus* and *amparo*) cannot be suspended even in times of emergency. These fundamental judicial guarantees are essential for the protection of a series of other nonderogable rights and must, by necessary implication, be themselves nonderogable.<sup>81</sup> But *quaere*, even for these fundamental remedies, if the courts in a time of emergency will exercise their jurisdiction to the same extent and with the same reach.

#### E) Right to compensation for illegal detention, Article 5(5)

1. A right to compensation under Article 5(5) supposes a violation of one of the previous paragraphs of Article 5. Material and moral prejudice may be covered.<sup>82</sup> Proof of prejudice can be required.<sup>83</sup>

There have been two cases on Article 5(5) in the period under review. In *Tsirlis and Kouloumpas v. Greece* (1997) Article 5(5) had been plainly breached as there had been no enforceable remedy for compensation under municipal law.<sup>84</sup> In the *Sakik and others v. Turkey* case (1997) the rule has been applied with regard to the administrative and judicial practice. The Court found that effective enjoyment of the rights guaranteed by Article 5(5) was not ensured with a sufficient degree of certainty. There were no examples for such compensation in practice. The laws quoted by the Government referred only to compensation for unlawful deprivation of liberty (which was not the case presently). Thus Article 5(5) had been violated.<sup>85</sup>

2. One may infer from the foregoing that the Court will scrutinize the effectiveness of the remedy for compensation – as that for challenging the legality of the detention – on three levels: (1) its formal existence in the legal order; (2) the effective possibility to exercise it in the circumstances; (3) the degree of certainty with which such a remedy can be said to exist taking into account the administrative and judicial practice of the State organs. (1) deals with formal existence, (3) with material existence, (2) deals with contextual effectiveness. All three aspects may be put under the hat of effectiveness in the broad sense.

### III) Fair trial guarantees (Article 6)

#### A) General aspects

1. There must generally be sufficient and adequate possibility to take position on the facts and on the law on equal footing with the prosecution and in an adversarial manner.<sup>86</sup> Unfairness of trial may stem from shortness of time to prepare the defense; denial of personal participation; partial and dependent tribunals; lack of information on charges; inadequate legal defense; exchange of judges in surprising ways; refusal to take account of witnesses, proofs and materials; giving decisive weight to statements of witnesses not present at trial; etc.<sup>87</sup>

It is difficult to distinguish between the general aspects of fair trial and the more specific ones which will be the object of further comment in the following pages. The comment at this place shall refer to all the aspects which are not more directly linked to one of the specific headings.

2. In the period under review, in the *Belziuk v. Poland* case (1998), the European Court seized the opportunity to

set forth some general aspects of the right to fair trial under Article 6. It said:

"(1) Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision at first instance. A State is required to ensure also before courts of appeal that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in this Article (...). (ii) A person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance trial hearing. However, the personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing. Indeed, even where an appellate court has full jurisdiction to review the case on questions both of fact and law, Article 6 does not always entail rights to a public hearing and to be present in person. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defense's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant (...). (iii) The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party is aware that observations have been filed and gets a real opportunity to comment thereon (...)"<sup>88</sup>

3. Three cases dealt with the problem of *freedom from self-incrimination*. An accused (or witness) must be able to stay silent if there is danger to incriminate himself by certain disclosures without incurring unfavorable references as to his guilt. In *Funke v. France* (1993) the Court reminded that this right covers all types of criminal proceedings: "The special features of customs law cannot justify such an infringement of the right of anyone 'charged with criminal offence' (...) to remain silent and not to contribute to incriminating himself".<sup>89</sup> At what moment does this immunity start? This depends on the definition given to the term "criminal charge". In the *Tejedor Garcia v. Spain* case (1997) the Court held that it referred to "the official notification given to an individual by the competent authority of an allegation that he has

<sup>80</sup> *Ibid.*, p. 99-100.

<sup>81</sup> *Habeas Corpus in Emergency Situations*, advisory opinion, OC-8/87, ser. A, no. 8, IAYHR, 1987, pp. 750 ff, 770, para. 42 = 9 HRLJ 94 (1988). See also the *Judicial Guarantees in States of Emergency*, advisory opinion, OC-9/87, ser. A, no. 9, IAYHR, 1988, p. 904, para. 25 = 9 HRLJ 204 (1988).

<sup>82</sup> *Ringeisen (art. 50) case* (1972), ser. A, no. 15, pp. 9-10, paras. 23-6.

<sup>83</sup> *Wasinsk case* (1990), ser. A, no. 185-A, p. 14, para. 38.

<sup>84</sup> *Rep.*, 1997-III, no. 38, p. 925, para. 66.

<sup>85</sup> *Rep.*, 1997-VII, no. 58, p. 2626, paras. 60-1.

<sup>86</sup> *Le Compte and others case* (1981), ser. A, no. 43, p. 23, para. 51 = 2 HRLJ 349 (1981).

<sup>87</sup> See e.g. the *Barberà, Messegue and Jabardo case* (1988), ser. A, no. 146 = 9 HRLJ 267 (1988).

<sup>88</sup> *Rep.*, 1998-II, no. 67, p. 570.

<sup>89</sup> Ser. A, no. 256-A, p. 22, para. 44.

committed a criminal offence".<sup>90</sup> The qualification of the offence as being criminal or not rests on municipal law. There is thus some leeway for States, subject to the limit of arbitrariness. The Court would then be able to consider the substance of the measure rather than its formal classification.

Freedom from self-incrimination does not extend as far as it might appear on first sight. Some acts may be required from the accused, some inferences drawn from his silence. This is shown by the next two cases. In *Serves v. France* (1997) the applicant had been fined for not having taken the oath to tell the truth. The Court found that his right of non-self-incrimination was not violated as the oath did not as such coerce him to incriminate himself. He would still be able to refuse to answer any questions that were likely to steer him in that direction.<sup>91</sup> The question is here one of causality. The oath was not the cause of a denial of the right to stay silent. In fact the oath did not affect that right; it acknowledged its existence and left open its exercise. To the extent this is borne out by the facts and no sanction is taken for such silence the reasoning of the Court is unimpeachable.

In *Murray v. United Kingdom* (1996) the applicant complained that his right to silence had been breached by way of incriminating inferences. The Court started by saying that the immunities granted by the right to non-self-incrimination are not absolute but relative.<sup>92</sup> Silence may serve in the assessment of evidence: "Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all 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".<sup>93</sup>

How should this limitation of the right to silence be interpreted? Clearly, it cannot be said that the right is once more not affected by the inferences as the accused is still allowed to stay silent. The freedom from self-incrimination does not limit itself to the fact of staying silent but encompasses a prohibition to draw adverse consequences from such a course of conduct. This alone gives effectiveness to the right. In the *Murray* case the inferences were common-sense inferences in the context of a considerable amount of evidence against the accused; as the Court explained they were inextricably linked to the ordinary course of assessment of evidence.<sup>94</sup> This, according to the Court, cannot be prohibited by the freedom from self-incrimination. The cardinal point seems to be the degree of directness and the importance of the inferences. If essential, important or at least material proof for convicting the accused is derived directly and mainly from such inferences, there will be a breach of the right. If on the other hand specific silences are used to shed light on other evidence positively secured and if this process involves only minor and common-sense arguments, silences may be used without breaching the right. In other words some silences may be used to bridge minor gaps in a considerable and consistent amount of evidence. Such minor "bridging-silences" may operate against the accused because they are inseparable from other positive evidence.

Out of this case-law a clearer line cannot be drawn. As the distinction is gradual there may and will be borderline cases. Probably they will have to be solved by giving some presumptive credit to the accused (*in dubio pro reo*).

4. In the *Teixeira de Castro v. Portugal* case (1998) the difficult problem of undercover agents (*agents provocateurs*) was posed. The applicant complained that

he had been denied a fair trial because plain-clothes police officers had incited him to commit the offence. The Court focussed on three aspects, the first one eliciting the decisive criterion as to admissibility of provocative action, the second, more contextual, strengthening the first, and the third being concerned with the trial stage after the action of the undercover agents. As to the first aspect the Court noted that the agents exercised a decisive influence on the commission of the offence and were not limited to give the applicant an opportunity of carrying out the crime. This conclusion was warranted, *inter alia*, because the applicant had no previous criminal record and because he got the precise amount of drug promised to the agents from other persons without possessing any other quantity of such drugs at his home at the moment of his arrest. The second, contextual factor, was that the police officers had acted on their own initiative and without any control by the investigating judge (unlike in the *Lüdi* case). Finally, as a third aspect, the Court found that the applicant had been convicted mainly on the basis of the statements of the agents; this fact amplified the defects previously noted.<sup>95</sup>

From this case one can abstract the following rule as to the use of undercover agents: (1) the incitement by the agents must not be the (only) cause for the decision of the accused to commit an offence, *i.e.* for choosing to disobey the legal order; it must not be more than a cause to commit a particular act or transaction which the accused would have been ready to undertake even without that provocation because of his regular links with crime in the field concerned. In other words, the agents must give an opportunity to do what the accused anyway does, not incite and lure the accused to an act that he would not otherwise have undertaken.<sup>96</sup> The question is akin to that of improper causality, that is, of causality for omissions: would the accused have committed like acts if the agents had not intervened? Obviously difficult questions of proof may arise, but ordinarily they can be solved by considering the overall attitudes and practice of the accused (especially in drug delicts). (2) The agents must be controlled and sworn in by investigating judicial authorities, they cannot act on their own initiative and without any control. The point is to prevent abuses. Both criteria are sensible and do not restrict excessively the fight against crime. The idea is sound: you should not do more than passively secure evidence of an attitude preexisting your intervention. The State cannot incite to crime.<sup>97</sup>

<sup>90</sup> *Rep.*, 1997-VIII, no. 60, p. 2795, para. 27.

<sup>91</sup> *Rep.*, 1997-VI, no. 53, p. 2174, para. 47.

<sup>92</sup> *Rep.*, 1996-I, no. 1, p. 49, para. 47: "These immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution" = 17 HRLJ 39 (1996).

<sup>93</sup> *Ibid.*, pp. 49-50, para. 47.

<sup>94</sup> *Ibid.*, pp. 51-2, para. 54.

<sup>95</sup> *Rep.*, 1998-IV, no. 77, p. 1463, paras. 37-8.

<sup>96</sup> As the Court says: "In the light of all these considerations, the Court concludes that the two police officer's actions went beyond those on undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed" (*ibid.*, p. 1464, para. 39).

<sup>97</sup> These points were not sufficiently considered in the dissenting opinion of Butkevych (*ibid.*, p. 1468) which at least recommends itself to the effect that interpretation against the *agents provocateurs* should not be too strong if crime is to be fought successfully in many difficult areas like drug offences.

5. Two cases of the period under review concerned procedural aspects. In *Edwards v. United Kingdom* (1992) the Court recalled that it must consider the fairness of proceedings as a whole, taking into account the stages of appeal or cassation. Thus, if there have been some defects of the prosecuting authorities in disclosing to the defense all material evidence, these defects may be cured by the subsequent procedure of the court of appeals.<sup>98</sup> A condition to that effect is certainly that the court of appeals has the same extent of powers to review facts and law as had the first instance. This jurisprudence of the Court, frequent also in municipal law, is not without problems. For the accused may lose one instance of appeal precisely on the defects at stake. But on the other hand, especially if the complaints on that point were effectively heard on appeal, the principle of procedural economy has much to recommend such a course of the jurisprudence.

Another procedural point was raised in the *Tejedor García v. Spain* case (1997). The applicant complained that proceedings against him had been unfair because the domestic courts had allowed the public prosecutor's application for an order setting aside the decision that no further action be taken, two months after the expiry of the time-limit of municipal law. The Court seized this opportunity to reaffirm the procedural sovereignty of each member State. The interpretation of procedural domestic law is a matter for domestic courts. These courts had held in the present case that the decision not to prosecute had not become final under Spanish law. The Court is limited to a control of arbitrariness or unreasonableness; no such arbitrary or unreasonable conduct could be found in the present case.<sup>99</sup> This strict limitation of the control of municipal procedural law by the Court is essential for otherwise the Court, which is only (*sic*) the guardian of human rights, would be turned into a court of cassation of supra-national character.

Finally, in the *Stanford v. United Kingdom* case (1994) the applicant complained that he could not follow and check the evidence in the proceedings at trial because of poor acoustics. The Court first assured itself that the proceedings had been overall fair: the counsel of the accused could discuss and assess every point of evidence with the accused, the summing up of the trial judge had been fair. Under such conditions there was no reason to hold otherwise under the plea of bad acoustics. Neither the applicant nor his lawyer raised that point during the proceedings where they had ample opportunity to do so. The reason had been tactical. For such decisions of the accused and his counsel the State was not responsible.<sup>100</sup> The question of acoustics was thus left to the private interests of the accused and could be waived. There being no sufficient public interest to call for *ex officio* examination or for a general State guarantee, the rule that nobody shall take advantage from his own fault was applied. This more liberal but also the more strict view as to the duties of the State is defensible. The result of the *Stanford* case does not seem unsatisfactory nevertheless.

6. In comparison, the Inter-American System has been concerned with the *right of access to a court of law* in a series of cases where alleged victims of human rights violations under military rule, or their relatives, were prevented to bring their claims by sweeping amnesty laws. The Commission has upheld such a right of access to a court on the basis of the duty undertaken by States to ensure the full enjoyment of human rights.<sup>101</sup> Moreover, in the *Judicial Guarantees in States of Emergency* advisory opinion (1987) the Inter-American Court affirmed that the

principles of due process of law cannot be suspended in states of emergency.<sup>102</sup>

#### B) Equality of arms

1. Equality of arms means equal standing of the prosecutor and the defense at trial. It entails that "everyone who is a party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent".<sup>103</sup> Inequality of arms exists for instance where an expert whose report had started the prosecution exerts a dominating position in the trial also, where he is advising the court on the matter of his expertise.<sup>104</sup> Inequality of arms furthermore exists if the accused is denied personal access at the court of appeals where the prosecutor can plead in favor of a *reformatio in peius*.<sup>105</sup> Inequality of arms also exists where the *Procureur Général* participates in the deliberations of the court on the allowance of the applicant's appeal, even if without voting right.<sup>106</sup>

2. The principle of equality of arms is closely linked to many other aspects of the right to fair trial and will thus be mentioned also in other contexts in an indirect way. This is true in particular for the right to adversarial proceedings. In the period under review 7 cases dealt with the principle of equality of arms.

In the *Kremzow v. Austria* case (1993) the European Court stated that single and minor inequalities during the procedure<sup>107</sup> can be outweighed by the general fairness of the proceedings.<sup>108</sup> Thus specific inequalities cannot be appraised in isolation if their importance is objectively

<sup>98</sup> Ser. A, no. 247-B, pp. 34-5, paras. 34, 39.

<sup>99</sup> Rep., 1997-VIII, no. 60, pp. 2796-7, para. 33.

<sup>100</sup> Ser. A, no. 282-B, p. 11, paras. 27-8, 30 = 15 HRLJ 188 (1994).

<sup>101</sup> Report 28/92, Cases no. 10,147; 10,181; 10,240; 10,262; 10,309 and 10,311 (Argentina) (1992), IAYHR, 1992, vol. 1, pp. 740 ff., 754, paras. 36-7: "Under Article 1.1 of the Convention, the States parties are obliged 'to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...'. The laws and the Decree [of amnesty] sought to, and effectively did obstruct the exercise of the petitioners' right under Article 8.1. With enactment and enforcement of the laws and the Decree, Argentina has failed to comply with its duty to guarantee the rights to which Article 8.1 refers, has abused those rights and has violated the Convention". See also: the Report 29/92, Cases no. 10,029; 10,036; 10,145; 10,305; 10,372; 10,373; 10,374 and 10,375 (Uruguay) (1992), IAYHR, 1992, vol. 1, pp. 884 ff., 902-8. See also the Report 36/96, Case 10,843 (Chile) (1996), IAYHR, 1996, vol. 1, pp. 422-3.

<sup>102</sup> "Reading Article 8 together with Articles 7(6), 25 and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees" (IAYHR, 1988, pp. 892 ff, 904-6 = 9 HRLJ 204 (1988)).

<sup>103</sup> *Kaufman v. Belgium*, Commission, case no. 10'938/84, DR, vol. 50, 1986, p. 115. See generally e.g. the *Monnell and Morris* case (1987), ser. A, no. 115, p. 23, para. 62.

<sup>104</sup> *Bönisch* case (1985), ser. A, no. 92.

<sup>105</sup> *Pataki* case, Commission, case B 596/59, Yb., vol. 6, pp. 730-2.

<sup>106</sup> *Borgers* case (1991), ser. A, no. 214-B, pp. 30-2, particularly p. 32, paras. 26-9.

<sup>107</sup> The accused had complained e.g. of the absence of time-limits for the submission of the Attorney General's croquis; of the fact that (only) the Attorney General was informed of the name of the reporting judge; etc.

<sup>108</sup> Ser. A, no. 268-B, p. 46, para. 75.

small. Rather the Court has to consider the entirety of the proceedings and to elicit therefrom a general conclusion as to the effects of such minor defects on the fairness of the whole. The approach is based on the idea of integrity of the proceedings: the whole sheds light on the single elements. Sometimes it is the cumulative effect of defects in themselves of minor importance with accounts for a breach of equality of arms.

3. Two cases turned on the question of *personal appearance* of the accused at the judicial body or appellate court concerned with his complaint. A classical case involving the breach of equality of arms is that of *Belziuk v. Poland* (1998). The public prosecutor was present on appeal and made submissions unfavorable to the applicant while he himself was not granted leave to appear. The Court said that Article 6(1) had been violated. As the prosecutor was present on the appeal and made submissions directed at having the applicant's appeal rejected, equality of arms and the right to adversarial proceedings required that the applicant be allowed to attend the hearing.<sup>109</sup> In the *Kampanis v. Greece* case (1995) the Court took first the opportunity to recall that if the time-limit for appearing personally on a hearing had not been respected by the applicant, he could not complain of inequality of arms if the prosecutor was all the same heard.<sup>110</sup> *Nemo auditur turpitudinem suam allegans*. But on another application of the accused, there had been a breach of equality of arms. This application had to do with release from detention. The decisive criterion was the length of this detention: as the applicant had been detained for a long time (up to the maximum permitted), equality of arms requested to give him an opportunity to appear in person and to reply to the arguments of the prosecutor.<sup>111</sup>

The United Nations Human Rights Committee stressed the link between personal attendance and equality of arms in strong and general terms. In the *D. Wolf v. Panama* case (1992), the Committee said that equality of arms and the duty of adversarial proceedings are not respected where "the accused is denied the opportunity personally to attend the proceedings, or where he is unable properly to instruct his legal representative".<sup>112</sup>

4. Two other cases concerned the *access of the accused to his criminal file*. In *Foucher v. France* (1997) the Court did stress the importance of such file access. The applicant had complained that he had not been able to have access to his case file or to obtain copies of the documents in it. The Court said that as the defendant was committed directly for trial in a police court and was finally convicted solely on the game warden's official report, access to the file was essential. Failing such access no adequate defense could be prepared; thus there was no equality of arms.<sup>113</sup> The question is linked with the guarantee under Article 6(3)(b). The cardinal criterion seems to be the importance of access to the file for the preparation of a reasonable defense. In proceedings based mainly on the filed documents or otherwise summary in nature, access becomes essential. The classification of the proceedings according to municipal law (police court, administrative sanctions, etc.) is not decisive; the question is if a criminal penalty is incurred. Moreover, access to the file can only be requested if it contains documents which the trial court will consider for determining the accused's guilt. This point was clarified in the *Bendenoun v. France* case (1994). The applicant had maintained that he had not been able to consult the whole file on which the authorities relied in tax-evasion proceedings. The Court noticed that the tax authorities had not relied on the documents production of

which was sought. The guilt of the accused was established only on the basis of reports where the accused had acknowledged his offences. To the extent that the file was thought by the applicant all the same worthy to be consulted, he should at least have given some specific reasons for his request as it was a very bulky file. This had not been the case and there was thus no violation of Article 6.<sup>114</sup> In effect, it may seem sensible that where the applicant has admitted his offences he at least states some reasons why he wants to consult a bulky file which will not be relied upon on trial.

5. The two last cases shed some light on other aspects of the principle. In the *De Haes and Gijssels v. Belgium* case (1997) the applicants complained that the trial court having refused in evidence some documents and the hearing of certain witnesses, the proceedings had resulted in inequality of arms. It was claimed that these documents and witnesses were fundamental for the defense. The Court did not question the autonomous power of the trial judge to assess the admissibility, pertinence and value of the evidence presented. But it held that in order to show why the applicants had written the statements in the incriminated articles, it was necessary for them to submit certain documents. The outright rejection of their application put them at a substantial disadvantage vis-à-vis the prosecution and thus infringed upon the equality of arms principle.<sup>115</sup> It was the *a priori* rejection of evidence seeming *prima facie* pertinent which motivated the Court to hold in favor of a breach of the Convention. This holding can be squared with the usual arbitrariness or unreasonableness control of the Court in matters of municipal law procedure. Nevertheless, the reading of the case leaves open some doubts on the appropriateness of the result. The Court tended towards the *quatrième instance* approach by interfering substantially with the prerogatives of the trial judge under municipal procedure. Attention should be paid to the idea that appreciation of evidence has to remain a matter of trial decision. *Quaere* if in this case the rejection of the documentary evidence claimed was arbitrary with regard to the applicable substantive provisions of municipal law.

Another problem was at stake in the *Bulut v. Austria* case (1996). Here the applicant had complained that the Attorney General submitted some observations to the supreme court which were not served on the defense. For the Court this was a classical case of inequality of arms. The Attorney General had taken a clear position as to the applicants appeal in that paper, without giving the defense an opportunity to reply. This inequality burdened the proceedings with unfairness.<sup>116</sup>

### C) Right to personal participation in the trial or on appeal

1. A criminal trial without the presence of the accused is in principle incompatible with Article 6.<sup>117</sup> Hearing in

<sup>109</sup> Rep., 1998-II, no. 67, p. 571, paras. 39-40.

<sup>110</sup> Ser. A, no. 318, p. 46, para. 51.

<sup>111</sup> *Ibid.*, p. 48, paras. 57-8.

<sup>112</sup> Communication no. 289/1988, A/47/40, p. 282. The Committee added: "In particular, the principle of equality of arms is not respected where the accused is not served a properly motivated indictment" (*ibid.*).

<sup>113</sup> Rep., 1997-II, no. 33, p. 465, paras. 35-6.

<sup>114</sup> Ser. A, no. 284, p. 22, para. 52 = 15 HRLJ 14 (1994).

<sup>115</sup> Rep., 1997-I, no. 30, p. 239, para. 58.

<sup>116</sup> Rep., 1996-II, no. 5, pp. 359-360, para. 49.

<sup>117</sup> *Colozza* case (1985), ser. A, no. 89, p. 14, para. 27; *Ekbatani* case (1988), ser. A, no. 134, p. 12, para. 25.

*absentia* is permitted if the State has acted diligently, but unsuccessfully, to give the accused effective notice of the hearing.<sup>118</sup> In the case of an *in absentia* trial there must be an opportunity for the convicted to reopen the trial.<sup>119</sup> It is unsettled if a re-hearing is possible where there had been a waiver or where the accused has absconded (various criminal proceeding laws of European States do not grant such a right). The question may well turn on the gravity of the offence and incurred penalty. The accused may waive his right of personal participation by unequivocal statements provided that he remains under the protection of minimum safeguard standards.<sup>120</sup>

2. In the period under review the question of personal participation in the trial was posed mainly in the context of *appeal or cassation proceedings*. The essential criteria for determining if personal presence is necessary at such higher courts are: (1) the ability of these courts to consider only questions of law or also questions of fact; (2) the ability of the court to increase the sentence; (3) the necessity, with regard to the nature of the offence, of the sentence or of the questions reviewed, to appraise the accused's personality. Especially in this last case, personal presence is indispensable.

As to the first point, the European Court said in *Bulut v. Austria* (1996) that adversarial hearings could be limited to the first instances excluding appeal proceedings involving only questions of law. As the supreme court had only such functions of law-assessment in the present case, the Convention had not been violated.<sup>121</sup> The opposite was true in the *Belziuk v. Poland* case (1998). Here the higher court had to determine questions of law and fact relevant to the conviction of the applicant. There could not be fair trial without direct assessment of the evidence given by the applicant in person.<sup>122</sup> From this it should not be inferred that every time questions of fact have to be reviewed a right to personal participation exists. The answer depends on the importance of personal defense of the accused relating to the facts in question. This was clearly spelled out in the *Kremzow v. Austria* case (1993). The Court recalled that even where a higher court has full jurisdiction to review the case on questions of law and fact, a right to be present in person cannot always be granted.<sup>123</sup> Regard must be had, the Court continued, to the special features of the proceedings involved and the overall manner in which the defense interests were protected in the light of the decided issues.<sup>124</sup> If the question turns essentially on legal aspects, the presence of a lawyer can be enough.<sup>125</sup> On the other hand, according to the Court, where the question is if the sentence should be increased or where the character, state of mind and motive of the accused has to be assessed, personal presence is necessary.<sup>126</sup> Such was the situation in the *Botten v. Norway* case (1996). As the Court said, the nature of the offence (neglect and carelessness in the performance of official duties but no intention to harm) turned the applicant's personality and character into an important consideration. As the supreme court did not even possess the prior assessment of this point by the lower court, Article 6 had been violated.<sup>127</sup>

One may conclude on this point by saying that the crucial and overriding aspect as to this type of personal participation is whether in context the proceedings cannot appear fair without having heard and assessed the accused's personality directly.

As was said by the United Nations Human Rights Committee in *A.O. Karttunen v. Finland* (1992), oral participation at the appeal stage may be necessary if only such a course of conduct "would have enabled the Court

to proceed with the re-evaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw [participation of a judge who should have been disqualified] had indeed affected the verdict of the District Court".<sup>128</sup>

3. Only one case concerned personal participation *at trial stage*. In *Zana v. Turkey* (1997) the Turkish authorities had claimed that the accused had waived his right of personal attendance *inter alia* because he insisted to address the court in Kurdish. The European Court rightly said that the fact that the accused wanted to raise procedural objections and wished to address the court in Kurdish could not be construed as an implicit waiver of his right of attendance. Such a waiver could only be established by unequivocal facts. As imprisonment was at stake, the trial could not be fair without a direct assessment of the applicant's evidence given in person. Thus there had been a breach of Article 6.<sup>129</sup>

#### D) Right to adversarial proceedings and right to challenge evidence

1. Generally speaking the term adversarial means that the evidence produced must be open to challenge and discussion by the other party. As the Court said from the perspective of the accused, "all evidence must in principle be produced in the presence of the accused (...) with a view to adversarial argument".<sup>130</sup> This aspect of fair trial like that of equality of arms is intrinsically linked to other aspects and it thus will appear also, albeit in a more indirect way, under other headings.

2. In the period under review, two cases related most strikingly to the element of adversariality of argument. These two cases could also have been subsumed under the heading of equality of arms to which the present principle is essentially linked. They turn around the question of the *duty of disclosure* for reports or observations filed by the prosecutor. In *J.J. v. The Netherlands* (1998) the applicant claimed that he had not been able to reply to the advisory opinion submitted to the supreme court by the Advocate General. The Netherlands had answered to this plea that the purpose of the advisory opinion was only that of assisting the supreme court to keep its case-law consistent. As it did not intend to take position on the evidence of the specific case, nor indeed to touch on anything else than questions of integrity of the jurisprudence, the accused had no standing to reply to it. The European Court

<sup>118</sup> *Ibid.*, p. 14-5, para. 28; *F.C.B. v. Italy* case (1991), ser. A, no. 208-B, p. 21, para. 33 = 12 HRLJ 369 (1991).

<sup>119</sup> *Colozza* case (*supra*, note 117), para. 29.

<sup>120</sup> *Poirimol* case (1993), ser. A, no. 277-A, pp. 13-14, para. 31-2.

<sup>121</sup> *Rep.*, 1996-II, no. 5, p. 358, paras. 41-2.

<sup>122</sup> *Rep.*, 1998-II, no. 67, p. 571, para. 38. See also *Botten v. Norway* (1996), *Rep.*, 1996-I, no. 2, p. 144, para. 49.

<sup>123</sup> Ser. A, no. 268-B, p. 43, para. 58, referring to *Fejde v. Sweden* (1991), ser. A, no. 212-C, p. 68, para. 31.

<sup>124</sup> *Ibid.*, p. 43, para. 59.

<sup>125</sup> *Ibid.*, p. 44, para. 63.

<sup>126</sup> *Ibid.*, p. 45, para. 67.

<sup>127</sup> *Rep.*, 1996-I, no. 2, p. 145, para. 50.

<sup>128</sup> Communication no. 387/1989, A/48/40 (mimeographed version), p. 120, para. 7.3.

<sup>129</sup> *Rep.*, 1997-VII, no. 57, p. 2551, paras. 70-1.

<sup>130</sup> *Barberà, Messegué and Jabardo* case (*supra*, note 87), para. 78 = 9 HRLJ 267 (1988). Cf. generally *ibid.*, pp. 31 ff., paras. 68 ff.; *Bricmont* case (1989), ser. A, no. 158, pp. 29-30, paras. 78 ff.; *Kostovski* case (1989), ser. A, no. 166, pp. 20-1, paras. 41-5 (anonymous witness).

rejected that argument. Basing itself on the principle that it is the effects of a legal act rather than its abstract purpose which have to be considered, the Court declared that the advisory opinion contained statements intended to influence the supreme court. This opinion could therefore contribute to an unfavorable outcome for the accused. In such circumstances the fact that it was impossible for the applicant to reply to it infringed his right to adversarial proceedings.<sup>131</sup> The Court at this stage seized the opportunity to recall what this right entails: "[This] right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed (...) with a view to influencing the court's decision".<sup>132</sup> The decisive criterion is thus that a piece of evidence or written observation is able to influence the court's decision. As soon as this is the case, regardless of the question how it was intended to influence that decision, the other party must be given disclosure and possibility to comment on it.

In the *Reinhardt and Slimane-Käid v. France* case (1998) the applicants had complained that neither they nor their counsel had received the reporting judge's report before the hearing whereas the Advocate General had. Moreover, they claimed not to have had any opportunity to reply to the Advocate General's submissions. The Court's answer is all but unexpected. As the report of the Advocate General may influence the decision of the court and is moreover drafted to that end, its non-disclosure creates an imbalance and is not compatible with the requirements of adversarial proceedings and ultimately with fair trial.<sup>133</sup> As can be seen the jurisprudence is well settled on this point. As to the other human rights bodies like the United Nations Human Rights Committee or the Inter-American Court and Commission, there is no notable contribution on the principle of adversarial proceedings in the period under review. Nor is there anything to be said as to the right to a public trial.

#### E) Right to an independent and impartial tribunal established by law

1. This important principle which generates abundant case-law contains many individual aspects which are added up to a general aggregate. *First*, there is a right to have access to a "court of law" (tribunal).<sup>134</sup> A definition of what this implies can be found in the *Belilos* case (1988): "[A] tribunal is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (...). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' term of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1) itself".<sup>135</sup> *Second*, the tribunal must be "established by law". This element is linked to that of independence of the tribunal. The judicial organization in a democratic society, as the Commission expressed, must not depend on the discretion of the executive, but should be regulated by laws emanating from Parliament.<sup>136</sup> It is obviously only the basic rules of jurisdiction and organization which must be spelled out by legislation, the rest being more fit for rules enacted by the executive or the court itself. *Third*, "independent" means that the judicial body must not be formally subordinated or effectively subjected to directions from other State organs, except hierarchically higher tribunals. A tribunal must thus be independent from the executive, from political organs (legislative organs) and also from the parties.<sup>137</sup>

The Court looks to several factors in order to determine whether a body can be considered to be independent: "[T]he Court has regard to 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".<sup>138</sup> *Fourth*, "impartial" means that the judges have to stand above the parties, to decide without personal influence and objectively, only according to their best knowledge and conscience. Impartiality means also lack of subjective prejudice or bias.<sup>139</sup> As the Court said there is thus an objective and a subjective element in impartiality: "The existence of impartiality (...) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in his respect".<sup>140</sup>

2. In the period under review it is this heading which provided the most rich case-law from the several human rights bodies.

First, there is the question of *independence* of the judicial body. The European Court had to deal only with two related cases where the question raised was squarely one of independence of the tribunal. In *Findlay v. United Kingdom* (1997) the applicant had complained that the court martial having sentenced him was not an independent and impartial tribunal since its members were subordinate to the officer who performed the role of prosecutor (and they also lacked legal qualification). The Court first notes that the convening officer in question had played a significant role in the proceedings as he himself appointed the members of the court martial. Moreover, he could vary the sentence imposed, which in any case was not effective until ratified by him. These circumstances and the fact that the members of the tribunal were his direct military subordinates could justify objective doubts about the tribunal's independence. Hence, Article 6(1) had been violated.<sup>141</sup> Some of the considerations of the Court could be taken to have been proffered *ex abundante*. The Court was at pains to show that the tribunal had been composed of judges effectively subjected to the convening officer who, moreover, had intervened

<sup>131</sup> *Rep.*, 1998-II, no. 68, pp. 612-3, paras. 42-3.

<sup>132</sup> *Ibid.*, p. 613, para. 43.

<sup>133</sup> *Rep.*, 1998-II, no. 68, p. 666, para. 105.

<sup>134</sup> *Deweer* case (1980), ser. A, no. 35, pp. 24-5, paras. 48-9.

<sup>135</sup> Ser. A, no. 132, p. 29, para. 64.

<sup>136</sup> *Zand* case, Commission, case no. 7360/76, DR, vol. 15, p. 80. See also: the *Belilos* case (*supra*, note 135), p. 29, para. 64; *Campbell and Fell* case (1984), ser. A, no. 80, pp. 38-9, para. 76.

<sup>137</sup> *Ringeisen* case (1971), ser. A, no. 13, p. 39, para. 95; *Bentham* case (1985), ser. A, no. 97, p. 18, paras. 41-3.

<sup>138</sup> *Campbell and Fell* case (1984), ser. A, no. 80, pp. 39-40, para. 78 = 6 HRLJ 255 (1985). The Inter-American Commission also held that the independence of a court can be assessed by: the manner of appointment of the judges and the duration of their terms; the irremovability of the judges; the protection against external pressures exerted on the judiciary (Report 1/95, Case no. 11,006 (Peru) (1995), IAYHR, 1995, pp. 278-280).

<sup>139</sup> *Piersack* case (1982), ser. A, no. 53, pp. 13-6, paras. 28 ff = 4 HRLJ 207 (1983); *De Cubber* case (1984), ser. A, no. 86, pp. 13-6, paras. 24 ff.

<sup>140</sup> *Hauschildt* case (1989), ser. A, no. 154, p. 21, para. 46.

<sup>141</sup> *Rep.*, 1997-I, no. 30, pp. 281-2, paras. 74-7. See also the *Cayne v. United Kingdom* case (1997), *Rep.*, 1997-V, no. 49, pp. 1854-5, based on analogous facts.

significantly in the present proceedings. It could be said that this criterion of effective influence, more akin to matters of impartiality, is superfluous, for independence is already infringed if there is a formal subordination of the tribunal to an organ representing the executive. But it must be stressed that in the present case such a formal subordination does not seem to have existed, or at least was not considered. Therefore the Court went over to the objective appearance-approach.

Three factors were decisive in the finding against independence, all of them resting on the effective role of the convening officer: (1) that he could appoint the judges; (2) that he had to ratify the sentence; (3) that the judges were outside the proceedings his subordinates. What could be imagined, is to consider all these aspects exclusively under the heading of "impartiality" and to limit the question of "independence" to matters of formal organization. Clearly, there is no such tradition in human rights law and little would be gained by introducing a clear-cut distinction on this point. All that can be safely asserted is that the objective appearance-approach in matters of independence is subsidiary to any finding of formal dependence. If there is a formal dependence of the judicial body, there is no need to examine if influence was effectively taken. However, the distinction may be difficult. In the above quoted case, could it not be maintained that the necessity of ratification of the judgment by the convening officer formally subordinated the tribunal to this officer?

Such aspects of formal subordination were envisaged by the Commission in the Inter-American system. The Commission had opportunity to stress that a special military court is not an independent tribunal in as much as it is subordinate to the Ministry of Defense, thus to the executive.<sup>142</sup> Another aspect of such formal subordination is the power of the executive to remove the judges as it sees fit. The Inter-American Commission has said that where a great number of judges are unconstitutionally removed from their posts the separation of powers is eliminated and the judiciary subjected to the executive branch. Tribunals composed according to such practice are not impartial or independent.<sup>143</sup>

At the United Nations Human Rights Committee the independence of tribunals has been at issue in two cases. In *R. Espinoza de Polay v. Peru* (1997) a special tribunal under anti-terrorist legislation composed of judges with covered faces ("faceless judges") was held to be neither independent nor impartial.<sup>144</sup> The reason for that holding is that under such a system there is no means whatsoever to ascertain if the conditions of independence or impartiality are met. Therefore this guarantee would be rendered nugatory. Hence by implication the violation of Article 14(1) of the Covenant. In *G. del Río v. Peru* (1992) several judges involved in the trial had referred to its important political implications. The Committee held that the absolute right to an impartial and independent tribunal had been infringed.<sup>145</sup> As to the aspect of independence, the members of the tribunal, by their statement, could objectively convey the impression that some dependencies from the political bodies of the State existed.

3. Questions of *impartiality* of the tribunals provide the great bulk of case-law in the present context. In the *Thorgeir Thorgeirson v. Iceland* case (1992) the European Court seized the opportunity to comment at some length on the principles involved under the heading of impartiality. After having recalled that the question must be considered under a subjective as well as objective perspective,<sup>146</sup> it went on to provide some supplementary

guidance as to their meaning: "As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (...). Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified".<sup>147</sup>

The important point to see is that there are two interests which this guarantee seeks to protect. They are at a different level and require different tests, one subjective, the other objective. There is, first, the interest of the individual prosecuted. This interest is secured by ascertaining that there is no subjective bias. According to general principles of law (*omnia acta praesumuntur esse rita; mala fides non praesumitur*) absence of bias is presumed. On the other hand there is a general interest in the credibility of criminal justice. Here more than anywhere else the old rule is essential: Justice must not only be done, but it must also be seen to be done. The absence of real partiality is no longer the heart of the matter. What counts is something of a much larger scope: it is the objective appearance of impartiality as it is felt by the reasonable observer. The crucial importance of this credibility justifies that in any case of objective doubt, however slight, as to the impartiality of the selected judges, there be a new composition of the tribunal. On the other hand, attention must be had that one party does not through arguments on impartiality seek to manipulate the bench according to its tactical wishes. The point is to remove any danger that the proceedings could objectively be considered as branded with partiality, not to assure the accused a composition of the court *à la carte*, as if the judges were arbitrators. The United Nations Human Rights Committee in *A.O. Karttunen v. Finland* (1992), in the context of the question of *iudex inhabilis*,<sup>148</sup> as well as

<sup>142</sup> Report 27/94, Case no. 11,084 (Peru) (1994), IAYHR, 1994, vol. 1, p. 518.

<sup>143</sup> Report 1/95, Case no. 11,006 (Peru) (1995), IAYHR, 1995, pp. 278-280, 282, 286.

<sup>144</sup> Communication no. 577/1994, A/53/40, p. 43: "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".

<sup>145</sup> Communication no. 263/1987, A/48/40, mimeographed version, p. 20, para. 5.2.

<sup>146</sup> See above, 1.

<sup>147</sup> Ser. A, no. 239, p. 23, paras. 50-1 = 13 HRLJ 440 (1992). See also *Padovani v. Italy* (1993), ser. A, no. 257-B, p. 20 and *Fey v. Austria* (1993), ser. A, no. 255-A, pp. 12-4.

<sup>148</sup> "Impartiality of the court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria" (Communication no. 387/1898, A/48/40, mimeographed version, p. 120, para. 7.2).

the Commission under the Inter-American system,<sup>149</sup> had also opportunity to provide some general guidance as to the meaning of "impartiality". For these human rights bodies as for the European Court the heart of the matter is the absence of preconceptions and the appearance thereof. Referring to specific facts the United Nations Committee added the *ex officio* examination of grounds for disqualification established by law, whereas the American Commission linked impartiality with the presumption of innocence. These are, in effect, subordinated aspects of the principle.

4. The question of impartiality arose mostly in the context of trial judges who had already acted in other capacities in previous stages of the proceedings. Thus some of them had already acted as investigating organs,<sup>150</sup> as officer examining an application for release,<sup>151</sup> as officer questioning the accused,<sup>152</sup> as organ taking pre-trial decisions,<sup>153</sup> or had made statements as to the viability of the indictment.<sup>154</sup> There is no general rule that a judge may never have touched in some way to the proceedings against the accused whom he has to judge on trial. The Court often repeated that the mere fact that a trial judge had also dealt with the case at a pre-trial stage is not sufficient to disqualify him.<sup>155</sup> Thus there must be a criterion distinguishing admissible and inadmissible pre-trial involvement according to the scope and importance of the activities involved. As the Court said in the *Fey v. Austria* case (1993): "[What counts] is the extent and nature of the pre-trial measures taken by the judge".<sup>156</sup> The importance of the appearance of impartiality was well appreciated by the Court. It rightly indicated that in any case of reasonable doubt impartiality shall not be upheld for the concern must be to remove "objectively all reasonable doubt" as to the impartiality of trial courts.<sup>157</sup> Such a reasonable doubt was found to exist only in the *Pfeifer and Plankl* case (1992) where two professional judges sitting in trial had already acted as investigating judges substantially involved in the case.<sup>158</sup> In all other cases no partiality was found. For these findings the Court used a main criterion which is, as already stated, the extent and nature of pre-trial involvement. Thus a mere questioning of the accused<sup>159</sup> or of witnesses,<sup>160</sup> the mere ascertainment that there was sufficient *prima facie* evidence justifying to put the burden of a trial on the accused<sup>161</sup> or the exercise of "limited" pre-trial powers<sup>162</sup> were not held incompatible with the guarantee of impartiality. But the Court also used other elements capable to reinforce the main criterion just stated: (1) the fact that the magistrate in the pre-trial stage followed rules designed specifically to satisfy the reasonable time requirement as upheld by the jurisprudence of the European Court;<sup>163</sup> (2) the fact that the magistrate had acted solely on the basis of the accused's own statements or admissions, without further investigation;<sup>164</sup> (3) the fact that the applicant had not complained of partiality during the municipal proceedings;<sup>165</sup> (4) the fact that in the exercise of those limited pre-trial powers the lawyer of the applicant had been present.<sup>166</sup>

The Court seems to have struck a fair balance between the interests involved. One understands the difficulties which may arise to have different magistrates at all stages of the procedure in small county courts, especially when the proceedings seek to guarantee impartiality by splitting up the functions of the magistrates in several independent phases. But it must be emphasized that it is desirable to have judges on the trial bench who were not previously concerned with the case in any way. Only then any suspicion of a preconception on the case can be eliminated – at least out of pre-trial influences.

5. Another question is that of the *impartiality of a jury*. It was posed in the *Holm v. Sweden* case (1993). The dispute arose out of libel proceedings against a right-wing author who had criticised in a book the policy of a political organization affiliated to a trade union. The applicant alleged that the jury composed to judge him was partial as several active members of the criticized political organization sat on the bench. The Court rightly held that objective fears for partiality could exist notwithstanding the guarantees inherent in the trial by jury procedure. Five of nine jurors had held or still held offices on behalf of or in the SAP-Party which through its former publishing house was indirectly interested in the outcome of the dispute.<sup>167</sup>

In two other cases it was racial bias of the jury which was at issue. In *Remli v. France* (1996) the applicant complained that a juror had made a remark of racist nature outside the courtroom. The municipal tribunal had not checked the evidence on this point by advancing purely formalistic grounds. It thereby deprived the applicant of the possibility of remedying a situation possibly contrary to his rights. The Court thus held that there had been a breach of Article 6.<sup>168</sup> On the other hand, there had been no such breach in *Gregory v. United Kingdom* (1997). The applicant complained that the trial judge did not discharge a jury racially biased. But here,

<sup>149</sup> "Impartiality presumes that the court or judge do not have preconceived opinions about the case *sub judice* and, in particular, do not presume the accused to be guilty". The Commission then goes on to distinguish subjective and objective impartiality according to the jurisprudence of the European Court. As to the objective test, it says: "Objective impartiality (...) requires that the tribunal or judge offer sufficient guarantees to remove any doubt as to their impartiality in the case" (Report 5/96, Case no. 10,970 (Peru), (1996), IAYHR, 1996, vol. 1, pp. 1120 ff., 1194).

<sup>150</sup> *Pfeifer and Plankl v. Austria* (1992), ser. A, no. 227, p. 16, para. 36 = 13 HRLJ 355 (1992); *Bulut v. Austria, Rep.*, 1996-II, no. 5, pp. 356-7, paras. 33-4.

<sup>151</sup> *Sainte-Marie v. France* (1992), ser. A, no. 253-A, p. 16, para. 32.

<sup>152</sup> *Padovani v. Italy* (1993), ser. A, no. 257-B, pp. 20-1, para. 28.

<sup>153</sup> *Nortier v. The Netherlands* (1993), ser. A, no. 267, pp. 15-6, paras. 33-6.

<sup>154</sup> *Saraiva de Carvalho v. Portugal* (1994), ser. A, no. 286-B, pp. 38-9, paras. 35-8.

<sup>155</sup> *Sainte-Marie v. France* (1992), ser. A, no. 253-A, p. 16, para. 32; *Fey v. Austria* (1993), ser. A, no. 255-A, p. 12, para. 30; *Nortier v. The Netherlands* (1993), (*supra*, note 153), para. 33; *Saraiva de Carvalho v. Portugal* (1994), ser. A, no. 286-B, p. 38, para. 35; *Bulut v. Austria*, (*supra*, note 150), para. 33.

<sup>156</sup> Ser. A, no. 255-A, p. 12, para. 30.

<sup>157</sup> *Pfeifer and Plankl v. Austria* (1992), (*supra*, note 150), para. 36 = 13 HRLJ 355 (1992).

<sup>158</sup> *Ibid.*

<sup>159</sup> *Padovani v. Italy* (*supra*, note 147), para. 28.

<sup>160</sup> *Bulut v. Austria* (*supra*, note 150), para. 34.

<sup>161</sup> *Saraiva de Carvalho v. Portugal* (1994), ser. A, no. 286-B, p. 39, para. 37.

<sup>162</sup> *Nortier v. The Netherlands* (1993), (*supra*, note 153), para. 35.

<sup>163</sup> *Padovani v. Italy* (*supra*, note 147), para. 28.

<sup>164</sup> *Ibid.*, pp. 20-1, para. 28; *Nortier v. The Netherlands* (*supra*, note 162), para. 35.

<sup>165</sup> *Bulut v. Austria, Rep.*, (*supra*, note 150), para. 34.

<sup>166</sup> *Nortier v. The Netherlands* (*supra*, note 162), para. 36.

<sup>167</sup> Ser. A, no. 279-A, pp. 15-6, para. 32.

<sup>168</sup> *Rep.*, 1996-II, no. 8, p. 574, paras. 47-8. The Court recalled the importance of the confidence which the tribunals must inspire (*ibid.*).

contrary to the French case, the judge chose to deal with that allegation. He heard prosecution and defense counsel. He then redirected the jury by firm words; his statement was clear, detailed and forceful; he deliberately broke off on occasions to satisfy himself that his words were understood. According to the Court, no more could be required under Article 6.<sup>169</sup>

In the context of juries an interesting case arose at the United Nations Human Rights Committee in *D. Chadee v. Trinidad and Tobago* (1998). The accused claimed that he had not received a fair trial because the extensive pre-trial publicity had influenced the jury. The Committee rejected this plea as the law had been amended in order to allow examination of prospective jurors by the defense. The jury selection occupied 14 days and the defense successfully challenged 169 potential jurors.<sup>170</sup> The problem reflected in this case is of general nature. It is well known that justice can flourish only in quiet and shadowy gardens far from the passions of the masses and of the spotlights of media.

6. A last point to be dealt with in the present context is that of *access to a court*. Pre-trial aspects have already been considered under Article 5(4) where the question was that of remedies to challenge a detention. The general right of access to courts to prosecute human rights violations has been considered under the heading "General aspects" (letter A, no. 6). What remains to be discussed are the restrictions to access to a tribunal for the accused in criminal proceedings. This question is quite settled in the European system and thus there is little jurisprudence to report on. In the *Hennings v. Germany* case (1992) the Court said that if the accused fails to take the necessary steps for securing receipt of his mail, he cannot later complain that he had not been granted access to a Court because of lapse of time.<sup>171</sup> This, once more, is an application of the old maxim that nobody can take advantage of his own wrong (*nemo auditur propriam turpitudinem allegans*). In the *Schmautzer v. Austria* case (1995) the applicant had complained that he had not had access to a tribunal having full jurisdiction. The context was one of administrative criminal proceedings. The Court upheld that plea. It recalled that a tribunal within the meaning of Article 6 must have "the power to quash in all respects, on questions of fact and law, the decision of the [administrative] body below".<sup>172</sup> *In casu*, neither the administrative nor the constitutional court had such powers. Thus it can be said that access to a tribunal means that the accused must be able to have his case judicially reviewed on facts and law, to a full extent.

#### F) Right to a decision in reasonable time

1. As the European Court has often stressed, what time is reasonable depends on the circumstances of the case.<sup>173</sup> Reasonableness is a fact-intensive legal standard. Out of a series of single decisions some categories (*Fallgruppen*) can be built up by legal analysis, allowing to determine more concretely their content and way of application. The Court uses mostly four criteria for appreciating if the time is reasonable in the circumstances: (1) the breadth and complexity of the case, e.g. if widespread financial criminality is involved; (2) the handling of the case by the State organs, i.e. did those organs always act reasonably quickly when it was up to them to carry the case on? (3) the behavior of the accused, e.g. did he use dilatory tactics? (4) the importance of the end of the procedure in the personal situation of the applicant, importance already more pronounced in criminal matters than elsewhere.

2. As the European Court said in the *Boddaert v. Belgium* case (1992) the reasonable time requirement has to be balanced against the interest of a proper administration of justice: "Article 6 commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice"; the Court then found that the conduct of the authorities "was consistent with the fair balance which had to be struck between the various aspects of this fundamental requirement".<sup>174</sup> On the other hand, in cases of criminal charges there is a right to special diligence against the State organs for speeding up the procedure.<sup>175</sup>

In the period under review the Court took no step towards postulating certain absolute time-limits. Certain delays could be regarded as inherently excessive, justifying *per se* at least a presumption of unreasonableness without examining the particular circumstances which had caused them. Such a course could have been adopted in cases such as *Mitap and Müftioğlu v. Turkey* (1996) where the proceedings had lasted almost 15 years.<sup>176</sup> Instead, the Court upheld its purely relative approach, measuring time relative to delaying factors. No particular factor is conclusive. The Court examines them separately and then assesses their cumulative effect.

a) The following delays were considered excessive with regard to *inactivity or unjustified slowness of the authorities*: 15 ½ months of inactivity in *Bunkate v. The Netherlands* (1993);<sup>177</sup> 10 years between arrest and

<sup>169</sup> *Rep.*, 1997-I, no. 31, p. 309, para. 47. One may here also recall the settled jurisprudence of the United Nations Human Rights Committee on the question to what extent it will disturb the conclusions reached by the jury: "it is not for the Committee to review the findings of these bodies in the absence of any indication that their conclusions were arbitrary or otherwise amounted to a denial of justice" (*B. Young v. Jamaica* (1997), Communication no. 615/1995, A/53/40, p. 74, see also: *B. Whyte v. Jamaica* (1998), no. 732/1997, *ibid.*, p. 200; *A. McLeod v. Jamaica* (1998), no. 734/1997, *ibid.*, p. 216; *D. Mc Taggart v. Jamaica* (1998), no. 749/1997, *ibid.*, p. 226; *S. Daley v. Jamaica* (1998), no. 750/1997, *ibid.*, p. 239; *D. Chadee v. Trinidad and Tobago* (1998), no. 813/1998, *ibid.*, p. 251; *C. Tomlin v. Jamaica* (1996), no. 589/1994, A/51/40, p. 194; *G. Campbell v. Jamaica* (1992), no. 248/1987, A/47/40, p. 238; etc. For a case where denial of justice was found because essential evidence was not brought to the attention of the jury, see *C. Wright v. Jamaica* (1992), no. 349/1989, A/47/40, p. 307. The Committee also said that the jury must meet particularly high standards as to thoroughness and impartiality in cases in which a capital sentence may be pronounced: *D. Pinto v. Trinidad and Tobago* (1990), no. 232/1987, A/45/40, p. 73.

<sup>170</sup> Communication no. 813/1998, A/53/40, p. 251.

<sup>171</sup> Ser. A, no. 251, p. 11-2, partic., para. 11.

<sup>172</sup> Ser. A, no. 328-A, p. 15, para. 36, see also: *Umlauft v. Austria* (1995), ser. A, no. 328-B, p. 39, para. 39; *Gradingner v. Austria* (1995), ser. A, no. 328-C, p. 63, para. 44; *Pramstaller v. Austria* (1995), ser. A, no. 329-A, p. 17, para. 41; *Palaoro v. Austria* (1995), ser. A, no. 329-B, p. 41, para. 43; *Pfarmeier v. Austria* (1995), ser. A, no. 329-C, p. 66, para. 40; *Mauer v. Austria* (1997), *Rep.*, 1997-I, no. 28, p. 83.

<sup>173</sup> See generally Frowein / Peukert (*supra*, note 43), pp. 262 ff. As to figures, see also D.J. Harris / M. O'Boyle / C. Warbrick, (*supra*, note 70), pp. 228-9.

<sup>174</sup> Ser. A, no. 235-D, p. 82-3, para. 39.

<sup>175</sup> *Abdoella v. The Netherlands* (1993), ser. A, no. 248-A, p. 17, para. 24.

<sup>176</sup> *Rep.*, 1996-II, no. 6 = 17 HRLJ 417 (1996).

<sup>177</sup> Ser. A, no. 248-B, p. 31, para. 23.

committal for trial in *Dobbertin v. France* (1993);<sup>178</sup> 4 1/2 years between arrest and trial where hearings had been held only at considerable intervals and where time had to be taken to acquit in *Yağcı and Sargin v. Turkey* (1995);<sup>179</sup> almost 4 years of proceedings in a case not complex and with periods of inactivity attributable to the judicial authorities in *Zana v. Turkey* (1997);<sup>180</sup> 8 years and some months in a complex case where the main reason for delay was the periods of inactivity of the investigating authorities in *Reinhardt and Slimane-Kaïd v. France* (1998).<sup>181</sup>

b) A delay may be excessive also with regard to the *bad organization of the State organs*. In *Mansur v. Turkey* (1995) proceedings had lasted more than eight years in part because they were strangely split in different courts which caused complications (moreover reports were not transmitted diligently among these courts).<sup>182</sup> In *Philis v. Greece (no. 2)* (1997) the proceedings had lasted 5 years and 2 months which was due to excessive caseload of the courts. The European Court held that Article 6 had been breached since it "imposes on contracting States the duty to organize their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time".<sup>183</sup>

c) The *complexity* of the case at hand is another important factor. The absence of complexity is used as an argument to buttress a finding that the State organs acted too slowly in the circumstances of the case. Thus in *Philis v. Greece (no. 2)* (1997) the Court contrasted the slowness of the courts with the lack of complexity of the case<sup>184</sup> and in *Zana v. Turkey* (1997) it linked the periods of judicial inactivity with the relative simplicity of the facts at hand.<sup>185</sup> If the case is complex this complexity must be the cause of the delays in order to discharge the State. If there are periods of unexplained judicial inactivity, the State will still be in breach of Article 6.<sup>186</sup> On the other hand, proceedings which lasted 8 1/2 years were considered compatible with Article 6 in a case of particular complexity, involving several companies and financial networks as well as many persons. Moreover, there had not been any inertia by the State authorities.<sup>187</sup>

d) If *delays are due to the applicant* the State cannot be rendered responsible for them to the extent it did not take advantage of the situation to further slow down the proceedings. Thus, in *Vendittelli v. Italy* (1994), 4 1/2 years for proceedings involving two courts were not considered unreasonable in length when the applicant bears some responsibility for the delay through requests for adjournments.<sup>188</sup> Similarly, in *Acquaviva v. France* (1995) a period of 4 years and 4 months was not considered unreasonable because, *inter alia*, several delays were attributable to the conduct of the applicants.<sup>189</sup>

e) Sometimes the Court has found the unreasonableness of a delay for *absence of valid justification* by the State. The burden of proof for showing that the delay was reasonable lays on the State. If it does not present a valid reason, the case will be resolved in its disfavor. Thus in *Mitap and Müftüoğlu v. Turkey* (1996) the Court said that 15 years of proceedings were unreasonable for a complex case, where no element submitted to it justified such a lengthy period.<sup>190</sup> The conclusion in *Messina v. Italy* (1993) can be explained on similar grounds.<sup>191</sup> In fact some reasons are invariably submitted by the States – as the complexity of the case – but these reasons are not sufficiently substantiated.

f) Finally, some other factors have been mentioned in passing by the Court in order to further buttress its findings made on the basis of the mentioned elements. In

*Acquaviva v. France* (1995) it was held that 4 years and 4 months of proceedings were necessary also because of the strained political climate in Corsica which warranted the postponement of certain measures.<sup>192</sup> It is once more the old rule: justice cannot be done in a passionate climate. In *Hozee v. The Netherlands* (1998), the Court took account of the fact that the court of appeals had mitigated the sentence passed in view of the time that had elapsed since the commission of the offences.<sup>193</sup> This strengthened the conclusion on the overall fairness of the proceedings.

In conclusion, it can be said that the delays will always be scrutinized in the light of the reasons advanced to justify them. If good reasons exist and there was no unjustified inertia, the length of the proceedings will not disqualify them. Unjustified inertia will always lead, *per se*, to a breach of Article 6, unless it is of negligible importance. As for the rest, length is placed in the context of a *Raumzeituniversum*: each factor (complexity, quickness of handling, behavior of the accused) is to be seen in the light of the others leading thus to a summing up in which the judge possesses an inherent margin of appreciation, and perhaps even discretion.

3. The discretionary element can be felt especially in the practice of the United Nations Committee on Human Rights. Here discretion has overshadowed any legal framework. The Committee dubiously jumps from the facts to a conclusion of breach or conformity with the Covenant, without any effort to elaborate a reasoned link between these poles – this being the specifically legal part of any case-analysis. For, as it has been said already by Roman Jurists, law is a science of instruments and justification before being a policy of results. Thus, the practice of the Committee breaks down to dusty casuistic reasoning without any guideline for legal analysis. Such jurisprudence, this must be said, is virtually useless for legal purposes. It seems an exercise of subjectivity unlimited – in the best case enlightened decision, in the worst arbitrary preference. For example, a violation of the principle of trial without undue delay has been found for: 8 years between arrest and final conviction,<sup>194</sup> but also for 2 years and 3 months between arrest and trial.<sup>195</sup> The limit

<sup>178</sup> Ser. A, no. 256-D, p. 117, para. 44.

<sup>179</sup> Ser. A, no. 319-A, pp. 20-2 = 16 HRLJ 286 (1995).

<sup>180</sup> Rep., 1997-VII, no. 57, pp. 2552-3, paras. 78, 80-5.

<sup>181</sup> Rep., 1998-II, no. 68, p. 663, para. 100.

<sup>182</sup> Ser. A, no. 319-B, pp. 52-3, paras. 63, 69-70.

<sup>183</sup> Rep., 1997-IV, no. 40, p. 1084, para. 40.

<sup>184</sup> *Ibid.*

<sup>185</sup> Rep., 1997-VII, no. 57, pp. 2552-3, paras. 78, 80-5.

<sup>186</sup> *Reinhardt and Slimane-Kaïd v. France*, Rep., 1998-II, no. 68, p. 663, para. 100.

<sup>187</sup> *Hozee v. The Netherlands*, Rep., 1998-III, no. 73, pp. 1101-2, paras. 51-4.

<sup>188</sup> Ser. A, no. 293-A, pp. 10-1, paras. 27, 29 = 15 HRLJ 328 (1994).

<sup>189</sup> Ser. A, no. 333, p. 167, para. 61.

<sup>190</sup> Rep., 1996-II, no. 6, p. 412, paras. 36-7 = 17 HRLJ 417 (1996).

<sup>191</sup> Ser. A, no. 257-H, p. 103, para. 28.

<sup>192</sup> Ser. A, no. 333, p. 16, para. 5; p. 17, para. 66.

<sup>193</sup> Rep., 1998-III, no. 73, pp. 1101-2, paras. 51-4.

<sup>194</sup> *B. Lubuto v. Zambia* (1995), Communication no. 390/1990, A/51/40, p. 14.

<sup>195</sup> *C. Smart v. Trinidad and Tobago* (1998), no. 672/1995, A/53/40, p. 149.

seems to lie somewhere around 2 years, since 1 1/2 years between arrest and trial,<sup>196</sup> or 10 months between conviction and appeal,<sup>197</sup> were not considered excessive. It is not useful to reproduce here the many cases decided in the period under review.<sup>198</sup> It may just be added that in some cases specific elements of objective justification were produced by the Committee. Thus, as the burden of proof lays on the States, if no sufficient reasons for explanation are advanced, the Committee will hold against the State.<sup>199</sup> Moreover, if the delay is attributable to the applicant, the State will not be responsible.<sup>200</sup> The Committee would gain much to try to objectivise its jurisprudence by reference to such factors as does the European Court.

### G) Presumption of innocence

1. Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law.<sup>201</sup> This entails in the first place a particular distribution of the burden of proof: this burden is on the prosecution and any doubt should benefit the accused. The presumption also means that the members of a court should not start with the preconceived idea that the accused is guilty.<sup>202</sup> It also limits the admissible scope of certain presumptions of law (*praesumptiones iuris*).<sup>203</sup> Moreover, it restricts the possibility of imposing certain charges or duties on the accused during the proceedings (or after acquittal), if these burdens would be incompatible with his provisional status of being considered innocent.

2. In the period under review six cases of the European Court dealt with the presumption of innocence. One of the most interesting among them is the *Allenet de Ribemont v. France* case (1995). The applicant complained of statements as to his guilt made in the media by the Minister of the Interior and the senior police officers immediately after the crime. The Court had thus to consider the *subject* to whom the duty embodied in the principle applies. It considered that for Article 6(2) to be effective, it must cover not only acts of the judiciary but also of other public authorities. In the present case the statements in the media were made by high public authorities in direct link with the judicial investigation and without any qualification or reservation. This clearly amounted to a declaration of guilt. Article 6(2) had thus been breached.<sup>204</sup>

3. In *Pham Hoang v. France* (1992) the compatibility of certain presumptions of law and/or fact in the field of customs offences arose (once more). The Court held that such presumptions of limited scope are not *per se* incompatible with our principle. But there are two conditions for their compatibility with the presumption of innocence. *First*, they must be limited in scope: "[They must be confined] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense".<sup>205</sup> *Second*, they must not lead to a rigid and automatic reliance upon themselves. In the present case both requirements were met. In particular, the court of appeal had duly weighed all the evidence before it and had refrained from any automatic reliance on the presumptions.<sup>206</sup> Thus Article 6(2) had not been violated.

A forensic expert may work on the hypothesis of guilt when writing his medical report. This aspect was at issue in *Bernard v. France* (1998). According to the Court the specialists appointed had logically to start from the working hypothesis that the applicant had committed the crimes he was charged with. The accused and his lawyer had all opportunities to make observations. Such a course was not incompatible with Article 6(2).<sup>207</sup>

On the other hand the fact that there may not be a succession in criminal liability is required by the presumption of innocence. In *A.P., M.P. and T.P. v. Switzerland* (1997) the Court held that the fact of imposing criminal sanctions on the heirs for tax offences committed by the deceased violates the principle that criminal liability does not survive the person and also the presumption of innocence.<sup>208</sup> This result may be welcomed considering the nature of the offences and the situation of the heirs. But its legal construction seems doubtful. There was no question of succession in criminal liability if one looks to the facts closely. The point was that a debt burdened the successor mass; and this debt was due to a fine imposed on the deceased for his own unlawful acts. Here the old principle *res transit cum onere suo*<sup>209</sup> should apply. In fact the alleged violation of the presumption of innocence is at most indirect and passive; it rests on an over-solicitation of the reach of the presumption.

4. A point that often arises concerns reimbursement of legal costs or compensation for detention after acquittal or

<sup>196</sup> *E. Morrison v. Jamaica* (1998), no. 635/1995, A/53/40, p. 124; *P. Kelly v. Jamaica* (1991), no. 253/1987, A/46/40, p. 248.

<sup>197</sup> *G. Campbell v. Jamaica* (1992), no. 248/1987, A/47/40, p. 239.

<sup>198</sup> Some examples may be quoted. A violation was found in: *J. Leslie v. Jamaica* (1997), no. 564/1993, A/53/40, p. 28 [29 months between arrest and trial]; *A. Finn v. Jamaica* (1997), no. 617/1995, *ibid.*, p. 86 [2 years and 5 months, *idem*]; *C. Smart v. Trinidad and Tobago* (1998), no. 672/1995, *ibid.*, p. 149 [2 years and 3 months, *idem*]; *S. Shaw v. Jamaica* (1998), no. 704/1996, *ibid.*, p. 170 [27 months, *idem*.]; *D. Taylor v. Jamaica* (1998), no. 705/1996, *ibid.*, p. 179 [*idem*]; *L. Seerattan v. Trinidad and Tobago* (1995), no. 434/1990, A/51/40, p. 28 [3 years and 2 months]; *C. Neptune v. Trinidad and Tobago* (1996), no. 523/1992, *ibid.*, p. 87 [2 1/2 years]; *E. Henry and E. Douglas v. Jamaica* (1996), no. 571/1994, *ibid.*, p. 162 [2 years and 6 months]; *N. Fillastre v. Bolivia* (1991), no. 336/1988, A/47/40, p. 299 [more than 4 years]. See also: *A.S. Yasseen and N. Thomas v. Guyana* (1998), no. 676/1996, A/53/40, p. 161 [2 years between decision to retry and retrial]; *S. Daley v. Jamaica* (1998), no. 750/1997, *ibid.*, p. 239 [2 years and 7 months between conviction and appeal]; *L. Garcia Fuenzalida v. Ecuador* (1996), no. 480/1991, A/51/40, pp. 55-6 [2 1/2 years, *idem*]; *C. Neptune v. Trinidad and Tobago* (1996), no. 523/1992, *ibid.*, p. 87 [7 years and 5 months to hear the appeal]; *E. Johnson v. Jamaica*, no. 588/1994, *ibid.*, pp. 180-1 [4 years and 3 months to hear the appeal]. No violation was found in: *E. Morrison v. Jamaica* (1998), no. 635/1995, A/53/40, p. 124 [1 1/2 year between arrest and trial]; *D. Mc Taggart v. Jamaica* (1998), no. 749/1997, *ibid.*, p. 227 [1 year, *idem*]; *P. Kelly v. Jamaica* (1991), no. 253/1987, A/46/40, p. 248. See also: *L. Stephens v. Jamaica* (1995), no. 373/1989, A/51/40, p. 9 [2 years and 10 months between trial and appeal]; *G. Campbell v. Jamaica* (1992), no. 248/1987, A/47/40, p. 239 [10 months, *idem*].

<sup>199</sup> See e.g. *L. Leslie v. Jamaica* (1997), no. 564/1993, A/53/40, p. 28; *L. Seerattan v. Trinidad and Tobago* (1995), no. 434/1990, A/51/40, p. 28.

<sup>200</sup> *L. Stephens v. Jamaica* (1995), no. 373/1989, A/51/40, p. 9.

<sup>201</sup> See e.g. the *Salabiaku* case (1988), ser. A, no. 141-B, pp. 14-8, paras. 26 ff.

<sup>202</sup> *Barberà, Messegué and Jabardo* case (*supra*, note 87), para. 77.

<sup>203</sup> *Salabiaku* case (1988), ser. A, no. 141-A, pp. 15-6, para. 28.

<sup>204</sup> Ser. A, no. 308, pp. 16-7, paras. 35-6, 41.

<sup>205</sup> Ser. A, no. 243, p. 21, para. 33 = 14 HRLJ 95 (1993).

<sup>206</sup> *Ibid.*, p. 22, para. 36.

<sup>207</sup> *Rep.*, 1998-II, no. 70, p. 880, paras. 38-41.

<sup>208</sup> *Rep.*, 1997-V, no. 45, p. 1489, para. 48. See also *E.L., R.L. and J.-O.L v. Switzerland*, *ibid.*, p. 1521, para. 53.

<sup>209</sup> See as early as Damasus, *Brocarda sive regulae canonicae* (around 1230), tit. 93.

discontinuation of the proceedings. In *Sekanina v. Austria* (1993), the applicant complained that he was refused any compensation for detention on remand after his acquittal because all suspicions had not been dispelled (and thus the benefit of acquittal should not extend to pecuniary entitlements). The Court considered that this case must be distinguished from earlier cases<sup>210</sup> where such suspicion existed after a conviction at first instance, the proceedings having been stopped thereafter for technical reasons or for death, before a judgment on appeal. In the present case there had been, however, a final acquittal. Thus, according to the Court, to rely on such suspicions once an acquittal has become final in order to deny any compensation for detention is incompatible with the presumption of innocence.<sup>211</sup>

Acquittal is therefore the crucial criterion for determining the right to compensation. The jurisprudence of the Court on this point certainly draws all the consequences of the presumption of innocence but the present commentator still has some doubts on the appropriateness of extending the principle that far. Monetary advantages or disadvantages linked to other criteria than acquittal from criminal guilt should not be outlawed by the presumption. It is recognized that the same act can give rise to various independent liabilities quite distinct one from another: for example civil and criminal. By the same token the duty of the accused to bear (part of) the costs of criminal proceedings if they were provoked by his own fault may be warranted under the principles of civil liability independently from acquittal in criminal matters where the standards of guilt are much more extenuating. Not guilt or innocence is the factor giving rise to such responsibility, but fault. Thus, in principle, our presumption is not affected. Even more generally, it may be asked why the collectivity should pay for compensating an individual for justified proceedings which led to an acquittal, not because some fault was not involved, but because the accused enjoyed the advantage of the particularly high standards of proof proper to criminal law. What is questionable is the establishment of a necessary link between the criminal and non-criminal aspects of a case: no monetary consequence under other norms than those of criminal law. This "criminalisation" of the law of liability may lead to doubtful rewards and to unsatisfactory results. Unless absolute liability for detention if acquittal be secured is accepted by legislation, what should be compensated is normally only actual loss if there is no (or negligible) fault on the part of the acquitted. An exception could be made for cases of hardship.

The *Leutscher v. The Netherlands* case (1996) shows a more undoubtedly recommendable aspect of the Court's jurisprudence. The applicant complained that a refusal by court to reimburse his legal costs incurred in criminal procedure was incompatible with the presumption of innocence. The Court recalls that Article 6(2) does not confer a right to such reimbursement where the proceedings taken are discontinued unless supporting reasoning for the refusal could not be dissociated in substance from a determination of guilt. In the present case the municipal court could dispense the applicant from payment for reasons of equity. In the field of the discretion granted, it could take account of the suspicion still weighing against the applicant, released only for time bar.<sup>212</sup> This distinction between criminal and non-criminal bases of liability are to be welcomed and lead to a result which can better be squared with spontaneous considerations of justice.

5. The Inter-American Commission on Human Rights also made some noticeable contributions to the presumption of innocence in the period under review. In its Report 5/96, Case 10,970 (Peru) (1996) it expressed some general considerations on the principle:

"The principle of innocence constructs a presumption in favor of a person accused of an offence, according to which he is considered innocent as long as his criminal liability is established by a firm judgment. (...). The presumption of innocence is related, in the first place, to the spirit and attitude of the judge who has to investigate the criminal charge. He must approach the case without prejudices and under no circumstances must he presume the accused guilty. (...). In this context, another elementary concept of criminal processual law, the objective of which is to preserve the principle of innocence, is the burden of proof. In criminal proceedings, the *onus probandi* does not lie with the accused; on the contrary, it is the State that has to demonstrate the accused's guilt. (...). The essential thing is therefore that the judge who hears the case is free of any prejudice concerning the accused's guilt and affords him the benefit of the doubt, i.e. does not condemn him until he is certain or convinced of his criminal liability, so that all reasonable doubt that the accused might be innocent is removed"<sup>213</sup>

These principles had sometimes to be applied in amazing contexts. Thus, in its Report 27/94, Case 11,084 (Peru) (1994), the Commission had to deal with a case where a number of army officers were tried by a military tribunal which simply presumed their guilt.<sup>214</sup> In another case the Commission had opportunity to state that an excessive period of pre-trial detention can also account for a violation of the presumption of innocence.<sup>215</sup>

#### H) Right to be informed of the charge

1. The right to be informed of the charge is intended to give the accused the elements he needs to prepare his defense. As the information should enable an adequate defense, it covers facts and legal aspects: the material facts upon which the allegation is based and the offence with

<sup>210</sup> *Lutz, Englert and Nöckenbockhoff v. Germany* (1987), ser. A, no. 123.

<sup>211</sup> Ser. A, no. 266-A, p. 16, para. 30.

<sup>212</sup> *Rep.*, 1996-II, no. 6, p. 436, paras. 29, 31.

<sup>213</sup> IAYHR, 1996, vol. 1, pp. 1194-1196.

<sup>214</sup> The Commission said: "The officers of the Special Military Tribunal who tried the plaintiffs in the present case were required to approach the case without any prejudice and were in no circumstances supposed to make an *a priori* guilty judgment, as they did" (IAYHR, 1994, vol. 1, p. 510-2).

<sup>215</sup> Report 12/96, Case 11,245 (Argentina) (1996): "The prolonged imprisonment [*in casu* over 4 years] without conviction, with its natural consequence of undefined and continuous suspicion of an individual, constitutes a violation of the principle of presumed innocence set forth in Article 8(2) of the American Convention", IAYHR, 1996, vol. 1, p. 278, para. 113. The Commission added: "The substantiation of guilt calls for the formulation of a judgment establishing blame in a final sentence. If the use of that procedure fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment. Preventive custody thus loses its purpose as an instrument to serve the interests of sound administration of justice, and the means becomes the end" (*ibid.*, pp. 278-280, para. 114).

which the accused is charged.<sup>216</sup> This must not cover all means of evidence on which the accusation rests.<sup>217</sup> The information must be given in a language understandable to the accused. This can require a translation of the documents testifying of the opening of the procedure, but not of the whole file.<sup>218</sup>

2. During the period under review only one case at the European Court dealt with this guarantee. In *Gea Catalán v. Spain* (1995) the applicant complained that he was not informed in detail of the charges against him as he was finally sentenced on the basis of another paragraph of Article 529 of the Spanish Criminal Code. For the Court, it is established that there had been only a clerical error of typing variously reproduced; but the erroneously indicated paragraph was manifestly inapplicable. Having regard to the clarity of the legal classification given to the findings of fact in the committal order, the applicant could not have been ignorant as to the charges.<sup>219</sup>

#### 1) Adequate time and facilities for the preparation of the defense

1. The accused must be able to consult orally and by writing his lawyer and they both must be able to pursue the defense in a way they see as appropriate, subject to the procedural rules.<sup>220</sup> At least counsel for the accused must be able to consult the documents constituting the file, subject to certain exceptions to be narrowly construed (security, protection of witnesses, etc.).<sup>221</sup> The adequacy of time will depend upon the complexity of the case,<sup>222</sup> the defense lawyer's workload,<sup>223</sup> the stage of proceedings<sup>224</sup> or the accused's decision to conduct his defense alone.<sup>225</sup>

2. At the European Court, in the period under review, the question was raised in several contexts, mostly of secondary importance. An interesting case is that of *Twalib v. Greece* (1998). This was a complex case in which a lawyer familiar with the file through the defense of a co-accused was appointed with only one hour's notice at the trial itself. In view of the complexity of the case the Court finds that this course could hardly be defended. However, as the applicant had a complete retrial at the appeals court able to examine all questions of law and fact and was there fully defended, the Court concludes that Article 6(3)(b) has not been breached.<sup>226</sup> As has already been said, admitting that defaults of that type can be cured by correct appeal proceedings may be justified under the ever more urgent principle of procedural economy. But it also raises concerns. The accused loses one instance of appeal. Moreover, such a course may lead to play fast and loose with the rights of the defense to the extent that a remedy for appeal is still available. In some way, therefore, this jurisprudence may well lead to fruits, but perhaps those will be of a poisonous tree.

In *Kremzow v. Austria* (1993) the applicant complained, *inter alia*, that his defense was impaired because he was not able to inspect his file in person. The Court brushes away this argument by recalling that restrictions of the right to inspect the file to the accused's lawyer are compatible with Article 6.<sup>227</sup> The applicant further alleged that the refusal to grant him attendance in the hearing on his nullity pleas had similar effects on his defense. The Court simply answers that this absence did not unduly hamper his defense.<sup>228</sup> Thus, *personal* involvement in the proceedings is not paramount under this heading as long as the accused's lawyer enjoys all rights and liberties necessary for the defense.

A point that usually arises is that of the absence or the *untimely service of documents* necessary or useful for the defense. *First*, this defect must have the effect of curtailing

in fact the defense. Thus in *Kremzow v. Austria* (1993) the Court found that there was still sufficient time and opportunity to formulate a reply even if the copy of the Attorney General's position paper was delivered "only" 3 weeks before the hearing.<sup>229</sup> *Second*, the effect of non-delivery must be considered in the light of the personal quality of the individual involved. Thus, in *Melin v. France* (1993) the Court found that the failed delivery of a judgment did not impair the defense since the accused was a practicing lawyer who knew the relevant rules on delivery (which were coherent and clear) and knew how to proceed to get the needed information.<sup>230</sup>

3. The jurisprudence of the United Nations Committee on Human Rights reveals some more eloquent breaches of the principle. In *G.W. Reid v. Jamaica* (1994) the accused met his legal aid lawyer only 10 minutes before trial. The lawyer was moreover not present at all the hearings.<sup>231</sup> In *P.A. Kelly v. Jamaica* (1996), the accused was not allowed to communicate with his lawyer during 5 days contrary to his express wish.<sup>232</sup> The Committee recalls in *A. Berry v. Jamaica* (1994) that certain defaults in communication with the lawyer can nevertheless be cured if the point at issue may be raised on appeal.<sup>233</sup> In *B.S. Harward v.*

<sup>216</sup> *Ofner v. Austria*, Commission, case no. 524/59, Yb. 1960, vol. 3, p. 344; *Gea Catalán* case (1995), ser. A, no. 309, p. 10, para. 26.

<sup>217</sup> Case E 7628/76, Commission, DR, vol. 9, p. 173.

<sup>218</sup> Case E 6185/73, Commission, DR, vol. 2, pp. 68-9. See also generally the *Brozicek* case (1989), ser. A, no. 167, pp. 18-9, paras. 38-42.

<sup>219</sup> Ser. A, no. 309, p. 11, paras. 28-9. For the United Nations Human Rights Committee, see *P. Kelly v. Jamaica* (1991), Communication no. 253/1987, A/46/40, p. 247: "Article 14, paragraph 3(a), requires that any individual under criminal charges shall be informed promptly and in detail of the nature of the charges against him. The requirement of prompt information, however, only applies once the individual has been formally charged with a criminal offence".

<sup>220</sup> *Can* case (1985), ser. A, no. 96, p. 17, para. 52 = 7 HRLJ 106 (1986).

<sup>221</sup> *Kamasinski* case (1989), ser. A, no. 168, p. 39, para. 88. As to the exceptions, see e.g. *the Haase* case, Commission, B. 7412/76, DR, vol. 11, p. 91-2.

<sup>222</sup> *Albert and Le Compte* case (1983), ser. A, no. 58, pp. 20-1, para. 41 (lack of complexity) = 5 HRLJ 219 (1984).

<sup>223</sup> *X. and Y. v. Austria*, Commission, Case no. 7907/77, DR, vol. 15, p. 160.

<sup>224</sup> *Huber* case, Commission, Case no. 5523/72, CD, vol. 46, p. 99.

<sup>225</sup> *X. v. Austria*, Commission, Case no. 2370/64, CD, vol. 22, p. 96.

<sup>226</sup> *Rep.*, 1998-IV, no. 77, pp. 1426-7, paras. 40-3.

<sup>227</sup> Ser. A, no. 268-B, p. 42, para. 52.

<sup>228</sup> *Ibid.*, p. 43, para. 56.

<sup>229</sup> Ser. A, no. 268-B, p. 42, para. 48.

<sup>230</sup> Ser. A, no. 261-A, p. 12, para. 24.

<sup>231</sup> Communication no. 355/1989, A/49/40, p. 62. In *L. Smith v. Jamaica* (1993), no. 282/1988, A/48/40, mimeographed version, p. 35, para. 10.4, it was held that when an attorney withdraws the day before trial, four hours to prepare the case with a new counsel is not enough time. In *A. Little v. Jamaica* (1991), no. 283/1988, A/47/40, p. 275, half an hour before trial and half an hour during trial are held insufficient time for preparation of a defense. See also, in the Inter-American system, Resolution 29/89, Case 10, 198 (Nicaragua) (1989), IAYHR, 1989, p. 314ff, 348, six weeks being held insufficient in a complex and important case where the accused had been held *incommunicado* for thirty days and forced to make self-incriminating statements.

<sup>232</sup> Communication no. 537/1993, A/51/40, p. 104.

<sup>233</sup> Communication no. 330/1988, A/49/40, p. 28.

Norway (1993) the Committee limits the right of the accused to have translated the relevant documents if his counsel has access to them and is thus able to inform his client.<sup>234</sup> A question that often arises is that of counsel's decision to drop a grounds of appeal contrary to the wishes of the accused. The Committee has a constant practice on this point which it summarized in *C. Smart v. Jamaica* (1998): such decision by counsel gives no complaint "if it is not arbitrary or incompatible with the interests of justice and stems only from professional judgement".<sup>235</sup>

Finally, the Committee stressed that many of the defects under this heading cannot be expected to be examined *ex officio* by the judge but must be raised in court. Thus, if the counsel or the accused felt inadequately prepared for lack of time granted to prepare the defense, it was incumbent upon him to request an adjournment.<sup>236</sup> In *U. Lewis v. Jamaica* (1996), the Committee said that if there had been lack of proper representation in the preliminary enquiry and the accused had later been represented by counsel of his co-accused with whom he had a conflict of interest, the lawyer had to raise this point in court; failure to do so cannot be imputed to the State.<sup>237</sup> This jurisprudence of personal responsibility is to be welcomed.

#### J) Right to personal defense or to appointment of a (legal aid) counsel

1. The accused has the right to defend himself in person.<sup>238</sup> If he elects to do so, the State will not be liable for lack of diligence in the defense.<sup>239</sup> The State may require that the accused be assisted by a lawyer in the interests of justice, be it at the trial stage or on appeal.<sup>240</sup> The State may restrict the number of lawyers appointed by the accused.<sup>241</sup> If the accused has no financial means (indigency) and the case is so difficult either in factual or legal terms as to require a lawyer also in the interest of proper administration of justice, there is a right to legal aid.<sup>242</sup> The tribunals have to control if the counsel acting under legal aid adequately and effectively discharges his duties, this evidently being limited to the most obvious insufficiencies.<sup>243</sup>

2. The question that most often arises in this context is that of the *absence of a lawyer in certain stages of the proceedings*. At the European Court, in the period under review, the question was asked twice for the *pre-trial phase* of the proceedings. In *Imbrioscia v. Switzerland* (1993) the accused had not been assisted by a lawyer in some pre-trial interrogations at the police station or by the district prosecutor. The Court starts by recalling the general rule in this matter: Article 6 applies to pre-trial proceedings; the paramount aim is that of a fair trial; to determine if the trial was overall fair, regard must be had to the entirety of the proceedings.<sup>244</sup> In the present case there has not been an unfair trial, especially because the State was not responsible for the defaults of representation. Failure to attend rested on the privately appointed counsel and lack of representation was not manifest, obliging the State authorities to take another course. When the counsel resigned, the authorities in fact immediately appointed a new lawyer. He missed some interviews, but attended on others. He had every opportunity to examine and challenge the findings.<sup>245</sup> The situation was different in *J. Murray v. United Kingdom* (1996). The applicant contended that he had been denied access to a lawyer in a crucial initial phase of the proceedings under specific anti-terrorist legislation. The Court recalls that restrictions are admissible if compatible with an overall fair hearing. In

the present case there was good cause for the restrictions (information-gathering on terrorism). But, according to the Court, other considerations outweigh this aspect. The scheme is such that whatever course the accused chooses to follow, he runs the risk of prejudicing his defense through a system of inferences. Under such conditions the concept of fair trial requires the benefit of legal assistance already at the initial stages of police interrogation.<sup>246</sup> The Court thus follows in this context a *vol d'oiseau* approach, assessing the overall fairness of proceedings without presence of a lawyer at the phase in dispute. A too extensive interpretation of what fairness requires must be resisted.

What if the relevant criminal proceedings law provides that the accused who does not present himself on trial (*in absentia trial*) cannot be defended by a lawyer? The policy reason is here obviously not to encourage absence or flight. The question was raised in *Poitrinol v. France* (1993). For the Court the fundamental right to be defended should not be lost on account of not being personally present at trial. The punishment of absence with the suppression of the right to be defended is at all events disproportionate in the circumstances.<sup>247</sup> Moreover, the inadmissibility of appeal as a sanction is also disproportionate with regard to the rights at stake. In particular, a review of the legal grounds rejecting excuses as to the absence is essential where the appreciation of the credibility of such excuses depends upon the extent of arguments to be heard on appeal.<sup>248</sup> The question arose again in the *Lala v. The Netherlands* case (1994). The conclusions outlined above were applied *a fortiori* since the accused was in this case not obliged by law to be present in trial.<sup>249</sup> The Court added that the right to be defended is so fundamental that even the failure of the counsel to ask permission to defend his absent client does not relieve the tribunal of the duty to ensure his presence.<sup>250</sup>

That is not to say that the Court does not recognize the duty of the lawyer to object to certain defects. In *Tripodi v. Italy* (1994) the accused complained that her appeal at

<sup>234</sup> Communication no. 451/1991, A/49/40, p. 154.

<sup>235</sup> Communication no. 672/1995, A/53/40, p. 149. See also *D. Mc Taggart v. Jamaica* (1988), no. 749/1997, A/53/40, p. 226.

<sup>236</sup> *A. Perkins v. Jamaica* (1998), no. 733/1997, A/53/40, p. 211. See also: *C. Tomlin v. Jamaica* (1996), no. 589/1994, A/51/40, p. 195; *A. Berry v. Jamaica* (1994), no. 330/1988, A/49/40, p. 27; *D. Douglas and others v. Jamaica* (1993), no. 352/1989, A/49/40, p. 47; *C. Wright v. Jamaica* (1992), no. 349/1989, A/47/40, p. 308.

<sup>237</sup> Communication no. 527/1993, A/51/40, p. 95.

<sup>238</sup> *Pataki* case, Commission, Yb., vol. 3, pp. 370-1.

<sup>239</sup> *Melin* case (1993), ser. A, no. 261-A, p. 12, para. 25.

<sup>240</sup> *Croissant* case (1992), ser. A, no. 237-B, pp. 32-3, paras. 28-30 = 14 HRLJ 92 (1993).

<sup>241</sup> *Ensslin and others* case, Commission, DR., vol. 14, p. 114.

<sup>242</sup> *Quaranta* case (1991), ser. A, no. 205, pp. 15-6, paras. 26 ff. = 12 HRLJ 249 (1991); *Benham* case (1996), *Rep.*, 1996-III, no. 10, p. 757, paras. 60-4; *Pakelli* case (1983), ser. A, no. 64, p. 19, paras. 29 ff. (on appeal) = 5 HRLJ 242 (1984).

<sup>243</sup> *Artico* case (1980), ser. A, no. 37, pp. 15 ff., paras. 31 ff. (passivity of the lawyer for reasons of health).

<sup>244</sup> Ser. A, no. 275, pp. 13-4, para. 38.

<sup>245</sup> *Ibid.*, pp. 14-5, paras. 41-2.

<sup>246</sup> *Rep.*, 1996-I, no. 1, pp. 54-5, paras. 63-6 = 17 HRLJ 39 (1996).

<sup>247</sup> Ser. A, no. 277-A, pp. 14-5, paras. 34-5.

<sup>248</sup> *Ibid.*, p. 15, para. 38.

<sup>249</sup> Ser. A, no. 297-A, p. 13, paras. 32-3 = 15 HRLJ 342 (1994).

<sup>250</sup> *Ibid.*, p. 14, para. 34. See also *Pelladoah v. The Netherlands* (1994), ser. A, no. 297-B, pp. 34-5.

the court of cassation was heard without the presence of her lawyer. But, as the Court says, presence of the lawyer is not an absolute requirement in a court which decides only points of law in last instance. Moreover, the lawyer in question, despite knowing that he would be unable to attend on that hearing, took no steps to ensure that it was rescheduled.<sup>251</sup>

Summing up this jurisprudence, it can be said that presence of the lawyer is paramount in trial and may be essential in pre-trial stages; its importance decreases as the case rises to the highest courts which are more and more concerned only with legal points or stereotyped defects. In parallel, the importance of raising an objection against the course followed increases; in trial regular presence of the lawyer has to be secured *ex officio*; for appeals to higher courts it is increasingly necessary to raise contentious points individually; if it is not done, the State cannot be held responsible.

At the United Nations Human Rights Committee some graver breaches of the principles here commented upon had to be redressed. In *J. Campbell v. Jamaica* (1993) the accused was notified of his court-appointed lawyer's name only after rejection of the appeal. He thus had no possibility of consulting him and to assist him in the preparation of the appeal.<sup>252</sup> In *L. Simmonds v. Jamaica* (1992) the accused was not informed of the scheduling of his appeal, jeopardizing the opportunities to prepare the appeal and to consult with his lawyer.<sup>253</sup> Finally, in *G. Campbell v. Jamaica* (1992) the accused had neither been allowed to instruct his representative for the appeal nor to be present in person for it.<sup>254</sup>

3. The European Court held, in the *Croissant v. Germany* case (1992), that a defense counsel may also be appointed against the will of the accused if this is justified by the interests of a proper administration of justice, e.g. the length and complexity of the proceedings, the interest to avoid interruptions, etc. This may be true also if the accused has already appointed defense counsel.<sup>255</sup>

4. A question which prompts rich jurisprudence is that of the grant of legal aid. In *Pham Hoang v. France* (1992) the Court recalls that (free) legal assistance for indigents is necessary if the issues are complex and the prospects of the case not hopeless.<sup>256</sup> The other human rights bodies presently reviewed contributed to the question of the necessity of legal aid. In its advisory opinion on *Exceptions to the Exhaustion of Domestic Remedies* (1990), the Inter-American Court stressed that the indigents have a right to free legal assistance if necessary for a fair hearing.<sup>257</sup> This resembles the *vol d'oiseau* technique adopted by the European Court and already mentioned.

The United Nations Human Rights Committee recalled that legal aid is in any case indispensable at all stages of the proceedings where a death sentence is at stake.<sup>258</sup> Moreover, legal aid may be necessary where the opposite course would deny the accused "the opportunity to have inquiries made about the matter and to pursue such legal remedies as may have been available to him".<sup>259</sup> This formulation seems too broad. In *A. Currie v. Jamaica* (1994) the Committee found a better formula in the context of proceedings at the constitutional court: aid must be granted "to determine whether the author's conviction in a criminal trial violated fair trial guarantee, if the interests of justice require such a scrutiny".<sup>260</sup> This proviso was entered because constitutional proceedings are distinct from criminal remedies and imply a different type of control. But also in criminal remedies, there must be some reason to grant legal aid: the complexity of the case and some chance of success.

Must legal aid be granted on appeal? Two conditions have to be satisfied for such aid being mandatory: (1) lack of means; (2) existence of specific interests of justice. As to this last criterion, the Court found it satisfied in *Boner v. United Kingdom* (1994). The questions to be raised required a certain legal skill to be effectively addressed. The court of appeal had wide powers to dispose of the appeal. The question was also very important for the applicant as a heavy penalty was at stake.<sup>261</sup> A similar situation prevailed in *Twalib v. Greece* (1998). Here the accused moreover did not speak the Greek language. As under Greek law there was no provision for legal aid in such appeals, a violation of Article 6 could be established as well in *abstracto* as in *concreto*.<sup>262</sup> Summing up, it can be said that the "interests of justice" depend on the special features of the proceedings involved<sup>263</sup> (e.g. appeal on facts or on specific legal aspects), on the factual and/or legal complexity of the case, on the importance of the penalties incurred, and on a series of more contingent factors such as the knowledge of the language used in court or the mental state of the accused.

5. The State is responsible for ascertaining that the legal aid counsel does not fail to perform his task. It is not enough to appoint a counsel and then to rid oneself of the matter. On the other hand, the State cannot be expected to assess the appropriateness of the steps taken for defending the accused. This is a matter for the professional judgement of the lawyer. In *Daud v. Portugal* (1998) the European Court gave some indications on the extent of the State's duties. It starts by recalling that a State can be held responsible only if it fails to intervene where the ineffectiveness of representation is manifest or otherwise brought to its attention. In the present case the applicant

<sup>251</sup> Ser. A, no. 281-B, pp. 45-6, paras. 27-30.

<sup>252</sup> Communication no. 307/1988, A/48/40, mimeographed version, p. 44, para. 6.2.

<sup>253</sup> Communication no. 338/1988, *ibid.*, p. 82, para. 8.4.

<sup>254</sup> Communication no. 248/1987, A/47/40, p. 239.

<sup>255</sup> Ser. A, no. 237-B, p. 33, para. 29 = 14 HRLJ 92 (1993).

<sup>256</sup> Ser. A, no. 243, p. 23, paras. 40-1 = 14 HRLJ 95 (1993).

<sup>257</sup> Ser. A, no. 11, paras. 25-7, Inter-American Court Series = 12 HRLJ 20 (1991).

<sup>258</sup> *R. La Vende v. Trinidad and Tobago* (1997), Communication no. 554/1993, A/53/40, p. 12; *V.P. Domukovsky and others v. Georgia* (1998), no. 623-7/1995, *ibid.*, p. 111; *A.S. Yasseen and N. Thomas v. Guyana* (1998), no. 676/1996, *ibid.*, p. 161; *O. Wright and E. Harvey v. Jamaica* (1995) no. 459/1991, A/51/40, p. 40. If a legal aid counsel, finding no merit in the appeal, decides not to advance arguments for the accused, the State party must appoint another lawyer: *C. Reid v. Jamaica* (1990), no. 250/1987, A/45/40, p. 91. A counsel has generally, in capital sentence cases, the duty to inform the accused that he finds no merit in the appeal, so that the accused can appoint another lawyer: *T. Jones v. Jamaica* (1998), Communication no. 585/1994, A/53/40, p. 54. See also: *A. McLeod v. Jamaica* (1998), no. 734/1997, *ibid.*, pp. 216-7; *O. Wright and E. Harvey v. Jamaica* (1995), no. 459/1991, A/51/40, p. 41; *G. Graham and A. Morrison v. Jamaica* (1996), no. 461/1991, *ibid.*, p. 48; *P.A. Kelly v. Jamaica* (1996), no. 537/1993, *ibid.*, p. 105; *R. Burrell v. Jamaica* (1996), no. 546/1993, *ibid.*, p. 129; *L. Grant v. Jamaica* (1994), no. 353/1988, A/49/40, p. 57.

<sup>259</sup> *M. Thomas v. Jamaica* (1997), Communication no. 532/1993, A/53/40, p. 5. See also *P.A. Kelly v. Jamaica* (1996), no. 537/1993, A/51/40, p. 106.

<sup>260</sup> Communication no. 377/1989, A/49/40, p. 77.

<sup>261</sup> Ser. A, no. 300-B, p. 75, para. 41. See also *Maxwell v. United Kingdom* (1994), ser. A, no. 300-C, p. 97, para. 38.

<sup>262</sup> *Rep.*, 1998-IV, no. 77, pp. 1428-1431, paras. 46-55.

<sup>263</sup> *Ibid.*, p. 1428, para. 46.

had not enjoyed effective defense as the first appointed counsel failed to take any steps for the defense before reporting sick and the second had no adequate time to prepare. The State should have acted, as the courts were put on notice of these misgivings by several letters of the accused.<sup>264</sup>

6. The European Court had not to deal with another usual question: that of the right of the accused to refuse a specific legal aid counsel, especially once he is dissatisfied with him. However, the question arose in *D. Pinto v. Trinidad and Tobago* (1990) at the United Nations Human Rights Committee, in a case slightly before the period here under review. The Committee showed itself quite liberal on this point in a case where a capital sentence was at stake.<sup>265</sup> This is particularly indicated where the accused himself arranges for another lawyer ready to represent him, even if this may cause some delay.

#### K) Right to call and cross-examine witnesses

1. The right to have witnesses on one's own behalf heard is not absolute. The judge may refuse to hear witnesses whose evidence he thinks immaterial for the case at hand.<sup>266</sup> Moreover, the accused must not necessarily be present when the court hears a witness if this is unavoidable for the witness to give unrestricted evidence. But in such a case the accused's lawyer has to be present.<sup>267</sup> Previous statements of witnesses or anonymous witnesses may serve as evidence when these witnesses do not appear in court only if an appearance is impossible and if other evidence corroborates their statements, *i.e.* if those are not the only proof for the guilt of the accused.<sup>268</sup> In such a case, the accused and his lawyer must be able to ask questions and to deny in an appropriate way the evidence given.<sup>269</sup>

2. The most problematic cases under this heading are those where it is decided that witnesses cannot be personally confronted to the accused in trial in order to protect them and/or to secure unrestricted evidence. As will be seen, the present commentator does not always agree with the jurisprudence of the Court on this crucial point. While recognizing the great importance of direct confrontation, the protection of the witness against revenge of gang criminals and the paramount social importance of fighting organized crime must prompt some carefulness against too bold postulates.

There is, first, the problem of *anonymous witnesses* in general. In *Saïdi v. France* (1993) the applicant had been convicted on the basis of testimony of witnesses who were not confronted to him in trial. As the Court said, the test is that of the "sole basis" for conviction: as in the present case such unopposed testimony constituted the *sole basis* for the conviction, there had not been a fair trial.<sup>270</sup> The witness evidence to be accountable must be corroborated by other proofs. It must be *one* element of a whole, not the *only* element at all. It must be *pars pro toto*.

Applying such principles with sufficient flexibility, the Court reached a sound solution in the *Doorson v. The Netherlands* case (1996). The reasons for the anonymity of the witnesses was protection against reprisals of the drug-dealers as had already happened in previous cases. The Court said that Article 6 will not be violated if the handicaps of the defense are sufficiently counterbalanced. Thus, during interrogation of those witnesses, counsel for the accused were present and could ask all questions except those as to their identity. Moreover, the finding of guilt did not rely solely or to a decisive extent on that evidence. Therefore, the counter-balancing of anonymity was sufficient.<sup>271</sup> This idea of a balancing has everything to

be recommended. Any rigid approach cannot be warranted in this matter. In *Van Mechelen and others v. The Netherlands* (1997), the applicant had been convicted on the basis of evidence of police officers whose identity was not disclosed and who were not heard otherwise than via sound link. The Court distinguishes this case from the *Doorson* case. It said that the situation of police officers is different in some respects from that of disinterested witnesses or victims. Their duties may involve giving evidence in open court. Moreover, in the present case, several aspects tended towards a finding of unfairness: (1) it was not explained why such an important limitation on the rights of the accused as sound link-communication was necessary; (2) the question of the (real) threat for the police officers was not addressed; (3) Mr. E., a civilian witness, did not enjoy the protection of anonymity and has not claimed having been threatened; (4) finally, the conviction of the applicants was based to a decisive extent on those anonymous statements.<sup>272</sup> If the first two criteria fail to convince, the last two have obviously a certain force. But they can hardly be decisive. The Court itself implicitly<sup>273</sup> admits that the evidence of Mr. E. was of a wholly different importance than that of the police officers; thus the threat cannot be directly compared. Moreover, in drug offences, the only material proof will often be the transaction on the spot; of this, in most cases, only the police officers involved there can testify. The jurisprudence reflected in this case allows organized criminals to play havoc with the State authorities and victims, assured as they may be of a large degree of immunity from punishment if the life or physical integrity of witnesses is not to be put in danger. Moreover, according to the Strasbourg case-law, these persons will be able to enjoy even financial compensation<sup>274</sup> which is to be paid by the community at large, including the victims, through their taxes. This situation can hardly be qualified as satisfactory.

Another very unsatisfactory result was reached in *Lüdi v. Switzerland* (1992). Here the applicant was convicted *inter alia* on the basis of an undercover agent's report who did not personally appear in court. The Court found that the rights of the defense were restricted to such an extent that there had not been a fair trial. This was so especially because it would have been possible to hear the agent in a way taking into account the legitimate interests of

<sup>264</sup> *Rep.*, 1998-II, no. 69, pp. 750-1, paras. 38-42.

<sup>265</sup> Communication no. 232/1987, A/45/40, p. 73: "In the circumstances, and bearing in mind that this is a case involving the death penalty, the State party should have accepted the author's arrangements for another attorney to represent him for purposes of the appeal, even if this would have entailed an adjournment of the proceedings".

<sup>266</sup> *Bricmont* case (1989), ser. A, no. 158, p. 31, para. 89.

<sup>267</sup> *Kurup* case, Commission, case no. 11219/84, DR., vol. 42, p. 287.

<sup>268</sup> *Isgrò* case (1991), ser. A, no. 194-A, p. 12, paras. 33 ff. = 12 HRLJ 100 (1991).

<sup>269</sup> *Kostovski* case (1989), ser. A, no. 166, p. 20, paras. 41-2.

<sup>270</sup> Ser. A, no. 261-C, p. 57, para. 44.

<sup>271</sup> *Rep.*, 1996-II, no. 6, pp. 471-2, paras. 71-5.

<sup>272</sup> *Rep.*, 1997-III, no. 36, pp. 711-3, particularly, paras. 56-63.

<sup>273</sup> By saying that the decisive evidence for conviction was that of the anonymous officers (sole basis test).

<sup>274</sup> In the case of *Van der Mechelen et al.* the Court awarded as just satisfaction for non-pecuniary damage a total amount of 105,000 guilders (about 47,600 euros), judgment of 30 October 1997, *Rep.*, 1997-VII, no. 56, p. 2426, para. 18.

anonymity.<sup>275</sup> This last point is not to be ignored, but unless the European Court boasts itself to the heights of a *quatrième instance* some margin must be left on this point to the municipal procedure and to the appreciation of the trial judge. This is even more true when, as presently, the undercover agent's report was not the sole basis for conviction.

3. The Court had the opportunity to stress once more that there is no duty of the judge to hear all the proposed witnesses. In *Vidal v. Belgium* (1992) the court of appeal had refused to hear four defense witnesses. The Court starts by recalling that the national tribunals enjoy a certain discretion as to the hearing of witnesses. The essential aim is that of full equality of arms. The question, in more general terms, is whether the proceedings as a whole can be considered as fair. In the present case, the court of appeals gave no reasons as to the rejection of the witnesses. This is inconsistent with a fair trial, all the more as the accused claimed that the witnesses were the only means to establish his innocence.<sup>276</sup> From this case the rule can be abstracted that a refusal to hear witnesses must be motivated, especially if these witnesses are claimed to be essential for the defense.

On the other hand, if a witness cannot be found (because he had moved) and the authorities have not been negligent in their efforts to find the person, his evidence previously given may be used in court, provided that it is not the sole basis for a conviction. This has been established in the *Artner v. Austria* case (1992).<sup>277</sup> It may be, however, that the trial has to be adjourned if the impossibility of attendance of an important witness is temporary. Thus, the United Nations Human Rights Committee in *L. Grant v. Jamaica* (1994) held that if an important witness has no means to attend, the judge would have to adjourn the trial, especially in a case involving death penalty. The police should have made transportation available for that witness under such conditions.<sup>278</sup>

#### L) Right to free assistance of an interpreter

1. This right covers all criminal proceedings and includes the translation of documents or oral evidence which are essential to be understood by the accused in order to secure a fair trial.<sup>279</sup> It does not involve translation of all the documents of the file.<sup>280</sup> The assistance is free in all cases, *i.e.* also in case of conviction.<sup>281</sup> This does not depend on the accused's means. Finally, this right can be waived by the accused (*Kamasinski*, note 280, para. 80).

2. There is no case-law of the European Court on this right during the period under review. Its legal aspects seem quite well-settled in the European system. The United Nations Committee on Human Rights had to consider the question in *Y. Cadoret and H. Le Bihan v. France* (1991) slightly before the period here reviewed. In this case two Bretons claimed that they did not receive assistance of an interpreter in French courts. Both, obviously, spoke excellent French. This led the Committee to restrict that right to persons unable to understand and express themselves adequately in the court's language.<sup>282</sup> This restriction has to be welcomed.

#### M) Right to a reasoned judgment

As the European Court said in the *Hadjianastassiou v. Greece* case (1992): "[The judgment must] indicate with sufficient clarity the grounds on which they [the judges] based their decision".<sup>283</sup> On the other hand it is not necessary to deal with every point raised in argument.<sup>284</sup> It does not seem necessary to further comment on this right

which prompts few problems. In the systems which know the right to appeal to a higher tribunal (Article 14(5) of the UN Covenant on Civil and Political Rights;<sup>285</sup> Article 8(2)(h) of the Inter-American Convention on Human Rights), the right to a reasoned judgment is the necessary basis for the practical enjoyment of that further right. Thus, in *L. Hamilton v. Jamaica* (1994), the United Nations Human Rights Committee said that for the right of appeal to be effective, it must encompass the right to have a reasoned judgment served.<sup>286</sup> The written judgment must, by the same token, be available in reasonable time.<sup>287</sup>

#### IV) Prohibition of retroactive criminal laws (Article 7)

1. It is an old principle (not valid in the Middle Ages under the practice of *poenae extraordinariae*), dating back to the era of enlightenment, that the crime and the penalties incurred must be regulated in a law already in force at the moment of the commission of the incriminated acts: *nullum crimen et nulla poena sine lege praevia*. J.P.A. von Feuerbach was one of the first criminalists to develop in detail that concept.<sup>288</sup> It is a fundamental guarantee against arbitrary acts. The principle contains several aspects: non-retroactivity, clarity of incurred penalties (*Bestimmtheitsgrundsatz*), necessity of a law in the formal sense, prohibition of unfavorable analogies, etc. It also includes exceptions such as the well-known rule of the more lenient new law (*lex mitior*).

<sup>275</sup> Ser. A, no. 238, p. 21, paras. 49-50 = 13 HRLJ 437 (1992).

<sup>276</sup> Ser. A, no. 235-B, pp. 32-3, paras. 33-4 = 13 HRLJ 425 (1992). See also the *Engel and others* case (1976), ser. A, no. 22, especially pp. 38-9, para. 91.

<sup>277</sup> Ser. A, no. 242-A, pp. 10-1, paras. 21-4 = 13 HRLJ 461 (1992).

<sup>278</sup> Communication no. 353/1988, A/49/40, p. 57.

<sup>279</sup> *Luedicke and others* case (1978), ser. A, no. 29, p. 20, para. 48.

<sup>280</sup> *Kamasinski* case (1989), ser. A, no. 168, p. 35, para. 74.

<sup>281</sup> *Luedicke and others* case (*supra*, note 279), paras. 38 ff., para. 46.

<sup>282</sup> Communications nos. 221/1987 and 323/1988, A/46/40, p. 224. See also *D. Guesdon v. France* (1990), no. 219/1986, A/45/40, p. 67.

<sup>283</sup> Ser. A, no. 252, p. 16, para. 33.

<sup>284</sup> *Van de Hurk v. The Netherlands* case (1994), ser. A, no. 288, p. 20, para. 61 = 15 HRLJ 201 (1994).

<sup>285</sup> See generally *G.W. Reid v. Jamaica* (1994), Communication no. 355/1989, A/49/40, p. 62.

<sup>286</sup> Communication no. 333/1988, A/49/40, p. 40. See also: *G.W. Reid v. Jamaica* (1994), Communication no. 355/1989, *ibid.*, p. 62; *A. Currie v. Jamaica* (1994), no. 377/1989, *ibid.*, p. 77; *L. Smith v. Jamaica* (1993), no. 282/1988, A/48/40, mimeographed version, p. 35, para. 10.5; *R. Henry v. Jamaica* (1992), no. 230/1987, A/47/40, p. 217.

<sup>287</sup> Five years to write down the judgment, plus four years to serve it to counsel, are not a reasonable time: *L. Champagne and others v. Jamaica* (1994), Communication no. 445/1991, A/49/40, p. 140. *Idem*, 9 years to serve a judgment: *V. Francis v. Jamaica* (1993), no. 310/1988, A/48/40, mimeographed version, p. 66, para. 12.2. *Idem*, 5 years: *A. Little v. Jamaica* (1991), no. 283/1988, A/47/40, p. 275. *Idem*, almost 5 years: *P. Kelly v. Jamaica* (1991), no. 253/1987, A/46/40, p. 248.

<sup>288</sup> See A. Kaufmann, "Paul Johann Anselm von Feuerbach – Jurist des Kritizismus", in: *Essays in Honor of M. Spindler*, vol. III, Munich, 1984, p. 181 ff. See as early as T. Hobbes, *De cive*, cap. XIII and *Leviathan*, cap. XXVIII. S. Pufendorf, *De iure naturae et gentium*, lib. VIII, cap. III, par. VII.

2. In *Kokkinakis v. Greece* (1993) the European Court had an opportunity to comment on the general meaning of the principle as embodied in the Convention: "The Court points out that Article 7 § 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the working of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable".<sup>289</sup>

The Court isolates four aspects of the principle in the quoted passage: (1) no retroactivity to the detriment of the accused; (2) no crime or penalty without a legal basis; (3) no extensive construction of criminal laws or even analogies; (4) sufficient precision of the criminal norm.

3. An amazingly open violation of the principle happened in *Jamil v. France* (1995). The term of imprisonment of the accused was increased pursuant to a law enacted after the offence was committed. As the Court noted, no one contested in the instant case that this law on the prevention of drug trafficking was applied retrospectively to the detriment of the applicant.<sup>290</sup> A much more difficult and interesting situation arose in *S.W. v. United Kingdom* (1995). The applicant complained that his conviction and sentence for rape of his wife constituted retrospective punishment. No common law precedent established the criminality of such conduct and the legislator had not yet acted. The case was delicate. This can be seen during all the reasoning of the Court which visibly struggles to reach the desired result. It starts by affirming that Article 7 does not outlaw elucidation of doubtful points through interpretation and developments of jurisprudence under the proviso that these developments are "consistent with the essence of the offence and could reasonably be foreseen".<sup>291</sup> As to foreseeability in the present case, the Court says that there had been a perceptible evolution of case-law dismantling the immunity of the husband by establishing exceptions; moreover, there was a general evolution of conceptions which, according to the Court, made judicial recognition of absence of immunity reasonably foreseeable.<sup>292</sup> The Court then turns to a teleological argument of very broad scope: "The essentially debasing character of rape is so manifest that the result of the decisions [convicting the applicant]... cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary persecution, conviction or punishment".<sup>293</sup> Indeed, concludes the Court, such an evolution is in line with the fundamental objectives of the Convention itself, which are to protect human dignity.<sup>294</sup>

It is as much difficult to disagree with the result reached as it is difficult to feel at peace with the reasoning followed. This is typically a case where either way taken leads to an infringement of a principle of justice. It is not here suggested that the way elected was wrong. It is still difficult not to admit that, as in all too urgent situations, the principle of non-retroactivity is set aside under a more pressing social and moral need for punishment. It is perhaps better to admit this than to engage in legal gymnastics of doubtful value. In the present case there simply was no previous law on the point at issue.

Precedents could only suffice our rule if they announced a change of jurisprudence for the future. The English legislator, on the other hand, had not acted.

If not all acts deeply immoral are just by that fact to be deemed also illegal, it is difficult to escape the conclusion reached by Loucaides, Trechsel, Nowicki and Cabral Barreto in their dissenting opinion appended to the Report of the Commission.<sup>295</sup> At the level of the Court, no judge dared to go that far. This course shows that sometimes even human rights jurisprudence is not blind to the person and defines the "good one" and the "bad one". Once again: it is not suggested that this is always avoidable.

4. The question of the precision and clarity of the criminal law (*Bestimmtheitsgrundsatz*) was at stake in the *Larissis and others v. Greece* case (1998). The applicants complained that the provision prohibiting proselytism was so vaguely worded that it breached the principle of certainty of criminal prohibition. The Court rejected that plea, and rightly so. It recalled that many laws, also criminal, have to be couched in somewhat flexible terms in order to keep pace with social changes. The definition of proselytism in the present case, together with the settled body of national case-law interpreting and applying it, satisfied the conditions of certainty and foreseeability prescribed by Article 7.<sup>296</sup>

5. Finally, the question of retroactivity in favor of the applicant as an exception to the principle had also to be addressed in the period under review. In *G. v. France* (1995) the applicant complained that he had been convicted for an act that, when perpetrated, did not constitute an offence. But, as the Court said, the new qualification of the crime (indecent assault instead of rape) fell under a recognized exception to the non-retroactivity principle: it was applied as the more lenient new law (*lex mitior*) and thus operated in the applicant's favor.<sup>297</sup>

#### V) *Ne bis in idem*

1. Another classical principle of criminal law is that nobody shall be prosecuted or punished for an offence for which he has already been judged and acquitted or convicted by final judgment. If the prosecution was stayed before a judgment the principle does not apply. Strangely enough, the European Convention does not contain that guarantee. It was added in Article 4 of the 7th Additional Protocol to the Convention dated 22 November 1984.

2. There is no case-law of the European Court on this principle in the period under review. But the Inter-American Commission on Human Rights did consider it at length in its *Report I/95*, case 11,006 (Peru) (1995) on which some words may be allowed. The accused had been acquitted on the charge of unlawful enrichment, but new proceedings were subsequently initiated against him on the same facts and charge. The Commission first made some general comments on the scope of the principle *non bis in idem*:

<sup>289</sup> Ser. A, no. 260-A, p. 22, para. 52.

<sup>290</sup> Ser. A, no. 317, p. 29, paras. 35-6.

<sup>291</sup> Ser. A, no. 335-B, p. 42, para. 36.

<sup>292</sup> *Ibid.*, p. 44, para. 43.

<sup>293</sup> *Ibid.*, pp. 44-5, para. 44.

<sup>294</sup> *Ibid.*, p. 45, para. 44. See also *C.R. v. United Kingdom* (1995), ser. A, no. 335-C, pp. 69-72.

<sup>295</sup> Ser. A, no. 335-B, pp. 54-5.

<sup>296</sup> *Rep.*, 1998-I, no. 65, p. 377, para. 34.

<sup>297</sup> Ser. A, no. 325-B, p. 38, para. 26.

"[Article 8(4) of the American Convention] shows that the underlying elements of the principle, for the Convention, are as follows:

1. The accused must have been acquitted; 2. The acquittal must be a final judgment; and 3. the new trial must be based on the same cause that prompted the original trial (...). The language used by the Convention, *i.e.* 'accused persons acquitted' implies that someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he has been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it has been determined that the acts of which he is accused are not defined as crimes. The Commission considers that the expression 'non appealable judgment' (...) should not be interpreted restrictively, that is, limited to the meaning given to it by the domestic law of the States. In this context, 'judgment' should be interpreted as any procedural act that is fundamentally jurisdictional in nature, and 'non-appealable judgment' as expressing the exercise of jurisdiction that acquires the immutability and incontestability of *res judicata*.<sup>298</sup>

What is to be retained is particularly the broad interpretation given to the term judgment considered not from the formal, but from the teleological (or "effects") point of view. In the present case, the superior court of justice and thereafter the prosecutor decided to dismiss the charges because in their opinion the acts charged were not defined as crimes. That ruling was contested by the remedies provided under the law. Once they were denied as inadmissible, the procedural ruling had become final and was covered by *res judicata*. Thus, even if there had not been a formal judgment of acquittal, the proceedings had been closed by a final decision having the force of *res judicata*. The principle of *ne bis in idem* was held by the Commission to apply to such "final decisions": "[T]he Commission finds that the protection accorded under Article 8, subparagraph 4, implicitly includes those cases in which reopening a case has the effect of reviewing questions of fact and law that have come to have the authority of *res judicata*".<sup>299</sup> Therefore the reopening of the case after the filing of a time-barred nullification plea was in violation of the *ne bis*-principle.<sup>300</sup>

This finding of the Commission contributes to define more precisely and to limit partially the general rule that the staying of proceedings is not to be equated to a final judgment and is not therefore covered by the *ne bis*-principle. An exception is here being made for cases where this stay was based on substantive legal reasons and has been adjudged on this point by the courts by a final and binding decision.

## VI) Conclusion

This long journey through the European Court's jurisprudence on detention and fair trial reveals a picture of constant efforts to reach the most satisfactory equilibrium between the concurring interests at stake. The Court, by its very nature, is under a diffuse and hidden – but not less tangible – danger of privileging too much one side of the coin: that of freedoms and rights of the individual. This is so because it is a specialized court. It

deals only with human rights. Any person or organ permanently concerned only with one aspect of reality develops a particular relationship and attachment to that matter. He tends to over-emphasize it. He tends to lose sight, be it only slightly and unconsciously, of the other aspects and interests inherent in human relationships. Such is the case, for instance, of the prosecutor. Bound to objectivity, he still tends to develop a certain hunting instinct. Under that perspective, the several supreme courts of the member States have an inherent superiority over the European Court. Dealing with administrative law as well as with fundamental rights and freedoms, they are constantly compelled to perceive and to adjust both sides of the coin, individual rights and individual duties, legitimate freedoms and concern for the common weal. For one thing should never be forgotten even if it constantly is: for each right granted to one subject, rights and freedoms of others are to be limited. Human rights should not be extracted from that complex interplay. Viewed from this perspective, the Court's jurisprudence reaches a good equilibrium on many matters while on a few others, in the eyes of the present commentator, it could still improve. But what must mainly be pointed out is that the general approach of the Court to its judicial role has much to be recommended. The Court had three options. It could have restricted its role to an organ controlling and sanctioning manifest abuses. With such an understanding, it could not have fulfilled the formative and regulative function it was created for. On the other hand, the Court could have engaged in a *quatrième instance* approach, divesting itself of its specific mission in order to become a general court of cassation of the Council of Europe member States. With this understanding it would by far have overstretched its role and legitimacy.

Instead the Court engaged in a middle way, assigning to itself the role of an essential milestone in the protection but also in the constant development of that branch of law called "human rights" and which embodies in some short-winded general propositions the essential political and legal commitments of the democratic States of Europe. It is on this course that the Court must stay. The danger today is not that of falling back to a mere *jurisdiction d'abus*. It is to strike out too boldly towards centralization and to limit thereby more than necessary this very diversity of conceptions and practices which stem from, account for and also guarantee political pluralism. Once more the golden rule is that formulated centuries ago by a great thinker, St. Augustine: "*In necessariis unitas, in dubiis libertas – in omnibus caritas*".

<sup>298</sup> IAYHR, 1995, pp. 298-300.

<sup>299</sup> *Ibid.*, p. 302.

<sup>300</sup> *Ibid.*, pp. 300-2. See also *The Prosecutor v. S. Dokmanovic*, International Criminal Tribunal for the Former Yugoslavia, Prosecutor's Response to the Trial Chamber's Request for a Brief on the Use of Cumulative Criminal Charges in relation to a proposed "Substantive" Non bis in idem Principle in International Criminal Law, Trial Chamber II, 10.2.1998, Case no. IT-95-13a-T, pp. 3 ff.