UNITED NATIONS

GENERAL COMMENT NO. 32

International Covenant on Civil and Political Rights

Article 14: Right to equality before courts and tribunals and to a fair trial

Adopted by the Human Rights Committee

Ninetieth session, July 2007

Office of the United Nations High Commissioner for Human Rights
Cambodia

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Introduction

The Royal Government of Cambodia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992. The ICCPR protects a range of important rights. Among them is the right to equality before the courts and tribunals and to a fair trial which is contained in Article 14.

The Human Rights Committee is a committee of eighteen independent experts elected by the States parties to the ICCPR to monitor its implementation. The Committee examines the reports submitted periodically by States parties. It adopts concluding observations which are recommendations made to the concerned State on how to improve compliance with its obligations under the ICCPR. For those States which have also ratified the first Optional Protocol to the ICCPR, the Human Rights Committee examines complaints submitted by individuals who allege violations of their rights by the State party. It is crucial that States parties understand the scope of their obligations under the ICCPR. In order to assist States parties in this regard, the Committee adopts General Comments in which it explains in more detail the obligations of States parties under each article of the ICCPR. These General Comments are based on the Committee's previous concluding observations and decisions in individual cases.

The right to equality before the courts and tribunals and to a fair trial is essential to the safeguard of the rule of law in any country. This is why the Human Rights Committee adopted General Comment No. 32 on Article 14 in July 2007 to provide more guidance as to what this complex right actually involves. The Committee emphasised that all the guarantees contained in Article 14 are applicable in all States parties, irrespective of whether they follow the civil law or common law tradition.

In this General Comment, the Human Rights Committee explained in detail the various guarantees of due process contained in Article 14. Starting with the right to equality before the courts and tribunals, the Human Rights Committee clarified that this general guarantee applies not just in the court system, but also to all judicial proceedings, such as for instance disciplinary proceedings against a civil servant. The Committee also emphasised the right of equal access to the courts. However, access to justice for the poor is often hindered by the lack of legal assistance. The availability of free legal assistance for the poor would ensure that they have better access to the courts.

The Human Rights Committee provided comprehensive explanations on the right to a fair and public hearing before a competent, independent and impartial tribunal. The Committee put particular emphasis on the independence of judges which should be guaranteed through, for instance, methods of appointment, security of tenure, rules on promotion, transfer, suspension and retirement. It is imperative that judges are free from political interference from the executive. Guarantees to safeguard the independence of judges should be enshrined in law.

In the General Comment, the Human Rights Committee also explained the principle of impartiality. While the concept of independence of judges refers to the ability of judges to make decisions free from any form of political influence, the concept of impartiality refers to their ability not to be influenced by personal bias or prejudice or by any preconceptions about the case before them, and not to be partial to either party to the case. Judges must not only be impartial, they must also appear to be impartial.

The Human Rights Committee explained that a fair trial should be conducted expeditiously and in public. When it comes to persons charged with a criminal offence, Article 14 guarantees the presumption of innocence. This principle, which is considered by the Human Rights Committee as fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge beyond reasonable doubt. It is thus not for the accused to prove that he or she is innocent.

All persons charged with a criminal offence should benefit from a number of safeguards such as the right to be informed promptly of the charges against him or her, the right to a lawyer of his or her own choosing, the right to free legal assistance in some cases, and the right to "equality of arms" between the defence and the prosecution. Article 14 also protects against forced confessions. Some of these safeguards are also contained in Article 38 of the Cambodian Constitution and the Code of Criminal Procedure.

General Comment No.32 expands on the basic principles for juvenile justice. Of course, juveniles should enjoy at least the same guarantees as are afforded to adults. In addition, they should have special protection. The Human Rights Committee emphasised that the detention of juveniles before and during trial should be avoided as much as possible. In general, States should seek to establish an appropriate juvenile criminal justice

system. In this regard, the Royal Government of Cambodia is considering the adoption of a Juvenile Justice Law as a first step towards the establishment of such a system.

General Comment No.32 also refers to the right to appeal and the right to compensation for miscarriages of justice. It recalls the principle of double jeopardy (*non bis in idem*) which prohibits a person from being tried and punished twice for the same offence.

Finally, General Comment No.32 ends with some important reminders about the relationship between Article 14 and other provisions of the Covenant. In particular, it recalls that forced confessions constitute violations of both Article 14 and Article 7 on the prohibition of torture and inhuman, cruel or degrading treatment. Unduly delaying trials is not just a violation of fair trial rights, but also of Article 9 (3) which provides that anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release. The Human Rights Committee also explains that the way criminal proceedings are handled can affect the exercise and enjoyment of other rights protected under the Covenant. The Committee gives the example of a defamation case which is kept pending for several years and explains that this could have a chilling effect on the person concerned and might unduly restrict his or her right to freedom of expression protected under Article 19 of the Covenant.

All in all, General Comment No.32 is especially useful considering that Article 14 is such a complex provision. In this important document, the Human Rights Committee provided comprehensive guidance as to how to interpret Article 14 – this should be of interest to all those committed to the implementation of fair trial rights in Cambodia.

OHCHR Cambodia
June 2013

International Covenant on Civil and Political Rights

Article 14

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

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

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

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

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

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

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

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

General Comment No. 32

Article 14: Right to equality before courts and tribunals and to a fair trial

I. GENERAL REMARKS

1. This general comment replaces general comment No. 13 (twenty-first session).

2. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.

3. Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph 1. Paragraphs 2 – 5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted. States parties to the Covenant, in their reports, should clearly distinguish between these different aspects of the right to a fair trial.

4. Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the

sole discretion of domestic law to determine the essential content of Covenant guarantees.

5. While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.[1]

6. While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non- derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.[2] Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency,[3] except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.[4] Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.[5]

II. EQUALITY BEFORE COURTS AND TRIBUNALS

7. The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of

[1] General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 8.
[2] General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 15.
[3] Ibid, paras. 7 and 15.
[4] Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15.
[5] General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 11.

this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.[6]

8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.

9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence.[7] This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[8]

10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in

[6] Communication No. 1015/2001, *Perterer v. Austria,* para. 9.2 (disciplinary proceedings against a civil servant); Communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition).

[7] Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea,* para. 9.4.

[8] Communication No. 202/1986, *Ato del Avellanal v. Peru*, para. 10.2 (limitation of the right to represent matrimonial property before courts to the husband, thus excluding married women from suing in court). See also general comment No. 18 (1989) on non-discrimination, para. 7.

paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.[9]

11. Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.[10] In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.[11]

12. The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.[12]

13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds**,** not entailing actual disadvantage or other unfairness to the defendant.[13] There is no equality of arms if, for instance**,** only the prosecutor, but not the defendant, is allowed to appeal a certain decision.[14] The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the

[9] Communications No. 377/1989, *Currie v. Jamaica*, para. 13.4; No. 704/1996, *Shaw v. Jamaica*, para. 7.6; No. 707/1996, *Taylor v. Jamaica*, para. 8.2; No. 752/1997, *Henry v. Trinidad and Tobago*, para. 7.6; No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.10.

[10] Communication No. 646/1995, *Lindon v. Australia*, para. 6.4.

[11] Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.2.

[12] Communication No. 450/1991, *I.P. v. Finland,* para. 6.2.

[13] Communication No. 1347/2005, *Dudko v. Australia,* para. 7.4.

[14] Communication No. 1086/2002, *Weiss v. Austria,* para. 9.6. For another example of a violation of the principle of equality of arms see Communication No. 223/1987, *Robinson v. Jamaica*, para. 10.4 (adjournment of hearing).

other party.[15] In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.

14. Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases,[16] objective and reasonable grounds must be provided to justify the distinction.

III. FAIR AND PUBLIC HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

15. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[17]

16. The concept of determination of rights and obligations "in a suit at law" (*de caractère civil/de carácter civil*) is more complex. It is formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, are equally authentic, and the *travaux préparatoires* do not resolve the discrepancies in the various language texts. The Committee notes that the concept of a "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the

[15] Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

[16] E.g. if jury trials are excluded for certain categories of offenders (see concluding observations, *United Kingdom of Great Britain and Northern Ireland,* CCPR/CO/73/UK (2001), para. 18) or offences.

[17] Communication No. 1015/2001*, Perterer v. Austria,* para. 9.2.

determination of particular rights.[18] The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons,[19] the determination of social security benefits[20] or the pension rights of soldiers,[21] or procedures regarding the use of public land[22] or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17. On the other hand, the right to access a court or tribunal as provided for by article 14, paragraph 1, second sentence, does not apply where domestic law does not grant any entitlement to the person concerned. For this reason, the Committee held this provision to be inapplicable in cases where domestic law did not confer any right to be promoted to a higher position in the civil service,[23] to be appointed as a judge[24] or to have a death sentence commuted by an executive body.[25] Furthermore, there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control, such as disciplinary measures not amounting to penal sanctions being taken against a civil servant,[26] a member of the armed forces, or a prisoner. This guarantee furthermore does not apply to extradition, expulsion and deportation procedures.[27] Although there is no right of access to a court or tribunal as provided for by article 14, paragraph 1, second sentence, in these and similar cases, other procedural guarantees may still apply.[28]

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[18] Communication No. 112/1981, *Y.L. v. Canada*, paras. 9.1 and 9.2.
[19] Communication No. 441/1990, *Casanovas v. France*, para. 5.2.
[20] Communication No. 454/1991, *Garcia Pons v. Spain*, para. 9.3.
[21] Communication No. 112/1981, *Y.L. v. Canada*, para. 9.3.
[22] Communication No. 779/1997, *Äärelä and Näkkäläjätvi v. Finland*, paras. 7.2 – 7.4.
[23] Communication No. 837/1998, *Kolanowski v. Poland*, para. 6.4.
[24] Communications No. 972/2001, *Kazantzis v. Cyprus*, para. 6.5; No. 943/2000, *Jacobs v. Belgium*, para.
8.7, and No. 1396/2005, *Rivera Fernández v. Spain*, para. 6.3.
[25] Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.4.
[26] Communication No. 1015/2001*, Perterer v. Austria,* para. 9.2 (disciplinary dismissal).
[27] Communications No. 1341/2005, *Zundel v. Canada*, para. 6.8, No. 1359/2005, *Esposito v. Spain*, para. 7.6**.**
[28] See para. 62 below.

18.The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example**,** as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.

19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.[29] The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[30] A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.[31] It is necessary to protect judges against conflicts

[29] Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.
[30] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.
[31] Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.[32] The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.[33]

21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.[34] Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.[35]

22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise

[32] Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.
[33] Communication No. 933/2000, *Mundyo Busyo et al v. Democratic Republic of Congo*, para. 5.2.
[34] Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.
[35] Idem.

serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional,[36] i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.[37]

23. Some countries have resorted to special tribunals of "faceless judges" composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives[38] from the proceedings;[39] restrictions of the right to a lawyer of their own choice;[40] severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado;[41] threats to the lawyers;[42] inadequate time for preparation of the case;[43] or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant.[44] Tribunals with or without faceless

[36] Also see Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 64 and general comment No. 31 (2004) on the *Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* para. 11.
[37] See communication No. 1172/2003, *Madani v. Algeria,* para. 8.7.
[38] Communication No. 1298/200a4, *Becerra Barney v. Colombia*, para.7.2.
[39] Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5.
[40] Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.
[41] Communication No.577/1994, *Polay Campos v. Peru*, para. 8.8; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5.
[42] Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.
[43] Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3.
[44] Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; Communication No. 1126/2002, *Carranza Alegre v. Peru*, para.7.5; Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3; Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.

judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.[45]

24. Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence,[46] or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury[47] that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.

26. Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.[48] It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its

[45] Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8 ; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.
[46] Communication No. 770/1997, *Gridin v. Russian Federation*, para. 8.2.
[47] See Committee on the Elimination of Racial Discrimination, communication No. 3/1991, *Narrainen v. Norway,* para. 9.3.
[48] Communications No. 273/1988, *B.d.B. v. The Netherlands*, para. 6.3; No. 1097/2002, *Martínez Mercader et al v. Spain*, para. 6.3.

obligation of independence and impartiality.[49] The same standard applies to specific instructions to the jury by the judge in a trial by jury.[50]

27. An important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision.[51] Where such delays are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.[52]

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.[53] The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations,[54] or to pre-trial decisions made by prosecutors and other public authorities.[55]

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent

[49] Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, para. 8.6.
[50] Communication No. 253/1987, *Kelly v. Jamaica,* para. 5.13; No. 349/1989, *Wright v. Jamaica*, para. 8.3.
[51] Communication No. 203/1986, *Mũnoz Hermoza v. Peru*, para. 11.3 ; No. 514/1992, *Fei v. Colombia*, para. 8.4 .
[52] See e.g. Concluding observations, *Democratic Republic of Congo*, CCPR/C/ COD/CO/3 (2006), para.
21, *Central African Republic*, CCPR//C/CAF/CO/2 (2006), para. 16.
[53] Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 6.2.
[54] Communication No. 301/1988, *R.M. v. Finland*, para. 6.4.
[55] Communication No. 819/1998, *Kavanagh v. Ireland*, para. 10.4.

strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

IV. PRESUMPTION OF INNOCENCE

30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.[56] Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree.[57] The denial of bail[58] or findings of liability in civil proceedings[59] do not affect the presumption of innocence.

[56] Communication No. 770/1997, *Gridin v. Russian Federation*, paras. 3.5 and 8.3.
[57] On the relationship between article 14, paragraph 2 and article 9 of the Covenant (pre-trial detention) see, e.g. concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 and Argentina, CCPR/CO/70/ARG (2000), para. 10.
[58] Communication No. 788/1997, *Cagas, Butin and Astillero v. Philippines*, para.7.3.
[59] Communication No. 207/1986, *Morael v. France*, para. 9.5; No. 408/1990, *W.J.H. v. The Netherlands*, para. 6.2; No. 432/1990, *W.B.E. v. The Netherlands*, para. 6.6.

V. RIGHTS OF PERSONS CHARGED WITH A CRIMINAL OFFENCE

31. The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.[60] Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant.[61] The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law,[62] or the individual is publicly named as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.[63]

32. Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.[64] In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase.[65] What counts as "adequate time" depends on the circumstances of each case. If counsel

[60] Communication No. 1056/2002, *Khachatrian v. Armenia*, para. 6.4.
[61] Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.8.
[62] Communications No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4 and 253/1987, *Kelly v. Jamaica*, para. 5.8.
[63] Communication No. 16/1977, *Mbenge v. Zaire*, para. 14.1.
[64] Communications No. 282/1988, *Smith v. Jamaica* , para. 10.4; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.
[65] See communication No. 451/1991, *Harward v. Norway*, para. 9.5.

reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial.[66] A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[67] There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.[68]

33. "Adequate facilities" must include access to documents and other evidence; this access must include all materials[69] that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim. If the accused does not speak the language in which the proceedings are held, but is represented by counsel who is familiar with the language, it may be sufficient that the relevant documents in the case file are made available to counsel.[70]

34. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[71] Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.

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[66] Communication No. 1128/2002, *Morais v. Angola*, para. 5.6. Similarly Communications No. 349/1989, *Wright v. Jamaica*, para. 8.4; No. 272/1988, *Thomas v. Jamaica,* para. 11.4; No. 230/87, *Henry v. Jamaica,* para. 8.2; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.

[67] Communication No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4.

[68] Communications No. 913/2000, *Chan v. Guyana*, para. 6.3; No. 594/1992, *Phillip v. Trinidad and Tobago*, para. 7.2.

[69] See concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.

[70] Communication No. 451/1991, *Harward v. Norway*, para. 9.5.

[71] Communications No. 1117/2002, *Khomidova v. Tajikistan*, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, para. 8.5.

35. The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case,[72] taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.[73] This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.[74] All stages, whether in first instance or on appeal must take place "without undue delay."

36. Article 14, paragraph 3 (d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.[75]

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[72] See e.g. communication No. 818/1998, *Sextus v Trinidad and Tobago,* para. 7.2 regarding a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay. In communication No. 537/1993, *Kelly v. Jamaica*, para. 5.11, an 18 months delay between charges and beginning of the trial did not violate art. 14, para. 3 (c). See also communication No. 676/1996, *Yasseen and Thomas v. Guyana*, para. 7.11 (delay of two years between a decision by the Court of Appeal and the beginning of a retrial) and communication No. 938/2000, *Siewpersaud, Sukhram, and Persaud v. Trinidad v Tobago*, para. 6.2 (total duration of criminal proceedings of almost five years in the absence of any explanation from the State party justifying the delay).

[73] Communication No. 818/1998, *Sextus v. Trinidad and Tobago,* para. 7.2.

[74] Communications No. 1089/2002, *Rouse v. Philippines,* para.7.4; No. 1085/2002, *Taright, Touadi, Remli and Yousfi v. Algeria*, para. 8.5.

[75] Communications No. 16/1977, *Mbenge v. Zaire*, para. 14.1; No. 699/1996, *Maleki v. Italy*, para. 9.3.

37. Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for by article 14, paragraph 3 (d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.[76]

38. Third, article 14, paragraph 3 (d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned "in the interest of justice"[77] as is the existence of some objective chance of success at the appeals stage.[78] In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.[79] Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the

[76] Communication No. 1123/2002, *Correia de Matos v. Portugal*, paras. 7.4 and 7.5.
[77] Communication No. 646/1995, *Lindon v. Australia*, para. 6.5.
[78] Communication No. 341/1988, *Z.P. v. Canada,* para. 5.4.
[79] Communications No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.4; No. 964/2001, *Saidova v. Tajikistan*, para. 6.8; No. 781/1997, *Aliev v. Ukraine*, para. 7.3; No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 58.

accused. Unlike in the case of privately retained lawyers,[80] blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case,[81] or absence during the hearing of a witness in such cases[82] may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[83] There is also a violation of this provision if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.[84]

39. Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7,[85] it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it.

40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings.[86] This right arises

[80] Communication No. 383/1989, *H.C. v. Jamaica*, para. 6.3.
[81] Communication No. 253/1987, *Kelly v. Jamaica,* para. 9.5.
[82] Communication No. 838/1998, *Hendricks v. Guyana,* para. 6.4. For the case of an absence of an author's legal representative during the hearing of a witness in a preliminary hearing see Communication No. 775/1997, *Brown v. Jamaica*, para. 6.6.
[83] Communications No. 705/1996, *Taylor v. Jamaica*, para. 6.2 ; No. 913/2000, *Chan v. Guyana*, para. 6.2; No. 980/2001, *Hussain v. Mauritius*, para. 6.3.
[84] Communication No. 917/2000, *Arutyunyan v. Uzbekistan*, para. 6.3.
[85] See para. 6 above.
[86] Communication No. 219/1986, *Guesdon v. France*, para. 10.2.

at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.[87]

41. Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.[88] Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred,[89] and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.[90]

VI. JUVENILE PERSONS

42. Article 14, paragraph 4, provides that in the case of juvenile persons, procedures should take account of their age and the desirability of promoting their rehabilitation. Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection. In criminal proceedings they should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal

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[87] Idem.

[88] Communications No. 1208/2003, *Kurbonov v. Tajikistan,* paras. 6.2 – 6.4; No. 1044/2002, *Shukurova v. Tajikistan*, paras. 8.2 – 8.3; No. 1033/2001, *Singarasa v. Sri Lanka,* para. 7.4; ; No. 912/2000, *Deolall v. Guyana*, para. 5.1; No. 253/1987, *Kelly v. Jamaica,* para. 5.5.

[89] Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.
15. On the use of other evidence obtained in violation of article 7 of the Covenant, see paragraph 6 above.

[90] Communications No. 1033/2001, *Singarasa v. Sri Lanka,* para. 7.4; No. 253/1987, *Kelly v. Jamaica,* para. 7.4.

guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation. Detention before and during the trial should be avoided to the extent possible.[91]

43. States should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age. It is important to establish a minimum age below which children and juveniles shall not be put on trial for criminal offences; that age should take into account their physical and mental immaturity.

44. Whenever appropriate**,** in particular where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator**,** counselling or community service or educational programmes, should be considered, provided they are compatible with the requirements of this Covenant and other relevant human rights standards.

VII. REVIEW BY A HIGHER TRIBUNAL

45. Article 14, paragraph 5 of the Covenant provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. As the different language versions (crime, infraction, delito) show, the guarantee is not confined to the most serious offences. The expression "according to law" in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognised by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out,[92] as well as

[91] See general comment No. 17 (1989) on article 24 (Rights of the child), para. 4.
[92] Communications No. 1095/2002, *Gomaríz Valera v. Spain*, para. 7.1; No. 64/1979, *Salgar de Montejo v. Colombia*, para.10.4.

which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal.[93] However, the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.[94]

46. Article 14, paragraph 5 does not apply to procedures determining rights and obligations in a suit at law[95] or any other procedure not being part of a criminal appeal process, such as constitutional motions.[96]

47. Article 14, paragraph 5 is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court[97] or a court of final instance,[98] following acquittal by a lower court, according to domestic law**,** cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.[99]

48. The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[100] A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.[101] However, article 14, paragraph 5 does not require a full

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[93] Communication No. 1089/2002, *Rouse v. Philippines,* para. 7.6.
[94] Communication No. 230/1987, *Henry v. Jamaica*, para. 8.4.
[95] Communication No. 450/1991, *I.P. v. Finland*, para. 6.2.
[96] Communication No. 352/1989, *Douglas, Gentles, Kerr v. Jamaica*, para. 11.2.
[97] Communication No. 1095/2002, *Gomariz Valera v. Spain*, para. 7.1.
[98] Communication No. 1073/2002, *Terrón v Spain*, para. 7.4.
[99] Idem.
[100] Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, para. 7.5; No. 623-627/1995, *Domukovsky et al. v. Georgia*, para.18.11; No. 964/2001, *Saidova v. Tajikistan*, para. 6.5; No. 802/1998, *Rogerson v. Australia*, para. 7.5; No. 662/1995, *Lumley v. Jamaica*, para. 7.3.
[101] Communication No. 701/1996, *Gómez Vázquez v. Spain*, para. 11.1.

retrial or a "hearing",[102] as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.[103]

49. The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal,[104] also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.[105] The effectiveness of this right is also impaired, and article 14, paragraph 5 violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision.[106]

50. A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor.[107]

51. The right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d), but at the same time also of article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an

[102] Communication No. 1110/2002, *Rolando v. Philippines*, para. 4.5; No. 984/2001, *Juma v. Australia*, para. 7.5; No. 536/1993, *Perera v. Australia*, para. 6.4.
[103] E.g. communications No. 1156/2003, *Pérez Escolar v. Spain*, para. 3; No. 1389/2005, *Bertelli Gálvez v. Spain*, para. 4.5.
[104] Communications No. 903/1999, *Van Hulst v. Netherlands*, para. 6.4; No. 709/1996, *Bailey v. Jamaica*, para. 7.2; No. 663/1995, *Morrison v. Jamaica*, para. 8.5.
[105] Communication No. 662/1995, *Lumley v. Jamaica*, para. 7.5.
[106] Communications No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.5; No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.3; No. 750/1997, *Daley v. Jamaica*, para. 7.4; No. 665/1995, *Brown and Parish v. Jamaica*, para. 9.5; No. 614/1995, *Thomas v. Jamaica*, para. 9.5; No. 590/1994, *Bennet v. Jamaica*, para. 10.5.
[107] Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 836/1998, *Gelazauskas v. Lithuania,* para. 7.2.

effective review of the conviction and sentence by the higher instance court.[108] The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.[109]

VIII. COMPENSATION IN CASES OF MISCARRIAGE OF JUSTICE

52. According to paragraph 6 of article 14 of the Covenant, compensation according to the law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.[110] It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time.

53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgement becomes final,[111] or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.[112]

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[108] Communication No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 5.8.
[109] See communications No. 750/1997, *Daley v Jamaica*, para. 7.5; No. 680/1996, *Gallimore v Jamaica*, para. 7.4; No. 668/1995, *Smith and Stewart v. Jamaica*, para.7.3. See also Communication No. 928/2000, *Sooklal v. Trinidad and Tobago*, para. 4.10.
[110] Communications No. 963/2001, *Uebergang v. Australia*, para. 4.2; No. 880/1999, *Irving v. Australia*, para. 8.3; No. 408/1990, *W.J.H. v. Netherlands*, para. 6.3.
[111] Communications No. 880/1999; *Irving v. Australia*, para. 8.4; No. 868/1999, *Wilson v. Philippines*, para. 6.6.
[112] Communication No. 89/1981, *Muhonen v. Finland*, para. 11.2.

IX. NE BIS IN IDEM

54. Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem.* This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction.

55. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.[113]

56. The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial.[114] Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.

57. This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant.[115] Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States.[116] This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.[117]

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[113] See United Nations Working Group on Arbitrary Detention, Opinion No. 36/1999 (Turkey), E./CN.4/2001/14/Add. 1, para. 9 and Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add. 1, para. 30.

[114] Communication No. 277/1988, *Terán Jijón v. Ecuador*, para. 5.4.

[115] Communication No. 1001/2001, *Gerardus Strik v. The Netherlands*, para. 7.3.

[116] Communications No. 692/1996, *A.R.J. v. Australia*, para. 6.4; No. 204/1986, *A.P. v. Italy*, para. 7.3.

[117] See, e.g. Rome Statute of the International Criminal Court, article 20, para. 3.

X. RELATIONSHIP OF ARTICLE 14 WITH OTHER PROVISIONS OF THE COVENANT

58. As a set of procedural guarantees, article 14 of the Covenant often plays an important role in the implementation of the more substantive guarantees of the Covenant that must be taken into account in the context of determining criminal charges and rights and obligations of a person in a suit at law. In procedural terms, the relationship with the right to an effective remedy provided for by article 2, paragraph 3 of the Covenant is relevant. In general, this provision needs to be respected whenever any guarantee of article 14 has been violated.[118] However, as regards the right to have one's conviction and sentence reviewed by a higher tribunal, article 14, paragraph 5 of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 when invoking the right to access a tribunal at the appeals level.[119]

59. In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).[120]

60. To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3 (g) prohibiting compulsion to testify against oneself or confess guilt.[121]

[118] E.g. Communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 823/1998, *Czernin v. Czech Republic,* para. 7.5.
[119] Communication No. 1073/2002, *Terrón v. Spain*, para. 6.6.
[120] E.g. communications No. 1044/2002, *Shakurova v. Tajikistan,* para. 8.5 (violation of art. 14 para. 1 and 3 (b), (d) and (g)); No. 915/2000, *Ruzmetov v. Uzbekistan,* para.7.6 (violation of art. 14, para. 1, 2 and 3 (b), (d), (e) and (g)); No. 913/2000, *Chan v. Guyana*, para. 5.4 (violation of art. 14 para. 3 (b) and (d)); No. 1167/2003, *Rayos v. Philippines*, para. 7.3 (violation of art. 14 para. 3(b)).
[121] Communications No. 1044/2002, *Shakurova v. Tajikistan,* para. 8.2; No. 915/2000, *Ruzmetov v. Uzbekistan,* paras. 7.2 and 7.3; No. 1042/2001, *Boimurodov v. Tajikistan*, para. 7.2, and many others. On the prohibition to admit evidence in violation of article 7, see paragraphs. 6 and 41 above.

61.If someone suspected of a crime and detained on the basis of article 9 of the Covenant is charged with an offence but not brought to trial, the prohibitions of unduly delaying trials as provided for by articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant may be violated at the same time.[122]

62. The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14[123] and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.[124] All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.

63. The way criminal proceedings are handled may affect the exercise and enjoyment of rights and guarantees of the Covenant unrelated to article 14. Thus, for instance, to keep pending, for several years, indictments for the criminal offence of defamation brought against a journalist for having published certain articles, in violation of article 14, paragraph 3 (c), may leave the accused in a situation of uncertainty and intimidation and thus have a chilling effect which unduly restricts the exercise of his right to freedom of expression (article 19 of the Covenant).[125] Similarly, delays of criminal proceedings for several years in contravention of article 14, paragraph 3 (c), may violate the right of a person to leave one's own country as guaranteed in article 12, paragraph 2 of the Covenant, if the accused has to remain in that country as long as proceedings are pending.[126]

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[122] Communications No. 908/2000, *Evans v. Trinidad and Tobago,* para. 6.2; No. 838/1998, *Hendricks v. Guayana*, para. 6.3, and many more.

[123] Communication No. 1051/2002 *Ahani v. Canada*, para. 10.9. See also communication No. 961/2000,
Everett v. Spain, para. 6.4 (extradition), 1438/2005, *Taghi Khadje v. Netherlands*, para. 6.3.

[124] See communication No. 961/2000, *Everett v. Spain*, para. 6.4.

[125] Communication No. 909/2000, *Mujuwana Kankanamge v. Sri Lanka*, para. 9.4.

[126] Communication No. 263/1987, *Gonzales del Rio v. Peru,* paras. 5.2 and 5.3.

64. As regards the right to have access to public service on general terms of equality as provided for in article 25 (c) of the Covenant, a dismissal of judges in violation of this provision may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary.[127]

65. Procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26, or disregard the equal right of men and women, in accordance with article 3, to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that "all persons shall be equal before the courts and tribunals," but may also amount to discrimination.[128]

[127] Communications No. 933/2000, *Mundyo Busyo et al. v. Democratic Republic of Congo,* para. 5.2.; No. 814/1998, *Pastukhov v. Belarus,* para. 7.3.
[128] Communication No. 202/1986, *Ato del Avellanal v. Peru,* paras. 10.1 and 10.2.