CHECKMATE: A COMPARATIVE EVALUATION OF THE PROTECTION OF FAIR TRIAL RIGHTS UNDER THE AFRICAN AND EUROPEAN HUMAN RIGHTS SYSTEMS

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EXECUTIVE SUMMARY

This thesis aims to conduct a comparative inquiry into the normative content of the fair hearing and its jurisprudence developed over the years by the African and European human rights systems; to compare the depth and rigour of such jurisprudence in the light of what each system has achieved or failed to achieve and to examine the strengths and weaknesses of the jurisprudence of each system. I argue that the fair trial norms and jurisprudence of the European human rights system are far more developed that those of the African system. The African Commission on Human and Peoples Rights has done a lot to expand the African fair trial regime. Nevertheless, the African system has a lot of catching up to do and as the African Court on Human Rights becomes the enforcement institution of the African system, this thesis points out areas where its fair trial jurisprudence require improvement.

This right to fair trial is common to both the African and European systems for the protection of human rights. It is contained in Article 7 of the African Charter on Human and Peoples' Rights and Articles 6 and 7 of the European Convention. Both provisions have spurned considerable deliberation in the jurisprudence of the two systems. Going through their norms and the jurisprudence developed by their respective implementing institutions, I have pointed areas of convergence and also areas of difference. We saw gaps in both these norms and jurisprudence and how the two systems responded in covering them. For some reasons, the European system has demonstrated its effectiveness shown so poignantly in the enforceable powers of its court supervised by the highest political institutions of the European Union. The African system is apparently hostaged by unaccountable political forces and its Commission, despite its best efforts, still remaining largely "a façade, a yoke that African leaders have put around [African] necks"

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INTRODUCTION

A little controversy between the United Nations and the government of Cambodia fore-grounded the establishment of the Extra-Ordinary Chambers in the courts of that country for the prosecution of criminal offences committed by the Khmer Rouge regime during the period 1975 – 1979. An estimated 1.7 million citizens of Cambodia were allegedly killed within that period.[1]

The U.N. began in April 1997 an investigation of the atrocities committed by the Khmer Rouge regime under the dictator, Pol Pot. A little while later, the government of Cambodia under Prime Minister Prince Norodom and his deputy addressed a letter to the then U.N. Secretary General, Kofi Anan in which they requested the "assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge (…)"[2] The U.N. General Assembly subsequently passed a resolution[3] asking Anan to act on the Cambodian request and mandating, if found necessary, a group of expects to investigate and bring to justice those responsible for the Khmer Rouge atrocities.

Things went very well thereafter. Anan constituted a group of three experts who toured Cambodia, obtained and evaluated information on those atrocities. They also examined the best possible means of bringing the perpetrators to trial following which they recommended the establishment of an ad hoc court to be sited in any other Asia-Pacific country other than Cambodia and that "the U.N. appoint the judges

[1] Mark E. Wojcik, Brooke M. Bennett, David C. Ianotti, Lisa A. Murphy & Annie Stritzke, *International Criminal Law*" 39 THE INT'L LAWYER, 283 (2005)
[2] *Id.*
[3] G.A. Res. 52/135, U.N. GAOR, 52 Sess., 70th Mtg., Agenda Item 112(b), at 16, U.N. Doc. A/RES/52/135 (1997)

[while] the prosecutors for the International Criminal Tribunal of Yugoslavia and the International Criminal Tribunal of Rwanda serve as prosecutors for the new tribunal"[4]

But things soon turned dramatically. Contrary to the recommendation of the group of experts, the government of Cambodia adopted a "Law on Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea". This court differed significantly from the one suggested by the U.N. Not only was it to sit inside Cambodia, its judges were to be drawn from Cambodia and from international justices. The U.N. demurred to be part of this arrangement. It argued, "Based on the current judicial system in Cambodia, the U.N. feared that a court with a majority of Cambodian judges could be heavily influenced and interfered with by the Cambodian Government"[5]

Official negotiation between the U.N. and the government of Cambodia[6] on the establishment of the court collapsed over this issue though the U.N. maintained contacts with the Cambodian authorities. Late 2002 the General Assembly of the U.N. passed another resolution, urging a resumption of official negotiation between the U.N. and the government of Cambodia. It entered in the resolution a caveat to the effect that the resumed negotiation should "ensure that the Extraordinary Chambers exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law" and emphasize "the importance of ensuring the

[4] See U.N. GAOR, 53d Sess., Annex, Agenda Item 110(b), at 35, U.N. Doc. A/53/850 (1999) available at <www1.umn.edu/humanrts/cambodia-1999.html> last visited March 30, 2008

[5] See *supra* note 1

[6] The Open Society Justice Initiative which "since its inception, has devoted substantial effort and resources to first ensuring that the court was created, and then working for its success," describes the negotiations as 'complex and tendentious" See *"Last best chance for Justice"* in OPEN SOC'Y JUST. INITIATIVE REP. ON DEV., 41, 42 (2005 –2007)

impartiality, independence and credibility of the process (…)"[7] In plain language the U.N. was to insist that the court applies the principles of fair trial in its proceedings.

The above introduction provides the background to the issue discussed in this thesis - the right to fair trial especially as it is applied in two co-existing supranational human rights systems. In discussing this issue, attention is concentrated on its normative content and the jurisprudence that surrounds is interpretation by the implementing structures of the African and European systems for the protection of human rights. It is a very important human right and among the most widely discussed in the human rights field.[8] As we could see from the U.N – Cambodian exchanges, this is for very good reasons. Upon it hangs the fate of many other human rights and failure to respect or protect it often impacts adversely on those other rights[9]. It is testament to the store, which the international human rights system places on the right to fair hearing that there has been an on-going struggle within the United Nations institutions to promote it to a non-derogable right[10].

The right to fair trial is common to both the African and European systems for the protection of human rights. It is contained in Article 7 of the African Charter on

[7] G.A. Res. 57/228, U.N. GAOR 57th Sess., 77th Plen. Mtg., Agenda Item 109(b), at 1-5, U.N. Doc. A/RES/57/228 (2002)

[8] See for example Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 HUM. RTS. Q. 294, 295 (2005)

[9] Amnesty International says "A fair trial is indispensable for the protection of other rights of particular interest to Amnesty International, such as the right to freedom from torture (…)" See <http://www.amnestyusa.org/International_Justice/The_Right_to_a_Fair_Trial/page.do…> last visited April 8, 2008. The point is reiterated by the African Commission on Human and Peoples Rights, which held in Civil Liberties Organization & Others v. Nigeria, (2001) AHRLR 75 at para. 30 that "The right to fair trial is essential for the protection of all other fundamental rights and freedoms"

[10] Lawyers Committee for Human Rights, *"What Is a Fair Trial? A Basic Guide to Legal Standards and Practice"* March 2000. See also Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: *"The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening,"* Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 59-62 available at <http://www1.umn.edu/humanrts/hrcommittee/hrc-annual94.htm>last visited March 30, 2008

Human and Peoples' Rights[11] and Articles 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[12] as amended by Protocol No.11. As is to be expected, both provisions have spurned considerable deliberation in the jurisprudence of the two systems. The right to fair trial is also doubtless the most popular and the one most usually invoked by petitioners seeking redress through the two systems. In the words of Jacot – Guillarmod "Article 6 of the European convention on Human Rights plays a central role within the system of protection established by that instrument. It is generally agreed that this provision is the most frequently invoked of the convention, both at national and international levels; it is also the subject of rich case law and extensive literature"[13]. This is confirmed in another text where the authors noted, "Procedural rights, those provided in Article 6 and those in Article 5 (…) have been the most commonly invoked before the European Court of Human Rights. About half the cases decided through 1993

[11] "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal"

[12] [1] In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[2] Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[3] Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him:; (b) to have adequate time and facilities for the preparation f his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[13] Olivier Jacot – Guillarmord "*Rights Related to Good Administration of Justice (Article 6)*" in J. Macdonald, F. Matscher and H. Petzold, ed., THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, (1993) The fair trial provisions of the European Convention have also been found useful as "the starting point for the most important interpretations that give protection to some economic and social rights" See Martin Scheinin, *Economic and Social Rights as Legal Rights* in A. Eide, C. Krauss & Alan Rosas eds. ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 41 (1995)

involved, at least in part, issues based on one or both of these Articles"[14] What is true of the European system is significantly true also of the African system.[15]

This thesis aims primarily to conduct a comparative inquiry into the normative content of the fair hearing and its jurisprudence developed over the years by the African and European human rights systems; to compare the depth and rigour of such jurisprudence in the light of what each system has achieved or failed to achieve and to examine the strengths and weaknesses of the jurisprudence of each system. I shall argue that for a variety of reasons the fair trial norms and jurisprudence of the European human rights system are far more developed that those of the African system. The African Commission on Human and Peoples Rights has done a lot to expand the African fair trial regime. Nevertheless, the African system has a lot of catching up to do and as the African Court on Human Rights becomes the implementing institution of the African system, this thesis points out areas where its fair trial jurisprudence require improvement.

One may be concerned about the utility of comparing the work of an African Commission with disproportionate political overtones and influence, and that of a European Court that has earned and asserted its independence for several years. Or why it is important to make a comparison of the work done by a Commission whose

[14] Mark W. Janis, Richard S. Kay & Anthony W. Bradley, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS, 376 (1995)

[15] According to Udombana, fair trial rights either standing alone or in conjunction with violations of other rights account for almost fifty percent of the cases lodged before the African Commission on Human and Peoples Rights. See *infra* note 21 at 311

first session was in 1987 and a court that was established some 28 years earlier.[16] Wouldn't this be about matching apples and oranges? If it were so, it may be a limited disincentive to this thesis. One writer argues, "The fact that after careful analysis the aspects to be compared in each legal system remain in some important senses apples and oranges is not bad"[17] According to him it is the real power of the comparative endeavour that out of the very fact of comparing "apples" and "oranges" the comparative researcher is able to construct a "fruit".

Consequently, the outcome of this research would be useful beyond its immediate goals for some important reasons. As the African system prepares for the take-off of its Court on Human Rights, it may have some lessons to learn and pitfalls to avoid by accessing the best practices available through the two systems in comparison here. In a sense, the "fruit" that springs from this thesis might be the one to germinate and grow into an African regional court that is useful to the objectives of its promoters.

Though many learned scholars would ordinarily argue with significant justification that this thesis is but comparing apples and oranges, such views may appear presumptuous given that analyses of the fair trial norms and jurisprudence of the two systems have been largely autonomously conducted without exploring their comparative dimensions. There are writers who have devoted extensive time analysing the structure, norms and jurisprudence of the European human rights

[16] The African Commission on Human and Peoples' Rights is established by Article 30 of the African Charter and was inaugurated on November 2, 1987. The European Court of Human Rights gained the required number of signatures to bring it into existence on September 3, 1958, the judges were elected January 21, 1959 and court opened on April 20, 1959. See Chidi A. Odinkalu "*The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System*" 2 AFR. HUM. RTS L. J. 225 (2001), Egon Schwelb "*On the Operation of the European Convention on Human Rights"* 18 INT'L ORG. 559 (1964)

[17] John C Reitz, "*How to Do Comparative Law*" 46 AM. J. COMP. L., 617 (1998)

system.[18] Others have given similar attention to the African system.[19] A few others have attempted what on their face value might look like comparative examination of the two systems. But coming from completely different strictures unrelated to the inquiry covered by this thesis, they contain information only minimally relevant to its overarching objectives.

Barnidge Jr. does a comparative work on the African and the Inter-American systems but with a very narrow focus on the right to an impartial hearing on detention, trial within a reasonable time and the presumption of innocence.[20] Heyns, Strasser and Padilla did what they called a "schematic comparison" of the European, Inter-American and African systems also with doubtful relevance to the goals of this thesis.[21] Their effort concerned neither the jurisprudence nor case law of the two systems in general terms or in the particular area of fair trial. Udombana not only analyses the fair trial norms of the African Commission but also examines how the Commission has, using foreign jurisprudence, developed its depth and supplemented its rather sparse content but again from a broadly non-comparative context.[22]

Nmehielle in his work devoted quite some time to the fair hearing jurisprudence of the African Commission. He also made references to the European case law but only as a means of drawing attention to gaps in both the norms and case

[18] See for example Paul L. McKaskle, *"The European Court of Human Rights: What It Is, How It Works, and Its Future"* 40 U.S.F.L. REV. 1 (2005)
[19] Kenneth Asamoa Acheampong, "*Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and Political Rights and Socio-Economic Rights*" 1 AFR. HUM. RTS L. J. 185 (2001)
[20] Robert P. Barnidge Jr. *"The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the Right to an Impartial Hearing on Detention and Trial Within a Reasonable Time and the Presumption of Innocence"* 4 AFR. HUM. RITS L. J. 117 (2004)
[21] Christof Heyns, Wolfgang Strasser & David Padilla, *"A Schematic Comparison of Regional Human Rights Systems"* 3 AFR. HUM. RTS L. J. 76 (2003)

[22] Nsongurua J. Udombana *"The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa"* 6 AFR. HUM. RTS L. J. 299 (2006)

law of the African system[23]. It was not for any worthwhile comparative reasons. Steiner, Alston and Goodman also tried to do a comparative, but in this case, of all the three regional systems in place.[24] According to them, they not only restricted themselves to the "distinctive aspect of each system" but put all their efforts in describing "the norms, institutional structure and processes" of the three systems. Their method showed how their effort in this respect was limited in scope. They said the European system is marked by "its productive and effective court" and the Inter-American system by "its Commission on Human Rights, a powerful organ". About the African system, they simply said it "is the least developed institutionally" Their work concerned neither jurisprudence nor case law.

There is obviously a yawning gap in this area of comparative legal analysis. The tendency exists rather unfortunately to dismiss the African human rights system as malnourished and having nothing to offer the other regional or global systems. Murray criticizes this propensity, which she blames on the "neglect by international human rights discourse views outside of the ruling, or dominant, Western and European states"[25] with the result that international human rights literature hardly takes note of African institutions. This thesis aims to bridge this gap not only by bringing the African human rights jurisprudence closer to its European counterpart but narrowly focusing it on a right both systems consider to be very important.

What are the similarities and differences in the fair trial norms and jurisprudence of the African Commission on Human and Peoples' Rights and the European Court of Human Rights? Do their respective standards admit of any

[23] Vincent Orlu Nmehielle, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE AND INSTITUTIONS 94, 104 (2001)

[24] Henry Steiner, Philip Alston & Ryan Goodman, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, 925 (2008)

[25] Rachel Murray, *"International Human Rights: Neglect of Perspectives from African Institutions"* 55 C.L.Q 193 (2006) cited in Steiner, Alston & Goodman, *supra* note 24 at 925

functional equivalents? In this age of universalism and relativism, are there particularistic European or African standards in the development of their respective fair trial norms or jurisprudence? Are there structural or contextual disparities that push the dissimilarities between them to their outer margins? Are there adaptable strategies available to strengthen the weaker of the two systems? In particular would an understanding of the similarities and differences be in any way useful to the work of the proposed African Court of Human Rights?

This thesis adopts to a large extent the comparative analytical method in the functional sense as described by Zweigert and Kotz.[26] According to them, this method relies on a four – layer approach involving the following: posing research questions in purely functional terms without reference to the concepts of the legal system with which the writer is very familiar, presenting an objective report from critically evaluating each of the compared systems, using inclusive syntax and vocabulary capable of accommodating heterogeneous legal systems and finally engaging in a critical evaluation of the two systems compared. But for obvious reasons, this thesis shall dispense with the third approach. Syntax and vocabulary have very limited value to this thesis because the content, goal, philosophy and jurisprudence of the two systems being compared belong to a common universal system the only obvious distinction being that they operate within two specific regions. Their syntax and vocabulary, though they may lead to varying results in actual application given both context and interpretation, are very much the same. There is therefore not enough difference between them in this regard to warrant a specific comparative inquiry in that direction.

[26] Konrad Zweigert & Hein Kotz, AN INTRODUCTION TO COMPARATIVE LAW, 34, 36 (1998), cited in Hang W. Tang *"Taking It Back: An Anglo-American Comparative Study On Restitution for Mistaken Gifts"* (Hauser Global Law School Program, Global Law Working Paper 07, 2004) available at < http://www.nyulawglobal.org/workingpapers/documents/GLWP0704Tang.pdf > last visited July 12, 2008

Bringing this method home might therefore require adhering to the counsel of Reitz to not only focus attention on the similarities and differences of the two systems but also in assessing their significance to the thesis to take into account "the possibility of functional equivalence"[27] This thesis shall also use quantitative and qualitative data as comparative measuring tools. It will require the application of statistical information from the mechanisms of the two systems. The need to satisfactorily interrogate the norms and case law of the systems being compared makes relevant the application of traditional legal reasoning and argumentation. But because of the obvious disparity in the quantity and depth of jurisprudence developed

by the two systems[28], this thesis would in the main be driven by the work of the African system. Consequently, case-law analysis will be concentrated on those areas where both systems have established the standards and avoiding as much as possible those areas where the European system has moved very far ahead. This will, however, be without prejudice to recommendations that could be made for development of the African system in those areas.

The first chapter of this thesis examines the conceptual and theoretical issues surrounding the right to fair trial. It traces the historical origins of the right and clarifies 'fair trial' and 'fair hearing'; whether they mean the same thing or whether they differ. Why do trials have to be fair? What is the relationship between fair trial and the ideas of justice and due process? The second chapter analyzes the normative and jurisprudential content of components of the right to fair trial common to the African and European human rights documents and conducts a comparative analysis of their respective case – law. It identifies gaps in the African norms and how the

[27] See *supra* note 12

[28] "(…) the African system has not yet yielded anywhere near the same amount of information and 'output' of recommendations or decisions – state reports and reactions thereto, communications (complaints) from individuals about state conduct, studies of 'situations' or investigations of particular violations – as have the other systems" See Henry Steiner, *et al*, *supra* note 18

African Commission on Human and Peoples Rights has supplemented the contents of those norms by borrowing from comparative regional jurisprudence, including the European system.

Chapter three examines those components of the right unique to the European system in the sense that those components are not covered by the text of the African Charter. In the course of analysis, efforts would be made to assert the relevance of those components by way of contributing to on-going debates whether or not the African Charter requires amendment to accommodate those absent components. The latter part of the chapter would dwell on the impact of context on the overall development of fair trial norms and jurisprudence within the two systems. The last chapter would draw conclusions based on the analysis and also make recommendations for the strengthening of the weaker of the two systems.

Chapter 1

1.1 Fair Trial: Historical and Conceptual Foundations

This chapter examines the historical, conceptual and theoretical foundations of the fair trial principle. What is fair trial and why is the right to fair trial important and why is it so crucial to many other rights? What are its origins and why is it necessary that trials be fair? Is fair trial the same as 'due process' in the American sense[29] or 'natural justice' in the way that concept is universally acknowledged? Could it possibly relate to 'principles of fundamental justice' in the sense of the Canadian Charter of Rights and Freedoms?[30] The understanding of fair hearing considered applicable to this thesis is that which accepts it as being shades of on the one hand natural justice and on the other due process in its procedural context.

1.1.1 Evolution of the Right to Fair Trial

Many who write about the right to fair trial hardly start from a definition. They prefer instead to describe it and its contents. According to a one time Justice of the U.S. Supreme court, "as a historic and generative principle [it] precludes defining, and thereby confining …"[31]But as a right in the form that it is known today, it has a very long history signposted by struggles of different peoples to free themselves from the arbitrariness of power. The manner in which the primitive society dealt with serious crimes, like murder, painted a picture of this rather long and arduous process. Uwe Wesel describes a procedure in which the accused, already presumed to be the culprit, seeks refuge in the hut of a witch doctor and whose only right is immunity from harm

[29] The Constitution of the United States of America provides in its Fifth Amendment that 'No person shall (…) be deprived of life, liberty and property, without due process of law (…)"
[30] Section 7 of the Canadian Charter of Rights and Freedoms provides "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"
[31] Justice Frankfurter in Rochin v. California, 342 U.S. 165 (1952)

so long as he remains inside the hut.[32] Bodenhamer, writing about pre-1066 England, for example, said criminal proceedings then were "oral, personal, accusatory…"[33] Trechsel further observes that medieval evidentiary rules contained several irrational methods including "compurgation (oath-taking), ordeal and battle"[34]

Hammurabi of ancient Babylon is credited with the first recorded attempt to lay down fair trial practices by requiring that judges hear at least both sides of a case,[35] thereby "[holding] back the strong from oppressing the weak"[36] It is also stated that in ancient China there were minimal procedures for notice and hearing when people were charged with an offence. More importantly, reference is often made to Jesus Christ who, when the Romans captured and put him to trial for sundry offences, was not condemned until he had been given the opportunity to reply and present evidence. On their parts the Greeks and Romans offered juries and professional orators.[37] It should be of interest that at these times, the will of rulers was the supreme law and citizens had little protection from their whims and caprices.[38]

1.1.2 The Magna Carta

As for its modern conception, the Magna Carta is generally regarded as the landmark document from which fair trial rights as they stand today evolved. In the United States case of *Griffin v. Illinois*[39] Justice Black stated:

> *Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to*

[32] See a fuller description of this process in Stefan Trechsel, *"Why must Trials be Fair"* 31 ISR. L. REV. 94 (1997)
[33] David J. Bodenhamer, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY, 11 (1992)
[34] *Id.*
[35] See *"Due Process of Law: Procedural and Substantive Issues"* at <http://faculty.ncwc.edu/mstevens/410/410lect06.htm> last visited on 24/12/2007
[36] Ronald Banaszak Sr., *"Fair Trial Rights of the Accused: A Documentary History"* (2002) available at <http://www.questia.com/PM.qst?a=101365042> last visited on 24/12/2007
[37] See *supra* note 26
[38] *Id.*
[39] Griffin v. Illinois, 351 U.S. 12 (1955)

> *that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Carta: 'To no one will we sell, to no one will we refuse, or delay, right or justice…No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled or anywise destroyed; nor shall we go upon him or send upon him, but by lawful judgment of his peers or by the law of the land' These pledges were unquestionably steps towards a fairer and more nearly equal application of criminal justice*[40]

The Magna Carta was not arrived at because of any worthwhile commitment to its ensuing landmark consequences. It resulted instead from a contest between the barons and King John in 1215. The cruel and arbitrary King needed money to finance his numerous expansionist wars and invariably levied all kinds of taxes on his subjects. After the King's defeat in a war with France in 1214, he immediately commenced plans for another war and new taxes to finance it.[41] This led to a revolt by the barons, who then drafted the document and forced the King to sign it. It should be noted though that the rights, which the Magna Carta contained, did not apply to commoners or serfs. They applied only to freemen.[42]

The Magna Carta however did not much curb the powers of the British King as it did expand the rights of the subjects and the years following its adoption witnessed a series of struggles and face-offs involving the Kings who tried to preserve their powers and Englishmen seeking to circumscribe them. "In these confrontations, sometimes the king maintained power and authority; on other occasions the people gained additional protections in the form of new guarantees of rights"[43]

[40] The Magna Carta, Articles 38 - 41
[41] *supra* note 31 See also "*English Bill of Rights*" <http://bessel.org/billrts.htm> last visited 25/12/2007
[42] *Id.*
[43] See *supra* note 31

1.1.3 The English Bill of Rights

Another major landmark was reached in 1689 when the British Parliament passed the English Bill of Rights. That year the elite in England forced King James to flee and installed in his place William of Orange and his wife Mary. As part of the oath at their installation, the new King and Queen swore to obey the laws of Parliament and to be guided by its decisions in all their actions.[44] This concession has been called the "Bloodless Revolution" or the "Glorious Revolution."[45]

Among its more important provisions the Bill of Rights 1689 stated that "excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" It also provided that "all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void"[46] According to Davidson " While the 'human rights' element of the Bill of Rights might appear to be slight and biased in favour of a particular class of citizens, nevertheless the whole context of the instrument was of fundamental importance, since it sought to replace the vagaries and excesses of arbitrary monarchical absolutism with parliamentary constitutional legitimacy"[47]

1.1.4 The Enlightenment Era

But the most important gains in the evolution of the right to a fair trial were made during the time of enlightenment during which several philosophers propounded the theory of "the inherent and unrelinquishable dignity of the individual human being"[48] The writings of the likes of John Locke, Thomas Hobbes, Hugo Grotius, Immanuel Kant and Jean Jacques Rousseau shaped the understanding of rights during this period and provided the plank upon which the revolutionary movements of that era built their

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Scott Davidson, HISTORICAL DVELOPMENT OF HUMAN RIGHTS, 7 (1993)
[48] *supra.* note 27

campaigns. Locke and Hobbes in particular shared in a philosophy which identified rights "with spheres of personal freedom"[49] While Locke said the idea of liberty is the idea of a power in any agent to do or forbear any particular action, Hobbes observed that "my right is a liberty left to me by law" and also "consisteth in liberty to do or forbear"[50]

Locke also drew a line of distinction between legitimate and illegitimate civil governments. While the former arises from the explicit consent of the governed the latter is established by force. Those who consent to civil authority transfer to the government their extant right to execute the law of nature and of being judges in their own causes. "These are the powers which they give to the central government, and this is what makes the justice system of civil governments a legitimate function of such governments"[51] The aim of legitimate civil governments, he said, is to preserve the rights to life, liberty, health and property of its citizens, and to prosecute and punish those of its citizens who violate the rights of others. "In doing this it provides something unavailable in the state of nature, an impartial judge to determine the severity of the crime and to set a punishment proportionate to the crime"[52]

1.1.5 The time of the Revolutions

The writings of the enlightenment philosophers influenced much of the revolutions of the 18th century especially in the United States and France. For example in "Seeking to disengage the [American] colonies from British rule following dissatisfaction over the levels of taxation and lack of representation in the British Parliament" the

[49] Martin P. Golding, *"The Concept of Rights: A Historical Sketch"* in Elsie L. Bandman & Bertram Bandman, BIOETHICS AND HUMAN RIGHTS, 44 (1978)
[50] *Id.*
[51] "Stanford Encyclopaedia of Philosophy" available at <http"//www.plato.stanford.edu/entries/locke> last visited on 25/12/2007
[52] *Id.*

American founding fathers took solace in the writings of Locke and French philosophers Montesquieu and Rousseau[53]. In the American Declaration of Independence[54], it was loudly proclaimed "We hold these truths to be self-evident, that all men are created equal, and that they are endowed by their creator with certain unalienable rights…"

Of particular note and significance too were the writings of Thomas Paine who first translated the French Declaration of the Rights of Man and Citizen. In his major work published at the time of the French Revolution, he argued "A man by natural right, has a right to judge in his own cause; and so far as the right of mind is concerned, he never surrenders it: but what availeth it him to judge, if he has not power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society of which he is a part, in preference and in addition to his own"[55]

But while neither the American Declaration of Independence nor the subsequent American constitution identified what those "unalienable rights" were, the French in their Declaration of the Rights of Man and Citizens of 1789 called those rights by name, including the right relevant to this thesis[56]. It did not, however, mean that the American colonies had no idea of what rights are unalienable or their specific contents. For example, it was already well known what they were in Pennsylvania and

[53] *supra* note 43
[54] Signed in Congress on July 4, 1776 by representatives of the thirteen United States of America available at <http://www.archives.gov/national-archives>
[55] Thomas Paine, THE RIGHTS OF MAN, Penguin Classics Reprint (1985)
[56] The French Declaration made the following significant provisions: (VII) No man may be accused, arrested or detained except as determined by law, and according to the forms it has prescribed. Those who solicit, promote, execute or cause to be executed arbitrary orders must be punished; but every citizen summoned or apprehended by virtue of the law must obey instantly; he renders himself culpable by resistance. (VIII) The law must impose no penalties other than those, which are absolutely and clearly necessary, and no one may be punished except by virtue of a law enacted and promulgated prior to the offence, and lawfully applied. (IX) Every man being presumed innocent until he has been declared guilty, it becomes unavoidable to arrest him, any severity, which is not necessary to secure his person, must be strictly repressed by law.

New York, two of the more influential colonies at that time. They had each established statements about citizens rights, setting out in clearer detail what specific rights are actually guaranteed from a list of many such rights that could actually be guaranteed.[57]

Speaking specifically about Pennsylvania, it introduced two documents – the Frame of Government[58] and more importantly the Charter of Privileges. The second part of the former document contained a statement of rights including the right of public trial, the right to bail and the right of the accused to appear in court to plead his or her case.[59] The latter document did not contain so many rights but "it did contain several rights that laid the foundation for the Sixth Amendment and the due process clause" of the American Constitution. It allowed the accused in a criminal trial the right to call witnesses and have a counsel and also provided that every person would be entitled to "ordinary course of justice", in other words due process.[60]

The drafters of the American constitution, however, did not deem it right to include a list of the rights guaranteed to individuals[61]. It was not until 1791 that, through a number of amendments, those rights were specifically set forth.[62] Among the rights guaranteed by the amendments relevant to this thesis are those found in the Fifth Amendment protecting the right to a jury trial for capital and other infamous crimes, right not to be twice subject to the same offence, the right against self

[57] *supra* note 32
[58] *Id.* William Penn, a Quaker with personal experience of religious discrimination, authored the document.
[59] *Id.*
[60] The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and be informed of the nature of the cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of Counsel for his defence"
[61] The only exceptions were in Article 1 Section 9 of the Constitution preserving the Writ of Habeas Corpus and prohibiting the passing if Bill of Attainder or ex post facto law.
[62] The first ten amendments to the Constitution were passed by Congress on September 25, 1789 and ratified by three-fourths of the states on December 15, 1791. See Louis W. Koenig, TOWARD A DEMOCRACY: A BRIEF INTRODUCTION TO AMERICAN GOVERNMENT, 492 (1973)

incrimination and the right not to be deprived of life, liberty or property without the due process of law. The Sixth Amendment[63] further guaranteed several fair trial rights applicable in criminal proceedings, the Seventh Amendment preserved trial by jury for certain other offences not of a capital nature while the Eighth Amendment banned excessive bail and fines and as well cruel and unusual punishments.

What was the state of human rights and specifically the right to fair trial in international law at this time? Even though the notion of individual rights found accommodation in several domestic legal systems as we have seen with Great Britain, United States and France, at the international level it struggled for relevance. Forced into submission by the Westphalian conception of state sovereignty and the degree to which other states could interfere in how states treated their citizens[64], international human rights law only blew muted trumpets[65]. Yet many jurisdictions recognized the value of enshrining basic fair trial and due process rights.

For example, the Belgian constitution of 1831 was known to have had "a considerable influence on constitutional developments all over Europe"[66] at this time, and contained guarantees of those classical freedoms "deemed to constitute a

[63] See *supra* note 25

[64] Christopher Gane & Mark Mackarel, Eds. HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE (1997) where it was argued "Legal and political philosophy in the 19th century was not particularly favourable to the development of internationally recognized human rights. The dominant theories of international law placed the interests of the state at the centre stage. The individual was not recognized as a subject of international law, and the concept of state sovereignty, so central to traditional international law thought, was profoundly hostile to the suggestion that a state could be called to account for the manner in which it treated its subjects" See also Jack Donnelly, INTERNATIONAL HUMAN RIGHTS: DILEMMAS IN WORLD POLITICS (1993), Christian Tomuschat, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2003)

[65] "The present foundations of international law with regard to sovereignty were shaped by agreements concluded by European states as part of the Treaties of Westphalia in 1648. After almost 30 years of war, supremacy of the sovereign authority of the state was established within a state of independent and equal units as a way of establishing peace and order in Europe. The core elements of state sovereignty were codified in the 1933 Montevideo Convention on the Rights and Duties of states. They include three main requirements: a permanent population, a defined territory and a functioning government. An important component of sovereignty has always been an adequate display of authority of states to act over their territory to the exclusion of other states" See <http://www.idrc.ca/en/ev-28492-201-1-DO_Topic.html> last visited 27/12/2007

[66] See Tomuschat, *supra* note 62 at 26, 27

necessary component of a modern constitutional text"[67] It protected individual liberty to the extent that no one could be prosecuted except in cases provided for by law while also prohibiting arrest without warrant.[68] It disallowed the establishment or enforcement of penalties outside the law[69] as well as the deprivation of property except for a public purpose and according to forms established by law, including the payment of compensation[70]. The constitution further proscribed punishment by confiscation of property[71] and the total deprivation of civil rights[72].

The Belgian model inspired similar provisions in the 1850 constitution of Prussia, the largest German state at the time. The said constitution had a rather long section containing 39 articles "On the Rights of the Prussians"[73] More national constitutions followed in enunciating those rights. The 1919 German Weimer Constitution not only set new norms and entrenched the classical freedoms but also expanded the rights to include new ones, mostly of the economic, social and cultural type.[74] On its part, the 1937 Irish constitution did not restrict itself to the rights terminology. It included in Article 45 a provision on "Directive Principles of Social Policy"

[67] *Id.*
[68] art. 7
[69] *Id*. art. 9
[70] *Id.* art. 11
[71] *Id.* art. 12
[72] *Id.* art. 13
[73] art. 3 – 42. See *supra* note 63
[74] *Id*. Some countries outside Europe and the United States appeared also to have incorporated those rights and freedoms into their own constitutions. Mary Ann Glendon, writing about developments that influenced the drafting of the Universal Declaration of Human Rights in 1948 noted the impact of a large bloc of states from Latin America at the San Francisco conference, "the largest single bloc at the conference" according to her. "Among them at that time" she continued, "were several that were struggling to establish constitutional democracies (…). Their focus was on the rights that they had recognized in their own twentieth –century constitutions and were then internationalizing in a draft document that would become the 1948 American Declaration of Rights and Duties" See Mary Ann Glendon, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 15 (2001)

1.1.6 Developments after the Second World War

The atrocities of the Second World War and the holocaust forced the international community to rethink the issue of state sovereignty. Because the war arose from how the German government not only oppressed its own citizens but also exported this oppression abroad, there was the feeling that states could no more be trusted to apply the right discretion in treating their citizens and that state action in this regard should be open to the scrutiny of a civilized world[75]. Constitutional rights had to give way to international human rights.[76]

Accordingly, securing basic human rights was a major war-aim of the allied forces in fighting the Germans. During discussions for a new international organization in 1944 at Dumbarton Oaks, promotion of respect for human rights was included as one of the principal purposes of the proposed organization.[77] However, the true test of this commitment was only to be seen in how the allied powers treated those alleged to be responsible for the atrocities of that war. As would be seen presently, the right to a fair trial as internationally recognized crystallized from these developments and what are known now in history as the Nuremberg Trials[78].

Given the degree of atrocities allegedly perpetrated by those brought to the trials, it was open to question whether those indicted would be permitted the luxury of fairness which they so blatantly denied their victims. But the Nuremberg charter was clear and unequivocal. In Article 16 it spoke of ensuring "fair trial for the defendants" and

[75] See Henkin, *et al* note 83 *infra*
[76] *Id.*
[77] *Id.*
[78] On August 8, 1945 the triumphant allied powers of the United States, France, United Kingdom, Northern Ireland and Union of Soviet Socialist Republics signed the Charter of the International Military Tribunal, which sat at Nuremberg, Germany trying those indicted under the charter. One writer states that "In the exercise of their legislative authority, the Allies renounced suggestions from within that Axis leaders be summarily executed and instead established international criminal tribunals to prosecute German and Japanese defendants – 'one of the most significant tributes that power has ever paid to reason'" See Beth Van Shaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals* (Santa Clara University Sch. of Law, Legal Studies Research Paper Series, Working Paper No. 47, December 2007), available at <http://ssrn.com/abstract=1056562>

outlined procedures to make this realizable. Those accused were to be allowed translation rights, the right to conduct their cases in person or with the assistance of counsel and the right personally or through counsel of their choice to present evidence in support of their defence and also to cross-examine witnesses called by the prosecution.[79]

This was later confirmed by the tribunal itself during the trials when it said: "Under the Anglo-Saxon system of jurisprudence every defendant in a criminal case is presumed to be innocent of an offence charged until the prosecution, by competent, credible proof, has shown his guilt to the exclusion of every reasonable doubt"[80] Given this background, it was asserted that hardly anyone who followed the Nuremberg trials could escape the conclusion that the defendants received a measure of fairness and justice much greater than the circumstances warranted.[81]

Questions remained though about the depth of fairness allowed by the Nuremberg Charter. According to one of the defendants, Karl Brandt, "the sentence has been established before hand"[82] seeking to emphasize the futility inherent in the expectation "that a victor could (…) judge a loathed enemy with the degree of objectivity necessary for a fair trial"[83] Another writer states that "What makes for a good 'morality play' tends not to make for a fair trial. And if it is the simplifications of melodrama that are needed to influence collective memory then the production had best be staged somewhere other than in a court of law"[84]

[79] *Id.* at art. 16 (c) – (e) Gerry Simpson, *"War Crimes: A Critical Introduction"* in THE LAW OF WAR (T.L. McCormack & G. J. Simpson eds, 1997) where he argues: "it is clear in an area of law so politicized, culturally freighted and passionately punitive as war crimes there is need for even greater protections for the accused"

[80] Horst H. Freyhofer, THE NUREMBERG MEDICAL TRIAL: THE HOLOCAUST AND THE ORIGIN OF THE NUREMBERG MEDICAL CODE, 87 (2004)

[81] *Id.* at 86

[82] See page 2622 of the proceedings

[83] Freyhofer, *supra* note 77 at 86

[84] Mark Osiel, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW, 59 (1999)

Yet the most severe charge raised against the Nuremberg process was its obvious disregard for the principle *nullum crimen sine lege*.[85] The Charter created among other offences "crimes against humanity"[86] and this only after the defendants had been arrested. Thus, though the Charter established new rules of international law, "they were immediately and then intermittently thereafter, impugned for their retroactive application"[87]

Nevertheless the point had been made about the need for due process and fairness in criminal proceedings. This was given practical effectuation in the Universal Declaration of Human Rights[88], which followed the creation of the United Nations and the adoption of its constitutive Charter.[89] Article 10 of the Declaration provides that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" Though the UDHR was and still is an idealistic, non-binding document, it is argued that its provisions are now regarded as having become the accepted norms of customary international law, including its provisions on the right to fair trial.[90]

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[85] In response to this charge, the Nuremberg Tribunal reasoned, "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation on sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished" The judgment is reprinted in 41 AM. J. INT"L L. 172 (1947)

[86] Article 6(c). The phrase "crimes against humanity" is said to have entered the vocabulary of human rights from a letter written by George Washington Williams, a Baptist Minister and journalist, to the U.S. Secretary of State Blaine dated 15 Sept. 1890. Williams used the term to describe the activities of Kind Leopold of Belgium in the Congo. See Adam Hochschild, KING LEOPOLD'S GHOST, 112, 317 (1998), cited in Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher & David Leebron, HUMAN RIGHTS (1999)

[87] See Freyhofer, *supra* note 80

[88] G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

[89] June 26, 1945, 59 stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945

[90] Daniel C. Prefontaine & Joanne Lee, *The Rule of Law and the Independence of the Judiciary*, Paper prepared for the World Conference on the Universal Declaration of Human Rights, Montreal, for the International Centre for Criminal Law Reform and Criminal Justice Policy, (Dec. 7, 8 & 9, 1998) available at <http://www.icclr.law.ubc.ca/pubications/Reports/RuleofLaw.pdf> last visited on June 7, 2008

But the real significance of the importance attached to fair trial rights followed in 1949 during the elaboration of the Geneva Conventions relating to the treatment of prisoners of war. The Conventions had an article 3 (known more popularly as "common article 3') dealing with minimum rules during armed conflict of a non-international character by which the contracting parties agreed to be bound. One of those rules proscribed "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"[91] Further international instruments have also recognized the wilful deprivation of a prisoner of war or a civilian of the rights to fair and regular trial as among the grave breaches of international humanitarian law.[92]

1.1.7. Fair Trial as a right in contemporary international law

Over time the right to fair trial has acquired great international importance as its major principles are embedded in several international treaties and regional instruments. One writer asserts that "The right to a fair trial might seem an unimpeachable example or "paradigm case" of what we mean by a "right" and certainly it is so widely believed that people have such a right that to claim they generally do not strikes one

[91] Article 3(1) (d) of the Third Geneva Convention of 12 August 1949. Article 84 thereof provides that "In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and in particular, the procedure of which does not afford the accused the rights and means of defense (…)" Some the guarantees were mentioned in Article 99 as follows: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed. No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having an opportunity to present his defense and the assistance of a qualified advocate or counsel" See also Article 75, Protocol 1 and Article 6, Additional Protocol of 1977.

[92] See for example art. 85 (4) (e) United Nations Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Jun. 8, 1977

initially as absurd"[93] Apart from the Universal Declaration of Human Rights, the right is very much present in almost all subsequent treaty-based human rights instruments, suggesting how fair it is "to say that there exists conventional minimum fair trial standards and guarantees that universally apply to all legal systems of the world notwithstanding the rich diversity of legal cultures"[94]

Such instruments include the European Convention on Human Rights and Fundamental Freedoms,[95]International Covenant on Civil and Political Rights,[96] African Charter on Human and Peoples Rights,[97] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[98] the Convention on the Rights of the Child,[99] and the African Charter on the Rights and Welfare of the Child.[100]

Though the right to fair trail enjoys such transcendental importance in international law[101], it is yet a derogable right. It does not fall within the non-derogable rights mentioned in Article 4 (2) of the International Covenant on Civil and Political Rights. Under the European Convention, it is absolute but derogable having

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[93] See *infra* note 101

[94] M.C. Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Law*, 3 DUKE J. COMP. & INT"L L. 235, 236 (1993)

[95] (E.T.S. 5) 213 U.N.T.S 222 entered into force Sept. 3, 1953

[96] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

[97] Adopted Jun. 27, 1981 O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 entered into force Oct. 21, 1986

[98] G.A. res. 39/46, annex, 39 U.N. G.A.O.R. Supp. (No.51) at 197, U.N. Doc. A/39/51 (1984), entered into force Jun. 26, 1987

[99] G.A. res. 44/25, annex, 44 U.N. G.A.O.R. Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990

[100] OAU Doc. CAB/LEG/24.9/49 (1990), art. 17

[101] The right to fair trial has also assumed great significance in extradition proceedings. For example Article 3 of the United Nations Model Treaty on Extradition clearly specifies as one of the grounds upon which an extradition request may be denied "if the person [extraditee] would be subjected to torture or cruel, inhuman punishment or degrading punishment or if that person has not or would not receive the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights, Article 14" See generally Roda Mushkat, *Fair Trial as a Precondition to Rendition: An International Legal Perspective*, (Centre for Comp. and Pub. Law, Faculty of Law, The University of Hong Kong, Occasional Paper No. 5, 2002) available at <http://www.hku.hk/ccpl/pub/occassionalpapers/paper5/paper5.doc> last visited on June 6, 2008

regard to article 15 thereof.[102] Article 7 of the African Charter governing the right to fair trial left the question of its derogability or otherwise to the imagination. However, under the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Commission, a non-derogability clause was inserted in paragraph (R) to the effect that "No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial"[103]

Perhaps taking a cue from the African Fair Trial Guidelines, the UN Human Rights Committee submitted in 1993 a recommendation to its sub-commission on Prevention of Discrimination and Protection of Minorities concerning a draft optional protocol to the ICCPR "aiming at guaranteeing under all circumstances the right to a fair trial and remedy"[104] In its recommendation, the committee stated as follows:

> *"The Committee is satisfied that State parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is considerable risk that the proposed draft optional protocol might implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency"*

In General Comment 29, the Committee on Human Rights further strengthened its position on the subject matter. It stated that safeguards related to derogation embodied

[102] Don Mathias, *The Accused's Right to a Fair Trial: Absolute or Limitable?* 2 NZ L. REV. 217, 227 (2005)

[103] Note should also be taken of the elaboration of this position by the African Commission on Human and Peoples' Rights in the case of Article 19 v. Eritrea, Comm. No. 275/2003, para. 98 where it held that "there are certain rights such as the right to life, the right to fair trial, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances" This was a re-statement of the court's earlier position in Civil Liberties Organization & Others v. Nigeria, *supra* note 9 at para. 27

[104] Hum. Rts. Comm. Ann. Rep. to the U.N. G.A., U.N. Doc. A/49/40 vol. 1 (1994) available at <http://www1.umn.edu/humanrts/hrcommittee/hrc-annual94.htm> last visited on March 30, 2008

in article 4 of the ICCPR are based on principles of legality and rule of law inherent in the Covenant as a whole document.[105] Further it asserted, "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency"[106]

1.1.8. What is fair trial?

In the introduction, it was shown how, like all legal concepts, it is difficult to offer a definition of fair trial that satisfies every theorist or captures all of its major components[107]. Thus, what dominates the field in putting the concept into a definitional context is an amalgam of the descriptive and interpretative approaches. There is clearly no lack of understanding of what the concept should embody, leading to the situation where the description and interpretation of it have trumped attempts at any clear cut definition. What is, however, clear in all circumstances is the theory of fair trial, which recognises that the power to impose a legal sanction for crime be circumscribed by a duty to be fair and even-handed in reaching the conclusion that indeed a crime was committed. The same principle is also made applicable in cases where a civil wrong is alleged in reaching a decision that such wrong did indeed occur.

Looking at fair trial from the descriptive and interpretative paradigms has yielded extensive literature. Patrick Grim, for example, prefaced his philosophical

[105] U.N. Hum. Rts. Comm. [HRC] International Covenant on Civil and Political Rights, General Comment No. 29 U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)
[106] *Id.*
[107] See Norman Dorsen, Michel Rosenfeld, Andras Sajo & Susanne Baer, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS, 1050 (2003)

inquiry into the concept by attempting a differentiation of two types of interpretation that it may be given. He referred first to "those which would treat it as a phrase applicable only to trials which in fact reach a correct verdict" then secondly to "those which would treat it as a phrase applicable independently of the correctness or incorrectness of whatever verdict is reached"[108] Though admitting that both interpretations may be "questionable", he said it was still possible that various understandings of the concept of fair hearing can be neatly distinguished as of the two types.[109]

But according to a second writer, to understand "fair trial" one must as a point of departure first grapple with the issue of fairness.[110] She argues, "Central to the concept of fairness is the relationship of power exercised by the court vis-à-vis the individual. As the general claim, a judicial system must not be characterised by random outcomes or disparate results for a similarly situated defendant or class thereof"[111] She said that fair trial helps to clarify fairness at four different levels: fairness and equality, fairness and morality, fairness and objectivity and fairness and impartiality.[112]

Again the question might be asked: what is fairness? It has been described as "the idea of doing what is best. It may not be perfect, but it's the good and decent thing to do. It requires being level-headed, uniform and regular, when all around you is prejudice, corruption and the desire of an angry mob to see justice done. [It] requires depth and breadth. Not only does the outcome have to be fair, but so does

[108] Patrick Grim, *The "Right" to a Fair Trial*, 2 J. OF LIB. STUD. 115, 116 (1978)
[109] *Id.*
[110] Gwynn MacCarrick, *The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition From Nuremberg to East Timor*, available at <http://www.isrcl.org/Papers/2005/MacCarrick.pdf > last visited March 31, 2008
[111] *Id.*
[112] *Id.*

everything along the line such as evidence gathering and presentation"[113] Fair trial could therefore be "a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms"[114] or "a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person"[115] It could be "a cornerstone of democratic societies"[116] or "having the assistance of a caring and competent defence team [and] having access to the resources necessary to investigate the case and background of the accused"[117] It may in fact be seen as "protecting the search for truth"[118]

Most of these definitions have their shortcomings. For example, almost all of them relate to the criminal trial while obviously discounting the centrality of fair trial in civil proceedings as well. But all the international human rights instruments

[113] See *supra* note 32

[114] Taken from <http://www.legislationline.org/?tid=105&jid=1&less=false> last visited on April 8, 2008

[115] See *supra* note 8

[116] <http://www.amnestyusa.org/International_Justice/The_Right_to_a_Fair_Trial/page.do…> last visited April 8, 2008

[117] <http://www.fairtrial.org/mission.html> last visited on April 8, 2008. The right has also been described as "the most fundamental of all freedoms" Estes v. Texas, 381 U.S. 540 (1965); "as near to an absolute right as any which I can envisage" Regina v. Lord Chancellor, *Ex parte* Witham, (1997) Q.B. 575, 585 and further as "perhaps the most fundamental tenet of constitutional democracy and has been recognised as a universal right. It is central to a Nation's search for social equilibrium and justice because all of the rights guaranteed by a constitution mean nothing if citizens do not have a right to a fair trial" Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK J. INT'L L. 9, 12 (2005). To another writer "While an ultimate definition of fairness will remain elusive, the attempt to describe its essential nature should assist in clarification. Put as plainly as possible, a fair trial means one where the law is applied accurately and without bias in accordance with the rules of evidence" then goes on to state "(…) the reader is asked to forbear from insisting on a more precise definition of fairness. What the courts regard as fairness must be left to emerge as inspection of cases proceeds. Different views are taken at different times: context is important, both historically and in the sense of the circumstances of each case" See Mathias, *supra* note 101 at 219. Lord Hope of Craighead says "As Professor Feldman, *English Public Law* (2004), para 15.04, has explained, the common law requirements of procedural fairness are essentially two-fold: the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made or implemented, and he has the right to an unbiased tribunal… The question whether the proceedings are fair must be determined by looking at the proceedings as a whole" See Meerabux v. Attorney General of Belize, (2005) 2 WLR 1307, para 40 cited in Mathias *supra* note 101

[118] Danny J. Boggs, *The Right to a Fair Trial*, U. CHI. LEGAL F. 1, 4 (1998) cited in Dorsen, *et al supra* note 102

guaranteeing fair trial rights, including the ones under consideration in this thesis, make reference to the significance of such rights also in the determination of civil rights and obligations. The disproportionate concern with fair trial in criminal proceedings is, however, not without legitimate foundations. International attention to the subject has leaned heavily towards its recognition in criminal cases both in regard to norms and jurisprudence.

However, the Nigerian Court of Appeal offers a description, which captures the essence of fair trial principles in criminal as well as civil proceedings. According to the court:

> *"Fair hearing is not only a constitutional issue, it is also a principle of English Law as well as customary law. It is also fundamental to any kind of adjudication whether under English Law or Customary Law. A fair hearing means a hearing in the court where all the people present and those outside the precincts of the court who observed or listened to the proceedings before the court would recognise that both parties were allowed to canvass and present cases and their cases were given even consideration and the court itself had the benefit of argument of both sides to the dispute before it"*[119]

More than its confirmation and approval of the fair trial principle, which is an important component of the common law tradition applicable in Nigeria[120], the above comment is also important for its reference to the fair trial principle as equally a customary law value. The court therefore makes an argument against any relativist or culturally nuanced notion of the fair trial principle. Though this view is made specific to Nigeria, I argue that it can actually be extrapolated to other parts of Africa, confirming fair trial essentially as a universal legal practice and containing no particularistic African ingredients. Later on in this thesis, I shall discuss whether the African Commission is for or against the above interpretation.

[119] Okoroike v. Igbokwe, (2000) 14 NWLR Pt. 688, 498, 500

[120] At common law the principle is captured in two mutually re-enforcing Latin maxims, *nemo judex in causa sua* (that no man may be a judge in his own cause) and *audi alterem partem* (that both sides to a dispute be heard before a judgment is reached). See Janis, Kay & Bradley *supra* note 13 at 375

1.1.9 Between "fair trial" and "fair hearing"

While some writers and certain provisions of international instruments make reference to "fair trial", others refer to "fair hearing", raising the question whether both mean the same thing or have different meanings. Article 10 of the UDHR speaks of a "fair and public hearing". The ICCPR contains exactly similar words.[121] The European Convention borrows exactly those words[122] though the article is titled "Right to a fair trial" The Inter-American Convention on Human Rights guarantees the right to "a hearing"[123] The African Charter on Human and People's Rights grants every individual "the right to have his cause heard"[124] At the national level, the New Zealand Constitution establishes a right to fair hearing[125] while the Nigerian Constitution also makes provision for "a hearing".[126]

Note should be taken that while the title parts of the above-mentioned articles asserted "fair trial", the descriptive parts of the same articles referred to either "hearing" or "heard". Is this mere semantics or are there differences in the meaning of the words "hearing" and "trial" in the context of these international instruments? This issue has not been addressed by any literature known to this writer. The tendency is to use the terms interchangeably as seen in the instruments highlighted. However, it is worth at this point a minimal inquiry into whether the same meaning could be ascribed to the two terms. This is important because the two terms will occur with varying degrees of frequency throughout this essay. What is a "hearing" and how is this different from a "trial"?

[121] See art. 14 (1)
[122] See art. 6 (1)
[123] See art. 8 (1)
[124] See art. 7 (1)
[125] See sect. 25 (a) New Zealand Bill of Rights Act 1990
[126] See sect. 36 (1), Constitution of the Federal Republic of Nigeria 1990

A "hearing" has been defined as "A judicial session (…) open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying"[127] Fair hearing was described as "a judicial or administrative hearing conducted in accordance with due process"[128] while fair trial was defined as "a trial by an impartial and disinterested tribunal in accordance with regular procedures (…), a criminal trial in which the defendant's constitutional and legal rights are respected"[129]

Each of these definitions, when closely scrutinized, hides a limitation. While the definition of "hearing" removes non-judicial sessions held in camera from its purview,[130] the portrayal of "fair hearing" is confined to only judicial and administrative sessions. The definition offered for "fair trial" on its part is restricted to those conducted by a "tribunal" in "criminal" proceedings discounting in the process trials outside tribunals and in proceedings other than criminal. This lack of clarity perhaps justifies the tendency for these two terms to occur interchangeably in legal literature and even international human rights instruments. Whatever differences exist may be either too tenuous to warrant confining and analysing them independently or may just be in the semantics. In the event, both phrases would be used in this thesis as having one and the same meaning.

[127] BLACKS LAW DICTIONARY, 725(1999)
[128] *Id.*
[129] *Id.* at 617.
[130] The reality of administrative agencies and their quasi-adjudicatory roles is therefore ignored. See for example the case of Albert and LeCompte v. Belgium, (1983) 5 E.H.R.R. 533

Chapter Two

2.1 African and European Fair Trial Norms: Separating the Wheat from the Chaff

The previous chapter laid the theoretical and historical foundations for the right to fair trial, and thus established the essential bedrock for this thesis. It traced the evolution of the right to fair trial and its place in the architecture of international human rights law. This chapter discusses fair trial norms of the African and European human rights systems. It shall also contain an analysis of the jurisprudence developed from identical norms of the two systems by their implementing institutions, that is the African Commission on Human and Peoples Rights and the European Court of Human Rights.

2.1.1 Identifying the Norms

The right to fair trial is governed under the European system for the protection of human rights by Articles 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6 of this Convention provides that:

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

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

3. *Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him: (b) to have adequate time and facilities for the preparation f his defence; (c) to defend himself in person or through legal assistance of his own choosing*

or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 of the same Convention provides that:

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

2. *This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.*

On its part, the African system is governed by Article 7 of the African Charter on Human and Peoples Rights which provides that:

1. *Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.*

2. *No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can only be imposed on the offender.*

Any researcher considering these two provisions would immediately be concerned about what appears to be the relative brevity of the African text compared to its more prolix European counterpart. Does this, as the argument goes, suggest more

fundamentality for the African text?[131] This is doubtful when all things are considered. The reason is because the provisions of the African Charter ignored some very important components of the right to fair trial. For example, it did not include the guarantee of public trial, which a learned legal writer has described as "regrettable"[132] The African Charter also did not make provision for the right to an interpreter for a party to court proceedings who does not understand the language of the court and further lacks content of the right to examine and cross examine witnesses. Further, the African Charter did not include the distinction, which the European Convention drew between the rights of individuals regarding the determination of their "civil rights and obligations" and consideration of any "criminal charge" that may be raised against them. Does not mentioning "civil" and "criminal" in the African Charter have any negative impact on the interpretation of its fair trial provisions, particularly with reference to civil trials or is this inferable from the text? This issue shall be given a separate consideration later.

Apart from the foregoing, the African Charter is also deficient in some more critical details of the right to fair trial. Where for example the European Convention in article 6(3) goes on at length on some very essential safeguards for an accused in a

[131] In the United States for example there is an on-going debate as to which between prolixity and brevity of constitutional provisions or legal codes connotes more fundamentality. While some argue that if the constitution or other legal code goes on at length about particular issues, it shows how importantly such issues ought to be regarded. Others contend that short, precise statements of principle bear, notwithstanding their brevity, a clearer ring of fundamentality. See for example Michael C. Dorf, *Putting the Democracy in Democracy and Distrust: The Coherentist Case for Representation Reinforcement* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 77, 2004), available at <http://ssrn.com/abstract=602541> last visited on June 5, 2008

[132] Evelyn Ankumah, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES 124 (1996). See also Nmehielle, note 20 *supra* at 102. *The* UN Human Rights Committee asserts that "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." U.N. Hum. Rts. Comm. [HRC] International Covenant on Civil and Political Rights, General Comment No. 32 U.N. Doc. CCPR/C/GC/32 (2007)

criminal process, the African Charter was either mute about those safeguards or hid them in some more popular and generalized safeguards, in the process throwing away the opportunity for much needed emphasis. What human right interest can be more fundamental than a crime suspect being informed early enough about the allegation against him and its details?[133] Being that often impermissible violations of the rights of crime suspects in Africa commences from avoiding this important step in the criminal justice process, that it was essentially ignored in the African Charter can hardly be justified.[134] Moreover, where the European Convention separated the right to legal representation and assistance from the adequate time and facilities requirement, the African Charter lumped them together as the right to defence and counsel while also completely ignoring the issue of legal aid. The European Convention on its part left out some specific elements of the right to fair trial. For example, it does not, like the African Charter, make a textual reference to the right to court. It also does not contain the prohibition on self-incrimination, making instead some "generalized standards … broadly protect[ing] the right to a fair hearing while at the same time identifying only a limited number of particularized standards within the broader fair hearing guarantee"[135] This certainly is equally true of the African Charter. Both instruments were also silent regarding the rule against double jeopardy in the criminal justice process.

[133] For another view of these shortcomings, see Kenneth Acheampong, *Reforming the Substance of the African Charter on Human and Peoples' Rights: Civil and Political Rights and Socio-economic Rights,* 1 AFR. HUM. RTS. L. J. 185, 196 (2001)

[134] This is a reality which contradicts the claim that regarding the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the African Charter on Human and Peoples Rights, "the three human rights treaty texts between them define the right to a fair trial in criminal proceedings in full and basically satisfactory terms. There are no important omissions…" See D. Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right,* 16 INT'L CRIM. L. Q. 352, (1967) cited in Salvatore Zappala, *Human Rights in International Criminal Proceedings,* 4, 5 (2003)

[135] See Mark Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights,* 12 COLUMBIA J. EUR. L., 341 (2006)

2.2.2 Covering the gaps, ironing out creases

Before entering the analysis of the jurisprudence of the two systems in relation to the above highlighted elements of the right to fair trial, let me first discuss how their mechanisms have responded to the demonstrable gaps in the normative texts. The European Convention has the least gaps, which have been identified as the non-textual reference to the right to court as an important component of the right to fair trial, lack of the rule against self-incrimination and also the absence of the rule against double jeopardy.[136]

2.2.2.1 Right to Court

Regarding the right to court, the European Court dealt admirably with the issue when finding that the right of access to court is an inherent element of the right to fair trial.[137] In the case of *Golder v United Kingdom*,[138] the court had to resolve the issue whether the right to fair trial applied only to cases already brought before domestic courts or includes an entitlement to initiate such proceedings. The court noted that Article 6(1) of the European Convention does not expressly state a right of access to the courts or tribunals but enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term.[139] It therefore concluded that while the right to fair trial applies to pending proceedings, it did not follow that a right to the very institution of such proceedings is thereby excluded.[140] It said, "It would be inconceivable (…) that Article 6 para. 1 should describe in detail the procedural

[136] Egon Schwelb, *The Application of the European Convention on Human Rights*, 64 AM. J. INT'L. L. 194, 196 (1970) (book review)
[137] Philip Leach, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 248 (2005). See also Jeremy Mcbride, *Access to Justice Under International Human Rights Treaties*, 5 PARKER SCH. J. E. EUR. L. 3, 5 (1998)
[138] (1979 – 80) 1 E.H.R.R. 524
[139] *Id* at para. 28
[140] *Id* at para. 32

guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings"[141]

The African situation presents a contrasting picture. The African charter recognizes the right to court, which it refers to as the right "to an appeal to competent national organs"[142] to redress violations of the charter. The African Commission has made several decisions regarding what would constitute a violation of this guarantee. For example the Commission has held the right violated when pending litigation in domestic courts are forecloseable by executive decree,[143] when instead of the right to appeal, judgments are rather confirmed by the executive,[144] where the King retains power to reverse all court decisions[145] or where the courts are deprived of personnel qualified to ensure that they operate impartially.[146] The Commission takes seriously the word "competent" appearing in the article and links it to the expertise of the judges and the procedures that they operate. Consequently, military tribunals are not per se objectionable so long as their procedures are neither unfair nor unjust. Though they may be presided over by military personnel, they are, however, subject to the same rules of transparency, independence and objectivity as the ordinary courts.[147] This notwithstanding, the Commission advised against the establishment of such tribunals irrespective of whatever domestic circumstances that may make their

[141] *Id* at para. 35
[142] Art. 7(1) a
[143] Constitutional Rights Project and Others v. Nigeria, (2000) AHRLR 227
[144] *Id.*
[145] Lawyers for Human Rights v. Swaziland, Comm. No. 251/2002
[146] Amnesty International & Others v. Sudan, (2000) AHRLR 297
[147] Civil Liberties Organization & Others v. Nigeria, *supra* note 9

establishment tempting as setting them up not only undermines the court system but creates the likelihood of unequal application of the laws.[148]

2.2.2.2 Right to Remain Silent

The European Court has also included by inference the right to remain silent or the rule against self-incrimination as an element of the right to fair trial though that element did not occur in the text of Article 6.[149] The court "did not offer an explanation of why it chose to incorporate the self-incrimination privilege as Convention right"[150] In the *Funke* case, the applicant claimed that the French customs investigation procedure which required him to produce his banking, stock and estate records violated his right not to aid the state with self-incriminatory evidence. The court held,

> *Being unable or unwilling to procure [the documents] by some other means, [the government] attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law (…) cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (…) to remain silent and not to contribute to incriminating himself*"[151]

The European Court has also openly endorsed the rule against self-incrimination in other cases that it has considered.[152] In the *Saunders* case in particular, the court established a relationship between the right to silence and the provisions of Article

[148] *Id*. at para. 23
[149] Funke v. France, (1993) 16 E.H.R.R 297 See also Schwelb, *supra* note 136 at 197. Further see Tharien van der Walt & Stephen de la Harpe, *The Right to Pre-Trial Silence as part of the Right to a Free and Fair Trial: An Overview* 5 AFR. HUM. RTS. L. J 70 (2005)
[150] See Berger, *supra* note 134 at 343
[151] See *supra* note 140 at para. 44
[152] For example Murray v. United Kingdom, (1996) 22 E.H.R.R. 29 and Saunders v. United Kingdom, (1996) 23 E.H.R.R. 313

6(2) of the Convention which places the burden of proof in criminal cases on the prosecution[153] when it stated, "The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense, the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention"[154]

Rule Against Double Jeopardy

The European Convention originally did not prohibit the rule against double jeopardy or the *ne bis in idem* rule.[155] The European Commission on Human Rights drew the attention of the Committee of Ministers to this gap. The Committee in turn referred the issue to the European Committee on Crime Problems, which in its opinion made exceptions to the application of the rule at the international stage. They advised that the principle should be restricted to "acquittals and to those convictions where the penalty has been served or where the fact that the penalty has not been served is due to a decision to that effect by the country imposing the sentence, or where no sanction has been imposed".[156]

In the alternative the Committee was of the view that the rule would better be placed in the Treaty on the International Validity of Criminal Judgments rather than drafting for it a different protocol. This opinion was apparently based on the understanding that prohibition of double jeopardy was widespread within the state

[153] See generally Berger, note 134 *supra* at 344

[154] At para. 68. Note also that European Court of Justice has incorporated the rule against self-incrimination as integral to the concept of European Union Law. See Orkem SA v. Commission of the European Communities, (1989) E.C.R 3283 at para. 98 where the court held that "an analysis of national laws has indeed shown that there is a common principle enshrining the right not to give evidence against oneself"

[155] See Schwelb, *supra* note 136 at 194

[156] *Id.*

parties to the European Convention and was in any case more a principle of domestic law than international law. Schwelb faulted this reasoning as being based on "a misunderstanding".[157] In his view, while it may be that none of the legal systems of the state parties to the European Convention permitted double jeopardy at the time except in transnational situations, the same was also true of most other rights defined in the Convention equally recognized in almost all the legal orders and this did not preclude them from being included in the Convention.[158]

But the situation in the European system has since changed with the adoption of Protocol 7 and its accession by a majority of the state parties. Article 4 of the Protocol provides that "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state" Interpreting this provision in *Gestra v Italy*,[159] the European Commission held that the double jeopardy rule applies only to trial and conviction for the same offence in the same jurisdiction. It does not extend to prosecutions taking place in different jurisdictions though violations of the rule may in some circumstances amount to inhuman and degrading treatment.[160]

2.2.2.3 The Right to Appeal

The European human rights Convention did not provide for the right to an appeal in the original text. This right was, however, incorporated in Protocol No. 7 to the

[157] *Id.*
[158] *Id.*
[159] Eur. Ct. H. R. App. No. 21072/92
[160] Nuala Mole, ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 25 (2000) available at <http://www.coe.int/T/E/Human_rights/h-inf(2002)9eng.pdf> last visited June 30, 2008

Convention with regard to criminal cases.[161] Can it therefore be argued that the European system does not cover appeals in civil cases? The European Court has interpreted article 6 to concern courts of first instance[162] but has nevertheless also held that when a state party provides in its domestic law for a right of appeal, the proceedings are covered also by Article 6 guarantees.[163]

But the question is: how does the African Commission respond to those situations when it is confronted with a complaint touching an important international right that is not addressed by the text of the Charter? The charter itself presented an indication as to what the Commission should do in such situations. It provides that the Commission should be inspired by international law on human and peoples' rights, provisions of the various African human rights instruments, the United Nations charter, the charter of the Organization of African Unity (now African Union),[164] the Universal Declaration of Human Rights and instruments adopted by the United Nations and by African countries in the field of human and peoples' rights.[165] The charter also allows the Commission to consult "other general or special international conventions, laying down rules expressly recognized by member states of the [African Union], African practices consistent with international norms on human rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine"[166]

[161] Art. 2, which provides that "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law" See also Nuala Mole & Catharina Harby, THE RIGHT TO A FAIR TRIAL: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 (2006)
[162] De Cubber v. Belgium, Eur. Ct. H. R. Ser. A. No. 86 of Oct. 26, 1984
[163] Delcourt v. Belgium, Eur. Ct. H. R. Ser. A. No. 11 of Jan. 17, 1970
[164] Henceforth any reference to the African Union (AU) should be interpreted to refer also the OAU depending on whether the activity to which the reference is directed occurred before or after the OAU was re-baptised to become the AU.
[165] Art. 60
[166] Art. 61

The Commission has responded in two different ways while interpreting the reach of these powers granted to it. It has elaborated several resolutions and declarations to supplement the Charter's provisions. It has also borrowed from the jurisprudence of other regional systems, including that of the European Court of Human Rights.[167] To date the Commission has elaborated four resolutions each of which in one way or the other addresses important fair trial concerns. These are the Resolution on the Right to Recourse and Fair Trial (1992), the Resolution on the Respect and the Strengthening of the Independence of the Judiciary (1996), the Resolution on the Right to Fair Trial and Legal Assistance in Africa (1999) and the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002).[168]

For the purposes of this thesis, I shall restrict discussions in this section to the resolution of 1999, which happens to be the most exhaustive, and the one most widely cited in the jurisprudence of the African Commission since it was adopted. That resolution also improved upon the provisions of the other resolutions earlier referred to and in some sense actually consolidated them. Most significantly, the resolution extended protection to the right against self-incrimination, which was not contained in the African Charter itself.[169] It specifically provided that the accused in a criminal proceedings has the right not to be compelled to testify against him or herself or to

[167] In Civil Liberties Organization & Others v. Nigeria, *supra* note 9 the African Commission observed, "In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. The Commission is also enjoined by the Charter and international human rights standards, which include decisions and general comments by the UN treaty bodies (Art. 60). It may also have regard to principles of law laid down by State Parties to the Charter and African practices consistent with international human rights norms and standards"

[168] Each of these resolutions and recommendations is available at <http://www.achpr.org> See generally Udombana *supra* note 21 306, 310

[169] Centre for Human Rights, University of Pretoria, THE AFRICAN HUMAN RIGHTS SYSTEM available at <http://www.chr.up.ac.za/centre_publications/ahrs/contributors.html> last visited June 31, 2008

confess guilt[170] and that silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.[171] Moreover, this resolution sought to cure the African Charter of one acute and inexplicable shortcoming for which it had long endured justified criticism:[172] the Charter's loud silence on the publicity of hearings. Prior to the adoption of the resolution, the African Commission had relied on its powers under articles 60 and 61 of the African Charter to create a norm, drawing in the process heavily from General Comment No. 13 of the UN Human Rights Committee.[173] The Commission concluded that only exceptional circumstances touching upon morals, public order or national security or where the justice of the case so demands could justify the exclusion of the public from trials whether civil or criminal.[174] Little wonder then that in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Commission included a paragraph on fair and public hearing.[175]

There is a sense, however, in which the Commission's intervention in this area presents an irony. By the provisions of the African Charter[176] and its own rules of procedure,[177] the Commission is forbidden to operate in the open while considering complaints concerning the violation of human rights whether coming from individuals or from state parties to the Charter. The Commission cannot even make any statement

[170] Para. N (6) d
[171] Para. N (6) d - 2
[172] Udombana, note 21 *supra* at 319
[173] Media Rights Agenda & Others v. Nigeria, (2000) AHRLR 2000
[174] *Id.* at para. 52
[175] Para. A (1)
[176] Art. 59 (1) provides, "All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decides" Note that on the contrary, the soon to be operational African Court on Human and Peoples' Rights is required by Art. 10 (1) of the Protocol establishing it to conduct its proceedings in public. The protocol was issued on Jun. 9, 1998 OAU DOC. OAU/LEG/EXP/AFCHPR/PROT (III) available at <http://www1.umn.edu/humanrts/africa/comision.html> last visited Jul. 2, 2008
[177] Rules 96 (1) and 106. See <http://www1.umn.edu/humanrts/africa/rules.htm> last visited Jul. 2, 2008

concerning its private sessions until it has consulted the interested state parties.[178] The drafters of the African Charter most probably divorced the charter from the requirement of public hearing because it was inconceivable that its own confidentiality clause could co-exist in the same document with the requirement of public hearing. But the Commission operating under what has been described as "cultic secrecy"[179] was under intense pressure from day one to accord openness to its deliberations.[180] Its sessions have remained secret despite its own opinion regarding the importance of publicity to judicial proceedings and this remains a controversial point in its very existence as an effective body for the protection of human rights in Africa.

I will now turn to the question what importance can be attached to these resolutions since as it is obvious they cannot be conferred with the same normative weight as the provisions of the African Charter itself. To be sure, each of these resolutions was subjected to an adoptive procedure by the General Assembly of the African Union.[181] The question of what place these resolutions occupy on the normative hierarchy of the African human rights system has not yet arisen for the Commission's specific pronouncement though complainants to the Commission and the Commission itself continue to make reference to them in their activities.[182] From this analysis, it could be argued that the resolutions would continue to supplement provisions of the Charter. Nevertheless, it appears worries about their real normative worth can only be put to rest by their inclusion into African human rights norms on

[178] Rule 96 (2)
[179] Udombana, *supra* note 21 at 320
[180] See generally U. Oji Umozurike, *The African Charter on Human and Peoples' Rights: Suggestions for more Effectiveness* 13 ANN. SURV. INT'L & COMP. L. 2 (2007)
[181] Refer to *supra* note 163
[182] See for example Liesbeth Zegveld & Mussie Ephrem v. Eritrea, (2003) AHRLR 85 250/2002 where the Commission said the treatment of crime suspects must comply with the Resolution on the Right to Recourse to Fair Trial as well as the Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

the basis of agreement among the contracting states by way of a protocol or whatever amendment process chosen to the present Charter.[183]

The African Commission has also shown considerable willingness to borrow from the jurisprudence of other international and regional systems. It often adopts the reasoning of the United Nations Human Rights Committee in its treatment of individual complaints filed under the International Covenant on Civil and Political Rights.[184] It has also found useful the jurisprudence of the Inter-American system[185] and as well the European Court of Human Rights.[186] Nevertheless, there still remain some elements of the right to fair trial neither accommodated in the African Charter nor in the various principles and resolutions adopted by the Commission.

While the European system has put to rest the non-inclusion of the rule against double jeopardy through a protocol to the European Convention on Human Rights, it has yet to be addressed by the African system. The reason for this omission and the apparent failure to redress it is very much unknown. But if it is for the same reason that delayed redress to similar shortcoming in the European system, the simple reason that the European system eventually worked out a solution makes that particular reason presently untenable. It may well be that most domestic legal regimes in Africa already cover this element of the right to fair trial in their laws. But so are almost all the other rights contained in the African Charter.[187]

[183] Calls for the amendment to the African Charter have been variously made in a way that the Charter's provisions would reflect international standards including in the area fair trial rights. See for example Acheampong, *supra* note 133 at 197

[184] In Civil Liberties Organization & Others v. Nigeria, *supra* note 9 the Commission referred to both General Comment No. 13 of the Human Rights Committee and the Committee's decision in Burgos v. Uruguay, but also the decision of the European Court in Le Compte, van Leuven & de Meyere v. Belgium.

[185] In Interights & Others v Botswana, the Commission referred to the Inter-American case of Tracey v. Jamaica, App. No. 41/2000 of April 14, 2000

[186] See Liesbeth Zegveld v. Eritrea, *supra* note 182 where the Commission referred to Ocalan v. Turkey, App. No. 46221/99 of March 12, 2003

[187] See *supra* note 151

An element equally ignored in the text of the African Charter, as is also the case in the European Convention is the right of appeal. The African Commission has however held that this component is inherent in the guarantee of fair trial. According to the Commission, "(…) the right to appeal [is] a general and non-derogable principle of international law [that] must, where it exists, satisfy the conditions of effectiveness."[188] It said an effective appeal is one that "subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice"[189]

2.2.2.4 "Civil Rights and Obligations"

Finally in this section, I will return to the distinction made in the European system between civil and criminal cases. In addition to paragraph 1 of Article 6 of the European Convention, which relates to the determination of civil rights and obligations or any criminal charge against any individual, paragraphs 2 and 3 thereof make specific guarantees to cover everyone charged with a criminal offence. The provisions of the African Charter did not make this distinction and did not even bother to separate those guarantees traditionally relevant only to criminal proceedings like the presumption of innocence. This situation expectedly sharpened the divergence between the two systems in their treatment of this issue.

While in the European system, the case law of the Commission and court clarifying matters falling within the remit of "civil rights and obligations" is rather broad and expansive; the issue expectedly has not been directly tackled by the African system. Not only has the European interpretation become rooted in its mechanism, it

[188] Civil Liberties Organization v. Nigeria, *supra* note 9 at para. 37
[189] *Id.*

is progressively and dynamically being extended to cover new situations. According to Mole and Harby "There is a substantial body of case law by the Court and Commission as to what is and what is not a civil right or obligation, and the interpretation of the phrase by the Convention organs has been progressive. Matters which were once considered outside the scope of Article 6, such as social security, now generally fall within the civil rights and obligations rubric of Article 6"[190]

The character of the "civil rights and obligations" and its significance in the Article 6 context is regulated by the European practice of interpreting its Convention concepts autonomously, that is the meaning attached to those concepts are for purposes of the convention different from their meanings in domestic law. Thus, for example, 'criminal charge' and 'civil rights and obligations' cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but relate to an autonomous concept which must be interpreted independently, even though the general principles of the High Contracting Parties must necessarily be taken into consideration in any such interpretation.[191] It has been suggested that this assertion implies an asymmetry or tension between Convention concepts on the one hand and the meaning ascribed to those concepts in domestic law on the other.[192]

European Court jurisprudence in this area goes beyond the surface, covering its many ramifications. From this have arisen several principles governing the field. Firstly, the Grand Chamber has held by a narrow majority that Article 6 will not apply in situations where national courts have reached a conclusion that no right exists in domestic law even if the claim relates to an issue that might otherwise be classified as

[190] Nuala Mole & Catharina Harby, See *supra* note 154 at 11
[191] Twenty One Detained Persons v. Germany, 27 Eur. Comm. H. R. (1968) 97, 116 para. 4. For a better and more in-depth understanding of how the autonomous concept works in the European system, see George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR* 15 EUR. J. INT'L. L. 282 (2004)
[192] *Id*.

a determination of civil right under the convention.[193] Secondly, the decisive consideration in reaching a conclusion whether a right under domestic law is civil in nature or not is the character of the right itself and not its character under domestic legislation.[194] The Court has also identified certain issues regarded as not concerning the determination of civil rights and obligations and therefore outside the reach of Article 6. They include taxation and customs issues,[195] matters dealing with immigration and nationality, especially deportation,[196] liability for military service,[197] right to stand for public office,[198] the right to state sponsored education[199] or medical treatment,[200] and issues related to legal aid in civil cases.[201]

The work of the African Commission with regard to this element of the right to fair trial has been either muted or tentative. The reason for this is unclear. There appears to be a deliberate plan not to accommodate civil proceedings within the complaint system, at least looking at the norms, as they currently exist. The Charter either covers only criminal proceedings or lumps it together with civil proceedings. The latter part of this conclusion would be inescapable however only if a civil component is read into the wordings of Article 7. The 1999 Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (hereinafter the '1999 Principles') did little to cover this yawning gap. It provides in paragraph A (1) that, "In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing (…)"

[193] Roche v. United Kingdom, Eur. Ct. H. R App. No. 32555/96
[194] Ringeisen v. Austria, 1 EHRR 455 where the court held that "Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the state concerned"
[195] Ferrazzini v. Italy, (2001) 34 EHRR 1068
[196] Maaouia v. France, (2001) 33 EHRR 1037
[197] Nicolussi v. Austria, Eur. Ct. H. R App. No. 11734/85
[198] Habsburg-Lothringen v. Austria, Eur. Ct. H. R App. No. 15344/89
[199] Simpson v. United Kingdom, Eur. Ct. H. R App. No. 14688/89
[200] L. v. Sweden, Eur. Ct. H. R App. No. 10801/84
[201] X v. Germany, Eur. Ct. H. R App. No. 3925/69

Notice that the word "civil" which should occur before "rights and obligations" as in both Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention[202] is missing. What could account for this aversion to the word 'civil'? Moreover, the Commission's jurisprudence has not in any way addressed itself to this issue. This situation cannot be anymore justified especially given that most African countries operate domestic regimes more in tune with international best practices in this regard than the uncertain stand of the region's human rights enforcement mechanism.[203]

2.2.3. Areas of Convergence

Having thus far discussed elements of the right to fair trial not covered or insufficiently addressed by the text of the two human rights systems under consideration, I shall now turn to those elements present in the text of both systems and the jurisprudence that has been developed by their mechanisms in interpreting those guarantees. Though contextual specifities exert influential impact on the development of these elements of the right to fair trial and the importance attached to them by the systems being discussed, it is demonstrable that there is no substantial disagreement in their jurisprudence. I will return later to the issue of context but it will be sufficient at this point to indicate that treatment of these elements is more ramified and rigorous under the European system than under the African system and I will also attempt to show why this is the case as the analyses continues.

[202] Art. 8 (1) of the Inter-American Convention on Human Rights provides "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations **of a civil**, labor, fiscal, or any other nature" [my emphasis]

[203] Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 provides that, "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality".

My analysis will proceed from first clarifying some important concepts upon which rests the elements to be considered and the jurisprudence that have been developed from interpreting them before examining the substantive ramifications of the elements to be considered.

2.2.3.1."Criminal Charge"

Article 6 (1) of the European Convention states that fair trial shall be accorded the determination of a criminal charge against a person. Article 7 of the African Charter did not mention criminal charge but it occurs in the very first paragraph of the 1999 Principles. As with the concept of civil rights and obligations, the European Court ascribes an autonomous meaning to the concept of criminal charge notwithstanding what domestic interpretation is given to the impugned behaviour said to constitute the criminal charge. According to Letsas, the theory of autonomous concepts prevents state parties to the European Convention from circumventing its guarantees by arbitrarily classifying and re-classifying offences.[204] The European Court itself expressed its apprehension about this possibility in the case of *Engel and Others v. Netherlands*[205] by holding that "If the Contracting Parties were able at their discretion to classify an offence as disciplinary instead of criminal … the operation of the fundamental clauses of articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention"[206]

In this case, the court developed a four-fold criterion for deciding whether an offence is criminal for Convention purposes. These are: the classification accorded the offence under domestic law, the nature of the offence, the purpose of the penalty and

[204] See *supra* note 191
[205] (1976) Ser. A No. 22
[206] *Id* at para. 81 See also Ozturk v. Germany, (1984) 6 EHRR 409 as well as Lauko v. Slovakia, (1998) 33 EHRR 994

the nature and severity of the punishment or penalty. Questions will not arise where national authorities by themselves classify an offence as criminal. In this case, Article 6 guarantees are automatically triggered. Where, however, the offence in question is not classified as criminal, the Court will evaluate the offence using the four-fold criterion outlined above to make an autonomous classification. The Court applies similar or slightly modified tests to examine the nature of the offence[207] and the purpose of punishment[208] as well as its severity to enable it decide whether an offence is criminal or disciplinary. For example, it has held that prison disciplinary proceedings will implicate Article 6 guarantees if the punishment imposed is punitive in nature.[209]

The African Commission does not apply anything resembling the European practice of autonomous interpretation. In this and several other areas that would be addressed in later chapters, the chasm between the European and African fair trial jurisprudence becomes rather stark. The dearth of African case law in this regard probably accounts for the short shrift accorded the area by academic scholars. While almost every scholar discussing the European system patiently navigates this area, their African counterparts often jump quickly into the more substantial elements of the guarantee in question, leaving behind a half – charted field. Could it be that the African Commission is restrained by its nomenclature as a Commission rather than a court? Or is it saddled with low quality legal advocacy that leaves analysis only at the shallow level? Is this not already food for thought for the about to commence African Human Rights Court?

[207] See Weber v. Switzerland, (1990) 12 EHRR 508 where the Court distinguished between disciplinary and criminal sanctions.
[208] In the Ozturk case, the German authorities had moved careless driving from criminal to a purely regulatory offence. The Court still held that because the law was generally applicable and carried a sanction of a deterrent and punitive kind, Article 6 was applicable. See also Ezeh & Connors v. United Kingdom, (2002) 35 EHRR 691
[209] *Id.*

2.2.3.2.Tribunal established by law or competent national organs

What are the essential characteristics of the institutions required to apply the principles of fair trial? The European Convention says they must be "established by law", "independent and impartial". The African Charter refers to them as "competent national organs." A cursory look at these texts shows that the European variant contains more details than its African counterpart about the qualities required of a body charged with determining civil rights and obligations or a criminal charge. The African text actually does not indicate what such national organs referred to, must do to be seen as competent. But yet again the 1999 Principles provide needed elucidation in this area. In paragraph A (4) it describes an "independent tribunal" as well as "impartial tribunal" in paragraph A (5). It went at length on what qualities would qualify such tribunal as independent or impartial.

It is also worth noting that the European Convention actually mentions "tribunal" while the African Charter refers to "national organs." Given the poor reputation of tribunals, especially military and other extra-judicial ones in Africa, it is understandable that the African Charter would avoid that choice of a description. However, the 1999 principles throughout its text kept alternating between "judicial body" and "tribunal." It will also be seen later that in its interpretation of these provisions the African Charter is not much bothered about how the body in question is described under national law so long as it applies the entire panoply of fair trial guarantees required under the Charter.

The European Convention says the tribunal must be established by law. This is a purely functional requirement and does not mean more than that such tribunal must be legally in existence prior to the dispute, which it is called upon to adjudicate, has jurisdiction that is statutorily settled and operates a regular procedure. Also it must have powers to issue a decision that is binding on all the parties concerned.[210] It will therefore be unacceptable for courts to be established to try specific individual cases or for its jurisdiction to be merely advisory even where the advice is followed.[211]

The European Court has developed several standards against which a particular body is to be assessed in order to decide whether or not it meets the characteristics of a tribunal established by law. It is a tribunal even if it does not form part of the ordinary judicial establishment so long as it meets certain fundamental requirements like being independent of both the executive branch of government and the parties in dispute. The tribunal meets the qualification if its members are under an appropriate term of office and its procedures offer guarantees considered adequate to resolve the particular kind of dispute.[212] The body does not cease to be a tribunal merely because it combines its judicial duties with other functions. This was the case for example where an applicant claimed that the Bar Council did not meet the character of a tribunal because it performed multifarious administrative, regulatory, adjudicatory, advisory and disciplinary functions. The court disagreed with the applicant, holding instead that plural functions by themselves alone are not sufficient to deprive an institution of being a tribunal established by law.[213]

[210] In the case of Van de Hurk v. The Netherlands, Eur. Ct. H. R Ser. A. No. 303 of Apr. 19, 1994 the applicant had complained that an industrial tribunal whose decisions is made subject to the ruling of the Crown or Minister, and that may lead to its non-implementation or suspension does not meet Convention criteria to be called a tribunal. The court held that the power to issue a binding decision, which may not be altered by a non-judicial body to the detriment of an individual, is inherent in the very notion of a tribunal.

[211] Bentham v. The Netherlands, Eur. Ct. H. R. Ser. A. No. 97 of Oct. 23, 1985

[212] De Wilde & Others v. Belgium, (1971) 1 EHRR 373

[213] H. v. Belgium, Eur. Ct. H. R. Ser. A. No. 127-B of Nov. 30, 1987

While the court does not require that minute details of the organization of a State's judiciary be statutorily regulated, it nevertheless demands that the judiciary as an institution be governed by law and not by executive discretion.[214] For example, in the case of *Zand v. Austria*[215] there was provision in the primary legislation for the establishment of labour courts and their jurisdiction while the Minister was by delegated legislation granted powers to decide the actual location of the courts and their territorial jurisdiction. The court held that Article 6 had not been violated.

On its part the African Charter refers to "competent national organs". In interpreting competence, the African Commission says it encompasses several facets including the expertise of the judges and the inherent justice of the laws under which they operate.[216] Thus in the case of *Constitutional Rights Project v. Nigeria*[217] where the Nigerian government issued new decrees proscribing over 13 newspapers and magazines published in the country and preventing their circulation while suits were pending in different courts challenging the invasion of the said media houses by armed soldiers, the Commission concluded:

> *To have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs. A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequences for the protection of individual rights.*[218]

[214] Lavents v. Latvia, Eur. Ct. H. R App. No. 58442/00
[215] Eur. Ct. H. R App. No. 7360/76
[216] Amnesty International v. Sudan, (2000) AHRLR 297
[217] (2000) AHRLR 227
[218] *Id*. at 232

Like the European Court the African Commission is not quite dismissive of tribunals whether they be specialised or ordinary. Not even where such tribunals are military in character and often sit in judgment over civilians. The Commission recognises that this could present serious problems as far as equitable, impartial and independent administration of justice is concerned. It has, however, held that, "The European Commission has ruled that the purpose of requiring that courts be "established by law" is that the organisation of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament. The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.[219]

Similarly, in *Civil Liberties Organization v. Nigeria (in respect of the Nigeria Bar Association)*,[220] a military decree issued by the authorities in Nigeria transferred the management of the bar association to the un-elected "Body of Benchers" and conferred on it both disciplinary and financial powers. The decree excluded recourse to the courts regarding the manner in which this un-elected body exercised its powers. The African Commission held on this complaint that the prohibition of litigation against the powers of the Body of Benchers infringed the right to appeal to national organs.[221]

2.2.3.3.Independence

The word "independent" is specifically mentioned in Article 6 (1) of the European Convention as one of the fundamental qualities required of a tribunal established by law to deal with civil rights and obligations as well as criminal charges. The word though not mentioned in the Article 7 of the African Charter has nevertheless been

[219] Civil Liberties Organization & Others v. Nigeria, *supra* note 102
[220] (2000) AHRLR 186
[221] *Id.* at para. 13

read into it by the jurisprudence of the African Commission. Independence of a court or tribunal is often taken to mean a situation where the body is free both from executive interference and as well the influence of the parties in dispute. This is particularly true with regard to the jurisprudence of the European Court.[222] This cannot mean though that the legislature is free to interfere with such bodies for example by binding them to certain standards of interpretation or retaining power to dissolve them. It would be more appropriate in my understanding if the court or tribunal were free from external influence notwithstanding the quarter from which it comes.

Independence of the court could be organizational. This addresses such issues as mode of appointment of judicial personnel, their immunity from litigation for all their judicial actions, their financial autonomy and their tenure. It could also have some procedural elements, for example with regard to powers given to the executive to nullify judicial decisions through the system of pardons or what in some countries is known as the prerogative of mercy. Apart from these qualifications, which are subjective, there is also the objective element: the court should appear to be independent to a normal observer.

According to the European Court, lack of a permanent tenure for judges is not by itself sufficient evidence of lack of independence provided all the other necessary guarantees are present.[223] In another case, a fixed six-year tenure for Appeal Council members was found to provide a guarantee of independence.[224] A court is, however, lacking in independence if it has to refer to the executive for solution a question

[222] See for example Ringeisen v. Austria, *supra* note 195
[223] Campbell & Fell v. United Kingdom, Eur. Ct. H. R. Ser. A. No. 80 of Jun. 28, 1984
[224] La Compte v. Belgium, Eur. Ct. H. R. Ser. A. No. 43 of Jun. 23, 1981

brought before it.[225] It is also prima facie evidence of lack of independence if the executive is empowered to overrule the decisions of courts.[226]

Though the context and issues covered by the African Commission jurisprudence on this element of fair trial are different from those of the European Court, the decisions are much the same. In *Lawyers for Human Rights v. Swaziland*,[227] the complainants stated that by a Proclamation of 1973 and also Decree of 2001, judicial power was vested in the King who also headed the executive branch of government. The laws in question not only conferred on the King the power to remove judges but also ousted the jurisdiction of the courts to entertain certain matters. The African Commission held that the provisions in themselves constituted a violation of Article 7 of the Charter and also tended to undermine the independence of the judiciary.[228] According to the Commission, "retaining a law which vest (sic) all judicial powers in the Head of State with the possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole"[229]

Similarly, in *Civil Liberties Organization v. Nigeria*,[230] the Commission held that special tribunals whose judges were specially appointed for each case by the executive branch of government, and which included on the panel at least one, and often a majority, of military or law enforcement officials was incapable of offering fair trial guarantees.[231] The Commission reached this conclusion notwithstanding submissions by the Nigeria government that the tribunals respected all the procedures

[225] Beaumartin v. France, Eur. Ct. H. R. Ser. A. No. 296 – B of Nov. 24, 1994
[226] Van de Hurk v. The Netherlands, *supra* note 211
[227] (2005) AHRLR 66
[228] *Id*. at para. 54
[229] *Id*. at para. 58
[230] (2000) AHRLR 243
[231] *Id*. at para. 21

of the regular courts.[232] However, in *Article 19 v. Eritrea*,[233] the Commission held that the mere fact the Complainant feared the judiciary was ineffective or its processes unavailing because the procedure for removing the Chief Judge was inconsistent with international standards was insufficient to found a conclusion that the judiciary lacked independence. It also stated that the Complainant should first have taken steps or attempted to invoke the necessary domestic machinery before jumping to the conclusion that they are ineffective.[234]

2.2.3.4.Impartiality

As with "independence" the European Convention also mentions "impartial" in the text of Article 6. The African Charter in Article 7 did not mention it and it may well be that the drafters expected that once "competent national organs" forms part of the text, important fair trial ingredients like independence and impartiality are automatically implied. But as earlier pointed out the 1999 Principles also mentioned "impartial tribunal" To inspire the confidence of parties who have brought a dispute before him or her, an adjudicator must operate above the fray and above the parties. He or she must be disinterested in the subject matter of the dispute to be free to reach a decision that the disputants would consider fair and binding on them. This is the very essence of the requirement of impartiality in adjudicatory bodies.[235] It needs also to be said that there exists a level of correlation between the independence of an adjudicatory body and the demands of impartiality. If the body is lacking independence, it will be futile to expect it to be impartial.

[232] *Id*. at para. 19
[233] Comm. 275/2003 See African Union, Report of the Afr. Comm. on Hum. & Peoples' Rts. To the Executive Council Eleventh Ordinary Session, 25 – 29 June, 2000 Accra, Ghana EX.CL/364 (XI)
[234] *Id*. at para. 67
[235] According to the former President of the Supreme Court of Israel, "Impartiality means that the judge treats the parties before him equally, providing them with an equal opportunity to make their respective cases, and is seen to treat the parties so. Impartiality means the judge has no personal stake in the outcome" See Aharon Barak, THE JUDGE IN A DEMOCRACY 101 (2006)

According to MacCarrick,[236] "Impartiality describes the attitude of the court to the parties, the opportunity afforded the parties in presenting their case, and the approach adopted by the court to the admission and assessment of evidence. Central to the concept of impartiality is the essential condition that the court is independent, and its evaluations free from outside influence" In the opinion of the European Court, impartiality denotes an absence of prejudice or bias, and "its existence or otherwise can (…) be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect"[237]

Regarding the objective approach, the court has decided that until the contrary is evidentially established the personal impartiality of a judge is presumed.[238] The court held that under this test it must be determined whether apart from the judges personal conduct, there are ascertainable facts, which may raise doubts as to his impartiality. In this respect, the court added, even appearances may be of certain significance. "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."[239] Therefore any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw.[240] The qualification that the fear of lack of impartiality be legitimate is of significant implication because often it is in controversy what threshold of doubt or fear of impartiality needs to be reached by a party for such fear or doubt to be considered legitimate.

[236] Gwynn MacCarrick, *supra* note 109
[237] Piersack v. Belgium, Eur. Ct. H. R. Ser. A. No. 53 of Oct. 1, 1982
[238] Hauschildt v. Denmark, (1990) 12 EHRR 266
[239] Fey v. Austria, Eur. Ct. H. R. App. No. 14396/98
[240] Piersack v Belgium, *supra* note 239

Often the court's jurisprudence has followed a case-by-case trajectory since the question whether a judge is impartial or not is a factual one. Thus the court has developed a rich body of case law dealing with specific appearances of impartiality. In *Lavents v. Latvia*,[241] it found a violation of Article 6 where the judge handling a criminal trial made public statements essentially prejudging the outcome of the trial. The judge expressed surprise that the accused person pleaded not guilty and made direct reference to the possibility of conviction or partial acquittal but not the possibility of total acquittal.

Two cases illustrate more clearly the options available in situations where it might be considered that an allegation of impartiality may be legitimate. In *Remli v. France*,[242] a third party overheard a member of the jury saying, "What's more, I'm a racist." The domestic court ignored the comment on the ground that it was not bound to consider events occurring outside its presence. The European Court held that the failure of the domestic court to verify the impartiality of the juror in question denied the applicant of the opportunity to redress a situation damaging to his case and was therefore a violation of Article 6. However, in *Gregory v. United Kingdom*,[243] the jury passed a note to the judge containing the statement, "Jury showing racial overtones. 1 member to be excused." The judge showed the note to both the prosecution and the defence, then warned the jury to try the case without bias but based on the evidence presented. Neither the prosecution nor the defence took action regarding the note. The court held that Article 6 was not violated. Distinguishing Remli from Gregory, it found that, "In that case [Remli], the trial judges failed to react to an allegation that an identifiable juror had been overheard to say that he was racist. In the present case [Gregory], the judge was faced with an allegation of jury racism, which, although

[241] See *supra* note 215
[242] (1996) 22 EHRR 253
[243] (1997) 25 EHRR 577

vague and imprecise, could not be said to be devoid of substance. In the circumstances, he took sufficient steps to check that the court was established as an impartial tribunal within the meaning of Article 6 (1) of the Convention and had offered sufficient guarantees to dispel any doubts in this regard"[244]

Most of the cases dealing with allegations of abuse of fair trial brought before the European Court concern situations where the judge conducting the trial had performed different roles in the process. In most instances the judge conducting a criminal trial would have participated in earlier investigations into the case. The question would then be whether his or her earlier involvement in the investigation is sufficient to draw an inference of likelihood of bias in the trial proceedings. In such instances, the court would look critically at the facts to reach a conclusion one way or another.

In *Piersack v. Belgium*,[245] the judge who conducted the trial had been previously a member of the department which investigation the criminal allegation and in fact initiated the trial. The court found insufficient objective impartiality and therefore a violation of Article 6. Also in *Hauschildt v. Denmark*,[246] in order to prolong detention, the judge had to be satisfied that there was a particularly confirmed suspicion that the accused committed the offence. The European Court stated that there was a rather tenuous connection between this finding and the real issue to be settled at the trial and therefore held that Article 6 was violated. Violation of Article 6 was similarly upheld in a case where the presiding judge on appeal had been involved in a case involving a co-accused in a previous judgment and in which the appeal

[244] See *Id*. at para. 49
[245] See *supra* note 239
[246] See *supra* note 240

decision contained numerous extracts from the earlier decision involving the co-accused.[247]

It is, however, not an appearance of impartiality where the judge had previously only recorded questions and answers under what are known as "letters rogatory" without an actual finding of facts.[248] Impartiality cannot also be raised in a case where the court played both advisory and judicial roles in which the advisory opinion and subsequent legal proceedings cannot be regarded as the same case or as amounting to the same decision.[249] The mere fact also that the judge in a case belongs to the same society or club with a party or witness in a case before him or her is not enough to trigger a fear of impartiality. So even where the judge in question is well known to one of the parties or a witness in a trial, such coincidence without more may be insufficient to raise fears that the judge would not be impartial.[250]

The jurisprudence of the African Commission regarding the impartiality of judicial bodies conveys the impression that the requirement of impartiality is coterminous with the demands for judicial independence. Independence and impartiality tend to be discussed in one bundle by the Commission. This may be explained by the very fact that the African Charter did not expressly mention the terms "independence and impartiality" in its text. Nevertheless, there are a couple of instances where the Commission departed from its practice to discuss situations of flagrant disregard for the principle of impartiality. Most of the complaints dealt with by the Commission in this area concerned mostly the establishment of extraordinary military tribunals and majority of them came from Nigeria when that country was ruled by the military.

[247] Ferrantelli & Santangelo v. Italy, (1997) 23 EHRR 288
[248] Fey v. Austria, *supra* note 241
[249] Kleyn v. The Netherlands, Eur. Ct. H. R. App. Nos. 39343/98, 39651/98, 43147/98 & 46664/99
[250] Pullar v. United Kingdom, (1996) 22 ECHR 391

In *Constitutional Rights Project v. Nigeria*,[251] (dealing with the case of Zamani Lekwot and others), the Commission treated a complaint regarding the imposition of the death sentence on some Nigerians. The sentences were passed under the provisions of the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987, which did not provide for any judicial appeal against the decisions of the special tribunals and prohibited the courts from reviewing the operations of the tribunals. The complaint alleged that the accused persons and their lawyers were constantly harassed and intimidated during the trial, forcing the defence lawyers to withdraw from the proceedings. This notwithstanding, the tribunal found the accused persons guilty and sentenced each one of them to death.

The Commission found that the Civil Disturbances Decree empowered the military authorities to confirm penalties of the tribunal. It held, "This power is discretionary, extraordinary remedy of a nonjudicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complainant seeking remedies from a source, which does not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective"[252]

The Commission also referred to portions in the Decree prescribing the membership of the special tribunal. The tribunal had one judge and four military personnel as members. The Commission said the tribunal was composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbances Act. In its words, "Article 7 (1) (d) of the African Charter requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if

[251] (2000) AHRLR 183
[252] *Id*. at para. 8

not actual lack, of impartiality. It thus violates Article 7 (1) (d)"[253] The court reached a similar judgment in a situation where the system of administering criminal justice is withdrawn from the competence of the courts established within the judicial order and conferred on an institution that was more an extension of the executive branch of government.[254]

Chapter Three

3.1. Substantive guarantees and the Impact of Context

The last chapter discussed the fair trial norms of the two systems in comparison followed by a description of areas of dissimilarities and convergence as well as an elaboration of some concepts underpinning the guarantees in place. In this chapter, I shall treat the more substantial, non-conceptual and more subjective fair trial principles from the more jurisprudential standpoint. While some of the guarantees to be discussed in this chapter apply to only criminal proceedings, others apply to both civil and criminal trials. In the latter part of the chapter, I shall discuss contextual differences that have impacted the development of the fair trial jurisprudence of the two human rights systems.

3.1.1. Trial or Hearing Within a Reasonable Time

Both the European Convention and the African Charter provide that in criminal proceedings, a trial or hearing must take place within a reasonable time. The International Covenant on Civil and Political Rights provides, with regard to criminal

[253] *Id*. at para. 14. See also International Pen & Others v. Nigeria, (2000) AHRLR 212 at para. 86 as well as Centre for Free Speech v. Nigeria, (2000) AHRLR 250
[254] Malawi African Association & Others v. Mauritania, (2000) AHRLR 149 at para. 98. Further Forum Conscience v. Sierra Leone, (2000) AHRLR 293 at para. 17

trials for the accused "to be tried without delay"[255] For civil proceedings, only the European Convention contains similar provisions. This is a fair hearing requirement that ensures not only that justice in done in a specific case but that it is done in a timely manner. As the saying goes, justice delayed is justice denied. This is especially more so for persons detained pending criminal trial for whom there are additional guarantees as under Article 5(3) of the European Convention and Article 6 of the African Charter. As the European Court has held, when justice is unduly delayed, its effectiveness and credibility may be jeopardised.[256] The same way that fair trial complaints account for majority of the cases filed before the European Court of Human Rights, allegations of delayed proceedings constitute a disproportionate percentage of complaints based on the alleged violation of Article 6 of the European Convention.[257] In none of either the African or European system is there a strict rule what length of time is reasonable or unreasonable to carry out a hearing. The question of reasonableness is therefore resolved on the basis of the specific circumstances of each case or situation.[258] It has been argued, for instance that time for the purposes of showing whether it is reasonable or not starts running from the time an individual becomes subject to a 'charge' and subsists until the case is conclusively determined.[259] In civil cases time is calculated from the time proceedings, whether administrative or judicial, are instituted and stops running "when the proceedings

[255] Art. 14(3)(c)
[256] See H. v. France, Eur. Ct. H. R. Ser. A. No. 162-A of Oct. 24, 1989
[257] See Mole & Harby, *supra* note 154 at 24
[258] In the case of Article 19 v. Eritrea, Comm. 275/2003, at para. 97 the African Commission referring to the European case of Buccholz v. Germany, Eur. Ct. H. R. Ser. A. No. 42 of May. 6, 1981 stated "The question of what is reasonable cannot be expressed in terms of a blanket time limit which will apply in all cases, but rather must depend on the circumstances"
[259] See Udombana, *supra* note 22 at 318 citing D.J. Harris et al, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 223 (1995)

have been concluded at the highest possible instance, when the determination becomes final and the judgment has been executed"[260]

The European Court in determining what time is reasonable in each given case has developed a three-way test by which it examines the complexity of the case, the conduct of the applicant and conduct of the relevant authorities. If the accused person is in detention, the fact may also form a significant consideration in deciding whether trial had been timely or delayed.[261] The African Commission has adopted this test also.[262] On the complexity of the case, several factors are considered in deciding whether a case is of such a complex nature to warrant a delay. Such factors include nature of the facts to be proved,[263] the number of accused persons and witnesses,[264] international elements,[265] joinder of the case to other cases and the intervention of other persons in the process.[266] Though the complexity of a case may justify extended proceedings, this is not necessarily so in all such cases. For example, in *Ferantelli and Santangelo v. Italy*[267] sixteen years was considered unreasonable in a complex murder case involving sensitive problems concerning juveniles.[268]

On the conduct of the applicant and state authorities respectively, the European Court has held on a consistent basis that where delays to proceedings are attributable to either of them the case for the party found culpable is weakened and this may be an important consideration in deciding whether the delay in question is reasonable or not. On the part of the authorities the primary requirement is that "A

[260] Mole & Harby, *supra* note 154 at 25
[261] Lawyers Committee for Human Rights, *supra* note 10 at 16
[262] See *supra* note 261 at para. 97
[263] Triggiani v. Italy, (1991) ECHR 20
[264] Angelucci v. Italy, (1991) ECHR 6
[265] Manzoni v. Italy, (1991) ECHR 15
[266] See Mole and Harby, *supra* note 154 at 26
[267] See *supra* note 249
[268] *Id*.

special duty rests upon the domestic court to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay"[269]

Accused persons and litigants in civil cases can also be responsible for delays either deliberately or in an effort to exhaust all available legal guarantees. However, delays caused by an accused person or litigant are not considered in calculating whether length of proceedings are reasonable or not. In the circumstances, only delays that can in some way be blamed on state authorities are taken into account. Also an accused in a criminal trial may not be required to quicken proceedings that might lead to a conviction.[270] The general principle in this regard was laid down in the case of *Union Alimentaria Sanders SA v. Spain*[271] as follows: the only duty imposed on an accused person or civil litigant is to "show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings"[272] In the case of *Ciricosta & Viola v. Italy,*[273] for example, the applicant requested at least 17 adjournments while not raising objection to six adjournments requested by another party to the proceedings. Though the case eventually took 15 years to conclude, the court held that the length of time was not unreasonable.

The African Commission follows largely the principles already established by the European Court and in the case of *Article 19 v. Eritrea*,[274] actually adopted the European standard.[275] The only point of departure in the African system is that while the European court treats delays in both criminal and civil proceedings, the African

[269] *Id*. at 27 See also Zimmerman & Steiner v. Switzerland, Eur. Ct. H. R. Ser. A. No. 66 of Jul. 13, 1983 where the court held that states have a duty to "organize their legal systems so as to allow the courts to comply with the requirements of Article 6(1) including that of trial within a reasonable time"
[270] See Eckle v. Federal Republic of Germany,
[271] (1989) Ser. A No. 157
[272] *Id*. at para. 35
[273] Eur. Ct. H. R. Ser. A. No. 337-A of Dec. 4, 1995
[274] Comm. 275/2003
[275] See *supra* note 261

Commission restricts its jurisdiction in this area to criminal cases. Its expansion of this right, for instance, in its Resolution on the Right to Recourse to Fair Trial states, "Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released"

The Commission has therefore held that a case concerning an applicant's ability to be professionally engaged which lasts two years without trial or projected trial date constitutes a violation of the reasonable time guarantee.[276] In *International Pen v. Ghana*,[277] the Commission found a violation where the applicant was detained in prison for seven years without trial. It reached the same decision in a situation where the detention was also for seven years[278] as well as where the detention was for an indefinite period.[279] Where a state out of sheer refusal or negligence fails to bring suspects to prompt trial before a judge or other judicial official constitutes a violation of Article 7(1)(d) of the Charter.[280]

In *Article 19 v. Eritrea*,[281] that state sought to justify the delay in bringing its political prisoners to trial within a reasonable time on the grounds of complexity and gravity of the offences allegedly committed and the existence of a war situation in that country. The argument did not persuade the Commission which held instead that "State parties cannot derogate from the [African] Charter in times of war or any other emergency situation"[282] It therefore concluded that the existence of war in Eritrea

[276] Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon, (2000) AHRLR 57
[277] (2000) AHRLR 124
[278] Constitutional Rights Project v. Nigeria (II), (2000) AHRLR 248 at para. 20
[279] Achutan & Another (on behalf of Banda & Others) v. Malawi, (2000) AHRLR 144
[280] Huri-Laws v. Nigeria, (2000) AHRLR 273
[281] *Supra* note 278
[282] *Id*. at para. 98

cannot justify excessive delay in bringing the detainees to trial and that "a backlog of cases awaiting trial cannot excuse unreasonable delays"[283]

3.2.2. Presumption of Innocence

This is one of the elements of the right to a fair trial relevant only to criminal cases and therefore present in both the texts of the European Convention and African Charter. It rests on twin pillars: that the judge trying a case be free from a pre-conceived notion of the guilt or otherwise of the accused and that the burden of proof is properly allocated. According to the European Court, the principle requires "that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused"[284] In the jurisprudence of the Court as well, though presumption of innocence is more properly related to criminal proceedings, it could also apply to certain classes of civil trials such as professional disciplinary cases,[285] action for damages arising from an acquittal in criminal proceedings[286] as well as stay of proceedings where a criminal prosecution is time-barred but the accused is nevertheless requested to pay costs.[287] Regarding the burden of proof, where the overall burden of proving an offence remains with the prosecution, rules, which require the accused to establish certain facts in his defence, are not thereby prohibited. No does Article 6(2) forbid presumptions of fact or law, which operate in every legal system.[288] However, States are required to confine them

[283] *Id*. at para. 99
[284] Barbera, Messegue & Jabardo v. Spain, Eur. Ct. H. R. Ser. A. No. 146 of Dec. 6, 1988
[285] Agosi v. United Kingdom, (1986) 9 EHRR 1
[286] Lutz v. Germany, Eur. Ct. H. R. Ser. A. No. 126 of Aug. 25, 1987
[287] Minelli v. Switzerland, Eur. Ct. H. R. Ser. A. No. 62 of Mar. 25, 1983
[288] Salabiaku v. France, Eur. Ct. H. R. Ser. A. No. 141-A of Oct. 7, 1988. In this case the court held that the existence of a presumption of responsibility where a person is caught in possession of a trunk containing banned drugs did not necessarily violate Article 6(2) if the domestic courts maintained a freedom of assessment and gave attention to the facts of the case, and in fact quashed one conviction.

within reasonable limits, which take into account the importance of what is at stake, and maintain the rights of the defence.[289]

The presumption of innocence governs the entirety of a criminal process including events that occurred at pre-trial.[290] It is not restricted to what transpires in court but also governs the behaviour of other state agencies in relation to an accused. In *Allenet de Ribemont v. France,*[291] the applicant was still in police custody suspected of murder when a senior police officer addressed the media and pointed out the applicant as the instigator of the murder. This claim, according to the court encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.[292] It found a violation of Article 6(2). But in *Daktaras v. Lithuania,*[293] the prosecutor, in response to an assertion by the defence lawyer that the evidence in the case file did not prove the guilt of the applicant, rejected the submission and stated that evidence collected during pre-trial investigation proved the applicant's guilt. The court advised prosecutors to be careful in choosing their words regarding persons not yet tried and found guilty especially in legal systems where the prosecutor also performed certain quasi-judicial functions. It, however, noted that the statement was made outside the public context of a press conference, and though describing the prosecutor's choice of words as unfortunate did not find a violation of the presumption of innocence. It came to this conclusion on the ground that in employing those words, both parties were merely arguing as to whether there was sufficient evidence for the applicant's trial to proceed and not whether his guilt has been legally established.

[289] *Id*. at para. 28
[290] Lawyers Committee for Human Rights, *supra* note 10 at 15
[291] (1995) 20 EHRR 557
[292] *Id*. at para. 41
[293] Eur. Ct. H. R. App. No. 42095/98

Under European Court jurisprudence, though the presumption of innocence abates with a determination of guilt, it may still be violated after a trial in which the accused person is acquitted. In *Sekanina v. Austria*,[294] the applicant following his acquittal on a charge of murder claimed reimbursement of costs and compensation for detention on remand. The trial court rejected the claim on the ground that his acquittal did little to dispel the suspicion that he committed the murder. The European Court on this application drew a distinction between cases that were finally determined on their merits and those involving discontinuance of proceedings before final determination and held that the declaration by the local court was inconsistent with the presumption of innocence. The same result would be achieved in cases where the prosecution was aborted by the expiry of the statutory limitation period.[295]

The African Commission has dealt with a couple of complaints regarding alleged violation of the presumption of innocence. Again its consideration of those complaints does not indicate the same rigour as in the European system and has been confined to criminal proceedings. For example, the Commission has held that detention of a person on the mere suspicion that the individual may cause problems is a violation of the right to be presumed innocent.[296] There is also a discernible lack of consistency in the jurisprudence of the Commission on this issue. In *Civil Liberties Organization and Others v. Nigeria*,[297] the complainants alleged that videotapes were displayed showing the accused persons making confessions before military officials and that the accused persons were found guilty based on those confessions. Nevertheless the Commission failed to find a violation of the presumption of innocence on the grounds that evidence was not presented showing that the military

[294] (1993) 17 EHRR 221
[295] Minelli v. Switzerland, *supra* note 291
[296] Pagnoulle (on behalf of Mazou) v. Cameroon, (2000) AHRLR 57
[297] *Supra* note 206

personnel before whom those videotaped confessions were made also participated in trying the accused persons. It also held that the alleged tapes were not presented before it as evidence and therefore could not rely on hearsay.[298]

But in Law Office of *Ghazi Suleiman v. Sudan I*,[299] the complaint alleged that the victims were declared guilty in public by investigators and highly placed government officials as in the Nigerian case. It was also alleged that the government organized wide publicity around the case ostensibly to convince the public that there had been an attempted coup and that those arrested were involved in it. Though it claimed that it could not act on the basis of information not proved before it as in the Nigerian case, the Commission still found that the publicity aimed at declaring the suspects guilty before the establishment of guilt by a competent court violated the applicants' right to be presumed innocent until proven guilty.[300] The Commission's attitude in these two cases is puzzling given that in another case also involving Nigeria it had relied for its information on "Nigerian and international sources"[301] Nevertheless, the Commission has also decided that to infer guilt based solely on the refusal of the accused to enter their defence and on statements obtained by force from them while in police detention amounted to a violation of the presumption of innocence.[302] It could therefore be seen that the dimensions of this fair trial guarantee are yet to be fully explored by the African system. This may be because of the paucity of cases touching other important areas or because the civil element present in the European system is carefully ignored by the African system.

[298] *Id*. at para. 41
[299] (2003) AHRLR 134
[300] *Id*. at para. 56. See also Media Rights Agenda v. Nigeria, (2000) AHRLR 262 at para. 54
[301] International Pen & Others (on behalf of Saro-Wiwa) v. Nigeria, (2000) AHRLR 212
[302] Malawi African Association & Others v. Mauritania, (2000) AHRLR 149 at para. 95

3.1.2. The Right to Defence and to Counsel of Choice

Just as complaints about the violation of the right to fair trial dominates the work of the European Court, grievances related to the denial of defence and legal representation affect a preponderance of cases before the African Commission. In the African system, these guarantees of defence and right to counsel are made specific to criminal proceedings, excluding civil ones while under the European system, Article 6 will in some instances demand that parties be entitled to cross examine witnesses.[303] Under the European system, these guarantees as they are set forth in Article 6(3)(a) to (e) include the right to have adequate time and facilities for the preparation of defence, to defend oneself personally or through counsel of choice and to legal aid if the accused lacks sufficient means, to examine or have examined witnesses called against him and to call witnesses to testify in his defence under similar conditions. The African Charter in Article 7(1)(c) simply guarantees "the right to defence, including the right to be defended by counsel of his choice"

Out of these norms has been spurned considerable jurisprudence from the two systems. The European Court has held that the main objective of Article 6(1) and 6(3)(c) to (e) is to secure the presence of an accused person at his trial and therefore in criminal proceedings, the accused must be present at the hearing.[304] However, absence of the accused may be permitted "if the authorities have acted diligently but not been able to notify the relevant person of the hearing"[305] or in the interests of administration of justice in some cases of illness.[306] An accused may also waive the

[303] X v. Austria, 42 CD 145
[304] Ekbatani v. Sweden, (1988) 13 EHRR 504
[305] See Mole and Harby, *supra* note 154 at 44 See also Colloza v. Italy, (1985) 7 EHRR 516
[306] *Id.*

right to be present at an oral hearing if such waiver is unequivocal and "attended by minimum safeguards commensurate to its importance"[307]

The right to be notified of the details of any criminal charges is central to the right to defence since no one can possibly be expected to defend unclear or uncertain allegations. It transcends merely informing the accused that he has been charged but when Article 6(3)(a) is read jointly with Article 6(3)(b) the accused is permitted access to evidence and supporting documents that he may require in preparing an effective defence. The particulars of the offence are essential in this regard because it puts the accused on notice of the facts of the allegation and their basis in law.[308] The European Court has held that the provision of full and detailed information about the charges against a defendant and the characterization that the court might adopt in the matter is an essential prerequisite for ensuring that the proceedings are fair.[309] Where the accused is implicated in the reasons for which he could not be adequately notified of the charges against him, he cannot complain of the violation of Article 6(3)(a)[310] as is the case where there are clerical errors in the statement of the statutory provision, which is the basis of a charge.[311]

On the promptness of the notification, the court requires that the accused be given full details of the alleged offence prior to any interview with the police. In *Mattoccia v. Italy*,[312] the European Court frowned at a situation where the accused was denied information regarding the date, time and place of the said offence with the result that the applicant was unable to present an adequate defence during the interview with the police. Again the information in question has to be in a language

[307] Poitrimol v. France, (1993) 18 EHRR 130
[308] Pellisier & Sassi v. France, Eur. Ct. H. R. App. No. 19632/92
[309] *Id.*
[310] Hennings v. Germany, Eur. Ct. H. R. App. No. 12139/86
[311] Gea Catalan v. Spain, Eur. Ct. H. R. Ser. A. No. 309 of Feb. 10, 1995
[312] Eur. Ct. H. R. App. No. 15918/89

the accused person understands. In *Brozicek v. Italy*,[313] a German national received a judicial notification, which amounted to an accusation for the purposes of Article 6(3)(a) whereupon he notified the public prosecutor about his difficulties understanding the content of the notification. He therefore requested one written in German or any of the official languages of the United Nations. The public prosecutor ignored the request and continued producing information about the allegation in Italian. The court held that absent a finding that the accused indeed had sufficient knowledge of Italian to understand the nature and cause of the allegation, it was incumbent on the Italian authorities to honour his request.

The requirements of "adequate time and facilities" are generally interconnected and require careful balancing of the demands for trial within a reasonable time as well as time sufficient enough for an accused to organize a meaningful defence. It is also essential to prevent rushed trials that truncate basic guarantees of fair trial. However, deciding what time and facilities are adequate in a given case does not follow any set strategy but depends on the peculiar facts of each situation. Among the factors to be considered before making a determination are the nature and complexity of the case and the stage of the proceedings. With particular reference to the issue of time there is a huge variety of applicable standards in the European Court jurisprudence. For example, a mere five days has been held adequate in prison disciplinary proceedings involving a charge of mutiny.[314] Where a doctor was charged with unjustified issuance of certificate indicating that a person was unfit to work, fifteen days was held to be adequate for the trial.[315] However in *Ocalan v.*

[313]Eur. Ct. H. R. Ser. A. No. 167 of Dec. 19, 1989
[314] Campbell & Fell v. United Kingdom, (1985) 7 EHRR 165
[315] Albert & Le Compte v. Belgium,

Turkey,[316] the court decision was that two weeks was insufficient time to prepare a 17,000-page file.

Whether or not adequate facilities had been given to the accused to make good his defence is also dependent on the circumstances of each individual case. However, certain guarantees, like the right of the accused to confidential communication with his lawyer are considered sacrosanct. However, where a detainee could be placed at some times in solitary confinement but otherwise free at other times to confer with a lawyer, he cannot succeed on a claim of denial of the right during those limited periods of solitary confinement. It is sufficient if he can communicate with his lawyer at other times. What is the nature of facilities that a defendant may require to organize a meaningful defence? From the jurisprudence of the court, it appears there is no limitation as to what materials may be useful so long as the defendant is able to show in what way the particular facility requested is necessary to prepare the defence.[317] As a general rule, the defence may be permitted to have access to information held by the prosecution even though this right may be subordinated to national security interests. In this case the domestic court must ensure that the relevant state interest necessarily justifies the restrictions in question.

The European court has further interpreted the fair hearing provisions of the European Convention to incorporate what is known as equality of arms or the right to adversarial proceedings which demands that a fair balance be struck in the treatment of parties to any given case. This has explained to required that "everyone who is party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage vis-à-

[316] Eur. Ct. H. R. App. No. 46221/99
[317] Bricmont v. Belgium, (1990) 12 EHRR 217

vis his/her opponent"[318] In the case of *Wynen v. Belgium*,[319] the Belgian Code of Criminal Procedure prohibited a defendant from submitting any memorandum or documents after a period of two months starting from the registration of the case. This time limit was not applicable to state which in any case submitted a memorandum five months after that of the applicant. The Applicant then filed a reply, which the court disregarded due to the procedural rule. The European Court held that the equality of arms was violated in this case. Adversarial proceedings require that parties to civil and criminal proceedings have knowledge of and comment on all evidence adduced or observations filed.[320]

As earlier stated, the African system has generated considerable jurisprudence around the defence rights of criminal suspects although the Commission's decisions are more specific and lack the diversity of the European handling of those guarantees. Again the brevity of the African text, which the Commission has been struggling to broaden, must account for this. For example, the Commission has held that Article 7(1)(c) of the Charter implies the right of the accused to be informed of the charges against him and the evidence upon which they are based and that where these are not brought to the knowledge of the accused, that guarantee is violated.[321] The right to defence, including the right to counsel governs the entire criminal justice process not only during trial but also during detention.[322] Where during trial, the offices and residences of defence lawyers were searched by security forces who took away files

[318] See Mole and Harby, *supra* note 154 at 46. See also Beheer B.V. v. Netherlands, Eur. Ct. H. R. Ser. A. No. 274 of Oct. 27, 1993
[319] Judgment of Nov. 5, 2002 cited in Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms* 27 HUM. RTS. Q. 304, 305 (2005)
[320] *Id*. See also Ruiz-Mateos v. Spain, (1993) 16 EHRR 505 at para. 63
[321] Courson v. Equatorial Guinea, (2000) AHRLR 93 at para. 21
[322] *Id*. at para. 22. In Constitutional Rights Project and Another v. Nigeria, the African Commission held that denying a detainee access to his lawyer clearly violates Article 7(1)(c) of the Charter.

and documents relevant to the defence of the accused persons, the Commission held that a violation of Article 7(1)(c) of the Charter had occurred.[323]

The Commission has gone further to amplify the right to defence under the Charter. It says fair trial includes certain objective criteria including the right to equal treatment.[324] It also consists in the defence and public prosecutor having equal opportunity to prepare and present their pleas and indictment during the trial or to argue their cases before the jurisdiction on an equal footing.[325] The right to defence also implies that at each stage of the criminal proceedings, the accused and his counsel should be able to reply to the indictment of the public prosecutor and in any case, to be the last to intervene before the court retires for deliberations.[326] It also includes the right to understand the charge being brought against oneself.[327] It could be concluded here that the above guarantees are very similar to the European requirement of equality of arms and right to adversarial proceedings as earlier discussed. However, the Commission has not described it as such.

But by far more of the cases alleging denial of the right to defence in the African system implicate the requirement that the accused be defended by counsel chosen by him. The Commission has held that the right to freely choose one's counsel is essential to the assurance of a fair trial.[328] The element of voluntariness has proven crucial in the jurisprudence of the Commission. Where a military tribunal is armed with powers to veto the choice of counsel for defendants was therefore declared an unacceptable infringement of the right to defence.[329]The Commission further objected

[323] International Pen & Others (on behalf of Saro-Wiwa) v. Nigeria, *supra* note 306
[324] Avocats Sans Frontiers (on behalf of Bwampamye) v. Burundi, (2000) AHRLR 48 at para. 26
[325] *Id*. at para. 27
[326] *Id*. at para. 28
[327] See Malawi African Association & Others v. Mauritania *supra* note 306 at para. 97 where only three of 21 accused persons spoke Arabic, the language of the court fluently. The Commission concluded that the 18 others did not have the right to defend themselves.
[328] Amnesty International & Others v. Sudan,
[329] *Id*. See also Law Office of Ghazi Suleiman v. Sudan I, *supra* note 304 at 141 para. 57

to an advocate licensing system that was not objective and seemed to contravene the independence of the bar.[330]

As with the European system, the African Commission has held while noting the impact of its Resolution on the Right to Recourse and Fair Trial of 1992 that in the determination of charges against individuals, they shall be entitled in particular to communicate in confidence with the counsel of their choice.[331] Though all persons accused of crime are entitled to defence by counsel of their choice, this is even more so in offences carrying the death penalty.[332] According to the Commission, the purpose of this provision is to ensure that the accused has the confidence of his legal counsel as failure to provide the guarantee may expose the accused to a situation where he will not be able to give full instructions to his counsel for lack of confidence.[333] Apart from direct interference with the volition of the accused in the choice of counsel, this guarantee could also be breached in other ways. For example where counsel chosen by the accused withdrew from the trial following harassment, arrest and search of defence counsels' offices as well as withholding evidence from the defence, the Commission concluded that Article 7(1)(c) had been violated.[334]

3.1.3. Right to Interpreter and Legal Assistance

The second leg of article 6(3)(c) of the European Convention provides that if a defendant does not have sufficient means to pay for legal assistance such should be granted to him free so long as the interests of justice so require while article 6(3)(e) provides that where the defendant cannot understand or speak the language of the

[330] *Id.*
[331] Media Rights Agenda v. Nigeria, *supra* note 305 at para. 56
[332] Civil Liberties Organization & Others v. Nigeria, *supra* note 9 at para. 28
[333] *Id.*
[334] International Pen & Others (on behalf of Saro-Wiwa) v. Nigeria, *supra* note 306 at paras. 97 & 101. See also Constitutional Rights Project (in respect of Lekwot & others) v. Nigeria, supra note

court, he should be given the free assistance of an interpreter. The Court reflects on certain important considerations in deciding whether the interests of justice justify the grant of free legal assistance. The considerations include the complexity of the case and its seriousness as well as what is at stake for the accused. Where, as the case of *Engel and Others v. Netherlands*[335] what is at stake is ordinary disciplinary proceedings, it was sufficient that the accused persons defended themselves in person regarding simple facts while legal assistance was reserved for legal issues arising on appeal.

However, in *Ezeh and Connors v. United Kingdom*,[336] the court found a violation of Article 6(3) in prison disciplinary proceedings before the prison governor, in which the applicants were un-represented while in *Perks and Others v. United Kingdom*,[337] the court relied on its previous decision in *Benham v. United Kingdom*[338] to hold that having regard to the complexity of the applicable law[339] and the severity of the sentence that might be imposed on the defendants,[340] the interests of justice demanded that they be represented freely in a case charging failure to pay community charges.

On the right to the free assistance of an interpreter, it is an absolute one and applied where the accused in a criminal trial cannot speak or understand the language of the court. It applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.[341]The costs of providing an interpreter to an accused cannot after the trial be recovered from him since, according to the European Court, the provision is "neither a conditional remission, nor a

[335] *Supra* note 206
[336] See *supra* note 209
[337] (2000) 30 EHRR 33
[338] (1996) 22 EHRR 293
[339] In Hoang v. France, Eur. Ct. H. R. App. No. 11760/85 the Court held that where complex issues of law are at stake, the defendant is not suited by reason of lack of necessary legal training to develop appropriate arguments, a task which only a trained and experienced law can perform.
[340] For example where the deprivation of liberty is likely to occur, the court has held that the interest of justice in principle calls for legal representation. See Benham v. United Kingdom, supra note 340
[341] See Kamasinski v. Austria, (1991) 13 EHRR 36

temporary exemption, nor a suspension, but a once and for all exemption or exoneration"[342]

The African Charter does not make specific provisions for the right to interpretation where the accused in criminal trials does not understand or speak the language of the domestic court or to legal assistance where the accused lacks sufficient means. However, these guarantees have been established in the African human rights system by various provisions of the Resolution on the Right to Fair Trial and Legal Assistance in Africa. Consequently, an accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used by the judicial body.[343] It governs the entire proceedings including at pre-trial and applies both to written and oral proceedings. It includes the translation or interpretation of all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence.[344] In the case of *Malawi African Association and Others v. Mauritania*,[345] only three out of 21 accused persons spoke Arabic, the language of the court fluently. The Commission held that the other 18 accused persons who did not have the benefit of interpretation to them of the proceedings in familiar language did not obtain fair hearing.

The Commission has gone ahead to read into the provisions of Article 7, as a whole the requirement that "the gravity of allegations brought against the accused and the nature of penalty he faced" are important considerations in clarifying the demands of justice that would mandate the offer of free legal assistance to an accused.[346] As it has been argued, there cannot be equality of arms where parties to a suit, whether

[342] Luedicke, Belkacem & Koc v. Germany, (1978) 2 EHRR 149
[343] Para. N(4)(a)
[344] Id. at paras. N(4)(b) to (d)
[345] *Supra* note 306 at para. 96
[346] Avocats Sans Frontiers (on behalf of Bwampamye) v. Burundi, (2000) AHRLR 48

criminal or civil are unable to approach the temple of justice by reason of impecuniousness.[347]

3.1.4. The right to a Public Trial

Article 6 of the European Convention makes provision for fair and public hearing and also mandates that judgments be pronounced publicly. However the requirement of publicity of hearings and judgments is not absolute. According to the Convention, the press and public may be excluded from particular proceedings if such exclusion serves the interests of morals, public order or national security in a democratic society. Such is also the case where the interests of juveniles or the protection of private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[348]

Around this right, the European Court has developed four inter-related elements, which reinforce one another. These elements are the right of the party to judicial proceedings to be present during its consideration, the right of the party to participate effectively at the hearing, some considerations that demonstrate the public character of the court hearing such as permission for the media to attend the hearings and an obligation on the court to make its judgment public. Circumstances that impel physical presence of parties to proceedings are relative and depend on the nature of the proceedings.

In criminal cases presence of the accused is mandated except in cases where the accused waives the right to be present or in some narrowly defined situations when *in absentia* trials are permitted. Waiver of the right to physical presence must be unequivocally established accompanied by minimum safeguards commensurate to its

[347] See Udombana, *supra* note 22 at 322
[348] *Supra* note 305

importance.[349] Regarding *in absentia* trials, the national authorities must show that they used due diligence in efforts to locate the accused person and pass to him information about the criminal charges and other important details of the trial, provided the accused may subsequently obtain from the court which tried him *in absentia* a fresh determination of the merits of the charge.[350]

Mere presence in court is however of little moment if the litigant in a civil proceedings or the accused in a criminal case is for any reason unable to effectively participate in the proceedings. In *Stanford v. United Kingdom*,[351] the Court refused to hold that a violation occurred in a case involving a slightly deaf applicant who was unable to hear some of the evidence given at the trial. Its decision rested on the fact that the defence attorney who could hear all the evidence chose not to request that his client be seated closer the witnesses. However, in *T. and V. v. United Kingdom*,[352] the trial of the applicants, then aged 11 for the murder of a toddler was against the background of massive publicity generated by the crime and there was medical proof that the applicants suffered from post traumatic stress. The court held that it was highly unlikely that the applicants would have felt sufficiently free in the charged courtroom and under such intense public scrutiny to have the benefit of effective legal consultation during the trial.

On the requirement of public and especially media access to the venue of hearing, although Article 6(1) provides for public hearings in general terms it did not spell out any exceptions which raises a prima facie presumption in favour of public hearing. This presumption can only be rebutted by strong exceptional circumstances strictly justified by the situation. The manner of restriction must be proportional to the

[349] Poitrimol v. France, *supra* note 312
[350] Colozza v. Italy, *supra* note 310
[351] Eur. Ct. H. R. App. No. 46295/99
[352] Eur. Ct. H. R. App. No. 24888/94

consideration justifying the prohibition of public access and be also necessary in the instant case.[353] In *Diennet v France,*[354] the court held that failure of a professional disciplinary body to seat in public at first instance is not cured on appeal to a body that sat in public since the appeal institution was not regarded as a judicial body and lacked the power to examine if the penalty inflicted was proportionate to the misconduct alleged.

Article 6(1) of the European Convention also demands that judgments of courts be pronounced publicly. This requirement does not have the same exceptions as are applicable to the necessity for hearings to be in public. According to the court, requiring that judgments be pronounced publicly does not mean that the judgment must always be read in open court. Thus, in *Pretto and Others v. Italy,*[355] the court held that "it considers that in each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent state must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6(1)"[356]

The African human rights system has been rather averse to the demands of publicity of hearings especially from the normative point of view. Neither the African Charter nor the various resolutions of its Commission contain any requirements for judicial hearings to take place in public. However, the Commission, standing on its implied powers under Articles 60 and 61 of the Charter has invoked international standards in this regard to assert this right. It has severally adopted paragraph 6 of the General Comment of the United Nations Human Rights Committee to the effect that

> *The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14 paragraph 1,*

[353] Campbell & Fell v. United Kingdom, *supra* note 319
[354] (1995) 21 EHRR 554
[355] Eur. Ct. H. R. App. No. 7367/76
[356] *Id*. at para. 26

> *acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons …*

The case of *Media Rights Agenda v. Nigeria*,[357] concerned allegations against a Nigerian journalist by the military regime that the said journalist had concealed plans to unlawfully overthrow the Nigerian government. He was secretly tried before a military tribunal and sentenced to imprisonment for life. The Nigerian government defended the secrecy of the trial on the basis of an omnibus statement that such was necessary in the interest of defence, public safety, public order and so on. It did not, however, indicate which of the circumstances prompted it to exclude the public from the trial. The Commission found the argument of insufficient quality to justify the secrecy of the trial and declared that Article 7 was violated in this regard.

A similar scenario played out in the case in *Civil Liberties Organization and Others v. Nigeria*,[358] which also involved trial for the military offence of treason arising from the same circumstances as in the *Media Rights Agenda* case. Except for the opening and closing ceremonies, the entire trial took place *in camera* contrary to Article 7 of the Charter. The Commission in this case noted that neither the Charter nor its Resolution on the Right to Recourse and Fair Trial specifically mentioned the right to a public trial. But yet again, it drew inspiration from the UN Human Rights Committee General Comment No. 13 and asserted that "The publicity of hearings is an important safeguard in the interest of the individual and the society at large"[359] Without Nigeria showing that such secret proceedings fell within the parameters of the exceptional circumstances contemplated by this guarantee, the Commission found that the right of the accused persons in this case to fair trial was violated.

[357] *Id.* at paras 49 - 53
[358] *Supra* note 9
[359] See para. 36

3.2. Traditional Courts in Africa

In the midst of arguments for or against making human rights guarantees relative to local conditions, the question may be asked if there are particular fair trial principles that could be considered alien to traditional systems of justice in Africa. The reality of the existence of traditional forms of adjudication in different parts of Africa can no more be debated. The question, however, is whether such institutions are to be left on their own without check or be made to bow to the dictates of international principles for the delivery of justice? It seems dangerous to put these institutions outside the purview of the international regime for acceptable trial procedures especially as they are known to be responsible often for massive violations of basic tenets of due process.[360]

The African Charter did not make reference to these courts in the norms that it established. But probably recognizing the danger with which this non-recognition of traditional courts in Africa is fraught, the African Commission covered the gap by devoting a whole paragraph of its Resolution on the Right to Fair Trial and Legal Assistance in Africa, 1999 to proceedings arising from those courts.[361] According to the Commission "Traditional courts where they exist are required to respect international standards on the right to fair trial"[362] As a minimum, such courts are required under the resolution to respect the equality of persons without discrimination, respect the inherent dignity of human persons and respect human liberty and security in addition to several other guarantees.

[360] See for example Joseph Otteh, FADING LIGHTS OF JUSTICE: AN EMPIRICAL STUDY OF CRIMINAL JUSTICE ADMINISTRATION IN SOUTHERN NIGERIA CUSTOMARY COURTS (1995) and Eze Onyekpere, JUSTICE FOR SALE: A REPORT OF THE ADMINISTRTATION OF JUSTICE IN THE MAGISTRATES AND CUSTOMARY COURTS OF SOUTHERN NIGERIA (1996)

[361] Para. Q See also *supra* note 169

[362] *Id*. at para. Q (a)

But with particular reference to fair trial demands, traditional courts by the provisions of the resolution must allow parties before them equal opportunity to prepare a case, present arguments and evidence as well as respond to opposing evidence or arguments. The right to an interpreter is guaranteed before these courts, as is the right legal representative of choice. The rights to speedy consideration of cases, appeal and public hearing are similarly protected. States in Africa under the resolution are required to guarantee the independence of traditional courts by their respective laws and also ensure their impartiality. According to the resolution the impartiality of a traditional court would be undermined when one of its members has expressed an opinion which would influence the decision making or has some connection or involvement with the case or a party to the case or has a pecuniary or other interest linked to the outcome of the case.[363]

Notwithstanding the significance of this aspect of the 1999 resolution of the Commission, they are yet to be tested in real terms as no previous case for consideration before the Commission has ever been concerned with a violation arising from the proceedings of a traditional African court. Nevertheless these courts continue sitting all over Africa. The mere fact that no life case has involved a claim based on these provisions demonstrates those issues of context affecting the African human rights system, which are considered in the next section.

3.2. Contextual Considerations and Impact

What my analyses thus far yields is that in each of the elements of fair trial considered, the European system is marked by advanced and expanding frontiers while the African system tugs at the fringes of the issues under reference. There is therefore a huge gulf between the two systems in terms of the depth and rigour of the

[363] *Id*. at para. Q (d)(1)

guarantees of fair trial, which their respective norms enshrine. What accounts for this wide-ranging disparity? They are the contextual realities of the two systems and the regions that they cover that exert considerable impact on the shape of human rights protection available through them. In fact, the current situation of the implementing organs of the two systems cannot be separated from the legal, social, economic and political conditions under which they have to function. Progress or deterioration in the development of these fundamental factors would undoubtedly affect the quality of their human rights enforcement capacity.

Many of the factors, which negatively affect progress in the African human rights system, are mostly taken for granted in the European system. Although the European system started long before Africa even emerged from colonization to ever start discussions about establishing a regional human rights system that does not completely account for the huge disparity in the two systems. From the process adopted to actualise the objectives of the European Convention and the interpretative system[364] established within its mechanism, no doubt is left about the direction of the European institutions. Perhaps the plethora of cases presented before its court and the diversity of subjects that they cover clearly indicate the high regard accorded the European human rights mechanism.

For example statistics show that European Court cases decided in 2006 amounted to 1, 560 with some 90, 000 cases pending.[365] On the contrary, in its report to the 11th Ordinary Session of the African Union Executive Council held June 25 – 29, 2007 in Accra, Ghana the African Commission presented a report which showed

[364] This is mostly "evolutive" which has been described as "the genius of the Convention that it is indeed a dynamic and living instrument. It has shown a capacity to evolve in the light of social and technological developments that its drafters, however far-sighted, could never have imagined" See Luzius Wildhaber, *The European Court of Human Rights in Action* 21 RITSUMEIKAN L. REV.83, 84 (2004)

[365] See Steiner, Alston & Goodman, *supra* note 24 at 964

10 communications decided on their merits, three declared inadmissible and one withdrawn by the complainant.[366] Therefore, the writers would be justified in their thesis that "the African system has not yet yielded anywhere near the same amount of information and 'output' of recommendations or decisions … as have other systems. In comparison with those systems, the States parties and Commission have taken only a few forceful or persuasive actions within the structure of the Charter to attempt to curb serious human rights violations, although recent years have shown promise of a more insistent and active stance"[367]

While the major challenge in Africa is how to stimulate an expanded use of its mechanism to address often egregious violations of human rights, the European system on the contrary is seeking ways to contain the torrent of cases submitted to it each year. According to Wildhaber "The main challenge facing the Court is now its ever-growing case-load"[368] He asserts that the volume of cases brought to the court grew exponentially by up to 140% in 1998 and by 1,500% since 1988.[369] This may be explained as a natural consequence of the effectiveness of the system which ensures that human rights violations are remedied, its judgments are supervised at the highest political power level, information about the Court's work is generally accessible and above all individuals have a right to send complaints to the court. Though funding may be a source of concern in pursuing such individual cases, there is no shortage of civil society and public interest institutions ready and able to help victims seek redress.

The African situation presents a totally different picture. Most cases litigated before the African Commission are possible only mostly with the support of public

[366] See *supra* note 234
[367] Steiner, Alston & Goodman *supra* note 24 at 1063
[368] See Wildhaber, *supra* note 371 at 89
[369] *Id*.

interest law organizations outside the continent. They are the ones with the resources to attend sessions of the Commission at which the cases are treated. On the other hand African groups are generally financially hamstrung and I submit that this factor is implicated in the paucity of cases taken to the Commission, which do not in any way match the level of human rights violations committed by various governments across Africa. In the event the fewer number of cases submitted to the African Commission for adjudication, relative to the mechanisms of other regional human rights systems, including the European system, detracts from the diversity of issues treated which ought to lead to a broadened view of the issues adjudicated. This probably accounts for why certain elements of the right to fair trial covered by the African Charter provisions and Resolutions of the African Commission are yet to be tested in real life cases.

The African human rights system is equally struggling against political chains around it by the existence of unaccountable governments on the continent. At the time the African Charter was adopted, several of the states on the continent were administered by dictatorships civil and military. Not much has changed ever since because "the domestic environment in most African countries remains largely unfriendly to human rights, as the dictators of yore have found creative means of buying electoral legitimacy"[370] This accounts for example for the secrecy which surrounds the work of the African Commission though it requires domestic institutions to apply openness as one of the most prominent demonstrators of fair trial.

What next requires to be explained is whether there is equivalence between the African and European fair trial procedures in a functional sense or if these highlighted contextual differences create a situation akin to comparing apples with oranges. I am

[370] Said Adejumobi, *Elections in Africa: A Fading Shadow of Democracy?* 21 INT'L POL. SC. REV. 59 (2000) cited in Chidi A. Odinkalu, *supra* note 16

of the opinion that the norms of the two systems meet relatively the description of equivalence and not quite that of a serious functional dichotomy. There are missing elements of the right to a fair trial in both systems though their response towards covering those gaps does not exactly match one another. The European system has responded in two ways: first by improving and refining the normative content of the Convention and second by creative interpretation of the norms by the Court in a way that supplements the Convention. On its part, the African system has relied mostly on Resolutions of the Commission and as well through the Commission's interpretation of extant norms. In fact it is to the credit of the African system that in trying to bridge the gap it has been very willing to borrow from the jurisprudence of the European Court. To my mind this sharpens the equivalence and though the issues of context as earlier highlighted tend to impact how the principles operate in practice, it is not of such fundamental consequence as to make the comparison that between apples and oranges.

This conclusion is inescapable since it is clear that rather than invoke particularist doctrines to undermine fair trial guarantees, the African system strives to bring its practice in conformity with standards through a process of borrowing. Otherwise it may have been tempting to place traditional African courts since they apply the laws of custom and tradition outside the ambit of universal fair trial practices. This did not happen and such traditional courts are under obligation if their proceedings are to pass the close scrutiny of compliance to apply those universal principles.

Chapter Four

4.1. Conclusion and Some Recommendations

What I have done in this thesis is to draw comparisons between the African and European guarantees of the right to fair trial in the wider context of drawing up strategies for better effectiveness of the African system. I started from a historical theoretical account of the development of human rights and in particular those covering fair trial or due process in the administration of justice. It is clear that the development of fair trial rights at the international human rights field followed the same trajectory as the development of other human rights guarantees recognised at the international arena. However, the character and significance accorded specific human rights vary with what is considered their fundamentality relative to others.

The right to fair trial ranks amongst the most significant and fundamental which reality is demonstrated by efforts at the level of the United Nations to make it a non-derogable right. The fact that this effort was aborted and the reasons offered for it rather than diminish the quality of this right only further heightens its international acceptance. Also the recognition of fair trial rights in the various Geneva Conventions on the treatment of persons captured as a result of war and the application of those guarantees even in periods of armed conflict elevates them the more. Moreover, their impact within various domestic legal jurisdictions further confirms this universal acceptance of fair trial guarantees as a legitimate necessity for both democracy and the rule of law to thrive.

Not surprisingly, both the African and European human rights systems make copious guarantees of the right to fair trial, which have been analysed in this thesis. Going through the norms of the two systems and the jurisprudence developed by their

respective implementing institutions, I have pointed areas of convergence and also areas of difference. We saw gaps in both these norms and jurisprudence and how the two systems responded in covering them. For some contextual and historical reasons, the European system has demonstrated its effectiveness shown so poignantly in the enforceable powers of its court supervised by the highest political institutions of the European Union. On the contrary, the African system is apparently hostaged by unaccountable political forces and its Commission, despite its best efforts, still remaining largely "a façade, a yoke that African leaders have put around [African] necks"[371]

Referring specifically to fair trial rights I have been able to show that the expanded access to the European Court of Human Rights and its effectiveness stimulates are more decentralized recourse to the court. The ability of the court to attract many cases makes it inevitable that the normative guarantees produce a diversity of jurisprudential positions, which make for both rigour and certainty in the application of the convention.

Though there was cautious optimism following the establishment of the African Commission regarding its expected effectiveness, the Commission has only been hindered mostly by structural problems associated with its very existence. Its difficulties are fairly well settled.[372] But it has struggled admirably to throw off those difficulties[373], which provide considerable issues that must engage the African Court

[371] Makau wa Mutua, *The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformation* 5 LEGAL FORUM 31 (1993) cited in U. Oji Umozurike, *supra* note 181

[372] Among the major problems that have been identified are the unresolved issue of confidentiality, non-direct reference to communications from individuals and non-governmental organizations, insufficient funding of the Commission, lack of support staff, ineffective follow-up mechanisms and lack of clear enforcement procedure for the Commission's decisions. See generally U. Oji Umozurike, *id*. See also Chidi A. Odinkalu, *supra* note 16

[373] For example, in the early days of its existence the Commission operated truly as one with "very brief and tersely argued" decisions which "have evolved over the years into more well-reasoned and substantial judgments. Yet the practice has not been formalized and remains ad hoc" See Frans Viljoen

of Human Rights once it commences operation.[374] At the normative level, the fair trial provisions of the African Charter have likewise been criticized for their many shortcomings. Some of those shortcomings, including the manner it "unduly limits the democratic ramifications of the right"[375] have been discussed in this thesis.

The Commission has been willing to experiment with progress even where this directly affronts the norms that established it. And in no area is this more evident than in its willingness to borrow from international and comparative systems to enrich its own work. Its interpretation of the fair trial provisions of the African Charter has been extensively influenced by the jurisprudence of the United Nations Human Rights Committee, and as well judgments of both the European Court of Human Rights and the Inter-American Court of Human Rights. This enthusiasm has however not impaired in any way the Commission's recognition of practices specific to Africa as its resolution on fair trial relating to traditional courts in the continent clearly shows.

Nevertheless, as the Commission warms up to operate alongside an African Court of Human Rights, its institutional set up and the principles governing its activities qualify for review and reformation. Against the background that the African mechanism requires a mixture of substantive, institutional and resourcing reforms,[376] and against the background of my analysis thus far, the following may be considered while tackling the reforms but immediately and in the long term.

The real normative character of the Principles and Guidelines issued by the African Commission in the process of formulating and laying down rules aimed at

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& Lirette Louw, *Compliance With the Recommendations of the African Commission on Human and Peoples' Rights* 101 AM. J. INT'L L. 4 (2007)

[374] African Heads of State adopted the Protocol to the African Charter on Human and Peoples' Rights authorizing the establishment of an African Court on Human Rights in June 1998. The 15th instrument of ratification was delivered by the Union of Comoros on December 26, 2003, completing the requisite number of ratifications needed to bring the protocol into force. This happened on January 25, 2004. See Barney Pityana, *Reflections on the African Court on Human and Peoples' Rights* 4 AFR. HUM. RTS. L. J. 121 (2004)

[375] See Kenneth Asamoa Acheampong, *supra* note 19

[376] Chidi A. Odinkalu, *supra* note 16 at 233

solving legal problems relating to human rights and freedoms in Africa[377] have not yet been properly articulated. It has been argued that the principles are not binding on state parties to the African Charter but have only persuasive value.[378] My suggestion is that rather than leave this important consideration to conjecture, including the most important principles in substantive amendment to the African Charter would clear any doubts that may exist in this area. This suggestion is made in recognition of the fact already made that the obligation that the African Charter places upon the African Commission to draw inspiration from international human rights instruments is not enough as anchor for some of the most important fair trial rights recognized internationally.[379]

There is therefore the need for the African system to normatively clarify several important fair trial guarantees not included in the African Charter. Among them are the right to silence in criminal proceedings and the corollary right not to incriminate oneself, the right not to be tried twice for the same offence, the right to public trials and for judgments to be pronounced publicly, guarantee of fair trial rights in civil proceedings and the right to interpretation. Pending when the Charter would be revised to accommodate this proposal, both the Commission and the African Court of Human Rights, whenever it begins operation, must continue to draw inspiration from international and comparative resources while expounding these guarantees in a manner that recognizes their universal character.

[377] Tharien van der Walt & Stephen de la Harpe, *supra* note 149 at 73
[378] *Id.*
[379] See Kenneth Asamoa Acheampong, *supra* note 19 at 196

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